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E-DISCOVERY AND CYBERSECURITY

Can Amended Federal Rules Effectively Mandate Cooperation?

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The day is finally at hand. Amendments to the Federal Rules of Civil Procedure will become effective in three short months, on Dec. 1. These amendments, which are intended to build upon the 2006 amendments to the rules, are meant to accomplish several objectives, including promoting effective and efficient case management, encouraging cost-effective and proportional discovery in civil actions, and advancing cooperation among counsel. This last area—cooperation—has been advocated by judges and influential members of the e-discovery community for years, but many practitioners have expressed doubt that such cooperation can be mandated from the top down. While the rules do give courts more leverage in situations where counsel will not cooperate, it remains to be seen whether these changes will spur the paradigm shift for which many judges and experts have been hoping.

Certainly, cooperation among counsel serves several purposes, including reducing initial discovery costs for collection, processing and review; narrowing the issues in litigation; and limiting potentially costly discovery disputes. This is especially true when a case involves e-discovery, because variables in data sources, archiving types, search terms, etc., have the potential to exponentially drive up discovery costs in even the smallest of matters. It makes logical sense, then, that parties should discuss e-discovery early in a case in order to limit pitfalls. Indeed, the drafters of the 2006 amendments to the Federal Rules of Civil Procedure recognized this and made the requirement of cooperation in e-discovery explicit by amending Rule 26(f) to "direct the parties to discuss discovery of electronically stored information during their discovery-planning conference." In reality, however, Rule 16 conferences regarding e-discovery mostly became either cursory discussions where the parties agreed to "work out" any issues that may arise or lengthy battles in their own right regarding format, metadata fields, etc., that occasionally required court intervention. Very few federal judges mandated a specific e-discovery plan to be agreed upon by the parties before the 26(f) conference.

Enter the Sedona Principles on Cooperation (otherwise known as the Cooperation Proclamation) in 2008. In the Cooperation Proclamation, the authors promoted the need for awareness of the advantages of cooperation, the commitment of all "legal system stakeholders" to engage in cooperation, and the need for "toolkits" to train these stakeholders. The proclamation also stated that cooperation is "consistent with zealous advocacy" because it gives clients "the best results at a reasonable cost, with integrity and candor as officers of the court." This document was greeted with great fanfare by judiciary members, who were no doubt weary of hearing

e-discovery disputes of their matters. Only two years after the proclamation was issued, 100 federal and state judges had endorsed it.

Cooperation, however, was slow to gain momentum. The Advisory Committee on the Federal Rules of Civil Procedure's report to the chief justice of the Supreme Court about the 2010 Conference on Civil Litigation at Duke University noted that cooperation was wanted and needed, but indicated it was not yet fully employed. It observed: "The many possibilities for improving the administration of the present rules can be summarized in shorthand terms: cooperation; proportionality; and sustained, active, hands-on judicial case management." In another report on the conference, the committee noted, "Cooperation among adversary counsel is a common theme running through many of these observations. The consensus in favor of promoting cooperation is widespread and fervent."

This 2010 meeting was the beginning of the push to update the rules to include cooperation as a goal. The 2015 amendments make minor changes to Rule 1 (Scope and Purpose) to indicate that the rules "are employed by the court and the parties" to show that the parties share in responsibility for achieving the "just, speedy, and inexpensive determination" espoused in the rule. The real change is in the advisory committee note to Rule 1, which states, "Rule 1 is amended to emphasize that ... the court should construe and administer these rules ... so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage overuse, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure." It adds, "This amendment does not create a new or independent source of sanctions," taking some of the bite out of the amendment.

Similarly, Rule 16 has been re-engineered to encourage direct communication. As the committee note points out, "The provision for consulting at a scheduling conference by 'telephone, mail, or other means' is deleted. A scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means." Finally, the committee note for Rule 26 expresses hope that, even with e-discovery issues, "discovery will be effectively managed by the parties"; however, the note acknowledges that there will be "occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own."

The rules' codification of greater cooperation, however, assumes that counsel have somehow subscribed to what Alexis de Tocqueville called an "enlightened regard for themselves"—in other words, that attorneys on both sides are willing to work for the greater good as a whole even if there are negative outcomes in the short term, firm in the belief that cooperation will ultimately benefit each individual. We are, unfortunately, in an imperfect system with counsel who may be unwilling or unable to meet this goal. "Just, speedy, and inexpensive determination" of every civil action in the federal courts is not always a party's goal, and neither will be sharing information that has historically been treated as attorney work product, such as search terms, custodian interviews for collection, and review protocols.

Any increase in cooperation will necessarily be client-driven. There will, of course, always be situations where clients are interested solely in tenacious counsel who will fight every point for an advantage, strategic or otherwise. Corporate clients, however, are increasingly demanding that their counsel engage cooperatively to reduce discovery costs and minimize disputes. Indeed, companies have long realized that the waste associated with a "scorched earth" approach may not be in their best interest.

While a paradigm shift toward cooperation may be on the legal community's horizon, it does not appear this shift will occur in the immediate future. As with the amendments in 2006, much of this "cooperation debate" will be hashed out in district courts on a day-to-day basis in 2016 and beyond.

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