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MANCIA V. MAYFLOWER BEGINS A PILGRIMAGE TO THE NEW WORLD OF COOPERATION

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The Sedona Conference® Cooperation Proclamation was first announced on October 7, 2009. One week later, Magistrate Judge Paul W. Grimm became the first judge to cite and endorse the proclamation in *Mancia v. Mayflower Textile Services. Co.*, 253 F.R.D. 354 (D.Md. Oct. 15, 2008). By September of 2009, at least twelve judicial opinions had already cited *The Sedona Conference® Cooperation Proclamation* (“the Proclamation”). This was just the beginning of a pilgrimage that many judges in the country will likely undertake to help lead the legal profession into a new world of cooperative discovery.

These first dozen opinions are interesting in their own right, but this article primarily focuses on uncooperative attorney conduct that spurred citation to the Proclamation. Study of these opinions reveals a common theme of iconoclastic lawyers that one federal judge criticized as a litigation culture of “fierce warriors” gone haywire.¹ The old habits of litigators built up over generations will take time to overcome. But overcome them we must, for otherwise our system of discovery will break down under the strain of new technologies and vast amounts of electronic information that most litigants maintain. The legal profession can no longer afford the old attitudes. Moreover, as these first twelve cases show, the law does not permit it. These twelve opinions and the Proclamation point to a way out of our current discovery quandary; they point to a collaborative model of discovery where lawyers can ride the wave of new technology, instead of be drowned by it.

Below are the first twelve opinions citing the Proclamation:

1. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008 Oct. 15, 2008).
2. *Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350 (S.D.N.Y. Nov. 21, 2008).
3. *Gipson, et al v. Southwestern Bell. Tel. Co.*, 2008 U.S. LEXIS 103822 (D. Kan. Dec. 23, 2008).
4. *Covad Communications Co. v. Revonet, Inc.*, 254 F.R.D. 147 (D.D.C. Dec. 24, 2008).
5. *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, Fed. Sec. L. Rep. P 95,045 (S.D.N.Y. Jan. 13, 2009).

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1 Ken Withers, *When E-Mail Explodes*, SAN DIEGO LAWYER, Nov.-Dec. 2008, at 36, 37-38.

6. *William A. Gross Const. Associates, Inc. v. American Mfgs. Mut. Ins. Co.*, 256 F.R.D. 134 (S.D.N.Y. March 19, 2009).
7. *Newman v. Borders, Inc.*, 257 F.R.D. 1 (D.D.C. April 6, 2009).
8. *Ford Motor Co. v. Edgewood Properties, Inc.*, 257 F.R.D. 418 (D.N.J. May 19, 2009).
9. *Dunkin' Donuts Franchised Restaurants LLC v. Grand Cen. Donuts, Inc.*, 2009 WL 1750348 (E.D.N.Y. June 19, 2009).
10. *Wells Fargo Bank, N.A. v. LaSalle Bank Nat. Ass'n*, 2009 WL 2243854 (S.D. Ohio July 24, 2009).
11. *In re Direct Southwest, Inc., Fair Labor Standards Act (FLSA) Litigation*, 2009 WL 2461716 (E.D. La. Aug. 7, 2009).
12. *Capitol Records, Inc. v. MP3tunes, LLC*, 2009 WL 2568431 (S.D.N.Y. Aug. 13, 2009).

Mancia v. Mayflower Textile Servs. Co.

Judge Grimm began the judicial pilgrimage with a case that does not involve e-discovery at all. *Mancia v. Mayflower Textile Services Co.*² concerned a dispute over a defendant's boilerplate objections to the plaintiff's discovery requests.³ *Mancia* illustrates that even though the Proclamation was born out of the heady problems and expense of electronic discovery, it applies to discovery of all kinds. This is an important case, not just for being the first to cite the Proclamation, but also for providing a scholarly review of the law behind the collaborative approach to discovery. Judge Grimm illustrated how the rules of procedure, ethics, and the common law all require collaboration in discovery.

Mancia is also important for its discussion of Federal Rule of Civil Procedure 26(g), which Judge Grimm calls the least understood and most frequently violated discovery rule of them all.⁴ Rule 26(g) requires counsel to make a *reasonable inquiry* before signing their name to a discovery response. It is similar to Rule 11, but applies only to the discovery pleadings. Notably, Federal Rule of Civil Procedure 11 does not apply to discovery pleadings.

Counsel for both parties in *Mancia* violated Rule 26(g). The thirty page opinion points out in precise detail what each party did wrong, including the plaintiff's unrestrained, over-broad interrogatory and production requests and the defendants meaningless boiler-plate responses. This kind of knee-jerk discovery shows that the attorneys did not make reasonable inquiries of the facts before promulgating or responding to discovery. Moreover, it illustrates that the parties did not make an adequate effort to collaborate. Even in cases involving limited discovery such as *Mancia*, the traditional uncooperative approach to discovery needlessly drives up the cost of litigation. As Judge Grimm notes, such behavior also violates existing law:

Although judges, scholars, commentators and lawyers themselves long have recognized the problems associated with abusive discovery, what has been missing is a thoughtful means to engage all the stakeholders in the litigation process - lawyers, judges and the public at large - and provide them with the encouragement, means and incentive to approach discovery in a different way. The Sedona Conference, a non-profit, educational research institute best known for its *Best Practices Recommendations and Principles for Addressing Electronic Document Production*, recently issued a *Cooperation Proclamation* to announce

2 253 F.R.D. 354, 355 (D. Md. 2008 Oct. 15, 2008).

3 *Id.* at 355.

4 *Id.* at 357.

the launching of “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.” *Cooperation Proclamation, supra*, at 1. To accomplish this laudable goal, the Sedona Conference proposes to develop “a detailed understanding and full articulation of the issues and changes needed to obtain cooperative fact-finding,” as well as “[d]eveloping and distributing practical ‘toolkits’ to train and support lawyers, judges, other professionals, and students in techniques of discovery cooperation, collaboration, and transparency.” *Id.* at 3. If these goals are achieved, the benefits will be profound. In the meantime, however, the present dispute evidences the need for clearer guidance how to comply with the requirements of Rules 26(b)(2)(C) and 26(g) in order to ensure that the Plaintiffs obtain appropriate discovery to support their claims, and the Defendants are not unduly burdened by discovery demands that are disproportionate to the issues in this case.⁵

Judge Grimm then continues in *Mancia* to spell out what was required by the parties to complete discovery. He notes that defendant’s boilerplate objections to Plaintiffs’ document production requests, where there were no particularized objections, naturally led to one of two conclusions:

[E]ither the Defendants lacked a factual basis to make the objections that they did, which would violate Rule 26(g), or they complied with Rule 26(g), made a reasonable inquiry before answering and discovered facts that would support a legitimate objection, but they were waived for failure to specify them as required. Neither alternative helps the Defendants’ position, and either would justify a ruling requiring that the Defendants provide the requested discovery regardless of cost or burden, because proper grounds for objecting have not been established.⁶

The boilerplate response of defense counsel was a serious strategic error, one that was costly to their client. Here, behavior of plaintiff’s counsel was equally objectionable and thus Judge Grimm was not inclined to find a complete and expensive waiver of all objections. Instead, he essentially ordered the attorneys to meet, try to cooperate, and reach agreement on several issues specified by Judge Grimm. The issues included trying to reach agreement on a range of damages that were likely if the plaintiff were to prevail. This is a critical fact issue that must be determined to establish a reasonable budget for discovery in this case, and every other case. Judge Grimm correctly notes that without a damage range it is impossible to perform an analysis under Rule 26(b)(2)(C), *Federal Rules of Civil Procedure* on the “overbreadth or burden” of the discovery propounded by the plaintiff.

The parties were ordered to report back to Judge Grimm after their meetings on these issues. The report required them to delineate their agreements and disagreements whereupon he would quickly rule to resolve the remaining issues. This procedure implements the cooperative approach heralded by the Proclamation and as Judge Grimm explains, this is entirely consistent with the adversary system of justice:

It is apparent that the process outlined above requires that counsel cooperate and communicate, and I note that had these steps been taken by counsel at the start of discovery, most, if not all, of the disputes could have been resolved without involving the court. It also is apparent that there is nothing at all about the cooperation needed to evaluate the discovery outlined above that requires the parties to abandon meritorious arguments they may have, or even to commit to resolving all disagreements on their own. Further, it is in the interests of each of the parties to engage in this process cooperatively. For the Defendants, doing so will almost certainly result in having to produce less discovery, at lower cost. For the Plaintiffs, cooperation will almost certainly result in getting helpful

⁵ *Mancia, supra* note 2, at 363.

⁶ *Id.* at 364.

information more quickly, and both Plaintiffs and Defendants are better off if they can avoid the costs associated with the voluminous filings submitted to the court in connection with this dispute. Finally, it is obvious that if undertaken in the spirit required by the discovery rules, particularly Rules 26(b)(2)(C) and 26(g), the adversary system will be fully engaged, as counsel will be able to advocate their clients' positions as relevant to the factors the rules establish, and if unable to reach a full agreement, will be able to bring their dispute back to the court for a prompt resolution. In fact, the cooperation that is necessary for this process to take place enhances the legitimate goals of the adversary system, by facilitating discovery of the facts needed to support the claims and defenses that have been raised, at a lesser cost, and expediting the time when the case may be resolved on its merits, or settled. This clearly is advantageous to both Plaintiffs and Defendants.⁷

This is a clear explanation of the role of cooperation in the adversary process and begins the pilgrimage on the right foot.

Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dept. of Homeland Sec.

The pilgrimage continued in Manhattan with Judge Frank Maas's opinion in *Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*⁸ *Aguilar* is an e-discovery case wherein the plaintiff sought to compel the production of metadata. *Aguilar* is well known for its phrase that Metadata has become "the new black" and contains a good discussion on when and how metadata should be requested.⁹

The attorneys in *Aguilar* did not reach any agreement on metadata at the beginning of the case; they did not even discuss it. They did their clients a disservice via silence as Judge Mass noted:

This lawsuit demonstrates why it is so important that parties fully discuss their ESI early in the evolution of a case. Had that been done, the Defendants might not have opposed the Plaintiffs' requests for certain metadata. Moreover, the parties might have been able to work out many, if not all, of their differences without court involvement or additional expense, thereby furthering the "just, speedy, and inexpensive determination" of this case. See Fed.R.Civ.P. 1. Instead, these proceedings have now been bogged down in expensive and time-consuming litigation of electronic discovery issues only tangentially related to the underlying merits of the Plaintiffs' *Bivens* claims. Hopefully, as counsel in future cases become more knowledgeable about ESI issues, the frequency of such skirmishes will diminish.¹⁰

Judge Moss directed attorneys to cooperate by referring them to both the *Sedona Principles* and the Proclamation:

The *Sedona Principles* also stress the need for the parties to resolve issues concerning metadata. As the Conference explains, the purpose of the amended Federal Rules is "to require parties, not courts, to make the tough choices that fit the particular discovery needs of a case." *Sedona Principles 2d* Cmt. 12c. This is appropriate because it is not the court but the parties who have the greatest knowledge of the documents in a case and whether the metadata accompanying those documents is relevant. Indeed, the Conference recently has issued a "Cooperation Proclamation," in which it stresses that the Federal Rules are a mandate that counsel act cooperatively in resolving discovery issues. See *Sedona Conference Cooperation Proclamation 2* (2008), http://www.thesedonaconference.org/content/misc/Files/Cooperation_Proclamation.pdf.¹¹

⁷ *Id.* at 365.

⁸ 255 F.R.D. 350 (S.D.N.Y. Nov. 21, 2008).

⁹ *Id.* at 359.

¹⁰ *Id.* at 364.

¹¹ *Id.*

Gipson, et al v. Southwestern Bell. Tel. Co.

The third endorsement was from Magistrate Judge David J. Waxse in *Gipson, et al v. Southwestern Bell. Tel. Co.*¹² This is a case with attorneys and *pro se* litigants where 115 motions and 462 docket entries were filed in the first year. Judge Waxse stated that many of the motions concerned minor issues that the parties should have been able to resolve on their own and directed them to the Proclamation:

To help the parties and counsel understand their discovery obligations, counsel are directed to read the Sedona Conference Cooperation Proclamation, which this Court has previously endorsed.¹³

Judge Waxse directed the parties to confer and stated that he would appoint a special master for discovery if they could not make progress on their own.

Covad Communications Co. v. Revonet, Inc.

Next to join the journey was Judge John Facciola, in *Covad Communications Co. v. Revonet, Inc.*¹⁴ *Covad*, like *Aguilar*, is an e-discovery opinion on the form of production. *Covad* involved paper production versus original native format, where metadata would be included. The attorneys not only failed to cooperate on deciding an appropriate form of production for ESI, but they failed to discuss the issue. Needless to say, little cooperation occurs when opposing counsel will not even speak with one another. As Judge Facciola put it:

It does not appear that Covad and Revonet ever discussed what form this (or any other) production should take. Instead the parties seem to be making assumptions based on each others' behavior: Covad expecting its documents in electronic form because Revonet hired a company to collect electronically stored information, and Revonet assuming that they should produce 35,000 pages of e-mails in hard copy because Covad produced its documents in that format. As there is no agreement, the parties invite me turn to the language of the requests themselves to determine whether Revonet can produce the e-mails other than in their native format.¹⁵

Judge Facciola then directed attorneys to the Proclamation and the need to talk to each other about e-discovery and reach agreement. The alternative of excessive motion practice is both a waste of the clients' money and an unnecessary expenditure of judicial resources. There is nothing to be gained over pointless disputes concerning relatively inconsequential issues, such as form of production, except for hour churning and big attorney fees. This kind of behavior is exactly what newly revised Rule 26(f) was designed to try to prevent by requiring parties to discuss these issues. As Judge Facciola observed:

Rule 26(f), as amended, specifically requires the parties to discuss the form that production of electronically stored information should take. Fed.R.Civ.P. 26(f)(3)(C). This controversy predates that provision, and underscores its importance. See *Aguilar v. Immigration and Customs Enforcement Div. of the U.S. Dep't of Homeland Sec.*, No. 07-CV-8224, 2008 WL 5062700, at *8-9 (S.D.N.Y. Nov.21, 2008) (emphasizing the need for cooperation between counsel in defining the form of production) (citing *The Sedona Conference Cooperation Proclamation* (2008), available at http://www.thesedonaconference.org/dlt/Form?did=Cooperation_Proclamation.pdf).¹⁶

¹² 2008 U.S. LEXIS 103822 (D. Kan. Dec. 23, 2008)

¹³ *Id.*

¹⁴ 254 F.R.D. 147 (D.D.C. Dec. 24 2008).

¹⁵ *Id.* at *2.

¹⁶ *Id.*

The failure of the attorneys in *Convad* to discuss the issue of form before they made production caused unnecessary work to later try to sort out the disputes that followed. Some attorneys call this the “paper or plastic” choice, and every supermarket bagboy knows to ask the customer if they want paper or plastic *before* they put the groceries in a bag, not after.

The plaintiff here did not specify the form of production in the boilerplate request for production that they used. The defendant also failed to ask about the plaintiff’s preferred form of production after receiving the vague request. The defendant unilaterally decided to produce emails in paper format. After the plaintiff received the paper production, the plaintiff then demanded plastic. The plaintiff wanted the same emails re-produced to them in their original native form. This usually means they are produced on CD-ROM, and thus the reference to “plastic.”

Judge Facciola ended up ordering the reproduction of the emails and other ESI in plastic, the original native form, but required the plaintiff to pay for part of the expenses. Judge Facciola explained this holding in his usual wonderful language:

Since both parties went through the same stop sign, it appears to me that they both should pay for the crash.¹⁷

S.E.C. v. Collins & Aikman Corp.

Judge Shira Scheindlin became the first District Court judge to cite to the Proclamation in *S.E.C. v. Collins & Aikman Corp.*¹⁸ *Collins* is a very interesting e-discovery case in its own right, addressing the Government’s discovery obligations in civil litigation. This is a large securities fraud case wherein a defendant asked the SEC to “produce for inspection and copying the documents and things identified” in fifty-four separate categories.¹⁹ The SEC responded with what is commonly called a document dump. As Judge Scheindlin described it:

The SEC produced 1.7 million documents (10.6 million pages) maintained in thirty-six separate Concordance databases - many of which use different metadata protocols.²⁰

They might as well have given the defendant a key to the Library of Congress and told him to help himself, and that the answers to his requests were somewhere in the archives. Naturally, the defendant objected to the SEC’s tactic. He wanted to be told where in the 10.6 million pages he might find the categories of documents he was looking for. He wanted the SEC to make some effort to look for these documents, not just put the entire burden and cost upon him. He complained that this kind of document dump was a way for the government to hide the relevant evidence.

To make matters worse, it turns out that the government had already sorted through most of the data themselves to retrieve the documents they thought were relevant. But the SEC took the position that this was secret work product, and, unlike a criminal case, they should not be required to disclose this selection process to defendants in this civil action. The SEC argued that it should only be required to produce the ESI in the manner in which it is ordinarily maintained in its usual course of business, which meant lumped in the several large databases it produced, not in the culled down editions it prepared for the case and refused to produce.

The government’s response constitutes an interesting adversarial tactic to be sure, but Judge Scheindlin was not buying the dodge to meaningful disclosure. She referred to the Advisory Committee Note to Rule 34, *Federal Rules of Civil Procedure*. The Note explained that the purpose of the new rule language added in 1980 to require production by categories or according to usual course of business organization was to eliminate the practice of “deliberately [mixing] critical documents with others in the hope of obscuring significance.”²¹ Judge Scheindlin understood that the intent of the rule

¹⁷ *Id.* at 151.

¹⁸ 256 F.R.D. 403, Fed. Sec. L. Rep. P 95,045 (S.D.N.Y. Jan. 13, 2009).

¹⁹ *Id.* at 406.

²⁰ *Id.* at 407.

²¹ *Fed.R.Civ.P.* 34 1980 Advisory Committee Note (quoting Section of Litigation, Am. Bar Ass’n, *Report of the Special Committee for the Study of Discovery Abuse*, at 22 (1977), reprinted in 92 F.R.D. 149 (1982)).

to allow for the production of documents as they “are actually kept in the usual course of business” was to minimize the burden of production while maintaining the “internal logic reflecting business use.”²² Judge Scheindlin reasoned that:

In most cases, documents produced pursuant to Rule 34 will be organized by subject matter or category. The provision prohibits “simply dumping large quantities of unrequested materials onto the discovering party along with the items actually sought.”²³

Judge Scheindlin also addressed the work product objections that the government lawyers raised to try to justify their document dump. This is an objection that is often made to try to justify an uncooperative approach to discovery. Judge Scheindlin’s analysis of this issue bears close scrutiny:

It is first necessary to determine the level of protection afforded to the *selection* of documents by an attorney to support factual allegations in a complaint. Such documents are not “core” work product. Core work product constitutes legal documents drafted by an attorney - her mental impressions, conclusions, opinions, and legal theories. This highest level of protection applies to a compilation only if it is organized by legal theory or strategy. The SEC’s theory - that every document or word reviewed by an attorney is “core” attorney work product - leaves nothing to surround the core. The first step in responding to any document request is an attorney’s assessment of relevance with regard to potentially responsive documents. It would make no sense to then claim that an attorney’s determination of relevance shields the selection of responsive documents from production. ...

The question of “undue hardship” is more interesting. The SEC contends that Stockman can search through the ten million pages and find substantially the same documents identified by the SEC without impinging on the thought processes of the SEC attorneys. Indeed - at significant expense and delay - Stockman could search the document databases using appropriate search terms, but the inaccuracy of such searches is by now relatively well known. A page-by-page manual review of ten million pages of records is strikingly expensive in both monetary and human terms and constitutes “undue hardship” by any definition.

It is patently inequitable to require a party to search ten million pages to find documents already identified by its adversary as supporting the allegations of a complaint. Thus, under either the undue hardship analysis of Rule 26 or the equities suggested by the Second Circuit, the 175 file folders prepared by the SEC’s attorney are not protected by the work product doctrine.²⁴

Judge Scheindlin concludes her analysis with a call for all lawyers, especially the SEC lawyers in this case, to read and understand the Federal Rules of Civil Procedure and the Proclamation:

With few exceptions, Rule 26(f) requires the parties to hold a conference and prepare a discovery plan. The Rule specifically requires that the discovery plan state the parties’ views and proposals with respect to “the subject on which discovery may be needed ... and whether discovery should be conducted in phases or be limited to or focused on particular issues” and “any issues about disclosure or discovery of electronically stored information” Had this been accomplished, the Court might not now be required to intervene in this particular dispute. I also draw the parties’ attention to the recently issued *Sedona Conference Cooperation Proclamation*, which urges parties to work in a cooperative

²² *Id.* at 409 (citing *Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. at 177).

²³ *Id.*

²⁴ *Id.* at 410-411.

rather than an adversarial manner to resolve discovery issues in order to stem the “rising monetary costs” of discovery disputes. The Proclamation notes that courts see the discovery rules “as a mandate for counsel to act cooperatively.” Accordingly, counsel are directed to meet and confer forthwith and develop a workable search protocol that would reveal *at least some* of the information defendant seeks.²⁵

Judge Scheindlin ordered the SEC to produce or identify some of the documents organized in response to Stockman’s requests and to negotiate an appropriate search protocol to locate the rest, including agency e-mail, and to do it all within twenty days. The judge acknowledged that the SEC had raised legitimate concerns about the burdens imposed by the requests, but admonished the SEC for unilaterally determining that those burdens outweighed the defendant’s need for discovery. In Judge Scheindlin’s words:

At the very least, the SEC must engage in a good faith effort to negotiate with its adversaries and craft a search protocol designed to retrieve responsive information without incurring an unduly burdensome expense disproportionate to the size and needs of the case. The parties are therefore directed to engage in a cooperative effort to resolve the scope and design of a search ...

Judge Scheindlin concluded by stating that if the parties could not reach agreement, she was prepared to appoint a special master to supervise remaining discovery.

William A. Gross Const. Associates, Inc. v. American Mfrs. Mut. Ins. Co.

Judge Andrew J. Peck is the next to join in with another excellent e-discovery case concerning the issue of keyword search. *William A. Gross Const. Associates, Inc. v. American Mfrs. Mut. Ins. Co.*²⁶ The case begins with this oft-quoted line:

This Opinion should serve as a wake-up call to the Bar in this District about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or “keywords” to be used to produce emails or other electronically stored information (“ESI”).²⁷

Gross Construction involved a multi-million dollar dispute over alleged defects and delay in the construction of the Bronx Criminal Court Complex. The parties subpoenaed a non-party, a large construction company, and demanded production of its ESI by using thousands of different search terms, including words such as: “sidewalk,” “change order,” “driveway,” “access,” “alarm,” “budget,” “build,” “claim,” “delay,” “elevator,” and “electrical.” The subpoenaed construction company objected, pointing out the obvious, that if all of these keywords were used, they would have to produce virtually all of their data for all of their construction projects. They did not, however, suggest any alternative.

Judge Peck made the following observation about the failure of the attorneys in *Gross* to conduct a proper search:

This case is just the latest example of lawyers designing keyword searches in the dark, by the seat of the pants, without adequate (indeed, here, apparently without any) discussion with those who wrote the emails.²⁸

Gross Construction is an example of another piece of major litigation where the lawyers not only failed to cooperate on e-discovery, they failed to even talk about it. Also, once again, we have a judge placed in what Judge Peck called “the uncomfortable position of having to craft a keyword search methodology for the parties, without adequate information ...”²⁹

²⁵ *Id.* at 414-415.

²⁶ 256 F.R.D. 134 (S.D.N.Y. March 19, 2009).

²⁷ *Id.* at 134.

²⁸ *Id.* at 135.

²⁹ *Id.*

Judge Peck ended up specifying certain keywords, but in other cases judges have refused to do this for the attorneys and have instead suggested they need to work it out themselves or retain experts and come back with expert testimony. For instance, in *Victor Stanley*, Judge Grimm held:

Selection of the appropriate search and information retrieval technique requires careful advance planning by persons qualified to design effective search methodology.³⁰

Judge Facciola was even more emphatic when faced with a similar situation in *O'Keefe* where he held:

Whether search terms or “keywords” will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics. Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread. This topic is clearly beyond the ken of a layman and requires that any such conclusion be based on evidence that, for example, meets the criteria of Rule 702 of the Federal Rules of Evidence.³¹

Here Judge Peck selected key words for the parties, but not without also telling all attorneys in New York that they need to get with the cooperation program:

Of course, the best solution in the entire area of electronic discovery is cooperation among counsel. This Court strongly endorses *The Sedona Conference Cooperation Proclamation* (available at www.TheSedonaConference.org).

Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI's custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of “false positives.” It is time that the Bar - even those lawyers who did not come of age in the computer era - understand this.

Newman v. Borders, Inc.

The next to cite the Proclamation is another opinion by Judge Facciola: *Newman v. Borders, Inc.*³² This was a straightforward race discrimination case where the plaintiff moved to compel an eighth deposition to discuss defendant's electronic document retention policy. In looking into this motion Judge Facciola was “stunned by how much time and effort has been spent on discovery in a case.” He was, as he put it, “well past being convinced that the potential legal fees in this case, thanks to the many discovery disputes, will dwarf the potential recovery, if there is one.”³³ Judge Facciola then resolved the latest dispute and admonished them to cooperate:

I understand from their papers that the parties attempted to resolve the controversy by trying to agree to an affidavit from Borders that spoke to the issues that arose during Morrow's deposition. They did not try hard enough. Accordingly, in lieu of a 30(b)(6) deposition Borders will submit an affidavit from a Borders representative who is truly knowledgeable that will speak to the following questions ... Counsel should become aware of the perceptible trend in the case law that insists that counsel genuinely attempt to resolve discovery disputes.³⁴

³⁰ *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260, 262 (D. Md. 2008).

³¹ *United States v. O'Keefe*, 537 F.Supp.2d 14, 24 (D.D.C. 2008).

³² 257 F.R.D. 1 (D.D.C. April 6, 2009).

³³ *Id.* at *3.

³⁴ *Id.*

Ford Motor Co. v. Edgewood Properties, Inc.

The next judge to join in is Magistrate Judge Esther Salas in her opinion, *Ford Motor Co. v. Edgewood Properties, Inc.*³⁵ This is another form of production, paper or plastic case. But this one has a twist. The requesting party asked for plastic, original native with full metadata. The responding party said they would produce in modified paper, here TIFF image files with some metadata.³⁶ Judge Salas called this “dueling declarations” where it was clear no agreement was reached, but then the responding party “unilaterally adopted its own objection and produced them in TIFF format.”³⁷ The requesting party then stood silent after the TIFF production began. Only later, after all production was complete, did they file an objection and ask the court to intervene and require a reproduction of the same documents in native form.

Judge Salas held that the requesting party had waited too long and had waived the objection. The requesting party should have complained as soon as the first paper production was made. Judge Salas then went on to explain cooperation to counsel and how simple measures could have avoided this whole problem:

The Sedona Principles and Sedona commentaries thereto are the leading authorities on electronic document retrieval and production. *William A. Gross Const. Assc., Inc. v. American Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y.2009) (“[t]his Court strongly endorses *The Sedona Conference Cooperation Proclamation*”); *John B. v. Goetz*, 531 F.3d 448 (6th Cir.2008) (following principles); *Aguilar v. Immigration and Customs Enforc. Div. of U.S. Dep’t of Homeland Sec.*, 255 F.R.D. 350 (S.D.N.Y.2008) (same). Relying on the principles and on the Federal Rules, *Aguilar* explicated the procedure by which parties are to propound electronic discovery requests upon each other, and the parties’ concomitant obligations thereto. ...

The Court finds Edgewood’s objection to be out of time. It is beyond cavil that this entire problem could have been avoided had there been an *explicit* agreement between the parties as to production, but as that ship has sailed, it is without question unduly burdensome to a party months after production to require that party to reconstitute their *entire* production to appease a late objection. The advent of E-Discovery does not serve to destroy parties’ discovery obligations that would exist in the ordinary course were other media involved. Parties would be best to heed the admonition of a recent court that “the best solution in the entire area of electronic discovery is cooperation among counsel.” *William A. Gross, supra*, 256 F.R.D. at 136l.³⁸

Dunkin’ Donuts Franchised Restaurants LLC v. Grand Cen. Donuts, Inc.

Back in Manhattan, Judge Marilyn Go, joined the cooperation pilgrimage with her opinion in *Dunkin’ Donuts Franchised Restaurants LLC v. Grand Cen. Donuts, Inc.*,³⁹ Once again the e-discovery dispute concerns search protocols for email. The plaintiff wanted a broad production, which defendant claimed would be too burdensome. The dispute was not well developed with no real facts about proposed search alternatives. With a vague background indicating a lack of discussion by the attorneys involved, Judge Go pointed counsel to the Proclamation:

Finally, the parties have been unable to agree on the appropriate scope of Dunkin’s search for emails relevant to the claims and defenses in this case. Rule 26(f) requires the parties to formulate a discovery plan which includes “any issues about disclosure or discovery of electronically stored information.” *Fed.R.Civ.P.* 26(f). In addition, *The Sedona Conference Cooperation Proclamation* recommends

³⁵ 257 F.R.D. 418 (D.N.J. May 19, 2009).

³⁶ *Id.* at 424.

³⁷ *Id.*

³⁸ *Id.* at 424, 426.

³⁹ 2009 WL 1750348 (E.D.N.Y. June 19, 2009).

that parties cooperate to resolve discovery disputes in order to reduce the rising costs associated with such disputes. See *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414-15 (S.D.N.Y.2009) (quoting *The Sedona Conference Cooperation Proclamation*). Accordingly, the parties are directed to meet and confer on developing a workable search protocol to obtain the information sought by the defendants in light of what was discussed at the motion hearing. Defendants' proposed search can be narrowed temporally and the scope of the search terms sought tailored to each employee, since some employees may have knowledge of only issues relevant to one set of counterclaims but not the other. The defendants must provide Dunkin with a list of the employees or former employees whose emails they want searched and the specific search terms to be used for each individual depending on whether they were likely to be involved with issues relating to the termination of the franchise agreement or the performance of the store development agreement.⁴⁰

Wells Fargo Bank, N.A. v. LaSalle Bank Nat. Ass'n

Magistrate Judge Michael R. Merz became the next *pilgrim-citator* in *Wells Fargo Bank, N.A. v. LaSalle Bank Nat. Ass'n*.⁴¹ This case involved a dispute between the parties as to whether they should search for ESI on backup tapes. The Court declined to address the merits of the case, pointing out that the motions had been filed four months after the discovery cut-off date. The briefing on motions, including motions to compel production of ESI on backup tapes, were not completed until just two months before trial. Under these circumstances, the Court declined to even consider the disputes and pointed out that the tardiness of the motions could have been avoided had the rules been followed and the attorneys cooperated:

Amendments to the Federal Rules of Civil Procedure in 2006 to acknowledge and accommodate the digital revolution were five years in the drafting and recognized in part the potential for ESI to overwhelm the litigation system. The Rules Advisory Committee sought to avoid that result by providing for early consultation among counsel to prevent ESI problems. More recently, The Sedona Conference has issued its *Cooperation Proclamation* to attempt to move litigators in the direction of cooperating by suggesting methods for doing so:

1. Utilizing internal ESI discovery "point persons" to assist counsel in preparing requests and responses;
2. Exchanging information of relevant data sources, including those not being searched, or scheduling early disclosures on the topic of Electronically Stored Information;
3. Jointly developing automated search and retrieval methodologies to cull relevant information;
4. Promoting early identification of form or forms of production;
5. Developing case-long discovery budgets on proportionality principles; and
6. Considering court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.

(*The Sedona Conference Cooperation Proclamation*, July, 2008, at 2; available at thesedonaconference.org). The current dispute is a mild example of the sorts of problems which result when counsel do not deal systematically with ESI

⁴⁰ *Id.* at *4.

⁴¹ 2009 WL 2243854 (S.D. Ohio July 24, 2009).

problems and possibilities at the outset of litigation, instead of filing one-paragraph boilerplate statements about ESI and waiting for the explosion later.

Whether it would have been appropriate for the Court to wade into the middle of this ESI dispute earlier in the case, the Court declines to do so now.

Judge Merz goes one step further than the prior opinions by setting forth the six methods suggested in the Proclamation to start to get litigators to cooperate.

In re Direct Southwest, Inc., Fair Labor Standards Act (FLSA) Litigation

Judge Sally Shushan takes the Proclamation into the deep south with an e-discovery search opinion: *In re Direct Southwest, Inc., Fair Labor Standards Act (FLSA) Litigation*.⁴² Here the parties had competing lists of search terms. The responding party claimed that the requestors list was too burdensome, that it would produce too many hits and cost an additional \$100,000 to review for privilege. As is still common both north and south of the Mason Dixon, this dispute was brought to the court for resolution at the end of the case, not the beginning as the rules contemplate. Here is Judge Shushan's reaction:

The defendants cite *William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Company*, 256 F.R.D. 134 (S.D.N.Y.2009), where the court said the decision "should serve as a wake-up call to the Bar in this District about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or 'keywords' to be used to produce emails or other electronically stored information...."

After reviewing some of the cases and commentators discussing the issue, the court said "the best solution in the entire area of electronic discovery is cooperation among counsel," and cited *The Sedona Conference Cooperation Proclamation*. *Id.* at 136. The undersigned echos this statement. Unfortunately counsel are not able to reach agreement on the search terms . . . The issue raised by this motion should have been resolved at the beginning of the discovery process and not at the end.

Judge Shushan then ruled against defendant, the party who cited to *Gross Construction*, and compelled discovery. This decision thus shows once again that e-discovery issues must be raised early in a case in order to receive protection from the court from burdensome requests. Do not put it off. Try to cooperate and start talks early, and if it fails, seek relief right away.

Capitol Records, Inc. v. MP3tunes, LLC

In *Capitol Records, Inc. v. MP3tunes, LLC* Judge Frank Maas. issued a complicated opinion concerning search.⁴³ The case cites to both *Gross Construction* and Proclamation.⁴⁴ Judge Maas had earlier directed the attorneys to the Proclamation, but they apparently did not get the message. The attorneys continued to engage in a series of self-serving letters that Judge Mass characterized as "dueling epistles for submission to the Court." The court here resolved some of the many issues presented and ordered the parties to meet and confer on several remaining issues to allow for a reasonable search of the ESI.

Conclusion

With twelve decisions in less than a year the Proclamation is well on its way to judicial acceptance. The lawyers who practice before these judges, and the many other judges that I predict

⁴² WL 2461716 (E.D. La. Aug. 7, 2009).

⁴³ 2009 WL 2568431 (S.D.N.Y. Aug. 13, 2009).

⁴⁴ *Id.* at 2.

will follow, are bound to hear and eventually to heed the call. Attorneys are bound to start to change their ways and cooperate on the many technical issues involved in discovery, especially in e-discovery.

Strategic cooperation on discovery as part of the adversary process makes good sense. It is a waste of time and money to battle over *paper or plastic* or engage in dueling search term lists. If we can cooperate on these discovery issues, we can significantly reduce the transaction costs of litigation and channel the parties arguments towards their proper sphere: legitimate disagreement on application of the law to facts and on the validity of contested facts. Scarce judicial resources should not be wasted on substantively meaningless discovery quarrels. The Bench and Bar alike should work together to continue this important movement towards efficiency and justice in our courts.