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# Some Thoughts on the Lawyer's E-volving Duties in Discovery

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## SOME THOUGHTS ON THE LAWYER'S E-VOLVING DUTIES IN DISCOVERY

Steven S. Gensler\*

Even the most Luddite litigator knows that we are well into the age of electronic discovery. To be sure, document discovery still will involve a banker's box or two of printed pages in most cases. But one is hard-pressed to think of many cases these days where one or both of the parties won't be just as interested – if not more so – in what's on someone's hard drive or e-mail server. Indeed, the thought of a litigator not even *considering* whether to take discovery of the other party's electronically stored information ("ESI") almost smacks of malpractice. Setting the question of professional duty aside, the world when document discovery centered on paper and banker's boxes is just not the litigation world we live in today.

Though the developmental process is hardly complete, the mechanics of e-discovery are rapidly taking form. Most notably, the 2006 amendments to the Federal Rules of Civil Procedure started to answer some of the basic questions underlying e-discovery. Are electronic records discoverable? Of course they are.<sup>1</sup> Do parties have to search all of their possible sources of electronic records, even their hard-to-access back-up tapes or other disaster recovery systems? Not initially, but it can be ordered for good cause.<sup>2</sup> Must parties produce their electronic records in their native format, or will printed-out pages of the information suffice? That's for the parties to work out, though the judge has the ultimate say.<sup>3</sup> And for the love of all that is holy, who pays for it all? As with ordinary discovery, the responding party presumptively bears the expense of search and production, though the e-discovery amendments give a nod to cost-shifting for so-called inaccessible data.<sup>4</sup>

The impact of e-discovery goes beyond mechanics. As the discovery rules evolve<sup>5</sup> to adapt to the computer age, the role of lawyers in the discovery process is evolving as well. More than ever before, lawyers are finding themselves in the

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\* Welcome D. & W. DeVier Pierson Professor, University of Oklahoma College of Law. This paper was prepared for the E-Discovery Symposium at the Northern Kentucky University Chase College of Law. Thanks go to the Chase College of Law for hosting the symposium, to the University of Oklahoma College of Law for providing research support, and to Ed Cooper and Rick Marcus for their comments on an earlier draft.

1. FED. R. CIV. P. 34(a)(1)(A).

2. FED. R. CIV. P. 26(b)(2)(B).

3. FED. R. CIV. P. 34(b)(1)(C), (2)(E).

4. FED. R. CIV. P. 26(b)(2) advisory committee's note (2006).

5. See Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?*, 25 REV. LITIG. 633, 660 (2006) (stating that the e-discovery rules are "consciously evolutionary" in that "they draw upon, and seek to identify 'best practices'" that had been developing in the courts for many years).

thick of the search and production process, standing arm-in-arm – if not foot-to-posterior – with their clients at every step. At the same time, judges increasingly are expecting the lawyers to walk hand-in-hand with each other in a cooperative process that starts at the very beginning of the lawsuit and continues to its conclusion.

This article explores three ways in which e-discovery is (or may be) changing the way in which lawyers participate in the discovery process. Part I examines how e-discovery seems to have brought us to the culmination of a process that began in the 1980s and 1990s – the front-loading of discovery. Part II looks at how e-discovery has rekindled interest in the cooperative approach to discovery. Lastly, Part III considers the way in which e-discovery has raised new and challenging questions about the relationship between lawyers and their clients in the process of preserving, identifying, and producing discoverable information.

### I. FRONT-LOADING THE DISCOVERY PROCESS

If there is a master blueprint to e-discovery under the Federal Rules, it lies in amended Rule 26(f) and the accompanying Advisory Committee Notes. Rule 26(f) requires the parties to confer early in the lawsuit, in advance of the deadline for the court to hold a scheduling conference and/or issue a scheduling order.<sup>6</sup> While the parties are instructed to discuss many subjects, the dominant topic for discussion is discovery.<sup>7</sup> Among the discovery issues to be discussed are the exchange of the Rule 26(a)(1) required initial disclosures, the preservation of discoverable information, and, most critically, the development of a proposed discovery plan.<sup>8</sup>

The discovery plan is itself a fairly comprehensive item, now covering six subcategories of discovery issues.<sup>9</sup> In it, the lawyers *must state* their views and proposals on, among others, the following key discovery issues:

- the subjects on which discovery may be needed;
- when discovery should be conducted (e.g., the need for phases) and completed;
- electronic discovery, including form of production;
- the process for claiming privilege or work-product protection;
- whether the court should alter any set limits on discovery; and
- whether the court should enter any case-specific discovery orders.<sup>10</sup>

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6. FED. R. CIV. P. 26(f)(1) (note, however, that the parties need not do so in a “proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise”).

7. FED. R. CIV. P. 26(f)(2) (also listing other topics for discussion, such as the nature and basis of the claims and defenses and the possibility of settlement).

8. FED. R. CIV. P. 26(f)(2).

9. FED. R. CIV. P. 26(f)(3).

10. FED. R. CIV. P. 26(f)(3).

The parties must attempt in good faith to agree on these proposals, but if they cannot agree then the discovery plan must set forth their respective views.<sup>11</sup>

The conference and plan required by Rule 26(f) serve two principal purposes. First, they are thought to facilitate the court's case management under Rule 16. That is to say, the parties' dialogue about their respective discovery needs and the resulting discovery plan supply critical inputs informing the court's choices about the general scope and timing of discovery.<sup>12</sup> Second, it is believed (or at least hoped) that the parties will be able to *agree* on various discovery issues thereby streamlining the pretrial process, reducing the number of discovery disputes, and making those that do arise smaller and easier for the court to resolve.<sup>13</sup>

It is ironic that discovery now pivots on the Rule 26(f) conference. Planning and cooperation in discovery is a concept that was not part of the original rules design. As detailed below, the modern version of Rule 26(f) was adopted almost as an afterthought and principally as a means for implementing the required initial disclosure provisions of Rule 26(a)(1). But the story of Rule 26(f) represents more than just an interesting history lesson. With the 2006 amendments and e-discovery, the Rule 26(f) conference imposes a heavy burden on lawyers to very quickly think through their own discovery needs while simultaneously investigating the information resource capacities of their clients. The story of Rule 26(f) is ultimately a story about how lawyers are now expected to make much more substantial investments in their cases at the very beginning.

#### A. *Original Expectations*

Modern discovery became a part of the federal litigation scene with the advent of the Federal Rules. Prior to the Federal Rules, there was very little discovery in federal court, either at law or in equity.<sup>14</sup> With the adoption of the Federal Rules, discovery took a leading role in the litigation process.<sup>15</sup> As Professor Subrin has documented, the Federal Rules aggregated virtually all of

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11. FED. R. CIV. P. 26(f)(2), (3).

12. FED. R. CIV. P. 26(f) advisory committee's note (1993) ("Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case.").

13. FED. R. CIV. P. 26(f) advisory committee's note (2006) ("[D]iscussion [of e-discovery issues] at the outset may avoid later difficulties or ease their resolution.").

14. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 698 (1998) (discussing the few forms of discovery available by federal statute and under the Federal Equity Rules).

15. Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2203 (1989) (discovery "helped shift the center of gravity from the trial to the pretrial stages").

the discovery devices being used in the various states in a way that no single state had ever done.<sup>16</sup>

Despite the centrality of discovery to the Federal Rules system, the 1938 Rules contained virtually nothing about discovery *management*, either by the parties through planning discussions or by the court. Rule 26(f) simply did not exist. None of the rules addressing specific discovery devices mentioned planning. And at that time, Rule 16 had not yet evolved into a case management rule. Its focus was on getting the case ready for trial, much like the final pre-trial conference now governed by Rule 16(e).<sup>17</sup>

What explains the absence of these now-familiar tools and practices for managing and coordinating discovery? The simple truth is that the original drafters did not include rules for extensive court management of discovery because they did not envision that judges would be very much involved in discovery. The original drafters “designed discovery to make information gathering a self-executing process. In other words, under the rules, the parties were expected to use discovery to prepare their case without having to resort to judicial proceedings.”<sup>18</sup>

The absence of provisions addressing *party communication* about discovery presents a separate puzzle. After all, it is one thing to leave the judge out of the discovery conversation; whether to require any such conversation at all is a quite different matter. But the answer here seems much the same – the original drafters simply did not envision that the parties (or their lawyers) would need to discuss discovery with each other.<sup>19</sup> Indeed, the original drafters seemed to be rather optimistic – perhaps naively so – about how lawyers would behave with these new discovery tools at their disposal.<sup>20</sup>

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16. See Subrin, *supra* note 14, at 739-40. As stated by Professor Dobie, a member of the original Advisory Committee, “If the term ‘revolutionary’ can be correctly applied to any part of the new rules, that part is discovery.” Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 275 (1939).

17. See Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 753 (1939) (stating that under Rule 16, the court may “hold a pretrial hearing to consider: (1) Simplifying the issues; (2) Amendments; (3) Admissions of facts or documents; (4) Limiting number of expert witnesses; (5) References; (6) Other matters likely to aid in the disposition of the matter”).

18. Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV. 479, 483-84 (1995). As explained by Professor Shapiro in his study of Rule 16, “extensive management of the pretrial process itself, though not explicitly ruled out by the terms of the rule, did not appear to play an important part in the thinking or deliberations of the rulemakers on Rule 16. In general, such matters as the timing and scope of pretrial discovery were to be handled by the parties, at least in the first instance.” David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1981 (1989).

19. Professor Sunderland, the architect of the 1938 discovery rules, wrote several articles discussing their design and operation. In none of the articles does he mention discussions between the parties.

20. See Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 34 (1994) (“[T]he reformers

This optimism arose from their predictions about the incentive structures that would be at play. First, there was a sense that lawyers would regulate themselves out of self-interest. That is to say, “[t]he drafters of the 1938 Rules believed that lawyers would not abuse discovery procedures because to do so would cost their clients both time and money.”<sup>21</sup> Second, the 1938 Federal Rules did include a fee-shifting mechanism.<sup>22</sup> Thus, even for those lawyers who saw profit (rather than cost) for their clients in contentious or excessive discovery, it was thought that the fee-shifting mechanism would be sufficient to discourage “captious refusals” and “unreasonable, unnecessary and vexatious applications.”<sup>23</sup>

In summary, the philosophy of the original drafters was that, while discovery was a critical complement to the notice pleading scheme, it did not need to be planned or managed because lawyers could be trusted to conduct discovery fairly and sensibly in most cases. Self-interest would guide the lawyers generally, while the fear of sanctions would deter exploitation. It was a nice ideal. It just didn’t work out that way.

### *B. The Birth and Reincarnation of Rule 26(f)*

Rule 26(f) was added in 1980.<sup>24</sup> The story behind Rule 26(f) begins four years earlier, however, with Chief Justice Burger’s Keynote Address at the 1976 Pound Conference. Moreover, the real story behind Rule 26(f) centers not so much on its birth in 1980 but on its near-death and reincarnation in 1993.

Chief Justice Warren Burger gave the Keynote Address at the 1976 Pound Conference. Echoing Roscoe Pound’s 1906 criticism of 19<sup>th</sup> century litigation practice – the condemnation of the so-called “sporting theory of justice”<sup>25</sup> – Chief Justice Burger expressed his dismay over “widespread complaints” of lawyers misusing and abusing the pretrial process.<sup>26</sup> Shortly thereafter, the American Bar Association formed a Special Committee on Abuse of Discovery (“ABA Special Committee”).<sup>27</sup> By December 1977, the ABA Board of

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submerged the obvious possibility that they were opening the door for enormous discovery abuse.”).

21. Griffin B. Bell et al., *Automatic Disclosure in Discovery – The Rush to Reform*, 27 GA. L. REV. 1, 8 (1992).

22. The original Rules included a version of Rule 37 that contains many of the sanctions provisions contained in the current version of Rule 37. For the text of original Rule 37, see 2 PALMER D. EDMUNDS, *FEDERAL RULES OF CIVIL PROCEDURE* 1158 (1938).

23. See Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 25 (1938).

24. FED. R. CIV. P. 26(f) advisory committee’s note (1980).

25. See Roscoe Pound, Address at the Convention of the Am. Bar Ass’n: The Causes of Popular Dissatisfaction with the Administration of Justice, in 35 F.R.D. 241, 281 (1906).

26. See Chief Justice Warren Burger, Keynote Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice: Agenda for 2000 A.D. – A Need for Systematic Anticipation, in 70 F.R.D. 79, 86, 95-96 (1976).

27. See AM. BAR ASS’N, REPORT OF THE POUND CONFERENCE FOLLOW-UP TASK FORCE, 74 F.R.D. 159, 165 (1976).

Governors had officially approved the Report of the ABA Special Committee for the Study of Discovery Abuse (“ABA Report”).<sup>28</sup>

The ABA Report made several suggestions to address the alleged problem of discovery abuse, two of which concerned Rule 26. The suggestion that captured most of the headlines – and that proved to be the most controversial – was to amend Rule 26(b)(1) to change the scope of discovery from material “relevant to the subject matter” to material “relevant to the issues raised by the claims or defenses of any party.”<sup>29</sup> Despite pressure from the ABA, the Chief Justice, and the Attorney General, the Advisory Committee ultimately declined to advance that suggestion – at least not at that time – on the basis that it was not persuaded that the reform either was needed or would make things better.<sup>30</sup>

The ABA Report also proposed a new provision authorizing a discovery planning conference.<sup>31</sup> This suggestion was successful, and Rule 26(f) took effect in 1980. But the Rule 26(f) conference created in 1980 was very different from the Rule 26(f) conference we know today. Prior to 1980, there was no mechanism in the Rules by which a party could seek the court’s general or prospective guidance and assistance in discovery. Rule 26(c) and Rule 37(a) authorized motions to address specific discovery problems, but the relief they provided reached only the issues raised by those motions and was only available after-the-fact. Those remedies offered small succor to the lawyer who found herself pitted against an opponent hell-bent on making every aspect of discovery as difficult as possible. The solution offered by the 1980 version of Rule 26(f) was to authorize parties to seek the court’s involvement by motion.<sup>32</sup> Specifically, Rule 26(f) authorized any party to propose a discovery plan to the other parties and obligated those other parties to “participate in good faith” in the framing of such a plan.<sup>33</sup> If those efforts were rebuffed, the party could file a motion seeking a discovery conference with the parties and the judge, following which the judge would enter an order establishing a discovery plan.<sup>34</sup>

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28. See SECTION OF LITIGATION AM. BAR ASS’N, SECOND REPORT OF THE SPECIAL COMM. FOR THE STUDY OF DISCOVERY ABUSE, 92 F.R.D. 137, 149-50 (1980).

29. See *id.* at 157.

30. See Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 756-60 (1998) (chronicling how the Advisory Committee initially proposed and then withdrew a proposal to narrow the scope of discovery along the lines suggested by the ABA Report).

31. See SECTION OF LITIGATION, *supra* note 28, at 159.

32. See FED. R. CIV. P. 26(f) advisory committee’s note (1993) (“This subdivision was added in 1980 to provide a party threatened with abusive discovery with a special means for obtaining judicial intervention other than through discrete motions under Rules 26(c) and 37(a).”).

33. See Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 526 (1980).

34. *Id.* Perhaps the best summary of the operation of the 1980 version of Rule 26(f) is found in the Advisory Committee Note accompanying the 1993 version of Rule 26(f) that replaced it. See FED. R. CIV. P. 26(f) advisory committee’s note (1993) (“The amendment envisioned a two-step process: first, the parties would attempt to frame a mutually agreeable plan; second, the court would hold a ‘discovery conference’ and then enter an order establishing a schedule and limitations for the conduct of discovery.”).



The 1980 version of Rule 26(f) was a flop. Nobody used it. The dialogue contemplated between the parties and the court was not mandatory, and few lawyers invoked it. Perhaps that should not have been a surprise given that the Advisory Committee all but chided lawyers not to use it, writing in the Advisory Committee Note that “[i]t is not contemplated that requests for discovery conferences will be made routinely.”<sup>35</sup>

A second wave of discovery reform efforts was underway even before the ink was dry on the 1980 amendments.<sup>36</sup> These efforts led to a package of amendments that took effect in 1983, and they marked a turning point in the role of judges in discovery. It was the beginning of the case management era. One critical change was the addition of the proportionality limit to Rule 26(b), an event that presaged a world of greater judicial oversight of discovery.<sup>37</sup> No less critical was the 1983 transformation of Rule 16 from a rule focused on trial to one that encouraged – and in some ways required – judges to take a hands-on approach to managing their cases throughout the life of the lawsuit, especially with respect to pretrial motions and discovery.<sup>38</sup>

With the 1983 changes to Rules 16 and 26, the already little-used Rule 26(f) conference receded into near obscurity. Indeed, with Rules 16 and 26 now explicitly giving federal judges specific means and expansive authority to actively manage discovery, there seemed little reason for keeping Rule 26(f). The Advisory Committee considered dropping Rule 26(f) in 1989 due to its overlap with the expanded Rule 16.<sup>39</sup> Two years later, the Advisory Committee formally proposed to eliminate Rule 26(f) due to its ineffectiveness and the belief that it was no longer needed in light of the supervening changes to Rules 16 and 26.<sup>40</sup>

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35. FED. R. CIV. P. 26(f) advisory committee's note (1980). Stepping back to see the larger picture, the 1980 version of Rule 26(f) was part of an amendment package that was weak at birth and received little nourishment thereafter. Justice Powell dissented from them (joined by Justices Rehnquist and Stewart), calling them “tinkering changes” that would serve only to “delay for years the adoption of genuinely effective reforms.” See *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting). This could hardly have inspired lawyers or judges to use them.

36. Marcus, *supra* note 30, at 760-61.

37. See FED. R. CIV. P. 26(b) advisory committee's note (1983) (“The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.”).

38. See FED. R. CIV. P. 16(a) advisory committee's note (1983) (“The amended rule makes scheduling and case management an express goal of pretrial procedure. This is done in Rule 16(a) by shifting the emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery.”).

39. See ADVISORY COMMITTEE ON THE CIVIL RULES, MINUTES APRIL 27-29, 1989, at 53, available at <http://www.uscourts.gov/rules/Minutes/CV04-1989-min.pdf> (“It was decided to retain the provisions of Rule 26(f), although it was acknowledged that there is considerable overlap with Rule 16, because this rule gives the lawyer an entitlement to cabin discovery.”).

40. See Comm. on Rules of Practice and Procedure of the Judicial Conference of the U. S., *Proposed Rules: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 105 (1991) (“The special ‘discovery

Enter the mandatory disclosure debate. The 1991 amendment package that quietly proposed to delete Rule 26(f) also included a highly-publicized and controversial proposal for requiring early mandatory disclosures.<sup>41</sup> The debates surrounding the merit of what became the 1993 version of Rule 26(a) need not be rehearsed here.<sup>42</sup> But there was one *logistical* issue that intersects with our tale of Rule 26(f). Since the beginning of the project, the Advisory Committee had struggled to figure out *when* the parties should make their initial disclosures. As published, the proposed rule tied the disclosures to service of the answer.<sup>43</sup> But that was problematic because motions under Rule 12 toll the time to answer, thus potentially deferring the disclosures for a long time or eliminating them altogether in the event of a dismissal.<sup>44</sup>

A solution emerged during a hearing on the proposed rules held in Los Angeles in November 1991. The mandatory disclosure proposal was modeled after practices in three districts that had adopted initial disclosure rules.<sup>45</sup> One of these districts – the Central District of California – also required the parties to meet and confer.<sup>46</sup> At the Los Angeles hearing, lawyers experienced with practice in the Central District of California spoke highly of their local meet-and-confer provision, quite obviously piquing the interest of the Chair of the Advisory Committee.<sup>47</sup> The meet-and-confer mechanism offered a solution to

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conference’ envisioned by the 1980 amendment has not proved to be an effective device to prevent discovery abuses.”).

41. *Id.* at 87-89.

42. For a taste of the commentary, see Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991); Bell et al., *supra* note 21.

43. See Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., *Proposed Rules: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 88 (1991).

44. See ADVISORY COMMITTEE ON THE CIVIL RULES, MINUTES NOV. 29-DEC. 1, 1990, at 2-4, available at <http://www.uscourts.gov/rules/Minutes/CV11-1990-min.pdf> (discussing pros and cons of various possibilities).

45. Mullenix, *supra* note 42, at 813-20 (analyzing local rules from those districts); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 806 n.193, 809 (1993) (discussing the history behind 1993 amendments).

46. See Mullenix, *supra* note 42, at 811 n.85 (setting forth the text of C.D. Cal. Rule 6).

47. See Hearings on the Proposed Amendments to the Federal Rules of Civil Procedure and Rules of Evidence, Thursday, November 21, 1991, at pp. 175-185 (testimony of Mary Ann Fong). Shortly after Ms. Fong’s testimony, the Chair of the Advisory Committee, Judge Pointer, clearly signaled his interest in pursuing a meet-and-confer mechanism, announcing: “Just to sort of alert those that are coming later this afternoon . . . you might want to address this issue about a meet and confer requirement because it’s, I think, clear that the committee would prefer to have a meet and confer requirement if we thought it was really workable. But we’ve had some questions.” *Id.* at 191. The minutes of a meeting two years before the hearing show that Judge Pfaelzer, a member of the Advisory Committee and a district judge in the Central District of California, had briefed the committee on the operation of the her district’s local rule on initial disclosures and meet-and-confer, but that concerns were raised about the efficacy of such a requirement. See ADVISORY COMMITTEE ON CIVIL RULES, MINUTES NOV. 17-18, 1989, at 8, available at <http://www.uscourt.gov/rules/Minutes/CV11-1989-min.pdf>. Thus, while the published 1991 proposed amendments suggested an “informal meeting of counsel” as the “preferred method of

the timing question: the parties would make or discuss plans for making their initial disclosures at the meeting. Serendipitously, it also solved a number of other thorny problems. It assuaged concerns about the uncertain scope of the initial disclosures: those concerns could be addressed on a case-specific basis by the parties at the meeting.<sup>48</sup> It solved the problem of how to coordinate the initial disclosures and party-initiated discovery: the parties would have to wait to begin taking discovery until after they had had their discovery planning conference.<sup>49</sup> Lastly, it solved a problem that had plagued practice under Rule 16 – how to get judges the information they needed to make meaningful scheduling orders.<sup>50</sup> The parties would be required to prepare a report based on their meeting and submit it to the court in advance of the time for setting the scheduling order.<sup>51</sup>

At the next Advisory Committee meeting, it was agreed to retain Rule 26(f) but to delete the old text and replace it entirely with a new provision requiring the parties to meet and confer about discovery and to prepare a discovery plan in advance of the Rule 16 scheduling conference and/or order.<sup>52</sup> Despite the substantial change to the content of Rule 26(f), the Advisory Committee deemed the revision sufficiently minor so as to not require republication.<sup>53</sup> With that, Rule 26(f) was brought back from near death, albeit reincarnated as a much different creature.

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exchanging the required disclosures,” it did not require any such meeting. *See* Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., *Proposed Rules, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 103 (1991).

48. *See* FED. R. CIV. P. 26(f) advisory committee’s note (1993) (noting that disclosures might be delayed in some cases “until after the parties have discussed at the meeting the claims and defenses in order to define the issues with respect to which the initial disclosures should be made”).

49. *See* FED. R. CIV. P. 26(d) (1993). The amendments initially proposed also had a moratorium on party-initiated discovery but it was tied to the *making* of the disclosures rather than the parties’ meeting. *See* Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., *Proposed Rules, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 94 (1991).

50. It was initially thought that the judges would devise their own methods for getting the information they needed, either through a conference or otherwise. *See* FED. R. CIV. P. 16(b) advisory committee’s note (1983) (“[W]hen no formal conference is held, the court may obtain scheduling information by telephone, mail, or otherwise.”). But in reality, the scheduling order was too often pro forma because of insufficient case-specific inputs.

51. *See* FED. R. CIV. P. 26(f) advisory committee’s note (1993); ADVISORY COMMITTEE ON CIVIL RULES, MINUTES APRIL 13-15, 1992, at 8-11. A similar concept had emerged from the Civil Justice Reform Act of 1990. *See* 28 U.S.C. §§ 471-82 (Supp. 1990). One of the suggestions for experimentation was preparation of a discovery schedule and plan “for complex or any other appropriate cases.” 28 U.S.C. § 473(a)(3)(C). Four of the ten pilot districts required that counsel jointly present a discovery/case management plan at the initial pretrial conference. *See* James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 652 (1998).

52. *See* ADVISORY COMMITTEE ON THE CIVIL RULES, MINUTES FEB. 21, 1992, at 3, available at <http://www.uscourts.gov/rules/Minutes/CV02-1992-min.pdf>.

53. *Id.*

The amendments to Rule 26(f) since 1993 have cemented its central role in discovery planning and case management. In 2000, the local opt-out option was eliminated. The Advisory Committee explained that it “ha[d] been informed that the addition of the conference was one of the most successful changes made in the 1993 amendments, and it therefore ha[d] determined to apply the conference requirement nationwide.”<sup>54</sup> And as discussed earlier, the 2006 e-discovery amendments added several more items for the parties to discuss and report upon.<sup>55</sup>

As of 2006, it is safe to say that the Federal Rules’ approach to discovery planning and management has made a full about-face since 1938. The idea that the parties will conduct discovery unilaterally – without talking to each other and without regulation by the court – is distant history. Today, rather, discovery is discussed, planned, and managed from the very beginning of the lawsuit until its conclusion.

### *C. E-Discovery and the “Meaningful” Rule 26(f) Conference*

At one level, the story of the evolution of Rule 26(f) is simply a sobering tale of great – if not naïve – expectations dashed by a disappointing reality. Discovery is not a self-regulating process, immune from friction or abuse. It requires management. And management requires communication, both between the parties and with the court. But there is a second level to this story, because the communication required by Rule 26(f) requires information. As a result, lawyers must take action earlier than ever to gather that information. This section explores the “front-loading” effect of the 2006 e-discovery amendments.

When discussing the front-loading of the lawyer’s investigative activities, one must start – at the latest<sup>56</sup> – with 1993, which gave us the Rule 26(a)(1) required initial disclosures and added the meet-and-confer requirement to Rule 26(f). Obviously, by requiring the parties to identify individuals likely to have discoverable information and relevant documents,<sup>57</sup> Rule 26(a)(1) imposed a

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54. FED. R. CIV. P. 26(f) advisory committee’s note (2000) (noting courts would retain the power to exempt individual cases by a case-specific order). Rule 26(f) also was amended to require only a “conference” rather than a “meeting” to reflect the concern that, while face-to-face meetings are preferable, they are not always practicable. *Id.*

55. See discussion *supra* notes 8-11 and accompanying text.

56. In the larger picture, the front-loading of pretrial activities really began in 1983 when Rule 16 was amended to require early case-management as a means of reducing pretrial expense and delay. See FED. R. CIV. P. 16 advisory committee’s note (1983). It is certainly true that setting a discovery schedule often forces the parties to undertake discovery sooner (and perhaps much sooner) than they would if left on their own. Still, the discovery deadline can stretch out months or even years into the future. Thus, for purposes of this article, I have chosen to start with 1993 and the required initial disclosures because of the way in which they force the parties to undertake their own case investigations at the very earliest stages of the litigation.

57. I refer here to the scope of the Rule 26(a)(1) disclosures put in place by the 1993 amendments. In 2000, the duty of disclosure was dialed back to identifying witnesses and documents that the party might use to *support* its claims or defenses. See FED. R. CIV. P. 26(a)(1)

burden on the parties and their lawyers to conduct an initial investigation into the facts of the case. The front-loading effect of Rule 26(a)(1) did not go unnoticed during the comment period. Both plaintiff and defendant groups voiced concerns that the proposed initial disclosure rule would require them to prepare earlier in the case than they were used to and that, by doing so, it “would change the way in which lawyers traditionally have practiced law.”<sup>58</sup> The 1993 version of Rule 26(f) had its own front-loading effect as well. If the lawyers were to be prepared to discuss the general discovery needs of the case and whether the court should alter or impose any limits on discovery, that imposed some corresponding duty to give some early thought to how they intended to pursue their claims or defenses.

The Advisory Committee was not swayed by any of the concerns expressed about shifting too much work to the front of the case. First, Rule 26(a)(1) was carefully written to tie the initial disclosures to the information that would be generated by a *reasonable* initial investigation.<sup>59</sup> So limited, that did not seem to demand too much early work. Second, and I suspect most fundamentally, there is every reason to think that the Advisory Committee was quite comfortable with the front-loading effect of the 1993 amendments. According to the Advisory Committee Note, “[a] major purpose of the revision [was] to accelerate the exchange of basic information.”<sup>60</sup> The members of the Advisory Committee were not ignorant of the fact that speeding up the exchange of information also meant speeding up the investigation process – they just thought that the net result was a good one. As one commentator explained, one of the purposes of the changes to Rule 26 was to change the way lawyers behave in the belief that “this new way of practicing would benefit the profession.”<sup>61</sup>

The relevant question, then, is not whether the e-discovery amendments have suddenly caused a shift to front-loading the pretrial process; that shift began no later than 1993. Rather, the relevant question is how the e-discovery

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advisory committee’s note (2000). Presumably, the investigation burden under the 2000 version of Rule 26(a)(1) is less than it was under the 1993 version.

58. Lasso, *supra* note 18, at 499. A related argument is that lawyers faced with such a short time period to make disclosures would overproduce in order to avoid being sanctioned for under-producing. See Comm’n from the Chief Justice of the U.S. Transmitting Amendments to the Federal Rules of Civil Procedure and Forms, Pursuant to 28 U.S.C. §2072, *Amendments to the Federal Rules of Civil Procedure and Forms*, 146 F.R.D. 401, 510-11 (Scalia, J., dissenting) (1993); Bell et al., *supra* note 21, at 43-44. This type of response would represent yet another form of front-loading of effort, though the burden presumably would fall more on the client (who was gathering) than on the lawyer (who was not sifting).

59. See FED. R. CIV. P. 26(a) advisory committee’s note (1993) (“The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings.”). Later developments and discoveries would be the subject of supplemental disclosures. *Id.* Moreover, if there were reasons to forego or delay the effort required to make initial disclosures, the parties could opt out by stipulation or obtain a court order. See FED. R. CIV. P. 26(a)(1).

60. FED. R. CIV. P. 26(a) advisory committee’s note (1993).

61. Lasso, *supra* note 18, at 499.

amendments might have altered or affected the shift to front-loading. The early returns suggest that the impact has been substantial, both in scope and degree.

The belief that lawyers should, if not must, significantly increase their early efforts in order to properly address the demands of e-discovery seems nearly universal. One reading the Advisory Committee Note to the 2006 amendments to Rule 26(f) could scarcely reach any other conclusion. The Note premises the discussion of amended Rule 26(f) on the idea that lawyers who talk about e-discovery early in the case will have fewer and less difficult problems later. Of course, the lawyers must prepare for that dialogue, and part of that is figuring out what information you need so you can *ask* your opponent if it exists and where.<sup>62</sup> Conversely, you must learn your own client's information system beforehand so you can *answer* such questions when they are posed to you.<sup>63</sup> Then at the meeting, the parties can discuss what information they would like and for what time periods, where that information might be found, and if those sources are reasonably accessible or not.<sup>64</sup>

But questions of scope and source are just the beginning. The Advisory Committee Note instructs the parties to discuss the form for producing electronically stored information to "avoid the expense and delay of searches or productions using inappropriate forms."<sup>65</sup> Relatedly, the parties should discuss the relevance of metadata and whether to produce their ESI in a form that includes the metadata.<sup>66</sup> The Note instructs the parties to discuss how to handle the review for and assertion of privilege and work-product protection, and whether to ask the court to incorporate any such agreements into the case management order.<sup>67</sup> Last but certainly not least, the Note directs the parties to discuss preservation, a topic the Note says "can be particularly important with regard to electronically stored information."<sup>68</sup>

While the Advisory Committee Note reflects some appreciation for the amount of advance investigation required to do all of the things advised, the only explicit mention is the acknowledgement that it will be "important for counsel to

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62. FED. R. CIV. P. 26(f) advisory committee's note (2006).

63. FED. R. CIV. P. 26(f) advisory committee's note (2006) ("It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference.").

64. FED. R. CIV. P. 26(f) advisory committee's note (2006).

65. FED. R. CIV. P. 26(f) advisory committee's note (2006).

66. *See* FED. R. CIV. P. 26(f) advisory committee's note (2006) ("Information describing the history, tracking, or management of an electronic file (sometimes called 'metadata') is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference.").

67. FED. R. CIV. P. 26(f) advisory committee's note (2006). At the time, the Advisory Committee Note reflected the uncertainty about whether such an order would be binding on third parties. *Id.* Under new Federal Rule of Evidence 502, enacted in September 2008, it is clear that such orders would be binding on other persons, in other cases, and in other courts. *See* FED. R. EVID. 502(d), (e) (addressing the controlling effect of a court order or a party agreement contained in a court order).

68. FED. R. CIV. P. 26(f) advisory committee's note (2006).

become familiar with” their clients’ information systems. Nonetheless, the rulemakers fully appreciated the front-loading effect the 2006 amendments would have. For example, in discussing the 2006 amendments, Judge Rosenthal, then the Chair of the Advisory Committee, acknowledged that “[t]he amendments increase the demands on lawyers early in the litigation” and that “[e]lectronic discovery imposes new requirements on lawyers and litigants to learn large amounts of information about their own and their adversary’s information systems, early in the case.”<sup>69</sup>

Shortly after the e-discovery amendments took effect, the Federal Judicial Center published a “pocket guide” to e-discovery for judges.<sup>70</sup> The Pocket Guide was unmistakable in its support for early and proactive e-discovery management, advising judges that “[w]hen ESI is involved, judges should insist that a meaningful Rule 26(f) conference take place and that a meaningful discovery plan be submitted.”<sup>71</sup> Moreover, the Pocket Guide made clear that the lawyers had a lot of homework to do in order to make their Rule 26(f) conferences meaningful:

For the ‘meet and confer’ process to be effective, attorneys must be familiar with how their clients use computers on a daily basis and understand what information is available, how routine computer operations may change it, and what is entailed in producing it. Attorneys need to identify those persons who are most knowledgeable about the client’s computer system and meet with them well in advance of the Rule 26 conference; it may also be advisable to have those persons present at the conference.<sup>72</sup>

The larger legal community quickly reached the same conclusions. Perhaps the leading secondary source on e-discovery is The Sedona Principles (Second Edition): Best Practices Recommendations & Principles for Addressing Electronic Document Production (June 2007).<sup>73</sup> It fully endorses both the

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69. Lee H. Rosenthal, *A Few Thoughts On Electronic Discovery After December 1, 2006*, 116 YALE L.J. POCKET PART 167, 177 (2006), <http://thepocketpart.org/2006/11/30/rosenthal.html>.

70. Barbara J Rothstein et al., Fed. Judicial Ctr., *Managing Discovery of Electronic Information: A Pocket Guide for Judges* (2007), [http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/\\$file/eldscpkt.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf). The Federal Judicial Center also publishes the Manual for Complex Litigation, which has a section dedicated to “Discovery of Computerized Data.” MANUAL FOR COMPLEX LITIGATION § 11.446 (4th ed. 2004). It encourages judges to encourage the parties to discuss various e-discovery issues early in the case, including scope issues, form of production, and privilege waiver protocols. *Id.*

71. Rothstein et al., *supra* note 70, at 4.

72. *Id.* at 5.

73. THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (Sedona Conference, 2d ed. 2007), available at [http://www.thesedonaconference.org/content/miscFiles/publications\\_html](http://www.thesedonaconference.org/content/miscFiles/publications_html). In the interests of full disclosure, I am currently a member of The Sedona Conference and participate in its e-discovery activities. I was not involved in the drafting of this particular document, however.

desirability of early dialogue about e-discovery<sup>74</sup> and the concomitant need for lawyers to investigate and prepare for that dialogue.<sup>75</sup> Commentators writing in the legal press have consistently emphasized the need for early investigation and preparation.<sup>76</sup> Also joining the chorus are the vendors of e-discovery services, who urge not just *early* attention but *advance* attention, including the creation of data maps before lawsuits are filed or the implementation of enterprise content management systems designed to manage e-discovery “proactively.”<sup>77</sup>

Collectively, the guidance from these disparate sources<sup>78</sup> is that “good” lawyers in the age of e-discovery will use the Rule 26(f) conference as an opportunity to take informed, preventive measures to deal with e-discovery. To do that, moreover, these “good” lawyers will need to (1) think through their own discovery needs so that they can discuss scope and source issues for the discovery they want to take from their opponents; (2) learn their client’s information policies and systems so that they can respond to the other party’s scope and source questions for the discovery the other party wants to take; and (3) gather any other information needed to discuss preservation issues. And they will need to do all of that in the brief period leading up to the Rule 26(f)

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74. Sedona Principle #3 states: “Parties should confer early in discovery regarding the preservation and production of electronically stored information when these matters are at issue in the litigation and seek to agree on the scope of each party’s rights and responsibilities.” *Id.* at 21.

75. *See id.* at ii, 21 (providing extensive list of topics that parties must be prepared to discuss); *see also id.* at 27 (“Unnecessary controversy over peripheral discovery issues can often be avoided at the outset by discussion of the parties of the potential scope and related costs of collecting relevant data. Accordingly, and consistent with the Federal Rules and best practices, parties should be prepared to discuss the sources of electronically stored information that have been identified as containing relevant information, as well as the steps that have been taken to search for, retrieve, and produce such information.”); *id.* at 41 (“Rule 26(f)’s early meet and confer obligations . . . imply that counsel must undertake early preparation sufficiently diligent to adequately represent the parties’ positions.”).

76. Ronald I. Raether, Jr., *Preparing for the Rule 26(f) Scheduling Conference and Other Practical Advice in the Wake of the Recent Amendments to the Rules Governing E-Discovery*, 54 FED. LAW., Aug. 2007, at 22 (asserting that the most significant change caused by e-discovery is that lawyers will have to make early decisions about how to deal with it); James K. Lehman et al., *Electronic Discovery and the Rule 26(f) Conference*, FOR THE DEFENSE, Jan. 2008, at 60 (arguing that lawyers should undertake early investigation of scope and source issues in order to gain a strategic advantage in the e-discovery planning process); John Rosenthal & Moze Cowper, *A Practitioner’s Guide to Rule 26(f) Meet & Confer: A Year After the Amendments*, 783 PLI/LIT 231, 236 (2008) (“If the goal is to have a productive Rule 26(f) Conference . . . both inside and outside counsel need to take the time to educate themselves [about the client’s information systems and policies].”).

77. *See* StoredIQ, Proactive eDiscovery Solution, <http://www.storediq.com/solutions/proactive.aspx> (last visited Mar. 17, 2009) (“These topology maps can help organizations better prepare for Rule 26(f) conferences, improving their ability to negotiate with the opposing counsel.”).

78. I make no effort here to canvass all of the sources that address the lawyer’s duty to prepare for e-discovery. For example, local rules may more precisely define the steps that lawyers must or should take in preparation for the Rule 26(f) conference. *See* Suggested Protocol for Discovery of Electronically Stored Information, Protocol 7 (D. Md.), *available at* <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf> (ten pages addressing preparatory steps).



discovery planning conference. That's a big jump from the front-loading effects of the 1993 amendments, and a world apart from how lawyers approached discovery in 1938.

*D. The Impact of Front-Loading*

Assuming that the 2006 e-discovery amendments have accelerated the process of front-loading the lawyer's efforts in discovery, the question then becomes whether that is a good or bad development. My current sense is that it is a mixed blessing, with the positive consequences outweighing the negative consequences in most cases.

In most respects, the type of up-front investigation, analysis, and preparation contemplated by the 2006 version of Rule 26(f) strikes me as a decidedly positive development. After all, one would hardly argue that lawyers should strive to be unprepared, ignorant, or directionless. Moreover, I subscribe to the view (criticized by some<sup>79</sup>) that judges should manage their cases. If judges are to manage their cases, they will need good inputs from the parties and their lawyers. In order to supply good inputs as to discovery, the parties and their lawyers need to know what information they have to provide to the other side and what information they want in return. In my view, this was the animating premise of the 1993 version of Rule 26(f).

The 2006 version of Rule 26(f) still contemplates a strong role for judicial case management, but in my view it is directed as much, if not more, at the party level. Specifically, it operates from the premise that e-discovery will collapse of its own weight if the court needs to oversee all of the potential details.<sup>80</sup> Accordingly, it is the parties who have to make it work by reaching agreement where they can on (1) scope and source questions; (2) practical questions like form of production and the mechanics of privilege review; and (3) preservation obligations. To be effective, many of these agreements will need to be reached early in the case. And, of course, the parties will need to make good choices. The only way the parties can make good choices early in the case is by making the even earlier effort to learn what they need to know about the capacities of their clients and the likely needs of their cases.

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79. Compare Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (criticizing emergence of active judicial case management) with Steven Flanders, *Blind Umpires – A Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984). See generally Rosenberg, *supra* note 15, at 2207-09 (discussing the rise of judicial case management).

80. In truth, this concern is neither entirely new nor unique to e-discovery. Magistrate Judge Brazil had made essentially the identical observation when discussing traditional discovery in the 1980s. See *In re Convergent Technologies Securities Litig.*, 108 F.R.D. 328, 331 (N.D. Cal. 1985) ("The whole system of Civil adjudication would be ground to a virtual halt if the courts were forced to intervene in even a modest percentage of discovery transactions.").

But there are competing considerations. First among them is cost.<sup>81</sup> It probably goes without saying that lawyers will spend many hours engaging in the range of activities contemplated by the Advisory Committee Note to Rule 26(f) and recommended by the Sedona Conference. Beyond paying their lawyers for this time, the parties will also incur internal costs in the form of the time and effort spent by their own employees to assist the lawyers in this process.<sup>82</sup> It is no answer to say that those costs would have to be incurred at some point because that's not necessarily true. Most cases settle, and a large percentage of them settle early in the case without any significant discovery activity.<sup>83</sup> It is almost certain that some of the Rule 26(f) preparation parties are taking for e-discovery would not have been incurred under a less front-loaded approach because the parties would have settled before it happened.<sup>84</sup>

For the cases that do not settle early, it is *probably* true that the early investments in discovery planning, while increasing costs up front, will pay dividends later. In 1997, the Advisory Committee invited the RAND Institute and the Federal Judicial Center to conduct empirical studies on discovery. The RAND study found that early case management – which included early discovery planning efforts – increased lawyer work hours initially, but that there was a corresponding decrease later *so long as the judge actively managed the case thereafter*.<sup>85</sup> The FJC study was able to examine specifically the effect of both required initial disclosures and a meet-and-confer requirement. Only a small percentage of survey respondents reported that either increased the total litigation costs.<sup>86</sup> As to the required initial disclosures, the majority was split

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81. The view that discovery costs are too high is held by many. For example, a joint report prepared by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System concludes that discovery costs under the existing rules structure are often “far too much” and that “[e]lectronic discovery, in particular, needs a serious overhaul.” *See Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System*, at 2 (March 11, 2009), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4053>.

82. *See* David Lender, *Don't Dread the Rule 26(f) Conference*, N.Y. L.J. (Special Section), Feb. 19, 2008 (acknowledging that learning the client's information system “means additional costs as well as the associated burdens on already over-taxed IT personnel”).

83. *See* Kakalik et al., *supra* note 51, at 635-36 (noting that over half of cases close within 270 days of filing and involve either no or very little discovery). *See also* Elizabeth G. Thornburg, *Giving the “Haves” a Little More: Considering the 1998 Discovery Proposals*, 52 S.M.U. L. REV. 229, 247 (1999) (analyzing the results of studies conducted by the RAND Institute and the Federal Judicial Center).

84. The concern that rules designed to make discovery more efficient might actually cause lawyers to incur needless costs by forcing them to act too quickly can be traced back as far as the mandatory disclosure debates. *See* Mullenix, *supra* note 42, at 819 (reporting the concern of one lawyer that the local rule governing initial disclosures forced lawyers to disclose too quickly and suggesting a staged process).

85. *See* Kakalik et al., *supra* note 51, at 652-54.

86. *See* Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rules Amendments*, 39 B.C. L. REV. 525, 563, 570 (1998).

more or less evenly on whether these devices reduced or had no effect on overall litigation costs.<sup>87</sup> But as to meet-and-confer, a majority (54%) reported that it had no effect, though 29% thought it reduced overall litigation costs.<sup>88</sup>

Intuitively, the potential savings to be captured from early investment in e-discovery would appear to be at least as great as those presented by required initial disclosures or the version of Rule 26(f) adopted in 1993.<sup>89</sup> Perhaps later empirical work will be able to confirm such an effect. But one of the lessons to be drawn from the RAND study probably applies here as well – that judges must actively manage e-discovery in order to reap the benefits of forcing the lawyers to invest their time and energy up front.<sup>90</sup> Of course, the savings in question are realized only in those cases that proceed to substantial discovery. In cases that are resolved early, there is no opportunity to capture the “planning dividend.”<sup>91</sup> In that respect, the early planning movement might be seen as an expense transfer that increases the “ante” for all federal civil cases in an effort to hold down later expenses in the cases that proceed through the full pretrial process.

A related problem is that changes in when and how costs are incurred can alter the dynamics of settlement. After the required initial disclosure rules were first adopted in 1993, Professors Issacharoff and Loewenstein predicted, using economic modeling modified by behavioral techniques, that the required initial disclosures would *increase* aggregate litigation costs because the front-loading of litigation expense would hurt settlement rates.<sup>92</sup> The FJC study looked at this question and found, based on attorney reports, that most lawyers thought that the initial disclosure requirement had either had no effect on settlement prospects or had increased them.<sup>93</sup> Nonetheless, it is certainly worth watching to see if the substantial early investigation and planning efforts associated with e-discovery seem to be altering settlement dynamics.

Finally, the front-loading effect of e-discovery appears to be altering the non-litigation behavior of firms. Vendors of e-discovery services often urge existing or potential clients to take a “proactive” approach to e-discovery, usually by advising them to make additional investments in enterprise content

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87. See *id.* at 563 tbl.17.

88. See *id.* at 570 tbl.23.

89. See, e.g., Rosenthal & Cowper, *supra* note 76, at 248 (“Rule 26(f) is about cooperation and working together. By coming together early, defining what is important and what is not, and working with your adversary, not against them, means less risk, less cost and more certainty.”).

90. See Kakalik et al., *supra* note 51, at 668, 677.

91. On the other hand, the early investment would pay off if it caused the parties to settle earlier than they otherwise would have, thereby avoiding those downstream pretrial costs altogether. For a discussion of whether early investment in fact leads to early settlement, see *infra* the discussion accompanying notes 92-93.

92. See Samuel Issacharoff & George Loewenstein, *Unintended Consequences of Mandatory Disclosure*, 73 TEX. L. REV. 753, 778 (1995) (predicting that settlement rates would drop because people would feel invested in their suits and because the new information was more likely to cause their valuations of the merits to diverge rather than converge).

93. See Willging et al., *supra* note 86, at 563 tbl.17.

management systems that will structure and manage their currently unstructured and unmanaged data. The idea is that, by paying for data management now, those parties will reap e-discovery savings later. Both vendors and attorneys are urging clients to step up their “document retention” plans. The idea here is to limit the cost of searching and producing by shrinking the universe of that which needs to be searched and produced.

In the abstract, these seem like relatively benign – if not positive<sup>94</sup> – consequences. But what if the promise of “proactive” e-discovery management is illusory? Is there proof that parties who pay now will save later? And as to data purging, the effects are potentially counterproductive to the firm’s business interests. The shelves of the “Business” section of bookstores are filled with volumes on Business Analytics, which is the technique of using statistical and quantitative analysis to make decisions that used to be made based on intuition or anecdote.<sup>95</sup> Analytics requires data, and lots of it. I suspect that the analytics gurus would cringe to hear that lawyers and vendors are telling firms to purge much of the data that the “quant jocks” might later want to mine for competitive business insights.

For now, I don’t view any of these competing considerations as cause for alarm. By and large, the benefits of early investment seem to outweigh the costs. And, in truth, the front-loading contemplated by Rule 26(f) is still nowhere near as demanding as some more dramatic reforms might involve. In some legal systems, for example, the plaintiff must plead its evidence in the complaint.<sup>96</sup> Some might say that’s *real* front-loading. Nonetheless, the discovery front-loading phenomenon merits more than a shrug of the shoulders. As a matter of logic, there must be some tipping point at which front-loading the discovery process causes more harm than good. We should watch carefully for signs that we are getting closer to that point, even if we do not think we have reached it yet.

## II. THE ROLE OF COOPERATION IN DISCOVERY

One of the hottest issues in e-discovery today is the extent to which lawyers must or should cooperate with each other. The idea of cooperation in discovery is not a new concept. Questions about the proper role of adversarialism in

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94. It seems clear that one of the byproducts of e-discovery is that firms feel an increased need to know what information they have and to try to manage it. There could be any number of nonlitigation benefits associated with acquiring that knowledge. Indeed, one of the principal legacies of e-discovery may be that it forced firms to engage in information management activities that, while designed to reduce discovery risks, in fact led to business rewards.

95. See THOMAS H. DAVENPORT & JEANNE G. HARRIS, *COMPETING ON ANALYTICS: THE NEW SCIENCE OF WINNING* 7 (Harvard Business School Press 2007).

96. See Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1351994](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1351994); Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709, 717-22 (2005).

discovery have existed at least since the Federal Rules were adopted in 1938, have prompted significant reform proposals in the past, and were prominent during the debates about the Rule 26(a) mandatory disclosures. E-discovery, however, has brought those questions back to center stage. In 2008, for example, The Sedona Conference launched a national effort to promote cooperation in discovery, arguing that “[o]ver-contentious discovery is a cost that has outstripped any advantage in the face of ESI and the data deluge.”<sup>97</sup> Similar sentiments are also starting to make their way into the case law.<sup>98</sup>

The argument for cooperation in discovery is simultaneously self-evident and dangerously vague. On one hand, one could hardly argue with the proposition that the parties should seriously and carefully consider the possible benefits of cooperation instead of mindlessly defaulting to battle mode. As an appeal to self-interest, the cooperative ideal stands on the firmest of footing. On the other hand, some have located a *duty* to cooperate in the Federal Rules or in the lawyer’s role as an officer of the court. The correctness of these propositions is not nearly so obvious and, in the end, likely depends on how one defines the breadth and content of the claimed duty.

#### A. *The Call for Cooperation*

Many readers will already be familiar with The Sedona Conference’s work in the field of e-discovery. Its flagship product is *The Sedona Principles* for e-discovery,<sup>99</sup> a compilation of fourteen “best practice” recommendations for e-discovery that has provided invaluable guidance to practicing lawyers and that has proved influential with judges.<sup>100</sup>

In July 2008, The Sedona Conference released a document titled *The Sedona Conference Cooperation Proclamation*.<sup>101</sup> With it, The Sedona Conference launched what it called “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.”<sup>102</sup> The animating premise of *The Cooperation Proclamation* is that too often lawyers act as though their duties as zealous advocates for their clients

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97. THE COOPERATION PROCLAMATION 1 (The Sedona Conference 2008), available at [http://www.thesedonaconference.org/content/tsc\\_cooperation\\_proclamation](http://www.thesedonaconference.org/content/tsc_cooperation_proclamation).

98. See, e.g., *William A. Gross Construction Associates, Inc. v. Am. Manufacturers Mutual Ins. Co.*, 256 F.R.D. 134, 137 (S.D.N.Y. 2009) (requiring cooperation in e-discovery); *Mancia v. Mayflower Textile Serv. Co.*, 253 F.R.D. 354, 363 (D. Md. 2008) (extensively arguing that lawyers can and should – and maybe must – cooperate in discovery).

99. See SEDONA PRINCIPLES, *supra* note 73. For other e-discovery-related publications produced by The Sedona Conference, see its website at [www.thesedonaconference.com](http://www.thesedonaconference.com).

100. See *Aguilar v. I.C.E.*, 255 F.R.D. 350, 355-57 (S.D.N.Y. 2008) (extensive discussion of *The Sedona Principles*’ commentary regarding metadata); *In re Seroquel Products Liability Litig.*, 244 F.R.D. 650, 656 (M.D. Fla. 2007) (describing *The Sedona Principles* as a “leading resource on dealing with electronic discovery”).

101. See THE COOPERATION PROCLAMATION, *supra* note 97, at 1.

102. *Id.*

require them to take an uncompromisingly adversarial approach in discovery. *The Cooperation Proclamation* views this as both counterproductive and, potentially, in violation of the Federal Rules of Civil Procedure. According to *The Cooperation Proclamation*, not only is cooperative discovery required by the Federal Rules, but it also best promotes the lawyer's twin duties of loyalty to their clients and as officers of the courts.

While *The Cooperation Proclamation* is directed at lawyers, its drafters realized that the best way to get the attention of lawyers is to get the attention of judges. Judges play a critical role in discovery culture in at least two ways. First, if judges demand cooperation – or if they at least punish abusive behavior – then lawyers will adjust their practices accordingly. Second, there is some sense that lawyers take needlessly adversarial positions in discovery not because they want to but because they think their clients want or expect that type of behavior. For lawyers who want to be cooperative, a message from the bench demanding or even encouraging cooperation may give them valuable cover with their clients. Toward that end, *The Cooperation Proclamation* has sought judicial endorsements. As of January 31, 2009, it had been endorsed by forty-four federal and state judges.<sup>103</sup> The effort to involve judges in the campaign is also showing up in the case reporters; a number of decisions have cited *The Cooperation Proclamation* when directing the parties to cooperate going forward or when chiding them for their failure to do so in the past.<sup>104</sup>

#### *B. Original Expectations and Past Efforts to Change Discovery Culture*

If parties and lawyers were to start to approach discovery as a cooperative process, they would be (perhaps unwittingly) fulfilling the vision of the original drafters. Recall that the 1938 rules lacked the court management and party communication provisions we have today.<sup>105</sup> They did not exist because the original drafters did not think them necessary. As one commentator explained, one of the premises of the new discovery rules was that “the lawyers would be guided by a sense of mutual self-interest in complying with the rules and that the discovery process would be self-regulating.”<sup>106</sup> Under this view, lawyers would

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103. <http://www.thesedonaconference.org/content/miscFiles/JudicialEndorsements.pdf>.

104. See William A. Gross Construction Associates, Inc. v. Am. Manufacturers Mutual Ins. Co., 256 F.R.D. 134, 137 (S.D.N.Y. 2009) (requiring cooperation in e-discovery and stating that “[t]his court strongly endorses *The Sedona Conference Cooperation Proclamation*”); S.E.C. v. Collins & Aikman Corp., No. 07 Civ. 2419(SAS), 2009 WL 94311, at \*9 (S.D.N.Y. 2009) (citing *The Cooperation Proclamation* and directing the parties “to meet and confer forthwith and develop a workable search protocol”); Aguilar, 255 F.R.D. at 359 (citing *The Cooperation Proclamation* for importance of discussing form of production and metadata); Mancía v. Mayflower Textile Serv. Co., 253 F.R.D. 354, 363 (D. Md. 2008) (citing *The Cooperation Proclamation* and describing the effort as “a laudable goal”).

105. See discussion *supra* Part I.A.

106. Bell et al., *supra* note 21, at 7-8; see also John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 513 (2000) (“[D]iscovery in civil litigation was

rationally eschew abusive practices that, in the end, would serve only to “cost their clients both money and time.”<sup>107</sup> So viewed, the discovery rules would move the litigation process away from the “sporting theory of justice” because, by their operation, each party would “lay all his cards upon the table, the important consideration [then] being who has the stronger hand, not who can play the cleverer game.”<sup>108</sup>

What the original drafters did not foresee was that discovery would then *become* the game. As Professor Miller put it, “the rulemakers’ expectations for a self-executing, cooperative pretrial phase have proven to be somewhat naïve.”<sup>109</sup> Some have even suggested that the original drafters ignored ominous warning signs about the realities of liberal, party-driven discovery.<sup>110</sup> Either way, “[t]he vision that adversarial tigers would behave like accommodating pussycats throughout the discovery period, saving their combative energies for trial, has not materialized.”<sup>111</sup>

In 1978, a young professor from the University of Missouri named Wayne Brazil attempted to resurrect the cooperative ideal. In an article that would prove influential for many years, Professor Brazil argued for a major reform of discovery that would purge the adversarialism that had come to dominate the discovery process.<sup>112</sup> Unlike the original drafters, Professor Brazil did not think that the discovery scheme as structured could yield that result. Indeed, Professor Brazil saw the discovery rules as the cause of the problem rather than as a component of any solution, writing: “Rather than discourage ‘the sporting or game theory of justice,’ discovery has expanded both the scope and the complexity of the sport.”<sup>113</sup> Professor Brazil’s proposed solution was to replace party-driven discovery with a court-supervised scheme of disclosures in which the parties would be required to disclose all relevant information and in which the lawyers supervising disclosure would owe their loyalties to the court.<sup>114</sup>

While the Advisory Committee was actively considering discovery reform at the time that Professor Brazil’s published his proposal in 1978, the proposal does

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intended to be an essentially cooperative, self-regulating process for which the parties would take responsibility, with little judicial intervention required.”).

107. Bell et al., *supra* note 21, at 7-8.

108. Sunderland, *supra* note 17, at 739. Sunderland’s proposal for a “list of relevant documents” was rejected in 1938.

109. Arthur M. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 15 (1984).

110. See Subrin, *supra* note 14, at 730-34 (discussing the “warning signs” known to or available to the original drafters regarding the potential for discovery abuse). See also Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1298-1302 (1978).

111. Miller, *supra* note 109, at 15.

112. Brazil, *supra* note 110.

113. *Id.* at 1304.

114. *Id.* at 1349.

not appear to have gained traction at that time.<sup>115</sup> Of course, discovery reform continued through the 1980s and into the early 1990s. In 1991, prompted by the passage of the Civil Justice Reform Act, the Advisory Committee published for comment a lengthy set of proposals that included a proposal to add required initial disclosures to Rule 26.<sup>116</sup> Under the proposal, parties would be required to disclose the names of individuals “likely to have information that bears significantly on any claim or defense” and to identify documents “likely to bear significantly on any claim or defense.”<sup>117</sup>

By this time, Wayne Brazil had become a federal Magistrate Judge and was a member of the Civil Rules Advisory Committee. He supported a broad disclosure rule in order, at least in part, to change the culture of adversarialism.<sup>118</sup> Judge Brazil found an eager ally in this campaign in Judge William Schwarzer, who was then the Director of the Federal Judicial Center and who had written his own influential article promoting a transition to a non-adversarial disclosure-based system of discovery.<sup>119</sup> The proposed Advisory Committee Note cited both of their articles.<sup>120</sup> At least some of the other members of the Advisory Committee seemed to have shared the view that the required initial disclosure proposal was a positive step forward on the path towards cooperation in discovery.<sup>121</sup>

The proposal generated a “storm of criticism” and faced opposition from many quarters.<sup>122</sup> One of the recurring points of criticism was that “the proposed amendment conflicts with the adversary system of American jurisprudence and perhaps even with the ethical obligations of attorneys.”<sup>123</sup> In part, the critics chafed against the idea that they might have to voluntarily produce information

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115. In his article, Professor Brazil criticized the principal suggestion of the ABA Special Report – the proposal to narrow the scope of discovery – on the ground that it was going in precisely the wrong direction by further *restricting* the free flow of information that he advocated. *Id.* at 1334.

116. See Marcus, *supra* note 45, at 807-08 (discussing history behind the Rule 26(a) proposal). Congress included the voluntary exchange of information as one of the reform recommendations listed in the CJRA. 28 U.S.C. § 473(a)(4) (1990).

117. See Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., *Proposed Rules: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 87-88 (1991).

118. See ADVISORY COMMITTEE ON THE CIVIL RULES, MINUTES NOV. 29-DEC. 1, 1990, at 2, available at <http://www.uscourts.gov/rules/Minutes/CV11-1990-min.pdf>.

119. See William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989).

120. See Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., *Proposed Rules: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 99-100 (1991).

121. See ADVISORY COMMITTEE ON THE CIVIL RULES, MINUTES NOV. 29-DEC. 1, 1990, at 3, available at <http://www.uscourts.gov/rules/Minutes/CV11-1990-min.pdf>.

122. See Bell et al., *supra* note 21, at 28; Lasso, *supra* note 18, at 487; Marcus, *supra* note 45, at 808.

123. Bell et al., *supra* note 21, at 46.



that would be harmful to their clients and to their litigation positions.<sup>124</sup> What seemed to trouble the critics even more, however, was the concern that, in order to identify the documents and the witnesses with information “likely to bear significantly” on the claims or defenses, a party (through its lawyer) would have to “stand in the shoes of the adversary” to figure out just what the other party’s case was and then assist the adversary in making that case.<sup>125</sup> Even Justice Scalia joined in the disapproval. He dissented from the 1993 amendments, writing:

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their clients – on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment – the new Rule would place intolerable strain upon lawyers’ ethical duty to represent their clients and not to assist the opposing side.<sup>126</sup>

The 1993 required initial disclosure rules did take effect, but they did so only by the skin of their teeth and they only lasted in that form for seven years. A bill to scuttle them passed the House and likely would have passed the Senate, but it failed to come up for a vote before the Senate adjourned.<sup>127</sup> Thus, while clearly unpopular in Congress, the 1993 disclosure rules took effect on December 1, 1993. They lasted in that form only until December 1, 2000, when the initial disclosure requirement was scaled back so that parties only needed to disclose the witnesses and documents they might use to support their claims or defenses.<sup>128</sup>

The backlash to the 1993 initial disclosure proposal does not mean that the current campaign for cooperative discovery is doomed. The notion that the

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124. See Thornburg, *supra* note 83, at 234-35 (“At bottom, the requirement of automatic disclosure seemed to [its opponents] incompatible with litigator culture, an understanding of the ‘adversary system,’ including discovery, as a process in which the only operative value is aggressive assertion of the interests of the client.”); Marcus, *supra* note 45, at 810 (stating that the automatic disclosure movement “certainly cuts against the grain of the adversary system as it has evolved in the discovery context”).

125. Bell et al., *supra* note 21, at 47; see also Linda S. Mullenix, *Adversarial Justice, Professional Responsibility, and the New Federal Discovery Rules*, 14 REV. LITIG. 13, 21 (1994) (discussing criticism “based on the theory that the new rules would reverse the traditional burdens on the plaintiffs and defendants and therefore force defendants to do the plaintiffs’ work for them”).

126. Comm’n from the Chief Justice of the U.S. Transmitting Amendments to the Federal Rules of Civil Procedure and Forms, Pursuant to 28 U.S.C. §2072, *Amendments to the Federal Rules of Civil Procedure and Forms*, 146 F.R.D. 401, 511 (Scalia, J., dissenting) (1993).

127. See Marcus, *supra* note 30, at 767-68; Lasso, *supra* note 18, at 487 n.20; see also Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1613 (1994).

128. See FED. R. CIV. P. 26(a)(1) advisory committee’s note (2000).

adversary system *demand*s adversarial discovery is no more convincing today than it was in 1993.<sup>129</sup> If the discovery rules require the automatic disclosure of information, then the party must disclose it, and the lawyer's duty then is to facilitate that disclosure, not to obstruct it.<sup>130</sup> More to our point, if the client *chooses* to go beyond the requirements of the discovery rules – such as by seeking less than it might be legally entitled to seek, or by producing more than it might be legally required to produce – then the lawyer's ethical and professional duty is to carry out the client's wishes.<sup>131</sup> The lawyer certainly has a role in counseling the client whether it is in the client's best interests to choose a cooperative approach. But where a client makes an informed choice to do so, the lawyer can claim no professional or ethical duty to insist on adversarialism.

Nonetheless, any reform proposal that calls for a change in discovery culture must recognize that past reforms aimed at making discovery a cooperative and non-adversarial process have encountered stiff resistance, and not just from the defense bar. As illustrated in the initial disclosure debates, one recurring fear is that, in a "cooperative" system, diligent and prepared lawyers will end up doing their lazier or less capable adversaries' work for them.<sup>132</sup> Readers will probably recall Justice Jackson colorfully expressing a parallel concern in his well-known concurring opinion in *Hickman v. Taylor*.<sup>133</sup> That was 1947, but the concern actually goes back at least as far as the original drafting debates. When Professor Sunderland submitted his initial draft of the discovery rules, it included a provision by which a party could be required to provide a list of all documents "which are known to him and are relevant to the pending cause."<sup>134</sup> The Committee rejected it after receiving numerous complaints that it would require a lawyer to prepare his adversary's case.<sup>135</sup>

The other recurring obstacle, of course, is the sense among some that the adversary culture is too deeply ingrained to change. In part, that view reflects a belief that lawyers have become so accustomed to adversarial discovery that they no longer know how to act any other way. It also reflects a sense that lawyers cannot be expected to take a compartmentalized approach – cooperating in discovery while simultaneously girding for a merits battle – to a process in which many see no clear divide between the purported compartments. As Professor Miller put it almost 25 years ago, "[i]t is unrealistic to expect them to

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129. See Mullenix, *supra* note 125, at 40 ("The argument that the new disclosure rules conflict with lawyers' professional responsibility is baseless . . .").

130. See MODEL RULES OF PROF'L CONDUCT R. 3.4; see also Lasso, *supra* note 18, at 509-10 (discussing ethics rules prohibiting the destruction or concealment of discoverable information).

131. See MODEL RULES OF PROF'L CONDUCT R. 1.2.

132. See *supra* notes 122-26 and accompanying text.

133. *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring) ("Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.").

134. Subrin, *supra* note 14, at 727.

135. *Id.* at 727-28.

act in a cooperative spirit or adhere to Marquess of Queensberry rules on what has become the central battlefield of modern litigation.”<sup>136</sup>

### C. *Exploring the Contours of Cooperation*

The current campaign for cooperation in discovery makes at least two, and possibly three, distinct claims. The first is that parties must cooperate because the Federal Rules require it. The second is that parties should cooperate because, in the age of e-discovery, the old adversarial methods are counterproductive and unsustainable. The third claim – which is often more implied than asserted – is that the lawyers who are conducting e-discovery have a duty to cooperate as officers of the court.

#### 1. “Cooperation” as Required by the Federal Rules

The strongest position that a proponent of cooperative discovery might take is to say that the Federal Rules require it. The Sedona Conference’s *Cooperation Proclamation* makes this assertion explicitly.<sup>137</sup> In *Mancia*, Judge Grimm reaches this conclusion as well.<sup>138</sup> Whether the Federal Rules really do require cooperation is a question that needs careful examination, however, and the answer to that question largely depends on what one means by the term cooperation.

It is certainly true that the Federal Rules often supply frameworks to facilitate cooperative behavior. Rule 29, for example, expressly allows the parties to enter into stipulations about discovery procedure.<sup>139</sup> Rule 26(d) also establishes a type of framework for cooperation. It directly permits the parties to cooperate by entering into stipulations regarding early discovery.<sup>140</sup> But an even more important manifestation of the cooperative ideal is buried in Rule 26(d)’s approach to discovery scheduling. In 1970, Rule 26(d) was amended to eliminate the complex “priority” rules that the courts had developed.<sup>141</sup> Instead, there would be no fixed priorities or sequences in discovery, and it was made explicit that the pendency of one party’s discovery did not preclude any other party from taking discovery at the same time.<sup>142</sup> In short, the parties were left to work out the timing and sequence between themselves, subject to judicial

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136. Miller, *supra* note 109, at 16.

137. See THE COOPERATION PROCLAMATION, *supra* note 97.

138. *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354 (D. Md. 2008).

139. FED. R. CIV. P. 29.

140. FED. R. CIV. P. 26(d)(1).

141. See FED. R. CIV. P. 26(d) advisory committee’s note (1970) (“The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court’s power to establish priority by an order issued in a particular case.”); see generally 8 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE §§ 2045-2046 (2d ed. 1994).

142. FED. R. CIV. P. 26(d)(2).

intervention if needed. The Advisory Committee was banking on the parties realizing that it was in their interests to cooperate lest they proceed down the path of mutually-assured destruction.<sup>143</sup>

Another way in which the discovery rules foster cooperation is by requiring *communication*. The most prominent instance is Rule 26(f), which requires the parties (1) to confer about discovery; and (2) to “attempt[] in good faith to agree” on a proposed discovery plan.<sup>144</sup> In the context of discovery motions, Rule 26(c)(1), Rule 37(a)(1), and Rule 37(d)(1)(B) require the moving party to certify that it has “in good faith conferred or attempted to confer” with the other affected parties in an effort to resolve the dispute without court action.<sup>145</sup> The failure to follow these directives exposes a party to various sanctions.<sup>146</sup>

While none of these rules explicitly require cooperation,<sup>147</sup> one might attempt to infer a duty to cooperate from either the obligation to communicate or the obligation to attempt in good faith to reach agreement on discovery issues. The correctness of that inference, however, then seems to turn on the definition of cooperation. If cooperation simply means to formulate and state defensible positions – but not necessarily to show any willingness to budge from those positions – then one can safely say that these discovery rules imply a duty to cooperate. But under that view, any cooperation required by Rule 26(f) would not appear to add anything beyond the general duty not to engage in abusive discovery. Rather, from that vantage point, Rule 26(f) would look to operate much like Rule 26(d) or Rule 29 – as a platform that *encourages* the parties to reach agreement on potential discovery problems and seeks to *facilitate* such agreements, but does not require them. On the other hand, if the meaning of cooperation is expanded to include a willingness to move off of defensible

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143. See FED. R. CIV. P. 26(d) advisory committee’s note (1970) (“Once it is clear to lawyers that they bargain on equal footing, they are usually able to arrange for an orderly succession of depositions without judicial intervention.”).

144. FED. R. CIV. P. 26(f) & advisory committee’s note (1993) (“The litigants are expected to *attempt* in good faith to agree on the contents of the proposed discovery plan.”) (emphasis added).

145. FED. R. CIV. P. 26(c)(1), 37(a)(1), 37(d)(1)(B).

146. See FED. R. CIV. P. 37(f) (sanctions for failing to participate in good faith in developing and submitting a proposed discovery plan per Rule 26(f)); FED. R. CIV. P. 37(a)(5) (setting forth consequences for failing to attempt in good faith to resolve the matter) (also incorporated by Rule 26(c)(3) to motions for protective order).

147. Some districts have adopted Local Rules that explicitly reference cooperation. See, e.g., Default Standard for Discovery of Electronic Documents, D. Del. (“It is expected that the parties to a case will cooperatively reach agreement on how to conduct e-discovery.”); Default Standard for Discovery of Electronically Stored Information, N.D. Ohio (“The court expects the parties to cooperatively reach agreement on how to conduct e-discovery.”); Administrative Order No. 174, Default Standard for Discovery of Electronically Stored Information, M.D. Tenn. (“The court expects the parties to cooperatively reach agreement on how to conduct e-discovery.”). The discussion that follows regarding the meaning of “cooperation” is equally applicable to these Local Rules.

positions – to *compromise* – in an effort to reach agreement, then it is not at all clear that this is what Rule 26(f), Rule 26(c), or Rule 37(a) actually demand.

Apart from the fact that the rules do not actually use the term “cooperate,” the drafting history of Rule 26(f) may also suggest caution about inferring a duty to cooperate from the duties to communicate and to attempt in good faith to reach agreement. When the Advisory Committee first proposed Rule 26(f) in 1978, it included language there and in Rule 37(e) authorizing sanctions against a party for the failure “without good cause to have cooperated in the framing of an appropriate discovery plan by agreement.”<sup>148</sup> After the public comment period, that language was deleted in light of objections that it was too broad.<sup>149</sup> In its place, the Advisory Committee added what it considered to be a lesser duty – “to participate in good faith” when another party proposes the development of a discovery plan.<sup>150</sup>

Another possible wellspring for a duty to cooperate in discovery comes from the signing requirement under Rule 26(g). Under Rule 26(g), a lawyer who signs a discovery request, response, or objection certifies to the best of his or her knowledge, information, and belief formed after a reasonable inquiry that the request, response, or objection is (1) consistent with the Federal Rules and nonfrivolous; (2) not interposed for an improper purpose; and (3) not unreasonable or unduly burdensome in light of the needs of the case and the stakes involved.<sup>151</sup> The obvious effect of Rule 26(g) is to incorporate Rule 11-type standards into the discovery process as appropriate.<sup>152</sup> Less obviously, Rule 26(g) takes the proportionality concept from Rule 26(b)(2) and converts it into a direct duty on the lawyers. In the aggregate, “Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37.”<sup>153</sup>

Rule 26(g) certainly supplies sanctioning authority in the event a party does something prohibited by the discovery rules. But does it also require cooperation? According to Judge Grimm, it does for this reason:

It cannot seriously be disputed that compliance with the ‘spirit and purposes’ of these discovery rules requires cooperation by counsel to

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148. Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 77 F.R.D. 613, 625-26 (1978).

149. ADVISORY COMMITTEE ON THE CIVIL RULES, MINUTES JULY 6, 1978, at 9, available at <http://www.uscourts.gov/rules/Minutes/CV07-1978-min.pdf>.

150. Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., *Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 80 F.R.D. 323, 330 (1979).

151. FED. R. CIV. P. 26(g)(1).

152. 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) (describing the amendments to Rule 11 and the Rule 26(g) proposal as both being directed towards lawyer responsibility).

153. FED. R. CIV. P. 26(g) advisory committee’s note (1983).

identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake in the litigation. Counsel cannot ‘behave responsively [sic]’ during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation.<sup>154</sup>

If one parses that statement, however, it becomes clear that – here too – whether Rule 26(g) requires cooperation depends entirely on what one means by that term. At various places in the opinion, Judge Grimm directs his focus at the lawyer’s duty to hew to the express requirements of the discovery rules. In one passage, for example, Judge Grimm reminds that:

Rule 26(g) charges those responsible for the success or failure of pretrial discovery – the trial judge and the lawyers for the adverse parties – with approaching the process properly: discovery must be initiated and responded to responsibly, in accordance with the letter and spirit of the discovery rules, to achieve a proper purpose (i.e., not to harass, unnecessarily delay, or impose needless expense), and be proportional to what is at issue in the litigation, and if it is not, the judge is expected to impose appropriate sanctions.”<sup>155</sup>

Later, when speaking of the lawyer’s “duty of loyalty to the ‘procedures and institutions’ the adversary system is intended to serve,” Judge Grimm again takes aim at conduct that would constitute various forms of discovery abuse, including “excessive discovery,” “boilerplate objections,” “evasive or incomplete” responses, and “tactical” delay.<sup>156</sup>

If cooperation is defined by adherence to the minimum requirements of the discovery rules, then one certainly can read Rule 26(g) to require cooperation. What is less clear is whether or how Rule 26(g) would require the parties to go beyond that and work together either (1) to determine the boundaries of permissible discovery in any particular case; or (2) to agree on a course of conduct within those boundaries. In other words, does Rule 26(g) require anything other than that the parties not stake out indefensible positions (with proportionality factoring into defensibility)? As a comparison, consider the expense-shifting provisions of Rule 37. While Rule 37(a) nominally requires expense-shifting against the party who “loses” in a motion to compel, the rule goes on to provide that the court must not shift expenses if the losing party’s position “was substantially justified.”<sup>157</sup> From that vantage point, it would seem

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154. See *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354, 357-58 (D. Md. 2008) (the “sic” refers to the possibility that “responsively” was inadvertently substituted for the intended term “responsibly”).

155. *Id.* at 360.

156. *Id.* at 362. See also *In re Convergent Technologies Securities Litig.*, 108 F.R.D. 328, 331-32 (N.D. Cal. 1985) (expressing the duties under Rule 26(b) and (g) in terms of requiring good faith and common sense to determine whether a discovery request or response is proper).

157. FED. R. CIV. P. 37(a)(5)(A)(ii), (B).

that the parties can have greatly diverging views about discovery – and insist on standing on those views to the point of requiring court intervention – without either of them necessarily having acted unreasonably or otherwise having engaged in abusive discovery.

At a different point in the opinion, Judge Grimm addresses the argument – made familiar during the mandatory disclosure debates of the 1990s – that lawyers cannot cooperate and still be zealous advocates. In refuting that argument, Judge Grimm explains: “However central the adversary system is to our way of formal dispute resolution, there is nothing inherent in it that *precludes* cooperation between the parties and their attorneys during the litigation process to achieve orderly and cost effective discovery of the competing facts on which the system depends.”<sup>158</sup> He is clearly right. But the point he makes is not that the Federal Rules require cooperation, but rather that the ethics and professional rules do not prohibit it.

## 2. Cooperation as an Act of Self-Interest

Taking as our starting point that parties may *choose* to cooperate in e-discovery, the question then becomes why a party would make that choice. In this section, I explore the idea that parties might choose a cooperative model out of self-interest.

First, the idea that parties might benefit by cooperating in discovery is neither new nor unique to e-discovery. If we step back from e-discovery for a moment, we can identify many areas where parties have been cooperating in discovery out of self-interest. When parties choose to enter into discovery stipulations under Rule 29, they presumably are doing so out of self-interest. Certainly nobody is forcing them to do so. When parties work out the logistics of discovery under Rule 26, they presumably are doing so out of self-interest. In that context, cooperation reflects the hope that courtesy will be returned with courtesy coupled with the realization that each side can inflict substantial pain on the other in the absence of courtesy and cooperation.<sup>159</sup>

To the extent the 2006 e-discovery amendments can be read as a call for cooperation, it is an appeal to the parties' self-interest. The Advisory Committee Notes identify any number of ways that the parties might be able to reduce cost and delay by discussing issues and working things out between themselves,

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158. *Mancia*, 253 F.R.D. at 361 (emphasis added).

159. One might also point to the well-established practice of lawyers “opting out” of full expert discovery by agreeing not to seek drafts or to inquire into certain types of attorney-expert communications. See REPORT OF THE CIVIL RULES ADVISORY COMM. 4 (May 9, 2008 as supplemented June 30, 2008) (“Many outstanding lawyers have told the Committee that they routinely stipulate out of discovery of draft reports and attorney-expert communications.”), available at [http://www.uscourts.gov/rules/Reports/CV\\_Report.pdf](http://www.uscourts.gov/rules/Reports/CV_Report.pdf). Experienced lawyers have learned that nobody wins that game, and therefore forego playing it out of mutual self-interest.

including the following: the topics or time periods for discovery;<sup>160</sup> the sources to search (including whether to search sources that are not reasonably accessible);<sup>161</sup> the form of production (including whether to produce in a form that includes metadata);<sup>162</sup> preservation issues;<sup>163</sup> and the possibility of agreeing to special protocols for privilege review.<sup>164</sup> The pervasive theme is that everyone involved – including the parties, not just the court – will be better off if the parties can reduce the number and complexity of disputes over e-discovery.

In my view, *The Cooperation Proclamation* is also best understood as an appeal to self-interest. It is true that *The Cooperation Proclamation* states that the Federal Rules require cooperation. It is also true that *The Cooperation Proclamation* at least suggests – if somewhat obliquely – that the lawyers have a duty to cooperate as officers of the court. But the dominant theme of *The Cooperation Proclamation* is that lawyers disserve the long-term, holistic interests of their clients when they mindlessly default to adversarial tactics. The essence of *The Cooperation Proclamation* may be found in this paragraph:

Lawyers preparing cases for trial need to focus on the full cost of their efforts – temporal, monetary, and human. . . . Over-contentious discovery is a cost that has outstripped any advantage in the face of ESI and the data deluge. It is not in anyone's interest to waste resources on unnecessary disputes, and the legal system is strained by "gamesmanship" or "hiding the ball," to no practical effect.<sup>165</sup>

Thus, *The Cooperation Proclamation* describes itself not as "utopian" but as "an exercise in economy and logic."<sup>166</sup> In other words, lawyers who really think about the costs and benefits of not cooperating will realize that they are better off cooperating.

If one reading these passages has an eerie feeling that the drafters of *The Cooperation Proclamation* are channeling the sentiments of the drafters of the original Federal Rules, it would not be unwarranted. There is no small

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160. See FED. R. CIV. P. 26(f) advisory committee's note (2006) ("[T]he parties may specify the topics for such discovery and the time period for which discovery will be sought.").

161. See FED. R. CIV. P. 26(b)(2), 26(f) advisory committee's note (2006) ("They may identify the various sources of such information within a party's control that should be searched for electronically stored information.").

162. FED. R. CIV. P. 26(f) advisory committee's note (2006) ("Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.").

163. See FED. R. CIV. P. 26(f) advisory committee's note (2006) ("Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan.").

164. FED. R. CIV. P. 26(f) ("Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver."); see also FED. R. CIV. P. 16 advisory committee's note (2006) (noting that including privilege review protocols in the case-management order "may be helpful in avoiding delay and excessive cost in discovery").

165. THE COOPERATION PROCLAMATION, *supra* note 97, at 1.

166. *Id.*



resemblance.<sup>167</sup> And if one were then to get a sinking feeling that the cause, however noble, is in fact utopian given the results of the last 70 years, that too would be understandable. Why would anyone expect lawyers to start viewing cooperation as being in their self-interest now when they seem to have taken the opposite view for so long?

One of the greatest challenges for the advocates of cooperation will be to persuade lawyers that they actually will benefit from cooperation. As discussed above, both clients and lawyers are free to take a cooperative approach to discovery if that is the client's wish. Historically, however, many lawyers have viewed themselves "as both ethically and professionally bound to take advantage of whatever procedural opportunities are available to them."<sup>168</sup> In cases where a cooperative approach seems risky, or where the benefits are not obvious and certain, it seems likely that lawyers will be strongly tempted to default to what they see as the safety of "zealous advocacy."

Other practical factors will stand in the way of cooperation. For one thing, lawyers can make a lot of money by churning discovery.<sup>169</sup> If one of the premises of the campaign for cooperation is to reduce expense, then one of the expenses on the cutting table will be attorneys' fees. Will lawyers opt for strategies that cut their fees? Second, adversarialism can be quite effective.<sup>170</sup> It is hard to imagine that lawyers who have – at least in their minds – profited from adversarial discovery will suddenly and voluntarily be willing to forego those tactics.

Finally, lawyers who believe in the benefits of mutual cooperation must find adversaries who share that view and behave accordingly. Game theorists have closely studied cooperative discovery as an application of the Prisoner's Dilemma.<sup>171</sup> Those studies have attempted to explain why lawyers continue to "defect" into non-cooperative behavior even though modeling and simulation both lead to the conclusion that mutual cooperation is a superior strategy.<sup>172</sup>

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167. See *supra* notes 16-23 and accompanying text.

168. See Bell et al., *supra* note 21, at 12.

169. See *id.* at 13.

170. See Beckerman, *supra* note 106, at 579-85.

171. See, e.g., Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994); John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569 (1989). While the Prisoner's Dilemma itself deals with a scenario in which prisoners independently must decide whether to stay silent or to squeal on their confederate, as a model it is generically used to describe any game in which "two parties acting individually wind up with an outcome worse for both of them than the outcome that they could obtain through cooperation." *Id.* at 578.

172. One possible area of inquiry is into whether e-discovery has changed the "payoff schedule" associated with the different strategies. In their study, Gilson & Mnookin considered whether commercial litigation actually presented a Prisoner's Dilemma – where mutual cooperation has a bigger payoff than mutual defection – or whether mutual defection was in fact the optimal strategy in that situation. Gilson & Mnookin, *supra* note 171, at 535. This may be one of the ways in which e-discovery "changes the game." In other words, when *The Cooperation Proclamation*

Thus, a part of the campaign for cooperation likely needs to be to show how clients and lawyers can signal their interest in cooperation without setting themselves up for exploitation.

At this point, it should be apparent that the current incentive structure for adversarial discovery depends heavily on what clients and judges will tolerate. Clients that come to believe in the long-term benefits of cooperative discovery will not retain lawyers who feel ethically or professionally bound to try to take every procedural advantage available.<sup>173</sup> One would expect the same fate to befall lawyers who deliberately fight over everything in order to run up their legal fees. And despite whatever questions might exist about the authority of judges to order lawyers to “cooperate,”<sup>174</sup> judges certainly have the power – if not the duty – to take the profit out of abusive discovery tactics by punishing the lawyers who engage in them. To take it a step further, judges could incentivize cooperation by rewarding those who in good faith *seek* cooperation, even if those overtures do not bear fruit. For example, imagine a discovery dispute where the moving party seeks sanctions on the grounds that the other side failed to locate and produce ESI and that the failure was the result of an unreasonable search process. Further assume, though, that the producing party had sought cooperation – e.g., by trying to develop an agreed set of search terms or an agreed set of records to search – but had been rebuffed by the party seeking discovery.<sup>175</sup> In that case, the fact that the producing party had attempted to work with opposing counsel to establish a search process would seem very relevant – though not dispositive – to determining whether the producing party had acted reasonably, and might justify giving the would-be-cooperator the benefit of the doubt if the issue of reasonableness was a close call.

In the end, then, the campaign for cooperation may be just as much a campaign to win over the hearts and minds of clients and judges as it is a campaign directed at lawyers. The irony of this observation is that, here too, it seems that little of discovery reform is ever truly new. The RAND study reached a similar set of conclusions over a decade ago when analyzing the problem of discovery abuse in the traditional discovery context:

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asserts that contentiousness is a “cost that has outstripped any advantage in the face of ESI and the data deluge,” it may in fact be recognizing that what e-discovery has done is change the “payoff schedules” associated with mutual cooperation and mutual defection.

173. Cf. Gilson & Mnookin, *supra* note 171, at 525 (arguing that clients should be willing to pay a premium for “cooperative” lawyers in order to reap the benefits of cooperative strategies).

174. See *supra* notes 137-58 and accompanying text.

175. Cf. William A. Gross Construction Associates, Inc. v. American Manufacturers Mut. Ins. Co., 256 F.R.D. 134, 135 (S.D.N.Y. 2009) (ordering parties and non-party document custodian to cooperate to develop search terms); Treppel v. Biovail Corp., 233 F.R.D. 363, 374 (S.D.N.Y. 2006) (chiding requesting party for rebuffing producing party’s efforts to develop an agreed set of search terms, calling it a “missed opportunity”). See also Jason Krause, *In Search of the Perfect Search*, A.B.A. J., April 2009, at 39 (describing the TREC Legal Track project and stating that the early research indicates that the best method for developing a set of search terms is for the lawyers to work together to identify them).

If attorneys engage in excessive discovery because they obtain lucrative fees from this practice, it might be more effective for clients to institute controls on fees . . . than to include new restrictions on the amount of discovery into the Rules. Alternatively, if attorneys engage in overly aggressive discovery because they believe that is what their clients expect of them, perhaps those clients need to be educated as to the relationship between what they expect of their counsel and litigation costs. If the local legal culture sometimes includes the use of overly aggressive discovery for strategic purposes of imposing costs and delay on opposing parties, which may sometimes drive inappropriate settlements or be a problem for poorer parties, perhaps the local judiciary needs to become involved more actively in managing discovery and signaling displeasure with inappropriate discovery behavior by lawyers and parties.<sup>176</sup>

At this point, it is far too soon to say whether the run of lawyers or clients will come to see cooperation as a preferred approach that maximizes their self-interest. If one looks at what lawyers are saying so far about how to approach the new, expanded Rule 26(f) conference, the signals are mixed. Some comments do in fact suggest a culture change. One lawyer made this suggestion: "Rule 26(f) is about cooperation and working together. By coming together early, defining what is important and what is not, and working with your adversary, not against them, means less risk, less cost and more certainty."<sup>177</sup> Another lawyer wrote, "The amended rules ultimately demand a dramatic shift in the culture of discovery from all-out warfare to greater collaboration."<sup>178</sup>

Other comments, though, seem to focus less on securing the joint benefits of cooperation and more on using the Rule 26(f) process as yet another means for gaining a competitive advantage. For example, one lawyer-commentator justified the time and expense needed to prepare for the post-2006 Rule 26(f) conference on the grounds that doing so will provide "ammunition to constrain demands made by the other side."<sup>179</sup> Later on, that lawyer characterized the post-2006 Rule 26(f) conference and the resulting Rule 16 scheduling conference as "the battleground where the case is shaped."<sup>180</sup> If lawyers come to view "cooperation" as yet another form of battle in which the goal is to extract concessions out of their adversaries while clinging to the most extreme positions

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176. Kakalik et al., *supra* note 51, at 633.

177. Rosenthal & Cowper, *supra* note 76, at 248 (extensively discussing how the parties can agree on scope issues for both preservation and production, format issues, and privilege review procedures); see also Moze Cowper & John Rosenthal, *Not Your Mother's Rule 26(f) Conference Anymore*, 8 SED. CONF. J. 261 (Fall 2007).

178. Jonathon M. Redgrave, *Needs, Wants and Civil Discovery: Why Less Can Be More for Requesting Parties*, THE FEDERAL LAWYER 5 (May 2008).

179. Aron U. Raskas, *Commentary: Rule 26(f): Meet and Confer*, THE DAILY RECORD (Baltimore), Nov. 13, 2006; see also Lender, *supra* note 82 (acknowledging that an attorney could seek limits on preparation time, individuals/custodians, and terms to be searched).

180. Raskas, *supra* note 179.

they can muster for themselves, then the campaign for cooperation is likely to be short and disappointing.<sup>181</sup>

### 3. A Duty to the System: A Duty to Sacrifice?

So far, we have looked at two possible sources of a “duty” to cooperate in discovery: (1) that the Federal Rules require it;<sup>182</sup> and (2) that the Federal Rules allow it and parties should choose to cooperate in order to best serve their clients.<sup>183</sup> In this section, we look at a third possible source: the idea that a lawyer has a duty to cooperate in discovery because the lawyer is an officer of the court and therefore has a duty to the legal system.

In examining this idea, we first must be clear about what we have already established in the discussion of the other duties. First, this version of a duty to cooperate necessarily addresses behavior that is *not required* by the Federal Rules. Lawyers and their clients already are required to follow the Federal Rules; we don’t need a “duty to the system” for that. Second, this version of a duty to cooperate necessarily addresses behavior that the lawyer does not think is in the client’s best interest. If cooperation is in the client’s best interest, then the lawyer should cooperate to serve the client, so we don’t need a “duty to the system” for that either. What we are talking about then, is whether lawyers have a duty to cooperate in ways that the Federal Rules do not require and that do not appear to benefit the client. Phrased from the other direction: is a lawyer ever required – as an officer of the court – to sacrifice his client’s interests in order to advance the interests of the legal system?

When the claimed sources of the duty to cooperate are disaggregated and put under the microscope, it is not clear to me that anyone actually is arguing that the lawyer’s “duty to the system” gives rise to a new, separate, and freestanding duty to cooperate. *The Cooperation Proclamation*, for example, states that lawyers have “twin duties of loyalty” to their clients and to the profession such that “[t]heir combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court.”<sup>184</sup> This certainly supports the idea that parties should follow the rules and consider cooperating in order to better serve their clients, but I don’t think it says that lawyers should cooperate contrary to their clients’ interests or wishes. Later on, *The Cooperation Proclamation* describes “over-contentious discovery” as a “cost that has outstripped any advantage” such that the transition from adversarialism to cooperation is “an exercise in economy and logic.”<sup>185</sup> The

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181. Cf. Setear, *supra* note 171, at 599 (explaining how parties might attempt to capture early gains by non-cooperative behavior if they think they can make a “quick killing” that exceeds the discounted future benefits of cooperation).

182. See *supra* Part II.C.1.

183. See *supra* Part II.C.2.

184. See THE COOPERATION PROCLAMATION, *supra* note 97, at 1.

185. *Id.*

consistent theme is not that lawyers should sacrifice their clients' interest for the sake of the system, but that lawyers and clients should recognize that cooperation is in fact in their best interest.

Similarly, in *Mancia*, Judge Grimm quoted at length from Professor Fuller about the intersection of the lawyer's duty of client advocacy with the lawyer's duty of loyalty to the justice system.<sup>186</sup> The quoted passage characterizes lawyers as trustees to the integrity of self-government and warns that advocacy that "misleads, distorts and obfuscates" hinders the process and imposes a "ruinous" cost to the system.<sup>187</sup> Following up on this notion, Judge Grimm condemns a variety of abusive discovery practices – e.g., excessive discovery, evasion, and delay tactics – and cites to Rules 26(c)(1), 26(f), 26(g) and 37(a)(1) and to various professional ethics standards.<sup>188</sup> There is no doubt that the cited materials and Professor Fuller's views support a more cooperative vision, but there is little to suggest that they support sacrificing the client's interest for the sake of the system.

What remains of the "duty to the system" rationale for cooperation, then, is not a clear theory but an amorphous, undefined, and arguably even un-invoked suggestion. This is not to say that lawyers, as officers of the court, are free to be as contentious and uncooperative as they wish. Rather, it is to say that the duties that lawyers owe as officers of the court most likely overlap – if not flow from – their duties under the Rules and to their clients.

#### *D. The Big Picture of Cooperation*

At this point, readers might conclude that I oppose the idea of cooperative discovery. Not so. If anything, I am a staunch proponent of it.<sup>189</sup> Indeed, because I fully agree with what I view to be the principal tenets of *The Cooperation Proclamation*, I have participated in the campaign by soliciting judicial endorsements in Oklahoma.

What I think is critical, however, is that the campaign for cooperation be clear about *what* we mean by cooperation and *why* parties should cooperate. Cooperation surely means more than just following the specific directives of the Federal Rules, whether they are couched in terms of affirmative duties like the duty to communicate or negative duties like the duty to refrain from abusive practices. But I do not think that cooperation means that a lawyer must relinquish a legitimate position that serves the client's interest in order to advance the good of the system. In sum, the campaign for cooperation, properly understood, urges parties and their lawyers to do more than just be willing to talk

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186. *Mancia*, 253 F.R.D. at 361-62.

187. *Id.*

188. *Id.* at 362 nn.5-6.

189. See STEVEN S. GINSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 456-57 (2009 ed.) (urging lawyers to consider the benefits of a cooperative approach).

and to forego abusive practices.<sup>190</sup> It urges them to seek out new ways to work together, and it urges them to do so not in spite of their interests but in furtherance of them.<sup>191</sup>

The message of the campaign for cooperation is not that a party-driven discovery process is bad, nor is it that it is always wrong or counterproductive for lawyers to fight over discovery. The message is that lawyers need to rethink what they're fighting over and realize that, in many instances, it is in everyone's best interest to cooperate rather than fight. By itself, that is a profound and critical message. If the only thing that *The Cooperation Proclamation* and related efforts achieve is to get lawyers to "stop and think" about whether a cooperative approach – either generally or on a task-specific basis – would serve their client's interest better than fighting, then the campaign for cooperation in discovery will, in my view, turn out to have been a smashing success.

### III. THE LAWYER'S DUTY TO OVERSEE SEARCH AND PRODUCTION

My final observation relates to the potential impact of e-discovery on the lawyer's role in preserving, searching for, and producing documents. It is fundamental that the duty to provide information and documents runs to the parties themselves.<sup>192</sup> Moreover, we typically leave it to the parties to undertake their own efforts to fulfill the obligations to preserve, search, and produce.<sup>193</sup> Of course, lawyers are part of that process. Most clients will look to their lawyers for guidance on how to fulfill their discovery obligations. And lawyers are certainly subject to various sanctions when their clients fail to discharge various discovery duties.<sup>194</sup>

The questions I want to explore here are these: do lawyers have a direct duty to participate in the process of preserving, searching for, and producing documents? If so, where does that duty come from, and what does it require? Finally, has that duty changed – either in its content or its application – as a result of e-discovery?

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190. See THE COOPERATION PROCLAMATION, *supra* note 97, at 1.

191. See *id.*

192. See *infra* text accompanying note 196.

193. See, e.g., *In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003) (noting that absent special circumstances, parties are entitled to search their own files for responsive materials); FED. R. CIV. P. 34 advisory committee's note (2006) ("The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances.").

194. See FED. R. CIV. P. 37(b)(2)(C) (providing that when a party fails to comply with a court order regarding discovery, the court may impose expenses on "the disobedient party, the attorney advising that party, or both").

### A. *Discovery Responsibilities Under the Federal Rules*

#### 1. The Party's Duty to Respond

In the American legal system, the parties are responsible for responding to discovery. In practice, the lawyers typically dominate the process. I suspect that few lawyers, for example, let their clients draft their own interrogatory answers. I suspect that even fewer would let their clients produce documents that the lawyer had not screened first. If nothing else, lawyer involvement is needed for the lawyer to make timely objections as to relevance, burden, privilege, work-product protection and the like. But it is important to keep in mind that the discovery requests are *directed to the parties*, not their lawyers.<sup>195</sup> It is the parties who have the duty of responding to discovery.

#### 2. Rule 26(g) and the Lawyer's Duty to Certify

1983 was a big year for rule changes. I have already discussed the significant amendments to Rule 16 and Rule 26(b).<sup>196</sup> Ironically, those amendments may not have been seen as the biggest developments that year. Rather, that label might have gone to the changes to Rule 11. Responding to concerns about the increase in abusive litigation tactics, Rule 11 was significantly revised and expanded.<sup>197</sup> Key revisions more clearly defined the scope of the lawyer's pre-filing inquiry and made sanctions mandatory when violations occurred.<sup>198</sup>

As a companion to the Rule 11 changes, Rule 26 was amended to include a new subsection (g).<sup>199</sup> New Rule 26(g) imposed a signing requirement in discovery that paralleled the signing requirement under Rule 11.<sup>200</sup> It required lawyers to sign all discovery requests, responses, and objections.<sup>201</sup> By signing,

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195. See Fed. R. Civ. P. 33(b)(1) (interrogatories must be answered by the party); Fed. R. Civ. P. 34(b)(2) (the party to whom a document request is directed must respond to it); Fed. R. Civ. P. 36(a) (the party must respond to requests for admission).

196. See *supra* notes 24-55 and accompanying text.

197. See FED. R. CIV. P. 11 advisory committee's note (1983).

198. See FED. R. CIV. P. 11 advisory committee's note (1983). A later round of amendments to Rule 11 in 1993 reinstated the trial judge's discretion whether to impose sanctions. See FED. R. CIV. P. 11(c) advisory committee's note (1993) ("The court has significant discretion in determining what sanctions, if any, should be imposed for a violation.").

199. The idea for Rule 26(g) came from the ABA's Second Report of the Special Committee for the Study of Discovery Abuse. See SECTION OF LITIGATION, AM. BAR ASS'N, SECOND REPORT OF THE SPECIAL COMM. FOR THE STUDY OF DISCOVERY ABUSE, 92 F.R.D. 137, 141-43 (1980).

200. See FED. R. CIV. P. 26(g) advisory committee's note (1983) ("Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection.").

201. FED. R. CIV. P. 26(g)(1).

the lawyer certified the legitimacy of the request, response, or objection. Mandatory sanctions would follow an unsupported certification.<sup>202</sup>

Rule 26(g) took the "attorney responsibility" theme of Rule 11 and applied it to the perceived problems in discovery.<sup>203</sup> The problem of over-discovery would be addressed by requiring lawyers to certify that their discovery requests were not made for an improper purpose (such as to harass or needlessly increase the cost of litigation) and were not unreasonable or unduly burdensome given the needs of the case.<sup>204</sup> The problem of junk responses would be addressed by requiring lawyers to certify that their responses, including objections, were formed after a reasonable inquiry, consistent with the rules, and warranted by the law.<sup>205</sup> Rule 26(g) blends in all of the cost-containment and control themes that motivated the 1983 amendments to Rules 16 and 26(b) and attempts to operationalize them through a Rule 11-like scheme of certifications and sanctions.

If the principal focus of Rule 26(g) was on curbing *lawyer* misbehavior, it also reached *party* misbehavior, but it did so indirectly. That is to say, Rule 26(g) did not impose any additional signing or certification requirements directly on represented parties.<sup>206</sup> But Rule 26(g) did make lawyers responsible for the process by which their clients gathered the information and documents that formed the basis for their discovery responses. Specifically, Rule 26(g) now squarely placed on the lawyer a duty to consider whether the party's processes for gathering the information or documents that then comprised the party's response were sufficient.<sup>207</sup> The Advisory Committee Note put the matter this way:

Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all of the information and documents available to him that are responsive to the discovery demand. Thus, the lawyer's certification under Rule 26(g) should be distinguished from other signature requirements in the rules, such as those in Rules 30(e) and 33.<sup>208</sup>

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202. FED. R. CIV. P. 26(g)(3).

203. See Marcus, *supra* note 152, at 364.

204. See SECTION OF LITIGATION, AM. BAR ASS'N, SECOND REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE, 92 F.R.D. 137, 142-43 (1980) ("[B]y imposing an obligation upon the attorney invoking a discovery procedure, the rule affirmatively emphasizes the need for a professional judgment involving more than mere relevance.").

205. FED. R. CIV. P. 26(g)(2).

206. See FED. R. CIV. P. 26(g) advisory committee's note (1983).

207. FED. R. CIV. P. 26(g).

208. FED. R. CIV. P. 26(g) advisory committee's note (1983).



When Rule 26 was amended in 1993 to include mandatory initial disclosure provisions, Rule 26(g) was amended to extend the signing duty to those as well.<sup>209</sup>

For twenty years, judges and lawyers alike paid little attention to Rule 26(g).<sup>210</sup> In particular, few cases addressed the contours of the lawyer's duty to certify his or her client's discovery responses. But there were a few notable cases that shed light on exactly what lawyers could and could not do when entrusting their clients to gather the requested information and documents.

The leading early case on the lawyer's duty to certify under Rule 26(g) is *National Association of Radiation Survivors v. Turnage*.<sup>211</sup> In *Turnage*, the plaintiffs had requested a wide range of documents from the Veterans Administration.<sup>212</sup> The V.A.'s process for responding was to send copies of the document requests to the heads of particular departments and leave it to the department heads to interpret the request and prepare a response.<sup>213</sup> The lawyer in charge of this process gave no instructions to the department heads and simply accepted whatever response came back without any effort to verify the sufficiency of the response.<sup>214</sup> In the face of evidence that large amounts of responsive materials were either missed or destroyed in the interim, the court concluded that the lawyer had violated Rule 26(g) by failing to conduct a sufficient inquiry before certifying the V.A.'s discovery responses.<sup>215</sup>

Another leading case, decided more recently, is *Metropolitan Opera Association, Inc. v. Local 100*.<sup>216</sup> That case involved a lawsuit brought by the Metropolitan Opera ("the Met") against a union for unlawfully involving the Met in an election dispute the union had with the Met's food service provider.<sup>217</sup> The Met served document requests seeking a wide range of materials concerning the union's activities, particularly insofar as they involved communications about the Met or directed at the Met's patrons or donors.<sup>218</sup> The union's lawyer forwarded these discovery requests to union officials, who were not lawyers, without any instructions and without any meaningful follow up.<sup>219</sup> When the union produced very few documents in response, the Met's lawyers repeatedly asked about the completeness of the productions and even identified documents

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209. See FED. R. CIV. P. 26(g) & advisory committee's note (1993) ("Paragraph (1) is added to require signatures on disclosures.").

210. Cf. WRIGHT ET AL., *supra* note 141, at § 2052 (noting that while Rule 11 has been often invoked "Rule 26(g) has not been much used").

211. Nat'l Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543 (N.D. Cal. 1987).

212. *Id.* at 545-46.

213. *Id.* at 552.

214. *Id.*

215. *Id.* at 555-56 (also finding the client liable for discovery sanctions).

216. Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees and Rest. Employees Int'l Union, 212 F.R.D. 178 (S.D.N.Y. 2003).

217. *Id.* at 184.

218. *Id.* at 184-85.

219. *Id.* at 222.

that they knew existed but for which there had been no production.<sup>220</sup> In reply, rather than take any steps to determine whether the union had in fact performed a proper search, the union's lawyer ridiculed the inquiries and repeated his assurances that the productions were complete.<sup>221</sup>

The court found that the union's lawyer had violated Rule 26(g) by certifying the union's responses "without any real reflection or concern for [his] obligations under the rules governing discovery and, in the absence of an adequate search for responsive documents, without a reasonable basis."<sup>222</sup> The union's lawyer attempted to avoid sanctions by arguing that he was entitled to rely on his client to perform the search and that Rule 26(g) did not require him to "personally supervise every step of the discovery process."<sup>223</sup> The court made short shrift of that argument:

While, of course, it is true that counsel need not supervise every step of the document production process and may rely on their clients in some respects, the rule expressly requires counsel's responses to be made upon reasonable inquiry under the circumstances. Here, there is no doubt whatsoever that counsel failed to comply with that standard . . . .<sup>224</sup>

Roughly stated, the case law yields three main principles. First, while the lawyer can leave the execution of the search and collection process to the client, the lawyer must supply some guidance to the client about what to search for and how far that duty extends.<sup>225</sup> Second, the certifying lawyer ultimately must make a reasonable effort – with reasonableness depending on the circumstances of the case – to ensure that the client has provided all of the responsive documents.<sup>226</sup> And third, the lawyer may not certify a response in reliance on her client's search and collection efforts in situations where the lawyer knows or has good reason to suspect that the client's response was insufficient.<sup>227</sup>

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220. *Id.* at 223.

221. *Id.* at 222-23.

222. *Metro. Opera*, 212 F.R.D. at 221-22.

223. *Id.* at 222.

224. *Id.*

225. *See id.* at 222; *Tarleton v. Cumberland County Corr. Facility*, 192 F.R.D. 165, 170 (D.N.J. 2000) ("Counsel had a duty to explain to their client what types of information would be relevant and responsive to discovery requests and ask how and where relevant documents may be maintained.").

226. *See Poole ex rel. Elliot v. Textron, Inc.*, 192 F.R.D. 494, 503 n.11 (D. Md. 2000). *See also Metro. Opera*, 212 F.R.D. at 222; *St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 516 (N.D. Iowa 2000); *Phinney v. Paulshock*, 181 F.R.D. 185, 203 (D.N.H. 1998); *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 555 (N.D. Cal. 1987).

227. *See Metro. Opera*, 212 F.R.D. at 222-23. *See also, e.g., The Rottlund Co. v. Pinnacle Corp.*, 222 F.R.D. 362, 384-85 (D. Minn. 2004) (outside counsel could not rely on the client to conduct the search where the client "had already proved, on too many occasions involving quite relevant information, incapable of understanding its obligations to permit reasonable reliance"), report and recommendation adopted in part and rejected in part on other grounds, 2005 WL 407860 (D. Minn. 2005). *Cf. Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co.*, 132

### *B. The Impact of E-Discovery*

Has e-discovery altered these duties? If the question is whether any of the 2006 e-discovery amendments explicitly altered these duties, the answer is easy: no. Rule 26(g) was not amended in 2006, and none of the amendments that were made in 2006 specifically addressed the lawyer's duty to oversee or monitor a client's conduct in preserving, searching for, or producing responsive materials. But since the advent of e-discovery, there has been a noticeable uptick in cases addressing the lawyer's duty to oversee his or her client's discovery processes. This section looks at three of the most prominent of those cases.

#### *1. Zubulake V*

The first case to specifically address the lawyer's duty to oversee the client's preservation and production of ESI was Judge Schiendlin's fifth opinion in the *Zubulake* saga.<sup>228</sup> The specific issue in *Zubulake V* was whether to impose sanctions against UBS or UBS's lawyers for e-mails that had been either lost or belatedly produced.<sup>229</sup> These failings resulted from three defects in UBS's preservation and search process. First, UBS failed to request and inspect the active files of at least two key employees.<sup>230</sup> Second, while UBS implemented a litigation hold, many emails were nonetheless deleted from UBS's active email files (though most of them were later recovered from backup tapes).<sup>231</sup> Third, several backup tapes were lost.<sup>232</sup>

Judge Schiendlin wrote that "[c]ounsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents."<sup>233</sup> The first component of this duty is to "make certain that all sources of potentially relevant information are identified and placed 'on hold.'"<sup>234</sup> The lawyer does not meet this duty simply by issuing a litigation hold and expecting that the party will retain and produce all relevant information.<sup>235</sup> Rather, "[c]ounsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched."<sup>236</sup> "To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture."<sup>237</sup> In addition, counsel must interview all of the key employees to determine whether all possible sources of

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F.R.D. 204, 210 (N.D. Ind. 1990) (ordering lawyer to "recertify" the response in light of minuscule production and client's own statements about the ad hoc nature of their search).

228. *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422 (S.D.N.Y. 2004).

229. *Id.* at 424.

230. *Id.* at 426.

231. *Id.*

232. *Id.*

233. *Zubulake V*, 229 F.R.D. at 432.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

information have been inspected.<sup>238</sup> Alternatively, counsel might take a more creative approach, such as by running a system-wide search of a broad list of key words and then retaining those documents for later review.<sup>239</sup>

Then, counsel has a continuing duty to ensure preservation. Counsel should periodically re-issue the litigation hold so that new employees are aware of it and to keep it fresh in the minds of all employees.<sup>240</sup> In addition, counsel should periodically contact the key employees to specifically remind them that the litigation hold is still in place.<sup>241</sup>

As applied, Judge Schiendlin found that, while UBS's lawyers "came very close" to fulfilling their duties, "counsel failed to properly oversee UBS in a number of important ways, both in terms of its duty to locate relevant information and its duty to preserve and timely produce that information."<sup>242</sup> Specifically, counsel failed to communicate the litigation hold to at least one key employee, failed to ask another key employee for her files, and failed to protect relevant backup tapes.<sup>243</sup>

## 2. *Cache La Poudre Feeds, LLC. V. Land O'Lakes, Inc.*

The next major opinion addressing the lawyer's role in overseeing client preservation and production efforts is *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*<sup>244</sup> In this case, the defendant Land O'Lakes was accused of various discovery violations, one of which was the failure to preserve and produce various documents.<sup>245</sup> Like UBS in *Zubulake V*, Land O'Lakes did take some steps to meet those obligations: it issued a litigation hold and it instructed the relevant employees to search their paper and electronic files for responsive documents.<sup>246</sup> But the process was not perfect: Land O'Lakes left it to the non-lawyer employees to make their judgments about what was "related to the litigation," accepted whatever the employees supplied without any control checking, did not review back-up tapes, failed to preserve or inspect computer files of departed employees, and failed to contact former employees.<sup>247</sup>

The plaintiff sought sanctions, relying heavily on *Zubulake V*.<sup>248</sup> In particular, the plaintiff appears to have made a list of each of the "duties" listed

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238. *Id.*

239. *Zubulake V*, 229 F.R.D. at 432.

240. *Id.* at 433-34.

241. *Id.*

242. *Id.* at 435.

243. *Id.* While Judge Schiendlin imposed sanctions against UBS, including issuing an adverse inference instruction, it does not appear that she imposed sanctions against UBS's in-house or outside counsel for their failings. See *id.* at 439-40 (itemizing sanctions).

244. *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614 (D. Colo. 2007).

245. *Id.* at 616.

246. *Id.* at 624.

247. *Id.* at 624-25.

248. *Id.* at 617-18.

in *Zubulake V* and then attempted to show how Land O'Lakes had not lived up to those duties.<sup>249</sup> The results were mixed.

On one hand, the court rejected the idea that *Zubulake V* established a list of actions that were mandatory in each case. In particular, the court rejected the idea that there was any one way to implement a litigation hold, instead citing *The Sedona Principles* for the proposition that the parties are in the best position to determine the specifics in light of their own systems and capabilities.<sup>250</sup> Nonetheless, the court did find fault with counsel's behavior. And here, the court specifically analyzed counsel's duties in reference to Rule 26(g).<sup>251</sup> While recognizing that parties are responsible for responding to discovery requests, the court added that "counsel cannot turn a blind eye to a procedure that he or she should realize will adversely impact that search."<sup>252</sup> It was not enough, according to the court, to announce a litigation hold and then delegate the collection of documents to employees without any effort to verify the completeness of the production.<sup>253</sup> Had counsel followed up on the preservation and search process, for example, he would have realized that Land O'Lakes' practice of wiping the hard drives of departing employees was destroying potentially relevant evidence for which there was no other source.<sup>254</sup> Moreover, because counsel was not involved in the preservation or search processes, there was no way that he could claim, as he had, that Land O'Lakes had "made every effort to produce all documentation and provide all relevant information."<sup>255</sup>

### 3. *Qualcomm Inc. v. Broadcom Corp.*

The final case is one that has received almost as much attention in lawyer circles as the *Zubulake* cases – *Qualcomm Inc. v. Broadcom Corporation*.<sup>256</sup> The final chapters of this saga have not yet been written. The ruling that grabbed national headlines (at least in the legal media<sup>257</sup>) has been partly vacated; in particular for our purposes, the issues associated with outside counsel's discovery oversight duties are back before the magistrate judge for further

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249. *Id.* at 625.

250. *Cache La Poudre Feeds LLC*, 244 F.R.D. at 628.

251. *Id.*

252. *Id.* at 629.

253. *Id.* at 630.

254. *Id.*

255. *Id.* at 629.

256. *Qualcomm, Inc. v. Broadcom, Corp.*, No. 05CV1958-B(BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008).

257. See, e.g., Jerold S. Solovy & Robert L. Byman, *Qualcomm Case Sends Tremors Nationwide*, NAT'L L.J., Jan. 31, 2008, available at <http://www.law.com/jsp/article.jsp?id=900005559917>; Alan Cohen, *Qualcomm's Hard-Earned Lessons*, CORP. COUNS., March 5, 2008, available at <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=900005504954>.

proceedings.<sup>258</sup> What was said in that initial ruling, however, is well worth considering here.

Accepting as true the facts as stated in Magistrate Judge Major's opinion, the case is relatively simple for our purposes. Qualcomm had sued Broadcom for patent infringement. The critical issue in the case was whether Qualcomm had participated in a public process that created a video coding standard.<sup>259</sup> If it had, then it could not prevail. In response to discovery requests directed towards that issue, Qualcomm through its interrogatory responses denied being involved in the standard-setting process during the relevant time period and, while it agreed to produce any such documents, then asserted that there were none to produce.<sup>260</sup> Qualcomm's lawyer signed the responses.<sup>261</sup> Later on, it was revealed that Qualcomm had in fact participated in the standard-setting process and possessed over 46,000 documents responsive to that issue.<sup>262</sup>

Needless to say, Qualcomm was hit with heavy sanctions.<sup>263</sup> In addition, Magistrate Judge Major imposed sanctions on Qualcomm's lawyers.<sup>264</sup> While Judge Major did not rely on Rule 26(g) as a basis for sanctioning all of the lawyers who engaged in culpable conduct,<sup>265</sup> she made it a focal point of her analysis, quoting at length from the discussion of the certification requirement in the 1983 Advisory Committee Note.<sup>266</sup> Focusing on the theme of good faith compliance and the lawyer's oversight responsibility, Judge Major added this observation:

The Committee's concerns are heightened in this age of electronic discovery when attorneys may not physically touch and read every document within the client's custody and control. For the current "good faith" discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents.<sup>267</sup>

Judge Major concluded that, while there was no direct evidence that the lawyers knew of all of these documents, they ignored obvious warning signs and

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258. *Qualcomm, Inc. v. Broadcom, Corp.*, No. 05CV1958-RMB(BLM), 2008 WL 638108, at \*3 (S.D. Cal. March 5, 2008).

259. *Qualcomm, Inc.*, 2008 WL 66932, at \*3.

260. *Id.* at \*2.

261. *Id.*

262. *Id.* at \*6.

263. *Id.* at \*17-19. Qualcomm did not appeal the sanctions issued against it. *Qualcomm, Inc.*, 2008 WL 638108, at \*1.

264. *Qualcomm, Inc.*, 2008 WL 66932, at \*18.

265. The court relied heavily on Rule 26(g), but ultimately predicated the sanctions on a wider range of sanctioning authority due to the fact that only one of the attorneys had actually signed the discovery responses in question. *Id.* at \*13 n.9.

266. *Id.* at \*7.

267. *Id.* at \*9.

accepted their client's "incredible assertions regarding the adequacy of the document search and witness investigation."<sup>268</sup> More specifically, Judge Major found as follows:

[O]ne or more of the retained lawyers chose not to look in the correct locations for the correct documents, to accept the unsubstantiated assurances of an important client that its search was sufficient, to ignore the warning signs that the document search and production were inadequate, not to press Qualcomm employees for the truth, and/or to encourage Qualcomm employees to provide the information (or lack of information) that Qualcomm needed to assert its non-participation argument and to succeed in this lawsuit.<sup>269</sup>

In other words, from a Rule 26(g) perspective, this was a case where it was patently unreasonable to accept the client's assurances that it had carefully and conscientiously searched its records and found nothing.

### C. A View Forward

What lessons can be drawn from these cases? Here too, my remarks are offered more in the spirit of observation than conclusion or prescription.

None of the outcomes in the cases discussed above gives me great cause for concern. If Qualcomm's lawyers did what Judge Major thought they did, then they quite blatantly violated Rule 26(g) and they deserved to be sanctioned. Just as lawyers may not cavalierly accept and repeat everything their clients say about the facts in the face of serious cause for doubt,<sup>270</sup> neither may they blithely accept and certify a client's assertions about discovery in the face of similar doubt. The failings of UBS's lawyers and Land O'Lakes' lawyers were far less severe, to be sure. But there were defects in what they did, and in any event it does not appear that any of those lawyers (as opposed to the clients) were actually sanctioned.

What does make me nervous, though, is some of the language in those cases, particularly *Zubulake V.*<sup>271</sup> Is it really true that, in order to certify a client's discovery response under Rule 26(g), the lawyer "must become fully familiar with her client's document retention policies [and] data retention architecture"?<sup>272</sup> Is the lawyer really under an obligation to *personally* speak with the client's information technology personnel and the "key players" in the

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268. *Id.* at \*12.

269. *Id.* at \*13.

270. See FED. R. CIV. P. 11(b). See also *Bus. Guides, Inc. v. Chromatic Comm'n. Enterprises, Inc.*, 498 U.S. 533, 548-49 (1991); *In re Pennie & Edmonds, LLP*, 323 F.3d 86, 87-88, 101-02 (2d Cir. 2003) (discussing trial court's finding that the law firm could not reasonably have relied on its client's statements in light of prior perjury and conflicting evidence).

271. Cf. David H. Levitt, *Counsel's Obligations for E-Discovery*, FOR THE DEFENSE, Aug. 2007, at 44 (questioning the list of oversight duties set forth in *Zubulake V.*).

272. *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).

litigation? Rule 26(g) requires the lawyer to make a “reasonable inquiry” before certifying a client’s response, and the Advisory Committee Note elaborates on that concept by saying that “the attorney may rely on assertions by the client . . . as long as that reliance is appropriate under the circumstances.”<sup>273</sup> Are we prepared to say that there is something inherently different about e-discovery that makes it *per se* unreasonable to ever rely on a client’s assertions that it fully understands its own information architecture, that it is looking in all of the right places, and that it has contacted and provided meaningful guidance to all of the key players?

There are also obvious questions of degree. As a matter of good practice, I fully subscribe to the idea that the lawyers who certify discovery responses generally should not just turn to their clients and say, “You did get all this, right?” But the question then becomes how much more inquiry is needed for the inquiry to be reasonable under the circumstances? There is very good reason to tie the inquiry test to the particular circumstances of the case. For some clients, a little bit of guidance coupled with a little bit of follow up might be enough. For others, there may be good reason for the lawyer to take a very hands-on approach.

The reasonableness of outside counsel’s conduct also should take into account other people who might be part of the discovery team.<sup>274</sup> The level of personal involvement required by outside counsel might well depend on whether the client had an in-house legal department, the level of support, involvement, and expertise that the in-house lawyers can provide, and past experience working with that in-house department in discovery. And what about in cases where a vendor has been hired to assist with e-discovery? Would it be enough to rely on the vendor’s assurances? Would we require that the signing lawyer personally instruct and oversee the vendor’s actions? Here too, it would seem that the circumstances would matter very much.

Going forward, courts will need to be sensitive to the implications of their Rule 26(g) rulings. On the one hand, there is an important message to be sent – lawyers are ultimately responsible for ensuring that their clients implement sound preservation, search, and production processes. On the other hand, there is a real danger of interjecting the highest-cost providers – the lawyers – into aspects of the process where they might not always be needed. Materials like the recent report issued by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System serve as important

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273. FED. R. CIV. P. 26(g) advisory committee’s note (1983).

274. See Thomas Allman, *Deterring E-Discovery Misconduct By Counsel Sanctions: The Unintended Consequences of Qualcomm v. Broadcom*, 118 YALE L.J. POCKET PART 161, 164-65 (2009), <http://thepocketpart.org/2009/03/04/allman.html>.



reminders that judges and rulemakers alike must be sure to include cost considerations in the balance when defining discovery obligations.<sup>275</sup>

The battlefield where this balance will play out is going to be sanctions motions where judges are asked to find that lawyers acted *unreasonably* in overseeing their clients' preservation and production processes. Arguments will be made that the certifying lawyer should have done more to ensure that the client preserved everything that needed to be preserved, searched in all the right ways in all the right places, and produced all of the responsive materials. As with any question that asks judges to determine reasonableness after the fact, judges will need to be careful not to be too critical in hindsight.<sup>276</sup> Ultimately, lawyers will do what judges say they must do. The message that judges send will determine whether lawyers come to view themselves as partners in the process, monitors, or babysitters.

#### IV. CONCLUSION

As we all live through the e-discovery evolution (not revolution), it is important to pay attention not just to what e-discovery demands in a technical sense, but also to how it is influencing the practice of law. From the perspective of the lawyer's role in discovery, it would appear that e-discovery has already had two significant effects and might have yet a third.

There can be little doubt that e-discovery has continued the process of front-loading discovery preparation and planning. In one sense, e-discovery completes a process begun in 1993 with the advent of the required initial disclosures. Lawyers must now make heavy investments in their cases at a very early stage of the litigation.

There can also be little doubt that e-discovery has rekindled a desire for cooperation. If the 2006 e-discovery amendments have a theme, it is that neither rules nor judges can solve the qualitative and quantitative problems posed by a world where a seemingly endless amount of information is stored in ever more creative and complicated ways. To prevent the system from collapsing of its own weight, lawyers must fight less and cooperate more. Private reform movements like the campaign to promote *The Cooperation Proclamation* will test whether the lofty ideals they represent are in fact beneficial strategies or empty platitudes.

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275. See *Final Report*, *supra* note 81. By making this observation, I do not mean either to endorse the full contents of the Final Report or to say that cost considerations are dispositive. I mean only to point out that cost considerations do matter – a point I believe to be noncontroversial and enshrined in the Rule 26(b)(2) proportionality provision – and to make explicit the linkage between cost and the extent to which lawyers become personally involved in the preservation, search, and production processes.

276. Cf. *Rhoads Indus., Inc. v. Building Materials Corp. of Am.*, 254 F.R.D. 216, 226-27 (E.D. Pa. 2008) (cautioning against using hindsight to determine whether a party took reasonable steps to screen for privilege).

Finally, e-discovery has prompted a new look – through the lens of the certification requirement under Rule 26(g) – at the lawyer’s role in overseeing the client’s preservation and production processes. At this point, it is far too soon to say exactly what effect e-discovery will have on the lawyer’s role. There is at least the potential, however, for Rule 26(g) to evolve in a way that makes the lawyer – rather than the client – the focal point of the preservation and search process.