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Cooperation, Discovery, and Translucency

Last summer, The Sedona Conference® and its first working group—the Working Group on Electronic Document Retention and Production—issued a short document entitled "The Sedona Conference Proclamation." The three-page document calls on all participants in the civil discovery process in the United States to come to discovery with a mind-set that is far removed from the scorched-earth discovery tactics portrayed in movies and is referenced in judicial decisions far too often. The text of the document concludes as follows:

> It is time to build upon modern Rules amendments, state and federal, which address e-discovery. Using this springboard, the legal profession can engage in a comprehensive effort to promote pre-trial discovery cooperation. Our "officer of the court" duties demand no less. This project is not utopian; rather, it is a tailored effort to effectuate the mandate of court rules calling for a "just, speedy, and inexpensive determination of every action" and the fundamental ethical principles governing our profession.

Throughout fall 2008 and spring 2009, the proclamation has been gaining increasing visibility. The document has been cited in six separate decisions, including *William A. Gross Constr. Assocs. Inc. v. American Mfrs. Mut. Ins. Co.*, No. 07 Civ. 10639, 2009 WL 724954 (S.D.N.Y. Mar. 19, 2009) and *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008)—cases that call on the bar to rethink how clients and lawyers approach discovery issues. The proclamation has also been cited in more than 20 blogs or articles on the topic. Notably, as of Jan. 31, 2009, 42 sitting judges and two retired judges had specifically endorsed the proclamation.

On March 11, 2009, the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver and the American College of Trial Lawyers (ACTL) Task Force on Discovery released a series of proposed principles. One of the core drivers with respect to discovery principles was the view that discovery costs far too much and has become an end in itself. Much of the solution the IAALS and ACTL has proposed focuses on the proposition that discovery should be limited by proportionality, taking into account the nature and scope of the case, relevance, importance to the court's adjudication, expense, and burdens placed on the court and the parties involved in the case. And now for the reality check for litigators as well as clients and courts: What does this proposal mean in practice? I do not profess to have a "magic bullet" for an answer, but I suggest that we all consider three guideposts: relevance, translucency, and perspective.

Relevance

There is no greater governing mechanism on the scope and breadth of discovery than the fundamental concept of relevance. Even at the far ends of court-approved discovery in the federal system litigants can get discovery of information only if it is "reasonably calculated to lead to the discovery of admissible evidence," which, of course, explicitly suggests that the information must be relevant (as it would need to be in order to be admitted at trial). Too often lawyers simply have not given sufficient care and thought to "what really matters" in a case to distill the claims and defenses into a concept of relevance that can be applied to a case and its attendant discovery.

Whether through "early case assessment" (a term that has taken on mythic proportions) or other means, lawyers and litigants who succeed in taming discovery are more likely than not those who present targeted requests and provide objections and responses based on a superior understanding of the core relevance of the issues in the case to the discovery at hand.

Translucency

Many articles and documents, including the "Sedona Cooperation Proclamation," use the word "transparent" or an equivalent to describe the discovery process. The document itself states the following: "With this Proclamation, The Sedona Conference® launches 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." I respectfully disagree with this word choice and think that promoting transparency may be creating more fear than openness, and the goal may also be simply wrong. Lawyers and their clients must be allowed—indeed encouraged—to have a free and frank dialogue

about discovery issues (such as preservation, collection, and production of documents) that are confidential and should remain confidential. True transparency would mean that adversaries would have the same level of access to clients and data, substantially changing the structure of the discovery process. Such a development could substantially chill the exchange of information with counsel that ultimately helps ensure adequate preservation and production of documents and electronically stored information.

The more accurate concept and terminology that should be broached with clients is an odd, four-syllable word: "translucency." The 10th edition of *Merriam Webster's New Collegiate Dictionary* defines "translucent" first as "permitting the passage of light"; the second definition is "transmitting and diffusing light so that objects beyond cannot be seen clearly"; and, perhaps most fitting in this case, the third definition is "free from disguise or falseness."

Neither clients nor counsel have to fear that their adversaries can sit down and rifle through cabinets, search endlessly on computers, meet and confer without bounds, and question witnesses without end on any topic under the blanket of "transparency." To be sure, counsel need to be prepared to intelligently disclose and discuss much more information about discovery processes than was expected 10 years or even five years ago. That aspect is critical to building trust and resolving disputes efficiently. But the process has contours, and clients need to be assured that their confidences that are properly within the scope of the attorney-client privilege will be protected.

Perspective

Limited discovery by proportionality is not a new idea. The Federal Rules of Civil Procedure have contained specific provisions related to proportionality since 1983, and Rule 1 itself has consistently championed the concept. And the IAALS and ACTL highlight this concept and the critical need for lawyers, litigants, and judges to embrace the idea.

Never before has it been possible for discovery costs to escalate beyond reason so easily and quickly if they are not controlled and placed into context. Although there is no doubt "a story behind the case," the *In re Fannie Mae Securities Litigation* decision, 552 F.3d 814 (D.C. Cir. 2009), quickly comes to mind when considering the rising cost of discovery. In this case, the Office of Federal Housing Enterprise Oversight ended up spending 9 percent of its annual budget (more than $6 million) in order to comply with a Rule 45 subpoena. Setting aside the reasons why the D.C. Circuit did not disturb the district court's rulings, it is apparent to most people that parties should not be required to consume such extraordinary resources in order to comply with discovery obligations absent extraordinary circumstances that might compel them to do so.

The bottom line is to always seek to place discovery into the context of the case at hand and the parties involved. Consider what you truly need, not just what you want. Think about tiering or staging discovery to focus on the most important discovery that can help lead to the resolution of the case before discovery costs spread like a wildfire. Meet and confer early to identify discovery requirements that will be truly burdensome and onerous, and be prepared either to justify the need if you are seeking such discovery or to obtain relief if the burdens are falling on your client. And never lose sight of Rule 1. **TFL**

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the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements; (2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, minitrials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently; and (3) the continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in the Federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs.'"
Alternative Dispute Resolution Act of 1998; findings and declaration of policy. Act Oct. 30, 1998, P.L. 105-315, § 2, 112 Stat. 2993.

[3]Abraham Lincoln, *Notes on the Practice of Law*, LINCOLN: SPEECHES AND WRITINGS 1832–1858 (The Library of America, 1989).