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THE CASE FOR COOPERATION

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EXECUTIVE SUMMARY

The Sedona Conference® issued its *Cooperation Proclamation* in 2008. The *Proclamation* initiated a comprehensive nationwide effort to promote the concept of cooperation in pretrial discovery. The *Proclamation* calls for information sharing, dialogue, training, and the development of tools to facilitate cooperative, collaborative, and efficient discovery. The *Proclamation* has been well received, especially by those judges who regularly confront discovery disputes that could be avoided by cooperative conduct among counsel. Indeed, nearly one hundred state and federal judges have already endorsed the *Proclamation* and the number continues to grow.

Cooperation in this context is best understood as a two-tiered concept. First, there is a level of cooperation as defined by the Federal Rules, ethical considerations and common law. At this level, cooperation requires honesty and good faith by the opposing parties. Parties must refrain from engaging in abusive discovery practices. The parties need not agree on issues, but must make a good faith effort to resolve their disagreements. If they cannot resolve their differences, they must take defensible positions.

Then, there is the second level. While not required, this enhanced cooperative level offers advantages to the parties. At this level, the parties work together to develop, test and agree upon the nature of the information being sought. They will jointly explore the best method of solving discovery problems, especially those involving electronically stored information ("ESI"). The parties jointly address questions of burden and proportionality, seeking to narrow discovery requests and preservation requirements as much as reasonable. At this level, cooperation allows the parties to save money, maintain greater control over the dispersal of information, maintain goodwill with courts, and generally get to the litigation's merits at the earliest practicable time.

* The *Case for Cooperation* was the subject of robust dialogue at two meetings of The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1), and we thank all of the WG1 members who contributed to the dialogue vastly improving this paper. In addition, we wish to acknowledge editorial contributions from The Hon. Shira A. Scheindlin (SD NY), Hon. James M. Rosenbaum (D MN), and Prof. Steve Gensler (U of OK School of Law). We also want to thank Jeannine Kenney, an associate who works with William Butterfield, for her research and assistance in preparing this paper. Finally, we wish to acknowledge our Working Group Series Sustaining and Annual Sponsors, whose generous support enables us to pursue our Working Group Series activities (see www.thesedonaconference.org/content/sponsorship for a listing of our WGS Sponsors).

The line between the first and second level cooperation is, of necessity, difficult to draw. There is no precise definition of "cooperation," as there are no precise definitions of good faith or reasonableness. However, absent a more cooperative posture in the discovery process, the cost of litigation and the burden imposed as courts are forced to attempt to resolve more and more discovery disputes, will ultimately bring the system to a halt.

Discovery disputes have existed since discovery began. But ESI has vastly increased the quantities of available information and the way it can be accessed. With almost all information electronically created and stored, there has been an exponential increase in the amount of information litigants must preserve, search, review, and produce. ESI is often stored in multiple locations, and in forms difficult and expensive to retrieve. These reasons compel increased transparency, communication, and collaborative discovery. The alternative is that litigation will become too expensive and protracted in a way that denies the parties an opportunity to resolve their disputes on the merits. As a result, in order to preserve our legal system, cooperation has become imperative.

Such cooperation is not in conflict with the concept of zealous advocacy. Cooperation is not capitulation. Cooperation simply involves maintaining a certain level of candor and transparency in communications between counsel so that information flows as intended by the Rules. It allows the parties to identify those issues that truly require court intervention. The parties may not always agree, but with cooperation their real disputes can be addressed sooner and at lower cost. As discussed in this paper, the concept of discovery cooperation is not new. It finds support in the Federal Rules of Civil Procedure, ethical standards, court decisions, economic considerations, and common sense. In a survey of 2,690 attorneys recently involved in federal litigation, more than 90% of respondents, representing both plaintiffs and defendants, "agreed" or "strongly agreed" with the statement, "[a]ttorneys can cooperate in discovery while still being zealous advocates for their clients."

This Cooperation initiative is being implemented in stages. First came The Sedona Conference's® *Proclamation*, which alerted stakeholders to the need for cooperation and its advantages. The announcement was an expression of support for the concept. Now, in this paper, we offer arguments supporting cooperation. The final stage will provide practical examples to train and support lawyers, judges, and others in cooperative discovery techniques. Using these steps, The Sedona Conference® will offer solutions to many of the problems associated with contemporary discovery, and allow litigants to devote their resources toward a resolution of their disputes on the merits.

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I. OVERVIEW

"If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes."
— Judge Wayne E. Alley in Krueger v. Pelican Products Corp.[1]

Although lawyers may be relieved that Judge Alley's authority does not extend beyond the mortal confines of the courtroom, his comments signal a shared and growing distaste, if not disdain, by judges for the cost, delay, and disruption resulting from unnecessary or abusive discovery disputes.[2] That *Krueger* was decided twenty years ago, prior to the explosion of routine electronic communications, demonstrates that the problem is not new. However, the advent of electronically stored information ("ESI") has dramatically exacerbated the problem, increasing the volume of potentially discoverable material, the complexity and cost of the discovery process, and the opportunities for not only unduly burdensome and overly broad discovery requests, but also responses and production that obfuscate and evade. "Hide the ball" has become "hide the byte."

As this paper argues, the growth in ESI has not changed the obligation of cooperation in discovery that attorneys owe to the court and opposing counsel under both the Federal Rules of Civil Procedure and the rules of professional conduct.[3] Those obligations have long existed and were reinforced with respect to electronic discovery by the 2006 Amendments to the Rules.[4] However, the explosion of ESI has made the development of parameters to guide cooperation in discovery more essential than ever. The complexity of ESI has created uncertainty over what constitutes cooperation and good faith regarding preservation, search, review, and production. Additionally, the magnitude of the ESI has dramatically increased costs to the judicial system generally, and clients, specifically. Cooperation can help mitigate both difficulties.

Cooperation in this context is best understood as a two-tiered concept. First, there is a level of cooperation as defined by the Federal Rules, ethical considerations, and common law. At this level, cooperation requires honesty and good faith by the opposing parties. Parties must refrain from engaging in abusive discovery practices. The parties need not agree on issues, but they must make a good faith effort to resolve their disagreements. If they cannot resolve their differences, they must take defensible positions.

Then, there is the second level of cooperation. While not required, this enhanced cooperative level offers advantages to the parties. At this level, the parties work together to develop, test, and agree upon the nature of the information being sought. They will jointly explore the best method of solving discovery problems, especially those involving ESI. The parties jointly address questions of burden and proportionality, in order to narrow discovery requests and preservation requirements as much as reasonable. At this level, cooperation allows the parties to save money, maintain greater control over the dispersal of information, maintain goodwill with courts, and address the litigation's merits at the earliest practicable time.

The line between first and second level cooperation is, of necessity, difficult to draw. There is no precise definition of "cooperation," as there are no precise definitions of good faith or reasonableness. However, counsel understand that absent a more cooperative posture in the discovery process, the cost of litigation and the burden imposed as courts are forced to attempt to resolve disputes, will ultimately bring the system to a halt.

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1 *Krueger v. Pelican Products. Corp*., C/A No. 87-2385-A (W.D. Okla. 1989).

2 Judge Alley's opprobrium has been quoted in *Dahl v. City of Huntington Beach*, 84 F.3d 363, 364 (9th Cir. 1996), *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 361 n.3 (D. Md. 2008) and *Network Computing Servs. v. Cisco Sys., Inc.*, 223 F.R.D. 392, 395 (D.S.C. 2004). *See also* W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 895, 906 (1996) (noting courts are "imposing public duties upon lawyers in discovery that . . . have content and carry severe sanctions for their violation" and noting that discovery conduct is provoking judicial backlash).

3 As discussed more fully *infra* Part II, the Federal Rules presume cooperation in discovery. *See, e.g.,* Fed. R. Civ. P. 1, 1993 Advisory Committee Note (noting that Rule 1 imposes on attorneys a shared responsibility to ensure that civil litigation is resolved without undue cost or delay).

4 For example, Rule 26(f)(3) was amended to include in the 26(f) conference any issues relating to preservation, disclosure, or discovery of ESI and the form in which it should be produced. *See* Fed. R. Civ. P. 26 (f), 2006 Advisory Committee Note.

One commentator has visualized these tiers of cooperation as concentric circles forming a target with a "bull's eye" in the center. An outer ring is what the rules clearly require. An inner ring goes beyond the requirements to the level of cooperation that can be achieved with creative energy applied to mutual self-interest. The rules require that attorneys hit the target somewhere, but make it clear that attorneys should aim for the center.[5]

A. The Costs of Unnecessary Discovery Disputes

Unnecessary discovery battles affect not just judicial tempers, increasing the likelihood of sanctions, but also impair the functioning of the judicial system by overburdening already stretched courts,[6] preventing adjudication of meritorious claims or forcing settlement of meritless ones due to excessive costs,[7] and undermining the very purpose for which discovery obligations exist — to allow adjudication on the merits.[8] Clients ultimately bear the costs of responding to lengthy and often repetitive or overly broad interrogatories and document requests — and boilerplate objections to them — or of sifting through reams of unresponsive electronic and physical documents, followed, in many cases, by time-consuming motion practice and hearings.[9] Substantively, the client may be no better off upon resolution of the dispute by the court since parties often find themselves in the same position they would have been in had they cooperated at the outset.[10]

But client costs may extend beyond financial outlays from drawn-out disputes. For example, failure of counsel to evaluate whether a discovery request is reasonable and not unduly burdensome before making it, or objecting to requests with boilerplate rather than fact-based objections, can warrant sanctions that impair adjudication on the merits, such as deeming facts admitted or objections waived.[11] Where counsel has not cooperated to identify appropriate parameters for electronic discovery, courts may reject later claims that discovery is overbroad, forcing unnecessary discovery costs on the client.[12]

B. The Benefits of Cooperation for E-Discovery

The appropriate level of transparency and communication with opposing counsel on the thorny issues involved in e-discovery can provide some degree of protection from the costs and potential sanctions that may result from lack of cooperation. For example, transparency and cooperation in initial phases of discovery may help identify both what must be preserved and the routine destruction policies in place that may help establish good faith if destruction is later challenged,[13] avoiding costly delays and possible spoliation sanctions. Good faith efforts to identify the sources and custodians of relevant ESI early in discovery and communication of that information to opposing counsel may help to not only avoid subsequent duplicative and costly searches, but also may rebut inferences of bad faith in discovery planning or intentional suppression of information if additional relevant sources are later identified. Early, transparent discussions on data storage systems

5 *See* Steven S. Gensler, *A Bull's-Eye View of Cooperation in Discovery*, 10 Sedona Conf. Journal at 370-372 (2009 Supp.).

6 *See* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 508 (2000) (noting the number of opinions in which courts have addressed discovery disputes has risen significantly compared with the prior decade).

7 *See* Final Report, Joint Project of the American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System (2009), *available at* http://www.actl.com/AM/Template.cfm?Section=Advanced_Search&section=PR_2009&template=/CM/ContentDisplay.cfm&ContentFileID=889.

8 *See* Wendel, *supra* note 2, at 906 n.41.

9 *See, e.g.*, Gary E. Hood, *Refuse to Play the Game: An Alternative Document Production Strategy in Intellectual Property Litigation*, 16 INTELL. PROP. & TECH. L. J. 1+, 1–2 (2004) (discussing the routine nature of lengthy discovery disputes in intellectual property litigation).

10 For example, in *Mancia v. Mayflower Textile Servs. Co.*, after several sets of interrogatory and document requests, four months of motions practice, and a court hearing on discovery violations, the court ordered parties to develop a discovery budget, determine whether additional discovery sought could be provided from less duplicative and expensive sources, attempt to reach agreement on additional discovery, including phased discovery, provide a status report to the court on any disputes, and if necessary return to the court for resolution. *See* 253 F.R.D. 354, 364-65 (D. Md. 2008). The outcome — an order for cooperation and communication — put the parties in nearly the same positions they would have been in had the disputes not ensued. *See id.*

11 *Id.* at 357 (noting Fed. R. Civ. P. 26 (g) requires counsel to certify that a discovery request, response, or objection is consistent with the rules of procedure, is not made to delay or increase the costs of litigation, is not unreasonably burdensome or expensive, and that violation is subject to sanction). The *Mancia* court noted that making boilerplate objections without identifying the specific basis for the objections is prima facie evidence of a Rule 26(g) violation and grounds for finding the objection waived. *Id.* at 358-59. *See also* Wendel, *supra* note 2, at 912-13 (discussing *Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242, 1246 (9th Cir. 1981) in which the court upheld the sanction of finding a fact admitted when defendants submitted a boilerplate response to admission requests and found such responses abused discovery and were not consistent with the requirement of good faith).

12 *See Kipperman v. Onex Corp.*, 2008 WL 4372005, at *8 (N.D. Ga. Sept. 19, 2008) (rejecting defendants objections that plaintiffs' requested e-mail search was burdensome where the court had previously offered defendants the opportunity to narrow the search terms).

13 Fed. R. Civ. P. 26(f) (parties must discuss issues regarding preserving discoverable information). *See also id.* 37(e) (absent exceptional circumstances, sanctions may not be imposed for failing to provide ESI lost due to routine, *good faith*, operation of an ESI system) (emphasis added).

employed by the parties puts each on notice as to what information may not be reasonably accessible, possibly avoiding the need for later motions to compel and post hoc explanations as to why documents were not produced.[14] Additionally, consultation about technical issues that arise in discovery can avoid later inferences of bad faith.[15] Further, transparency may establish the form in which a party normally maintains ESI, potentially avoiding disputes over whether data should have been produced in native format.[16]

Courts increasingly recognize that "electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI."[17] For instance, working cooperatively with opposing counsel to identify a reasonable search protocol, rather than making boilerplate objections to the breadth of a requested protocol or unilaterally selecting the keywords used without disclosure to opposing counsel,[18] may help avoid sanctions or allegations of intentional suppression. Indeed, because knowledge of the producing party's data is usually asymmetrical, it is possible that refusing to "aid" opposing counsel in designing an appropriate search protocol that the party holding the data knows will produce responsive documents could be tantamount to concealing relevant evidence.[19]

C. Cooperation in Discovery and Zealous Advocacy Are Not Conflicting Concepts

Still, from the perspective of many practitioners, abandoning a purely adversarial stance during discovery in favor of cooperation appears antithetical to the concept of zealous advocacy.[20] This paper demonstrates that cooperation — in the sense intended by the *Proclamation* — and zealous advocacy are not conflicting concepts under professional conduct rules. Cooperation requires neither conceding nor compromising the client's interests. Nor does it require foregoing court resolution of *legitimate* discovery disputes. Court criticism has centered on *unnecessary* disputes — those that could have been avoided by cooperating and communicating according to procedural and ethical obligations — rather than those arising from good faith disagreements about the parameters and progress of discovery that may require court intervention. Cooperation avoids unnecessary disputes and violation of ethical rules while preserving for court resolution of those disputes that cannot be resolved through good faith cooperation.

Cooperation, as envisioned by the *Proclamation*, requires, for example, that counsel adequately prepare *prior* to conferring with opposing counsel to identify custodians and likely sources of relevant ESI, and the steps and costs required to access that information. It requires disclosure and dialogue on the parameters of preservation. It also requires forgoing the short term tactical advantages afforded one party by information asymmetry so that, rather than evading their production obligations, parties communicate candidly enough to identify the appropriate boundaries of discovery. Last, it requires that opposing parties evaluate discovery demands relative to the amount in controversy. In short, it forbids making overbroad discovery requests for purely oppressive, tactical reasons, discovery objections for evasive rather than legitimate reasons, and "document dumps" for obstructionist reasons. In place of gamesmanship, cooperation substitutes transparency and communication about the nature and reasons for discovery requests and objections and the means of

14 Fed. R. Civ. P. 26 (b)(2)(B) provides that parties need not provide discovery of ESI that is not reasonably accessible due to undue burden or cost.

15 *See In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 662 (M.D. Fla. 2007) (shielding technical staff from opposing party rather than cooperating by fostering consultation "is not an indicum of good faith").

16 Fed. R. Civ. P. 34 (b)(2)(E) (party must produce ESI in the form in which it is ordinarily maintained).

17 *William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009). *Accord Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 112 (2d Cir. 2002) ("as a discovery deadline or trial date draws near, discovery conduct that might have been considered 'merely' discourteous at an earlier point in the litigation may well breach a party's duties to its opponent and to the court"); *In re Seroquel*, 244 F.R.D. at 662 (party was obligated to cooperate with opposing counsel to identify key word protocol rather than unilaterally selecting limited terms); *Bush Ranch v. Du Pont,* 918 F. Supp. 1524, 1543 (M.D. Ga. 1995) ("It is the obligation of counsel under the rules, as officers of the court, to cooperate with one another so that in pursuit of truth, the judicial system operates as intended."); *Marion v. State Farm Fire and Cas. Co.*, 2008 WL 723976, at *3-4 (S.D. Miss. Mar. 17, 2008) ("This Court demands the mutual cooperation of the parties. It hopes that some agreement can be reached . . . this Court will [not] hesitate to impose sanctions on any one-party or counsel or both - who engages in any conduct that causes unnecessary delay or needless increase in the costs of litigation.").

18 *See In re Seroquel*, 244 F.R.D. at 662.

19 In a survey of 2,690 attorneys recently involved in federal litigation, more than 90% of respondents, representing both plaintiffs and defendants, "agreed" or "strongly agreed" with the statement, "[a]ttorneys can cooperate in discovery while still being zealous advocates for their clients." Emory G. Lee III & Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey, 62-63 (Federal Judicial Center October 2009), *available at* http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage!openform&url=/library/fjc_catalog.nsf/DPublication!openform&parentunid=363B0DBDB772C35D85257648007A18B7. At least one commentator, Jason R. Baron, has argued that in circumstances where a party is certain that opposing counsel's proposed search protocol would not capture documents it knows would be responsive violates Rule 3.4 of the Model Rules of Professional Responsibility by failing to suggest or use additional search terms that would result in production; such conduct is tantamount to suppression. *See* Symposium, *Ethics and Professionalism in the Digital Age: Ninth Annual Georgia Symposium on Ethics and Professionalism*, 60 Mercer L. Rev. 863, 877 (2009).

20 Model R. Prof'l Conduct Preamble Paragraph 2 (2006).

resolving disputes about them. In at least twelve recent decisions, jurists have recognized the need for discovery cooperation and cited with approval the *Cooperation Proclamation*.[21]

As noted in the Overview section of this paper, to understand what is meant by the word "cooperation" in this context, it is useful to think of a two-tiered approach. First, there is a level of cooperation required by the Federal Rules, ethical considerations and common law. This limited level of cooperation requires communication and good faith by parties.[22] It requires that parties refrain from engaging in abusive discovery practices. It does not require agreement on issues, but it requires that parties take defensible positions if agreement cannot be reached.[23] But there is also a second level of cooperation. While not specifically required, this enhanced level of cooperation is usually advantageous for parties. As noted by one commentator, this enhanced level of cooperation "urges [parties] 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."[24] Thus, parties engaging in this level of cooperation will work together to develop and test search criteria. They will jointly explore the best method of solving difficult problems like data discovery. They will address burden and proportionality by seeking to narrow discovery requests and preservation requirements as much as is reasonable. Through such cooperation, parties save money, maintain more control over what information is disseminated, engender good will with courts, and generally get to the merits of litigation much sooner.

This paper lays out the legal and ethical foundations for the duty to cooperate in discovery and the economic case for cooperation independent of those foundations. It begins with a discussion of cooperation required, either expressly or impliedly, by the Federal Rules of Civil Procedure. Second, it presents professional conduct rules that embody the duty to cooperate and discusses illusory conflicts with other professional conduct rules. It argues that the concept of zealous advocacy, properly understood as bounded by an attorney's duties as an officer of the court and to follow the law, does not conflict with the duty to cooperate in discovery. Third, evolving legal authority for the duty to cooperate is presented through a discussion of recent case law that addresses, in particular, cooperation in electronic discovery and growing court frustration with bad faith litigation conduct. A discussion of the practical reasons for cooperation — economic and strategic benefits — concludes the analysis.

II. THE FEDERAL RULES OF CIVIL PROCEDURE ASSUME COOPERATION IN DISCOVERY

A. The Evolution of American Discovery Procedures

The Federal Rules of Civil Procedure do not explicitly require counsel to cooperate in discovery, but the duty is implicit in the structure and spirit of the Rules. Indeed, the liberalization of discovery beginning in 1938 with the adoption of the Rules was designed to promote the resolution of disputes. Such resolution was intended to be based on facts underlying the claims and defenses with a minimum of court intervention, rather than on gamesmanship that prevented those facts from coming to light entirely or at least far too late in the process to serve the fair and efficient administration of justice. A brief look at the history of the modern Federal Rules makes clear that cooperation has been an essential element of the logic underlying them.

The modern Federal Rules were adopted in reaction to the pre-1938 system. Prior to 1938, lawyers prepared for trial principally through a process of formal pleadings, with complex rules for

21 *See Capitol Records, Inc. v. MP3tunes, LLC*, 2009 WL 2568431, at *2 (S.D.N.Y. Aug. 13, 2009); *In re Direct Sw., Inc., Fair Labor Standards Act (FLSA) Litig.*, 2009 WL 2461716, at *1, 2 (E.D. La. Aug. 7, 2009); *Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n*, No. 3:07-cv-449, 2009 WL 2243854, at *2 (S.D. Ohio July 24, 2009); *Dunkin' Donuts Franchised Rests. LLC v. Grand Cen. Donuts, Inc.*, 2009 WL 1750348, at *4 (E.D.N.Y. June 19, 2009); *Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418, 424-25, 427 (D.N.J. May 19, 2009); *Neuman v. Borders, Inc.*, 257 F.R.D. 1, 3 (D.D.C. Apr. 6, 2009); *William A. Gross Const. Associates, Inc. v. American Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. March 19, 2009); *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 415 (S.D.N.Y. Jan. 13, 2009); *Covad Commc'ns. Co. v. Revonet, Inc.*, 254 F.R.D. 147, 148-49 (D.D.C. Dec. 24 2008); *Gipson v. Sw. Bell Tel. Co.*, Civ. No. 08-2017, 2008 U.S. Dist. LEXIS 103822, at *4 (D. Kan. Dec. 23, 2008); *Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350, 353-56, 358-59, 362 (S.D.N.Y. Nov. 21, 2008); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 359, 363 (D. Md. 2008).; *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 363 (D. Md. 2008).

22 See discussion *infra* Parts II, III, and IV. *See also* Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 550 (2009).

23 *See* Gensler, *supra* note 22, at 552.

24 *Id.* at 556.

replies and responses that put a premium on gamesmanship at the expense of concealing critical facts until trial.[25] Attorneys relied primarily on an opponent's pleadings for discovery, without much disclosure.[26] By contrast, the new Rules allowed counsel to discover information about the opponent's case before trial through the devices outlined in the Rules. As the Supreme Court has recognized, the more liberal approach to discovery made "trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[27]

> The Court has also noted that these new instruments of discovery were designed to serve
>
> (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark.[28]

In the first set of amendments to Rule 26 in 1946, the Advisory Committee sought to clarify that the "purpose of discovery is to allow a broad *search* for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case."[29]

> In *Hickman v. Taylor*, the Supreme Court identified the value of pre-trial discovery:
>
> The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial. . . . Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.[30]

The Court further cautioned that counsel may not hide "any material, non-privileged facts" from the opposing party.[31] Reflecting a core principle underlying the *Cooperation Proclamation*, the Court recognized that the inherent role of "a lawyer [as] an officer of the court" requires attorneys to "work for the advancement of justice while faithfully protecting the rightful interests of his clients."[32] By permitting disclosure of even privileged information in some circumstances, the Court struck a balance between the ostensibly competing duties of attorneys to the court and to their clients. It noted that a chief objection to liberal discovery — that it promotes a fishing expedition — had been rejected because of the mutual benefits of discovery.[33]

Discovery was further liberalized in 1970 when the requirement to show "good cause" to obtain discovery under Rule 34 was eliminated.[34] Other 1970 changes in the mechanics of discovery were designed "to encourage extrajudicial discovery with a minimum of court intervention,"[35] preserving, of course, the ultimate authority of the courts to "limit discovery in accordance with [the] rules" even as to matters within the scope of Rule 26(b).[36] The rules thus contemplated that while discovery was to be managed largely by the parties, courts may intervene to limit or otherwise manage discovery when necessary.

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25 *See Moore's Federal Practice,* Paragraph 26.02 at 26-31 (3d. ed. 2008).
26 *See* George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, 28 (2007), *available at* http://law.richmond.edu/jolt/v13i3/article10.pdf.
27 *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).
28 *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).
29 Fed. R. Civ. P. 26, 1946 Advisory Committee Note (emphasis added) (citing case law for the proposition that the Rules "permit 'fishing' for evidence as they should").
30 329 U.S. at 507.
31 *Id.* at 513.
32 *Id.* at 510.
33 *See id.* at 508 n.8.
34 *See* Fed. R. Civ. P. 34, 1970 Advisory Committee Note.
35 *Margel v. E.G.L. Gam Lab Ltd.*, 2008 U.S. Dist. LEXIS 41754, at *10 (S.D.N.Y. May, 29 2008) (citing Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 2288 at 655-56 (2d ed. 1994)).
36 Fed. R. Civ. P. 26, 1970 Advisory Committee Note.

In 1980, the Rules were amended to address growing concerns with discovery abuse. Despite the intent that liberalized discovery rules would advance the interests of fair administration of disputes, concern mounted that adversarial, rather than cooperative, conduct drove the process. In a landmark 1978 law review article, Magistrate Judge Wayne Brazil of California made an impassioned plea for substantial changes to both procedural and ethical standards. Such changes, he argued, were necessary and appropriate because:

> The adversary character of civil discovery, with substantial reinforcement from the economic structure of our legal system, promotes practices that systematically impede the attainment of the principal purposes for which discovery was designed. The adversary structure of the discovery machinery creates significant functional difficulties for, and imposes costly economic burdens on, our system of dispute resolution.[37]

Specifically, along with more far-reaching recommendations, Brazil proposed, "shifting counsel's principal obligation during the investigation and discovery stage away from partisan pursuit of clients' interests and toward the court [and] expanding the role of the court in monitoring the execution of discovery."[38]

Beginning in 1980, a series of amendments to Rule 26 addressed discovery abuses. The amendments encouraged cooperation by suggesting — and later requiring — parties to "meet and confer" to, *inter alia*, develop a discovery plan.[39] By 1993, parties were made *jointly* responsible for development of the discovery plan and "for attempting in good faith" to agree to one.[40] When good faith discussions failed to produce an agreement, the Rule contemplated that parties may seek court assistance.[41] However, court intervention should be invoked only after "counsel . . . has attempted without success to effect with opposing counsel a reasonable program or plan for discovery."[42] Narrow disputes were not to be resolved by resorting to requests for protective orders or conferences with the court.[43] The Advisory Committee observed that parties' discovery obligations are intertwined with the underlying goal of the Federal Rules to promote the administration of justice:

> Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay. As a result . . . the rules have not infrequently been exploited to the disadvantage of justice. These practices impose costs on an already overburdened system and impede the fundamental goal of the just, speedy, and inexpensive determination of every action.[44]

The amendments also provided courts with explicit authority to sanction parties who failed to meet their obligations to engage in "good faith" discovery planning.[45]

Acknowledging the reality that the discovery process "cannot always operate on a self-regulating basis," Rule 26(b)(1) was amended to address overbroad and unnecessary discovery, and introduce the notion of proportionality, intending "to encourage judges to be more aggressive in identifying and discouraging discovery overuse."[46] The amendments also recognized the duties of counsel to "reduce repetitiveness and *oblige lawyers to think through their discovery activities in advance*

37 Wayne Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1296 (1978).
38 *Id.* at 1349.
39 Rule 26(f) was added to the Federal Rules in 1980 to provide parties with a means for judicial intervention when facing abusive discovery tactics. *See* Fed. R. Civ. P. 26(f), 1993 Advisory Committee Note. The Rule was initially designed as an elective procedure used only in special cases upon a party's request. *See id.* In 1993, the Rule was amended to require all parties to meet as soon as practicable and formulate a discovery plan for submission to the court. *See id.* A 2006 amendment explicitly required the Rule 26(f) conference to include discussion regarding discovery of ESI and assertion of privileges in cases where those topics apply. *See id.*, 2006 Advisory Committee Note.
40 Fed. R. Civ. P. 26 (f)(2).
41 *See id.*, 1993 Advisory Committee Note.
42 *Id.*, 1980 Advisory Committee Note.
43 *See id.*
44 *Id.*, 1983 Advisory Committee Note (citations and quotations omitted).
45 *Id.* 37(f).
46 *Id.* 26(b), 1983 Advisory Committee Note.

so that full utilization is made of each deposition, document request, or set of interrogatories."[47] Recognizing again that discovery is not to be used as an adversarial tool, but instead to ensure the administration of justice, the Advisory Committee noted that discovery was not to be used to "wage a war of attrition or as a device to coerce a party."[48] Finally, by imposing on counsel the duty to sign each discovery request, response, or objection and, thus certify the reasonableness of each, Rule 26(g) imposed "an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes" of the Rule.[49] With false certification subject to sanctions and a determination of reasonableness ultimately in the hands of the court, the amended Rule reflected the role of the courts as a backstop when parties failed to meet their obligations rather than to diminish those obligations: "If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse."[50]

In 1993, Rule 26(f) was amended to omit provisions requiring a court scheduling conference after the parties met and conferred, reserving judicial supervision of the timing, scope, and extent of discovery until after the parties had conferred.[51] Former subdivision (f) "envisioned the development of proposed discovery plans as an optional procedure,"[52] whereas the new Rule directed, with few exceptions, "in all cases . . . litigants must meet . . . and plan for discovery" prior to submitting proposals to the court.[53] The Rule requires parties to "attempt in good faith to agree on the contents of the proposed discovery plan."[54]

In 2000, the scope of Rule 26(a) disclosures was narrowed to information the party intended to use to support its claims or defenses.[55] While courts retained ultimate authority over the scope of discovery, the Advisory Committee Note makes clear that cooperation prior to court intervention was the expectation of the rule:

> The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. *In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention*. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action.[56]

Principles of party cooperation were carried forward in the 2006 amendments to Rule 26(f), directing parties to discuss issues relating to ESI, including the form in which it should be produced.[57]

It can hardly be questioned that the amendments subsequent to Judge Brazil's 1978 critique did not fully mitigate adversarial, rather than cooperative, discovery conduct.[58] However, a failure of the parties to comply with their obligations to cooperate, and of courts to enforce those obligations, does not negate the inherent obligation to cooperate embodied in the Rules. As discussed below, courts faced with complex and confrontational e-discovery disputes have increasingly recognized that obligation. The following section discusses in more detail the specific Rules that impliedly assume cooperation.

B. The Federal Rules of Civil Procedure Assume Cooperation

Consistent with the history just described, a careful analysis of the Federal Rules of Civil Procedure demonstrates that the Rules both promote and assume cooperation in discovery between

47 *Id.* (emphasis added).
48 *Id.*
49 *Id.* 26(g), 1983 Advisory Committee Note.
50 *Id.*
51 *See id.* 26(f), 1993 Advisory Committee Note.
52 *Id.*
53 *Id.*
54 *Id.*
55 *See id.* 26(a)(1), (b)(1), 2000 Advisory Committee Note.
56 *Id.* 26(b)(1) (emphasis added).
57 *See id.* 26(f), 2006 Advisory Committee Note.
58 *See, e.g.,* Beckerman, *supra* note 6, at 513 (arguing that "civil discovery suffers from conceptual inconsistencies and structural flaws" requiring far-reaching changes to the rules).

litigating parties throughout the litigation. While the Rules do not always precisely define how and when cooperation is expected in the context of discovery, their framework identifies both how and why cooperation is assumed. The specific Federal Rules of Civil Procedure that provide a framework for the expectation of cooperation during discovery include Rules 1, 26, and 37.[59]

Rule 1 directs that all of the Rules be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[60] Thus, because cooperation in discovery can reduce both the duration of the discovery period and its costs, specific Rules governing discovery that require good faith discussions and conduct should be construed to promote cooperation. Moreover, Rule 1 reinforces the primacy of attorneys' obligations to ensure the objectives of the Rules are achieved — the Advisory Committee Note directs that attorneys, "as officers of the court," share responsibility with the court to ensure that "civil litigation is resolved not only fairly, but also without undue cost or delay."[61] Cooperation by counsel to conduct discovery, particularly electronic discovery, efficiently and in good faith to ensure information sought and produced is consistent with fair administration of the litigation is thus implicit in Rule 1's command. Conduct that uses discovery for illegitimate adversarial purposes — to oppress, coerce, delay or evade — contravenes attorneys' obligations under Rule 1.

More specifically, several subsections included in Rule 26 assume a certain level of cooperation regarding discovery in the earliest stages of a case. Rule 26(a) imposes obligations on parties and counsel to disclose certain information at the outset of litigation, including the categories of relevant ESI.[62] Pursuant to Rule 26(f), the parties must confer at an initial conference about the nature of the claims involved and certain other specifics relating to the scope of discovery.[63] These obligations extend to conferences regarding the production of ESI.[64] In both instances of early discussion, the opportunity exists for counsel to cooperate beyond simply disclosing plainly required information. Though cooperation is not explicitly mandated under Rule 26(f), Rule 26's command that counsel engage in "good faith" efforts to develop a joint discovery plan suggests that counsel must do more than meet to announce their absolute positions on contested discovery issues, without any attempt to resolve those disputes based on the *legitimate* needs of the parties. The requirement to "confer" mandates, at a minimum, a good faith basis for disagreements. If cooperation were not an element of the required conference, the requirement that parties "confer" would be surplusage.

The Rules also require that parties must have a legitimate basis for their discovery demands and disputes, based on some prior, reasonable factual inquiry. This type of augmented duty to cooperate, beyond the mandated initial disclosures and conferences, may under certain circumstances be imposed by the obligations contained in Rule 26(g). That rule requires that parties sign discovery requests, responses and objections certifying, *inter alia*, that each is "not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation" and is not "unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."[65] Whether parties can so certify without good faith communication and transparency with the opposing party to identify needs, costs, and other issues seems unlikely. Thus, the type of cooperation The Sedona Conference® advocates in this context goes beyond the mere disclosure of certain mandated facts, requiring, in addition, assistance and joint effort to achieve the very best discovery protocol. In *Mancia v. Mayflower Textile Services Co.,* the court held that Rule 26(g)'s obligation of certification, following a "reasonable inquiry," was "intended to impose an 'affirmative duty' on counsel to behave responsibly during discovery" — which requires cooperation and communication,

59 In a companion paper discussing how the Federal Rules address cooperation, Professor Steven Gensler organizes the Rules into clusters. *See* Gensler, *supra* note 5, at 366-368. First, he notes that several provisions of the Rules impose duties on parties to communicate and give consideration to positions held by opposing parties as they engage in discovery planning. *See id.* (citing Fed. R. Civ. P. 26(f)(1), 26(f)(2), 26(f)(3) and 37(f)). Next, Professor Gensler concludes that a second cluster of rules require communication and good faith conduct by parties after discovery disputes arise. *See id.* (citing Fed. R. Civ. P. 26(c), 37(a)(1), 26(c)(3) and 37(a)(5). Finally, Professor Gensler recognizes a third cluster of rules that demand good faith regarding the content and purpose of discovery requests and responses. *See id.* (citing Fed. R. Civ. P. 26(g)(1), 26(g)(1(B)(i), 26(g)(1)(B)(ii) and 26(g)(1)(B)(iii)).

60 Fed. R. Civ. P. 1.

61 *Id.*, 1993 Advisory Committee Note.

62 *See id.* 26(a)(1)(A)(ii).

63 *See id.* 26(f).

64 *See id.* 26(f)(3)(c).

65 *Id.* 26(g)(1)(B).

particularly in the realm of e-discovery.[66] This construction of Rule 26(g) is supported by Rule 1 and the Advisory Committee Note to Rule 26(g), which provides in part:

> 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. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obligates each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term "response" includes answers to interrogatories and to requests to admit as well as responses to production requests.[67]

Any certification of discovery requests or responses that violates the requirements of Rule 26(g) is subject to sanction, absent "substantial justification."[68]

Finally, Rule 37 is entitled "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions." Specifically, Rule 37(f) provides for sanctions for failure to "participate in good faith in developing and submitting a proposed discovery plan." The requirement of "good faith" requires an honesty of intent in discovery planning. That standard cannot be met by a party who has failed to confer with the opposing side about the scope of the claim and likely defenses in order to determine the appropriate scope of discovery; to conduct pre-meeting and ongoing due diligence regarding the availability, location and costs of discovering information and sharing that information with the opposing party; to seek agreement on the form of production and the means of searching and retrieving information; and to develop a reasonable discovery budget consistent with the nature of the claim.

In addition to the Federal Rules of Civil Procedure, 28 U.S.C. Section 1927 allows the imposition of costs and attorneys' fees when attorneys engage in dilatory conduct not justified by *legitimate* needs of the client, providing that:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.[69]

Consistent with the approach of the *Cooperation Proclamation*, sanctions envisioned by the statute focus on unjustified delay — delay legitimately based on a client's needs is not sanctionable under the statute.[70] The *Proclamation* requires cooperation to identify and flesh out legitimate disputes and to provide courts with a factual foundation on which to make a decision should the parties be unable to reach a resolution absent court intervention.

These mechanisms give the courts the broad discretionary authority to issue an array of sanctions against parties who fail to cooperate during discovery. Considered *in toto*, the Federal Rules impose on attorneys an obligation not to engage in conduct that delays, burdens or renders litigation unfair. The means by which parties can fulfill their obligations under Rule 1 can be found in the specific rules governing discovery conduct. The goal of the *Cooperation Proclamation* and associated resource materials is to provide parameters for what good faith, cooperative conduct in electronic discovery entails and what it does not.

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66 253 F.R.D. 354, 357-58 (D. Md. 2008).
67 Fed. R. Civ. P. 26 (g), 1983 Advisory Committee Note.
68 *Id.* 26(g)(3).
69 28 U.S.C. § 1927 (2000).
70 *See* H. CONF. REP. NO. 96-1234 (1980), as reprinted in 1980 U.S.C.C.A.N. 2781, 2782.

III. COMPLIANCE WITH PROFESSIONAL CONDUCT RULES REQUIRES COOPERATION IN DISCOVERY[71]

The duty to cooperate is likewise embodied in the professional conduct rules to which attorneys are bound. Though ethical rules discuss an attorney's obligation to act with zeal in asserting the client's interests,[72] that duty is not unqualified.[73] It is bounded by an attorney's ethical duties to opposing counsel, opposing parties, third parties, and importantly, the tribunal and the judicial system as a whole.[74] As the *Mancia* court recently noted:

> A lawyer who seeks excessive discovery given what is at stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in responding to discovery, or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is . . . hindering the adjudication process, and making the task of the "deciding tribunal not easier, but more difficult," and violating his or her duty of loyalty to the "procedures and institutions" the adversary system is intended to serve. Thus, rules of procedure, ethics and even statutes make clear that there are limits to how the adversary system may operate during discovery.[75]

Professional conduct rules require attorneys to simultaneously meet ethical duties to their clients and the tribunal and to conform their conduct to the requirements of the law.[76] Indeed the Preamble to the Model Rules of Professional Conduct ("MRPC") upon identifying zealous advocacy as the attorney's role immediately confines that duty — it is subject to the "rules of the adversary system."[77] Other limitations on zealous advocacy are replete throughout the Preamble,[78] and are reflected in specific rules.

The need for litigators to balance simultaneous ethical duties is nothing new.[79] Apart from the ethical duties implicated by discovery conduct, discussed below, the list of ethical obligations to ensure the fairness and integrity of the justice system that trump attorneys' duties to their client is lengthy and familiar. For example, counsel has a duty to inform unrepresented persons with interests potentially adverse to the client of that adversity and must refrain from giving them any legal advice,

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71 While professional conduct is governed by state-adopted ethical rules, the discussion in this section necessarily focuses on Model Rules. The Model Rules, and much of their commentary, however, have been adopted, in large part, by nearly every state. *See* Model Rules of Professional Conduct, Dates of Adoption, Am. Bar Ass'n, *available at* http://www.abanet.org/cpr/mrpc/alpha_states.html; State Adoption of Comments To Model Rules of Professional Conduct as of February 2009, Am. Bar Ass'n, *available at* http://www.abanet.org/cpr/jclr/comments.pdf. In addition to state conduct rules, other relevant state-issued guidelines, apart from ethical rules, may apply. *See, e.g.,* California Attorney Guidelines of Civility and Professionalism, Sec. 9, *available at* www.calbar.ca.gov/calbar/pdfs/reports/Atty-Civility-Guide.pdf; The Texas Lawyer's Creed, Sec. 3, Paragraphs 14-19, *available at* http://www.texasbar.com/Content/ContentGroups/Bar_Groups/Foundations1/Texas_Bar_Foundation/TX_Lawyers_Creed.htm.

72 *See* Model R. Prof'l Conduct Preamble Paragraph 2 ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *Id.* 1.3 cmt. 1 (The obligation to serve a client diligently requires the attorney to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf").

73 See Sylvia Stevens, *Whither Zeal? Defining "Zealous Representation,"* Oregon State Bar Bulletin, July 2005, *available at* http://www.osbar.org/publications/bulletin/05jul/barcounsel.html; Allen K. Harris, *Zealous Advocacy: Duty or Dicta: Have the 'Z' Words Become a Disservice to Lawyers?*, OKLAHOMA BAR JOURNAL , *available at* http://www.okbar.org/obj/articles_03/121303harris.htm. Both commentators note that when the ABA Model Rules replaced the Code of Professional Responsibility, the term "zeal" was not included in Rule 1.3. While the word "zeal" remains in the Preamble and Comment to Rule 1.3, the duty imposed by the Rule is "reasonable diligence and promptness." Model R. Prof'l Conduct, 1.3. This conclusion is consistent with the Restatement (Third) of the Law Governing Lawyers, which notes that a lawyer's obligation to act "zealously" on behalf of the client is not unlimited: "The Preamble to the ABA Model Rules of Professional Conduct (1983) and EC 7-1 of the ABA Model Code of Professional Responsibility (1969) refer to a lawyer's duty to act 'zealously' for a client. The term sets forth a traditional aspiration, but it should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling. For legal purposes, the term encompasses the duties of competence and diligence." *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS Section 16 cmt. d.

74 Commentary to Model Rule 1.3 confines the obligation to act with zeal to "whatever lawful and ethical measures are required to vindicate a client's cause." Model R. Prof'l Conduct 1.3, cmt. 1.

75 *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 362-63 (D. Md. 2008).

76 *See* Model R. Prof'l Conduct Preamble Paragraph 1 (lawyer is both representative of clients and officer of the court); *id.* Paragraph 5 ("A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. . . . While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.").

77 *Id.* Paragraph 2.

78 *See id.* Paragraph 4 ("lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law"); *id.* Paragraph 9 (lawyer has an "obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.").

79 *See* Wendel, *supra* note 2, at 895.

though doing so may be beneficial to the client.[80] To fulfill their duties as officers of the court, attorneys must report adverse controlling authority to the court, even where opposing counsel has not done so, and correct even inadvertent misstatements of material fact or law, though doing so is contrary to the client's interest.[81] Moreover, counsel is bound by these duties to the tribunal even where compliance requires disclosure of confidential information.[82] Similarly, counsel must withdraw from representation, regardless of the impact on the client (subject, of course, to court approval) when continued representation would require a violation of ethical rules or other law.[83] The list of mandatory ethical obligations that may be contrary to the client's interest goes on.

Thus, lawyers' obligation of zealous advocacy is confined by, rather than in conflict with, their obligations to the court.[84] As discussed below, while there is a place for zealous advocacy in discovery, an attorney's ethical and procedural obligations to cooperate with opposing counsel are not subjugated to the concept of zealous advocacy. Meeting one's duty to a client does not excuse failure to identify sources of and produce basic evidence sought in discovery,[85] frivolous discovery requests, unfounded objections in discovery,[86] false representations or certifications to the court,[87] or discovery delay for delay's sake.[88]

A. The Duty to Expedite Litigation Requires Cooperation

First and fundamentally, an attorney's ethical duty to conform his or her conduct to the requirement of the law unquestionably requires, in the context of discovery, compliance with procedural rules of the court.[89] As discussed *supra* Part II.B, those rules include Rule 1 of the Federal Rules of Civil Procedure, noting an attorney has an obligation, as an officer of the court, to avoid undue delay and cost;[90] Rule 26(f), which assumes a certain degree of cooperation in discovery planning; and Rule 26(g), requiring an attorney to certify that discovery requests and responses are not made for an improper purpose. Consistent with those rules, Rule 3.2 of the MRPC requires attorneys to make reasonable efforts to expedite litigation. Refusal to cooperate in discovery by making overly broad or unnecessarily costly discovery requests or objecting to requests without legitimate foundation is inconsistent with the duty to expedite litigation. Cooperation in discovery planning is thus assumed not only by the Civil Rules, it is among the obligations of Rule 3.2 of the MRPC.

Cooperating to expedite discovery does not conflict with any notion of zealous advocacy. First, the duty to expedite must be "*consistent with the interests of the client*."[91] Thus, neither Rule 3.2 nor the cooperation envisioned by the *Proclamation* would require counsel to forego pursuing even time-consuming resolution of discovery disputes necessary to serve the legitimate interests of the client. For example, cooperation does not foreclose objections to expansive discovery requests after a thorough inquiry about the nature and sources of responsive information. Cooperation *does*, however, require communicating with opposing counsel about the basis for the objection and making a good faith effort to narrow discovery and achieve a mutually agreeable solution. Second, failure to make reasonable efforts to expedite can only be founded on the *legitimate* interests of the client. What Rule 3.2 and the procedural rules, as emphasized here and advanced in the *Proclamation, do* forbid is discovery delay for the purpose of delay only. Though delay for delay's sake

80 *See* Model R. Prof'l Conduct 4.3, cmt. 1.
81 *See id.* 3.3(a), cmt. 11 (noting that the truth-seeking judicial process takes precedence over the client's interest in such cases).
82 *See id* 3.3(c).
83 *See id.* 1.16(a)(1).
84 For an actual conflict to exist between rules regarding zealous advocacy and duties to the court, it must be impossible for an attorney to comply with both obligations. However, the MRPC, by making clear which rules are mandatory and which are aspirational, establishes that some duties will take precedence over others.
85 *See In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 665 (M.D. Fla. 2007) (failure to produce usable and reasonably accessible documents resulting from failure to cooperate was sanctionable conduct).
86 *See* Model R. Prof'l Conduct 3.1, 3.4(d).
87 *See id.* 3.3.
88 *See id.* 3.2, cmt. 1 ("The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.").
89 *See id.* 3.4(c) (an attorney may not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists"); *id.* Preamble Paragraph 5 ("lawyer's conduct should conform to the requirements of the law"); *see also* Wendel, *supra* note 2, at 919 (Rules 3.4 (c) and 3.4(d) require attorneys to make good faith efforts to abide by civil discovery rules).
90 *See* Fed. R. Civ. P. 1, 1993 Advisory Committee Note.
91 Model R. Prof'l Conduct 3.2 (emphasis added).

may benefit the client, the rules do not recognize that benefit as a *legitimate* interest.[92] Consequently, good faith cooperation in discovery to meet the obligations of Rule 3.2 works in tandem with, not in opposition to, the concept of zealous advocacy.

B. The Duties of Candor to the Tribunal and Fairness to the Opposing Party Require Cooperation

The duty to cooperate in discovery is also embodied in Model Rule 3.4 which prohibits a party from obstructing another party's access to evidence or unlawfully altering, destroying, or concealing a document or other material having potential evidentiary value. When failure to cooperate in preservation, discovery planning, and production results in obstruction or destruction, attorneys violate not only procedural rules that risk court-imposed sanctions, they risk discipline by the state ethics enforcement authorities.[93] Where ESI is involved, obstruction or destruction does not require affirmative acts — it can result when counsel simply does nothing. For example, failure to engage opposing counsel in a meaningful dialogue about preservation obligations can result in destruction of relevant evidence from routine operation of document destruction and retention systems. Additionally, failure to cooperate in discussions regarding a meaningful electronic discovery plan based on information about each party's custodians and electronic storage systems may in itself be obstruction. As discussed more fully *supra* Part II, the Federal Rules require participation in a Rule 26(f) conference to discuss ESI issues. In addition to Model Rule 3.4's candor and fairness requirements, Model Rule 1.1 requires that counsel provide "competent representation," which is defined as requiring "legal knowledge, skill, thoroughness and preparation reasonably necessary to the representation." To fulfill these corollary obligations to meet and confer in candor and with competence, counsel must be sufficiently informed and knowledgeable about the client's existing sources of ESI and data management and storage systems, and prepared to discuss them, at the Rule 26(f) conference. That is because, as one commentator noted, in an age of electronic information, "it is, as a practical matter, impossible to get meaningful discovery if one side refuses to discuss the parameters of what constitutes a reasonable search, leading to unfair and oppressive results."[94] Likewise, a responding party engages in obstructionist conduct forbidden by ethical rules when it refuses to discuss means of narrowing the opposing side's proposed search protocol, though it has superior information about what methodology is likely to produce responsive documents, and then dumps a clearly unmanageable number of documents on the requesting party.[95]

A knowing failure to comply with civil discovery rules that assume cooperation could likewise violate Rule 3.4(d)'s admonition that an attorney may not knowingly disobey the rules of a tribunal except when based on a non-frivolous assertion that no valid obligation exists. Thus, attorneys who sign discovery requests, disclosures, or objections that were made with an improper purpose or that are unreasonable or unduly burdensome violate not only Rule 26(g), they also violate Model Rule 3.3 by making a false statement of fact to the tribunal. Rule 26(g) was intended to impose on counsel an affirmative duty to behave responsibly in discovery. That obligation, as the *Mancia* court noted, "requires cooperation by counsel to identify and fulfill legitimate discovery needs" while avoiding unduly costly and burdensome discovery.[96] In the context of electronic discovery, it will nearly always be preferable for counsel to certify the propriety of their discovery requests or objections after engaging in extensive cooperation prior to the commencement of discovery. For example, producing parties can, with more certainty, conclude requests are overly broad or unduly burdensome or that sources requested to be searched are unlikely to yield documents admissible in evidence after meeting with opposing counsel to discuss the opposing side's needs, investigating and evaluating the client's existing sources of ESI and the client's data

92 Commentary to Rule 3.2 recognizes that the benefits of "improper delay" — one without a "substantial purpose other than delay" or for the "purpose of "frustrating an opposing party's attempt to obtain rightful redress or repose" — are "not a legitimate interest of the client". Model R. Prof'l Conduct 3.2 cmt. 1.

93 *See Qualcomm Inc. v. Broadcomm Corp.*, 539 F. Supp. 2d 1214 (S.D. Cal. 2007). In a patent infringement action, the defendant alleged that the plaintiff had intentionally hidden the existence of certain patents from an international standard-setting consortium until the consortium had set standards and, to comply with those standards, the industry had developed products that necessarily infringed on the plaintiff's patents. The court found for the defendants on the merits and following trial entered an order detailing the plaintiff's actions to obstruct discovery and instructing plaintiff's counsel to show cause why they should not be sanctioned and face professional discipline. The court characterized plaintiff's counsel's actions as "gross litigation misconduct," the court detailed "constant stonewalling, concealment, and repeated misrepresentations," including the withholding of over 200,000 pages of relevant emails and electronic documents.

94 *Ethics and Professionalism in the Digital Age: Ninth Annual Georgia Symposium on Ethics and Professionalism*, *supra* note 19, at 874.

95 *See id.* at 875-877 (discussing *Kipperman, supra* note 12*)*.

96 *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357-58 (D. Md. 2008).

management and storage systems, and communicating with the opposing side about those systems. Similarly, parties requesting discovery can more accurately certify that the request is neither "unreasonable nor unduly burdensome" — that it is narrowly tailored — after conferring with the opposing side to understand potential sources of information, the means by which that information will be retrieved, the costs of doing so, and potentially less burdensome sources of information.[97]

While neither Rule 3.2 nor Rule 3.4 explicitly require cooperation, attorneys will be hard pressed to meet their obligations under these provisions without cooperating on the scope, nature, and means of discovery both prior to discovery's initiation and throughout the litigation.

C. Ethical Rules Do Not Subordinate the Duty to Cooperate to the Duty of Confidentiality

The duty of confidentiality has long co-existed with discovery obligations and other ethical duties to the court. Though some have argued that seeking an informational advantage by minimizing documents provided to the opposing party is firmly grounded in the duty to preserve client secrets and protect privileged information,[98] that assertion does not answer whether an attorney violates his ethical duties to the court, not to mention his obligation to follow federal and local rules, when he withholds information requested by opposing counsel that is *not privileged*. At least one court has firmly rejected the argument that zealous advocacy obligates counsel to construe discovery requests narrowly to withhold documents harmful to the client.[99] The duty of attorneys to conform their conduct to the law prohibits them from withholding information that the Federal Rules require be produced upon good faith discovery requests or that would be produced if the parties engaged in good faith discussion about the nature and scope of discovery sought. While cooperation does not require attorneys to *volunteer* smoking gun documents that opposing counsel has not requested, it does require good faith efforts to produce information that the attorney reasonably understands is being sought.

In the context of electronic discovery, the duties of confidentiality, loyalty and zealous advocacy do not excuse failure to cooperate with opposing counsel in identifying likely sources of responsive ESI and developing appropriate search protocols that are likely to produce documents counsel knows the client possesses and the opposing party seeks. This does not mean that counsel must steer the opposing side to harmful documents. However, counsel may not use his superior information as to the location or nature of responsive documents to thwart good faith discovery requests by refusing to engage cooperatively to identify the sources likely to contain relevant information and the search terms likely to produce responsive documents.[100]

Thus, where the Federal Rules assume cooperation, the ethical duties discussed above will likewise require attorneys to adhere to the cooperation expected under the Federal Rules. Moreover, even under circumstances where the Federal Rules do not explicitly address discovery cooperation, an attorney's ethical obligations under Rules 3.3 and 3.4 might nonetheless require cooperation.

IV. COURTS RECOGNIZE BOTH THE NEED FOR COOPERATION AND THE OBLIGATION TO COOPERATE

Courts have long recognized the need for attorneys to work cooperatively to conduct discovery, a need that has grown with the volume of ESI now typically involved in litigation. More recently, this recognition is often expressed as frustration over having to decide an avoidable dispute or simply an exasperated call for cooperation among counsel. For example, faced with overreaching

97 *See id.* at 358 (noting that although overbroad discovery requests are served in part because parties do not have enough information to narrowly tailor them, that difficulty is avoided by cooperating prior to serving the request).

98 *See* Beckerman, *supra* note 6, at 526.

99 *See* Wendel, *supra* note 2, at 914-18 (discussing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993)). In *Washington State Physicians*, defendant objected to plaintiff's request for documents for any drug other than the specific product at issue in the litigation where defendant knew documents relating to other drugs contained information about the toxicity of the active ingredient in the product in suit. The court rejected defendant's argument that its ethical duties to the client required it to both construe discovery requests narrowly and avoid turning over damaging documents, concluding that defendant's objections "did not comply with either the spirit or the letter of the discovery rules and thus were signed in violation of the certification requirement." 858 P.2d at 1083.

100 *See Ethics and Professionalism in the Digital Age: Ninth Annual Georgia Symposium on Ethics and Professionalism*, *supra* note 19, at 874-877.

discovery demands by one side and obstinate resistance to production by the other, one court observed that "the gravest error committed by the Magistrate was thinking that the parties could meet and confer to discuss any outstanding discovery requests" and concluded simply that "[t]his Court demands the mutual cooperation of the parties."[101] Courts further recognize that counsel's role as advocate in an adversarial system is not inconsistent with cooperating "to achieve orderly and cost effective discovery of the competing facts on which the system depends" and that the "rules of procedure, ethics, and even statutes make clear that there are limits to how the adversary system may operate during discovery."[102] As noted by the court in *In re Seroquel Products Liability Litigation*:

> [T]he posturing and petulance displayed by both sides on this issue shows a disturbing departure from the expected professionalism necessary to get this case ready for appropriate disposition. Identifying relevant records and working out technical methods for their production is a cooperative undertaking, not part of the adversarial give and take. This is not to say that the parties cannot have reasonable disputes regarding the scope of discovery. But such disputes should not entail endless wrangling about simply identifying what records exist and determining their format. This case includes a myriad of significant legal issues and complexities engendered by the number of plaintiffs. Dealing as effective advocates representing adverse interests on those matters is challenge enough. It is not appropriate to seek an advantage in the litigation by failing to cooperate in the identification of basic evidence. [103]

As discussed in Part II above, courts also recognize that the Federal Rules of Civil Procedure encourage and in many respects assume cooperation during discovery. "The overriding theme of [the 2006] amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable."[104] Thus, courts have held that counsel must confer and engage in good faith, meaningful discussions with the opposing party on discovery issues;[105] refrain from making discovery requests that are overly burdensome, costly, or disproportionate to the issue at stake;[106] make a reasonable inquiry into the factual basis for discovery objections and avoid boilerplate objections;[107] refrain from substantially unjustified discovery arguments;[108] perform a reasonable search for documents on a timely basis;[109] negotiate reasonable and workable search protocols;[110] provide accurate information to the court about steps taken in discovery;[111] provide a knowledgeable 30(b)(6) witness on IT issues;[112] and, in appropriate situations, either introduce expert testimony to support the suitability of search and review protocols, or avoid the need for expert testimony by cooperating with opposing counsel to create a mutually agreeable protocol.[113]

Even where courts decide discovery disputes without determining that the conduct of either side has violated procedural or ethical rules, courts are increasingly urging parties, often in frustrated or blunt language, to attempt to resolve or avoid such disputes by discussion and cooperation. Faced with a discovery dispute caused by the failure of the parties and a nonparty to provide "careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms" for the production of ESI, one court found itself "in the uncomfortable position of having to craft a keyword search methodology for the parties," and concluded simply that "the best solution in the entire area of electronic discovery is cooperation among counsel."[114] After a detailed but restrained

101 *Marion v. State Farm Fire and Cas. Co.*, 2008 WL 723976, at *3-4 (S.D. Miss. Mar. 17, 2008) (internal quotations omitted). *See also In re Seroquel,* 244 F.R.D. 650, 660 (M.D. Fla. 2007).
102 *Mancia*, 253 F.R.D. at 361-62 (citing the *Cooperation Proclamation*).
103 244 F.R.D. at 660.
104 *Board of Regents of the Univ. of Nebraska v. BASF Corp*, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007).
105 *See Mancia*, 253 F.R.D. at 364–65. *See also CBT Flint Partners, LLC v. Return Path, Inc.*, 2008 WL 4441920, at *3 (N.D. Ga. Aug. 7, 2008); *Mikron Indus., Inc. v. Hurd Windows & Doors*, 2008 WL 1805727, at *1 (W.D. Wash. Apr. 21, 2008).
106 *See Mancia*, 253 F.R.D. at 358; *Marion*, 2008 WL 723976, at *2, *4.
107 *See Mancia*, 253 F.R.D. at 358–59, 364.
108 *See CBT Flint Partners*, 2008 WL 4441920, at *2–3.
109 *See Keithley v. The Home Store.com, Inc.*, 2008 WL 3833384, at *8, *12, *14–15 (N.D. Cal. Aug. 12, 2008).
110 *See SEC v. Collins & Aikman Corp.*, 256 F.R.D. at 414, 418 (S.D.N.Y. 2009) (citing the *Cooperation Proclamation*). *See also In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 662, 664 (M.D. Fla. 2007).
111 *See Keithley*, 2008 WL 3833384, at *1, 10, 13, 15–16.
112 *See Ideal Aerosmith v. Acutronic USA, Inc.*, 2008 WL 4693374, at *2–3 (W.D. Pa. Oct. 23, 2008).
113 *See Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260 n.10 (D. Md. 2008).
114 *Gross Constr. Assocs. v. Am. Mfers. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (citing the *Cooperation Proclamation*).

discussion of a series of unnecessary disputes over the scope of document requests and interrogatories, the adequacy of responses to such, and claims of privilege, another court noted that "the costs associated with adversarial conduct in discovery have become a serious burden not only on the parties but on this Court as well."[115] The court went on to comment that "counsel's obligations to act as advocates for their clients and to use the discovery process for the fullest benefit of their clients . . . must be balanced against counsel's duty not to abuse legal procedure," and "reiterate[] its advice to counsel to communicate and cooperate in the discovery process."[116] Indeed, courts faced with protracted discovery disputes often lament the conduct of both sides and initially decline to make a decision, instead instructing the parties to confer and attempt to resolve the issues.[117] Other courts, having decided some or all pending discovery disputes, urge (if not plead with) the parties to meet and confer as to future disputes rather than repeat the process.[118]

V. THE BENEFITS OF COOPERATION

As these cases suggest, attorneys can expect courts to increasingly enforce cooperation obligations imposed by procedural and ethical rules and to urge parties in increasingly strong terms to cooperate in ways that may go beyond what such rules and ethical requirements require.[119] Given this pressure from the bench, the unrelenting growth in the volume of electronic data, the economics of modern litigation, the financial and strategic benefits of cooperation, and the costs and risks of obstructionist conduct, cooperation in discovery is no longer merely desirable or laudatory, but rather is imperative to advance a client's interests.

A. The Economic Imperative to Cooperate in Discovery

The most straightforward reason for parties to cooperate throughout the discovery process is simple economics — unnecessarily combative discovery wastes time and money. While this has always been the case, the increased volume and complexity of discoverable ESI in modern litigation has increased the costs of combative approaches to discovery as well as the potential savings of a more cooperative approach. While a 1983 study found "relatively little discovery occurs in the ordinary lawsuit" and "no evidence of discovery in over half our cases,"[120] a lawsuit between corporations may now involve "more than one hundred million pages of discovery documents, requiring over twenty terabytes of server storage space."[121] Obviously, this increase in the volume of documents and other information potentially responsive to discovery requests directly increases discovery costs. Moreover, the inherent complexity of ESI (such as multiple storage locations, varying formats, obsolete technology, metadata, and dynamic information) further increases the costs of preservation, review, and production. As a result, an adversarial approach to discovery, which might once have resulted in a minor but tolerable increase in litigation costs, could today substantially multiply such costs, potentially changing litigant behavior and often making discovery costs case-determinative.

Evidence increasingly indicates "that the sheer volume and complexity of electronically stored information (ESI) can increase litigation costs, impose new risks on lawyers and their clients, and alter expectations about likely court outcomes."[122] Where such expansive discovery may once have been the exception to the rule,[123] it can now account for as much as ninety percent of total litigation expenses.[124] Increased volume is a primary culprit, as modern discovery "may encompass hundreds of thousands, if not millions, of electronic records."[125] For example, the amount of ESI is estimated to have increased thirty

115 *Gipson v. Sw. Bell Tel. Co.*, 2009 WL 790203, at *21 (D. Kan. Mar. 24, 2009) (citing Rule 26(g) and *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 359 (D. Md. 2008)).
116 *Id.*
117 *See, e.g.*, *Dunkin' Donuts Franchised Rests. LLC v. Grand Cent. Donuts, Inc.*, 2009 WL 1750348, at *4 (E.D.N.Y. June 19, 2009) (citing the *Cooperation Proclamation*).
118 *See, e.g., Marion v. State Farm Fire and Cas. Co.*, 2008 WL 723976, at *4 (S.D. Miss. Mar. 17, 2008).
119 *See Newman v. Borders, Inc.*, 257 F.R.D. 1, 3 n.3 (D.D.C. 2009) (noting "the perceptible trend in the case law that insists that counsel genuinely attempt to resolve discovery disputes" and citing the *Cooperation Proclamation*).
120 David M. Trubek, et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89–90 (Oct. 1983).
121 Robert Douglas Brownstone, *Collaborative Navigation of the Stormy E-Discovery Seas*, 10 RICH. J.L. & TECH. 53, at *21 (2004).
122 James N. Dertouzos, Nicholas M. Pace & Robert H. Anderson, *The Legal and Economic Implications of Electronic Discovery: Options for Future Research*, RAND Institute for Civil Justice, 2008, at ix, *available at* http://rand.org/pubs/occasional_papers/2008/RAND_OP183.pdf (hereinafter "Dertouzos, et al.").
123 *See, e.g.*, Trubek, *supra* note 120, at 91.
124 *See* Mike Dolan & John Thickett, *Unbundling and Offshoring*, 71 TEX. B. J. 730, 730 (Oct. 2008).
125 *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D. Md. 2005).

percent annually from 1999 through 2002 alone.[126] Businesses in North America alone send and store an estimated 2.5 trillion new e-mails per year.[127] Consequently, larger corporate parties have expansive amounts of discoverable ESI,[128] while even individuals and small businesses often have quantities of data "substantially out of proportion to their ability to bear" the resulting costs of discovery.[129]

The inherent complexity of ESI also creates new and potentially costly issues in discovery. Deleted information is often not actually destroyed.[130] ESI often changes dynamically and can even change merely by being accessed.[131] Hidden metadata can include responsive information but can be difficult for the unprepared to preserve and produce.[132] Difficult to manage backup data may be responsive and need to be preserved, even if not searched and produced.[133] In addition, ESI typically resides in many locations, including hard drives, network servers, floppy disks, backup tapes, PDAs, thumb drives, smart cards, and cell phones.[134] It includes voice recordings as well as text documents, and instant messaging. And, emerging social media promise to increase the complexity and cost of e-discovery.[135] These complications magnify the cost issues raised by the sheer quantity of electronic documents. In addition, they can expose unprepared parties to spoliation claims for failure to preserve and produce.[136]

This increase in the volume and complexity of documents in today's digital world has not, however, altered the basic rules of discovery.[137] Documents must still be preserved, collected and produced, often at great cost. In one case, restoration of data from two hundred backup tapes was estimated to cost $9.75 million even before the recovered documents were reviewed.[138] Beyond the cost of preservation and collection, ESI is still generally reviewed by attorneys for relevance and privilege — an activity that some now estimate may account for as much as 75-90 percent of the costs of e-discovery.[139] Production and review, even in smaller cases, can cost hundreds of thousands of dollars.[140] Businesses now frequently spend more money to prepare for electronic discovery through technology upgrades and revised IT processes — an expenditure that smaller companies may be

126 *See* Dertouzos, et al., *supra* note 122, at 1 (citing School of Information, University of California at Berkeley, *How Much Information?* (2003)).
127 Daniel Hodgman, *A Port in the Storm?: The Problematic and Shallow Safe Harbor for Electronic Discovery*, 101 NW. U. L. REV. 259, 276 (2007) (citing David Narkiewicz, *Electronic Discovery and Evidence*, 25 PENNSYLVANIA LAWYER 57 (2003)).
128 *See* Brownstone, *supra* note 121, at 53.
129 Hon. Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 349 (2000).
130 *See, e.g.*, *United States v. Crim. Triumph Capital Group, Inc.*, 211 F.R.D. 31, 46 n.8 (D. Conn. 2002) ("When a user deletes a file, the data in the file is not erased, but remains intact . . . where it was stored until the operating system places other data over it.").
131 *See* Hodgman, *supra* note 127, at 275 (citing THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2007)).
132 "Courts generally have ordered the production of metadata when it is sought in the initial document request and the producing party has not yet produced the documents in any form." *Aguilar v. Immigration and Customs Enforcement Div. of the U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350, 357 (S.D.N.Y. 2008); *In re Priceline.com Inc. Sec. Litig.*, 233 F.R.D. 88, 91 (D. Conn. 2005) (production ordered in TIFF format with corresponding searchable metadata databases); *Williams v. Sprint/United Mgmt. Co.,* 230 F.R.D. 640, 654 (D. Kan. 2005) (ordering production of Excel spreadsheets with metadata even though no request had been made initially because producing party should reasonably have known that metadata was relevant). *But see Wyeth v. Impax Lab., Inc.,* 248 F.R.D. 169, 171 (D. Del. 2006) ("reviewing [metadata] can waste litigation resources"); *Williams,* 230 F.R.D. at 651 ("Emerging standards of electronic discovery appear to articulate a general presumption against the production of metadata"); *Michigan First Credit Union v. Cumis Ins. Soc., Inc.*, 2007 WL 4098213 (E.D. Mich. Nov. 16, 2007) (declining to require production of documents in native format due to burden concerns).
133 *See, e.g.*, *Wells v. Xpedx*, 2007 WL 1200955 (M.D. Fla. Apr 23, 2007) (producing party has duty to search hard drives, servers, and backup tapes for responsive deleted emails and files); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (requiring recovery and production of all deleted emails relevant to discrimination and retaliation claims); *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57 (2003) (requiring production of backup tapes after finding that numerous relevant emails were deleted); *Samide v. Roman Catholic Diocese of Brooklyn*, 5 A.D.3d 463 (N.Y. App. Div. 2d Dep't 2004) (requiring recovery and production of all relevant deleted emails). *See also* Thomas Y. Allman, et al., *Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, The Sedona Conference Working Group on Electronic Document Retaliation & Production (2008) *available at* http://www.thesedonaconference.org. *But see Scotts Co. LLC v. Liberty Mut. Ins. Co.*, 2007 WL 1723509 (S.D. Ohio June 12, 2007) (upon objection, requesting party may have to establish that requested deleted information is both relevant and retrievable); *Oxford House, Inc. v. City of Topeka,* 2007 WL 1246200 (D. Kan. Apr. 27, 2007) (deleted files not required to be produced due to undue burden).
134 *See* Dertouzos, et al., *supra* note 122, at 2; THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2007).
135 *See Covad Commc'ns Co. v. Revonet, Inc.*, 258 F.R.D. 5, 16 (D.D.C. 2009) ("[T]he universe of items to be considered for production is ever expanding with the ubiquity of e-mail and other forms of electronic communication, such as instant messaging and the recording of voice messages. Electronic data is difficult to destroy and storage capacity is increasing exponentially, leading to an unfortunate tendency to keep ESI even when any need for it has long since disappeared. This phenomenon - the antithesis of a sound records management policy - leads to ever increasing expenses in finding the data and reviewing it for relevance or privilege.").
136 *See, e.g.*, *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, 2005 WL 674885, at *1 (Fla. Cir. Ct. Mar. 23, 2005) (failure to use good faith in production and preservation of e-mails exposed company to liability for spoliation); *In re Telxon Corp. Sec. Litig.*, 2004 WL 3192729, at *23 (N.D. Ohio July 16, 2004) (sanctions imposed for bad faith modification of electronic records, loss of electronic files, and failure to produce relevant e-mails).
137 *See* Gensler, *supra* n. 22, at 581.
138 *See* Richard Van Duizend, *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information*, Conference of Chief Justices, at vi (2006) *available at* http://www.ncsconline.org/images/EDiscCJGuidelinesFinal.pdf.
139 *See* Dertouzos, et al., *supra* note 122, at 3. *See also Covad Comm'ns,* 258 F.R.D. at 14 ("Experience shows" that review for relevance and privilege "may dwarf the cost of the search").
140 *See, e.g.*, *Oxford House, Inc. v. City of Topeka,* 2007 WL 1246200, at *4 (D. Kan. Apr. 27, 2007) (production of deleted files estimated to cost more than $100,000); *Ex parte Cooper Tire & Rubber Co.*, 987 So. 2d 1090, 1104 (Ala. 2007) (acknowledging producing party's evidence that discovery burden would "entail thousands of hours and will cost hundreds of thousands of dollars").

unable to make.[141] Ultimately, these discovery cost increases "could dominate the underlying stakes in dispute" and even lead parties to decide against litigating meritorious claims or defenses.[142]

Against this backdrop of increasing volume and complexity of ESI magnifying the costs of discovery, antagonistic discovery strategies can be even more expensive and problematic than in the past. Such strategies "lead to delay as well as expenditures of much time and money on repetitive scope-of-discovery issues."[143] With the smaller scope and complexity of paper-based document discovery in litigation in prior years, these delays and cost increases could be minimal, or at least more tolerable. However, given the already substantially increased cost of discovery in light of the increased volume and complexity of ESI, the incremental costs imposed by combative approaches to discovery and unnecessary discovery disputes can be even more problematic.

This additional burden on parties and the judicial system is, in large part, avoidable. Commentators note that electronic discovery's complications and expense can be most problematic when the information is "not managed properly."[144] While the proliferation of ESI and its particular attributes have increased discovery costs in many ways, ESI by its very nature is particularly susceptible of being properly managed so as to limit costs. For example, ESI can be more accessible than paper records. Once identified and collected, ESI is generally easier to de-duplicate, sort, search and otherwise process in bulk. It can also be easier to actually handle and produce.[145]

Agreement between parties on key parameters such as the identity of custodians whose data will be preserved and/or collected; the date ranges, search terms, and methodologies to be employed by the parties to identify responsive data; and the format(s) in which document production will occur has the potential to unlock ESI's more useful attributes to reduce discovery expenditures for all parties. Early agreement on such key parameters makes it much less likely that a party will be ordered to supplement its production (and thus incur the expense of repeating searches, reviews, and production) because its opponent convinces a court that the producing party's unilateral choices were too narrow or otherwise inappropriate. In a survey of 2,690 attorneys recently involved in federal litigation, more than 60% of respondents, representing both plaintiffs and defendants, "agreed" or :strongly agreed" with the statement, "[t]he parties ... were able to reduce the cost and burden of the ... case by cooperating in discovery." Lee ET AL., *supra* note 19, at 30-31.

In this regard, cooperation does not mean simply volunteering data or information. Rather, cooperation suggests early, candid, and ongoing exchanges between counsel. For each side, these exchanges must address both the potentially discoverable information which that side possesses and its needs for information in the possession of the other side. Such dialogue can facilitate reciprocal agreements regarding preservation and production obligations that can enable each party to fulfill its own discovery obligations at lower cost and with less risk and to obtain the information it needs from the other side without undue expense or tribulation.

Indeed, cooperation in discovery is not an "all or nothing" matter. The parties can mutually reduce costs and risks by agreeing on many or most issues even if they cannot resolve all potential discovery disputes. Even in cases where both parties follow a good faith, cooperative approach, there may still be issues on which the parties legitimately disagree. Nonetheless, when that occurs, both sides should consider whether a cooperative, negotiated approach may be preferable to a judicial determination. Most cases settle because the parties elect not to face the expense of litigating to a conclusion on the merits and the risk of an unfavorable result. Similarly, parties who follow a cooperative approach to discovery can often resolve quite legitimate differences regarding discovery through negotiated resolutions by, for example, finding a livable middle ground between two fully defensible positions, or trading "wins" on multiple issues to create an overall resolution. Indeed, early cooperation on basic discovery parameters not only directly prevents or limits the additional litigation expense which might otherwise be imposed by discovery disputes on those matters, but it may also

141 *See* Dertouzos, et al., *supra* note 122, at ix.
142 *Id.* at 3 (noting, however, a lack of empirical research on "[t]he extent to which costs have increased"). *See also id.* at 13 ("[S]everal interviewees claimed that the significant burdens of e-discovery outweighed the benefits of going to trial, especially in low-stakes cases.").
143 Brownstone, *supra* note 121, at 53.
144 Dertouzos, et al., *supra* note 122, at ix.
145 *See id.* at 15.

foster a less confrontational approach in which the parties are able to resolve downstream differences without involving the court.

Overreaching discovery demands, obstructionist responses to legitimate discovery and unproductive discovery disputes all unnecessarily drain the resources of litigants and slow, or even prevent, adjudication on the merits. In contrast, when parties conduct discovery in a diligent but cooperative and candid manner, each can obtain the discovery it needs to adjudicate the dispute on the merits (or to reach a mutually agreeable settlement) while minimizing discovery expense. In any given case, it is thus in the interest of both sides to embrace a mutually cooperative approach to the exchange of discoverable documents and data. While either party could upset this balance by pursuing overreaching discovery, responding to legitimate discovery in an obstructionist manner, or forcing unnecessary discovery disputes, courts may use the rules of civil procedure and professional conduct to encourage compliance with a cooperative approach.[146] Aware of the already large cost of discovery of ESI and of the significant but unnecessary cost of discovery disputes, encouraged or pushed toward cooperation rather than gamesmanship by the courts and the rules of procedural and professional responsibility, and armed with better tools to effectuate such cooperation, it is in the self-interest of all parties to pursue a cooperative approach to discovery.

B. The Strategic Benefits of Cooperation

One potential difficulty in attempting to follow such a cooperative approach is that, particularly at the outset of a dispute, tensions are high, clients are unhappy if not angry, and the suggestion by counsel that a case may be resolved more efficiently and effectively by taking a cooperative approach to discovery may be interpreted by the client as weakness. Model Rule 2.1 states that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." At the same time, as discussed in Part III, other professional responsibility rules, guidelines for civility and professionalism, and court rules instruct lawyers that civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation are essential to the fair administration of justice and conflict resolution. When a client understands these professional responsibilities of an attorney, the mandate of Rule 2.1 is consistent with a cooperative, reasonable approach to discovery. However, a client driven by distrust, fear, or a desire for retribution or to win at any cost may perceive discovery as just another opportunity to penalize the opponent and cooperation as a weakness. Such client motivations and perceptions can put the attorney in the middle and create a fundamental impediment to the reasonable cooperation in discovery so essential in the age of ESI.

Cooperation, however, is in the interest of even an aggressive client, and an attorney who persuasively explains this to the client serves both the client and his or her own professional obligations. Such a client must first understand what cooperation is and is not. Cooperation in the discovery context does not mean giving up vigorous advocacy; it does not mean volunteering legal theories or suggesting paths along which discovery might take place; and it does not mean forgoing meritorious procedural or substantive issues. Cooperation does mean working with the opposing party and counsel in defining and focusing discovery requests and in selecting and implementing electronic searching protocols. It includes facilitating rather than obstructing the production and review of information being exchanged, interpreting and responding to discovery requests reasonably and in good faith, and being responsive to communications from the opposing party and counsel regarding discovery issues. It is characterized by communication rather than stonewalling, reciprocal candor rather than "hiding the ball," and responsiveness rather than obscuration and delay.

Cooperation defined in this manner is not only largely compelled by the attorney's obligation to comply with legal rules, ethical obligations and the professional rules of conduct, but it also offers the client the benefits of creating and maintaining credibility with the court and the opposition, enhancing the effectiveness of advocacy, and minimizing client costs and risks. A client

146 *See* discussion *supra* at Parts II and III.

should be informed and understand that the attorney's duties to the client[147] are not unlimited[148] but are circumscribed both by court rules[149] and obligations of civility and professionalism.[150] Statements of civility and professionalism published by many courts and bar associations are particularly informative in explaining to a client the limits of representation and the obligations of an attorney to the administration of justice. These statements discuss conduct that may not be unethical but would be considered unprofessional and hence unacceptable.[151] The California Guidelines provide, for example, that an attorney has obligations of "civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and *cooperation*, all of which are essential to the fair administration of justice and conflict resolution."[152] Statements of professionalism and civility such as these provide important foundational justifications that can be brought to bear when persuading clients bent on being overly aggressive and resistant to take a more cooperative approach to dispute resolution.

Moreover, both counsel and clients should recognize that an obstructionist, overreaching, or simply non-cooperative approach to discovery invites adverse consequences for the non-cooperative party itself. This can take the form of non-cooperative conduct in return from the other side, leading the parties to conduct discovery "the hard way," with each party incurring unnecessary expense as a result of the other side's non-cooperative approach, but neither gaining a strategic or tactical upper hand. It can also take the form of an adverse decision or even sanctions on the discovery dispute in question. Non-cooperative conduct early in the discovery process can lead a court to view that party's position less favorably when discovery disputes ripen and come before the court.

In addition, a cooperative approach that actively engages the other side on search methodologies and other e-discovery parameters and which incorporates the opposing party's legitimate needs into the production process makes it more likely that the court will accept the producing party's efforts as reasonable when a dispute later arises. That reduces the likelihood that the court will require the client to engage in costly repeat searches, reviews, and other discovery tasks.[153]

Similarly, non-cooperative conduct by a requesting party early in discovery can make the court reluctant to require further discovery from an opponent that has tried to cooperate. Thus, one court has recently recognized that, where the producing party asked opposing counsel "repeatedly to suggest search terms" but was rebuffed, "it is unfair to allow [the requesting party] to fail to participate in the process and then argue that the search terms were inadequate. This is not the kind of collaboration and cooperation that underlies the hope that the courts can, with the sincere assistance of the parties, manage e-discovery efficiently and with the least expense possible."[154]

Moreover, both counsel and the client should understand the desirability if not necessity of creating and maintaining credibility with the court, court staff, and opposing counsel. The most effective advocate is one who is believed and one who can be trusted. Indeed, the credibility of the attorney transcends a particular case or a particular client. A client must understand that an attorney's obligations to other clients mandates candor with both the court and with opposing counsel. The attorney's word must be trusted and that attorney's professional credibility cannot be compromised for one case or one client. The benefits of being represented by an attorney with a reputation of trustworthiness and candor is that the court and opposing parties will be more willing to accept representations and the need to prepare and present "proof" (and thus briefing, hearings and other formal proceedings) may be lessened. Furthermore, an attorney who has a reputation for being

147 *See* Model. R. Prof. Conduct 1.2 ("a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued").

148 For example, abiding by the client's decisions does not extend to counseling or assisting in criminal or fraudulent conduct, asserting frivolous positions, making false statements or presenting false evidence to a court or other tribunal, or unlawfully obstructing access to evidence or concealing or destroying evidence. *See id.* 2.1(d), 3.1, 3.3, 3.4.

149 The Federal Rules of Civil Procedure and analogous state rules define the substantive duties with which attorneys must comply. For example, Rule 26(a) mandates that the parties make certain initial disclosures; Rule 26(b) limits the scope of permitted discovery; and Rule 26(f) requires meeting for the exchange of initial information.

150 *See* Van Duizend, *supra* note 138.

151 *See id*.

152 California Attorney Guidelines, *supra* note 71, at 3 (emphasis added).

153 *See, e.g., Kipperman*, *supra* note 12, at *8 (defendant's failure to cooperate as to search terms led to rejection of argument that plaintiff's requested search was overbroad).

154 *Covad Commc'ns. Co. v. Revonet, Inc.*, 254 F.R.D. 5, 14 (D.D.C. 2009) (citing the *Cooperation Proclamation*). *Accord Wells Fargo Bank v. LaSalle Bank Nat'l Ass'n*, 2009 WL 2243854, at *2-3 (S.D. Ohio July 24, 2009) (refusing to require defendant to restore and search back-up tapes after close of discovery where the parties could have avoided the dispute "by conferring appropriately early in the case about ESI," citing the *Cooperation Proclamation,* describing parties' conduct as filing "one paragraph boilerplate statements about ESI" in the Rule 26(f) report and "waiting for the explosion later" rather than "deal[ing] systematically with ESI problems at the outset of the litigation").

credible will likely have the adversarial advantage over the course of the dispute resolution process, particularly over an attorney who has below par credibility. Success in advocacy and persuasiveness on substantive issues is enhanced by the cooperative approach to discovery. Cooperatively working through procedural issues can have the effect of building a reservoir of goodwill and trust that can be drawn upon in advocating for the client's position on important substantive issues. Likewise, reasonableness, civility and flexibility begets a like response.

In short, a cooperative approach is more likely to speed up the time for reaching a resolution, to enhance the possibility of settlement, enhance the likelihood of an optimum result and lower the overall cost of the dispute resolution process.

C. Avoiding the Prisoner's Dilemma

When both sides to litigation pursue a cooperative approach to discovery, each party benefits by reducing its discovery expense while it still obtaining necessary information to which it is entitled. However, the phenomenon which game theory refers to as the "Prisoner's Dilemma" suggests that the fear of being disadvantaged if the other side were to take a non-cooperative approach to discovery could lead both sides to reject cooperation, thus raising litigation expenses for both sides while giving neither any advantage as a result of this additional cost. Either party in a particular case may perceive that one could gain an advantage over the other by employing obstructionist, overreaching or combative tactics, potentially preventing its opponent from obtaining needed and discoverable data, but itself reaping the benefits of receiving full discovery from its more cooperative opponent. In the classic Prisoner's Dilemma, the prospect that an opponent might seek such an advantage could lead both sides to defensively pursue a non-cooperative approach, so that, in the end, neither gains a unilateral advantage over the other and both are actually worse off than if both had cooperated.[155] In discovery, this would result in each spending more on discovery than would have been the case if both sides had taken a cooperative approach, but with neither party gaining the benefits of mutual cooperation much less an upper hand over the other side.

However, the Prisoner's Dilemma phenomenon breaks down where the actors involved must repeatedly face the same or similar decisions with the same or similar costs, benefits and risks. Under these circumstances, a party considering taking a non-cooperative approach in an attempt to gain an advantage over the other side must evaluate the risk of the other side responding with similar conduct during a subsequent "round."[156] In the discovery setting, for example, an obstructionist approach regarding e-discovery parameters during a Rule 26(f) conference may lead to non-cooperative conduct by the other side in subsequent meet-and-confer situations where the first party would itself benefit from mutually cooperative resolutions. Indeed, even in a single Rule 26(f) conference or other individual meet-and-confer situation, there are often multiple issues to address, each of which can be viewed as a "round" in which non-cooperative conduct by one side could induce non-cooperative conduct by the other side in subsequent rounds.

Thus, a party's non-cooperative conduct in each round potentially has later adverse consequences for that very party, and the threat of such can lead both sides to a cooperative approach.[157] This leads the parties, each following its own self-interest, to pursue a cooperative approach that leads both to the mutually beneficial result — here, lowering discovery expenses. The opportunity (indeed, the requirement) imposed by the civil rules and many local rules to address and attempt to agree upon key discovery parameters early in each case, coupled with the high likelihood that there will be many additional downstream steps in each case can induce both sides to behave in a cooperative manner.

The Prisoner's Dilemma phenomenon further breaks down where the actors involved can communicate with each other to develop and exchange enforceable, reciprocal commitments; where each actor can learn about the other's reputation for trustworthiness as to such commitments from the

155 *See* Robert Axelrod, THE EVOLUTION OF COOPERATION, at 7-10, 125 (Rev. Ed., Perseus Books Group 2006); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 514-15 (1994).
156 *See* Axelrod, *id.* at 12, 20-21, 125; *see also* G. Paul & J. Baron, *supra* note 26, at 56 note. 134.
157 *See* Axelrod, *id.* at 131-32.

other's prior interactions with third parties; and where each actor must be concerned with the impact of its own present conduct on its reputation and thus its ability to elicit conduct that it may seek from others in the future.[158] Unlike the two isolated hypothetical individuals in the Prisoner's Dilemma who *cannot* communicate with each other, attorneys and parties in litigation can cooperatively bargain for interdependent commitments on specific issues before actually performing and conveying benefits on the other side. They can also enforce such commitments through court involvement, consider the reputation of the opposing counsel and party in deciding whether to enter such agreements, and consider the consequences of their actions on their own reputation, all of which permits and encourages cooperative solutions.[159]

Finally, the circumstances of litigation introduce a variable not present in the classic Prisoner's Dilemma: the possibility of an intervening enforcement authority. In litigation, the attorneys and parties conducting discovery must also consider how a court will view and potentially reward or penalize their actions. As discussed in Section B above, an obstructionist or overreaching approach by a party in discovery may lead to unfavorable decisions by the court as to that very issue or as to other discovery disputes in the same case. Moreover, forcing the court to address an unnecessary discovery dispute or taking an inappropriately aggressive or unsupported position may undermine the credibility of counsel and the party on subsequent procedural or substantive issues. This threat can provide incentives for each party to pursue a cooperative approach. Of course, judicial willingness to support reasonable discovery approaches and to penalize overreaching and obstructionist positioning will increase the effectiveness of this incentive. Indeed, that attorneys will again appear before the courts, and their clients may as well, creates a dynamic in which the threat of future obstructionist conduct by opponents, or risk of gaining a reputation among the judiciary as unduly combative during discovery, encourages cooperative behavior.

Thus, while there may remain cases in which a party opts for a contentious, non-cooperative approach to discovery, potentially forcing onto the opponent disputes not of its choosing and their attendant costs, in most cases, mutual self-interest should lead both sides to a cooperative approach. Indeed, as the explosion in electronic data and the economics of litigation, and pressure from the courts induce more attorneys and parties to conduct discovery in a cooperative manner, those who continue to pursue unduly combative approaches may find that their conduct increasingly stands out as inappropriate to both courts and other counsel, rendering such conduct increasingly counter-productive.

VI. CONCLUSION

If parties are expected to continue to manage discovery in the manner envisioned by the Federal Rules of Civil Procedure, cooperation will be necessary. Without such cooperation, discovery will become too expensive and time consuming for parties to effectively litigate their disputes.

158 *See id.* at 11-12.
159 *See* Gilson & Mnookin, *supra* note 155, at 564 (counsel's concern about reputation may facilitate cooperative solutions).