



## **INTRODUCTION**

This is the latest issue of the NAGTRI E-Discovery Bulletin, a compendium of recent case law, publications and legislation pertaining to electronic discovery issues to be published monthly. It is supported by the National Association of Attorneys General Training and Research Institute (NAGTRI) and written by Hedda Litwin, Cyberspace Law Counsel. The Bulletin welcomes articles and information from its readers for upcoming issues.

## **CAN'T WE ALL JUST GET ALONG?**

“Can’t we all just get along?” That question certainly sums up the well know opinion by Magistrate Judge Paul Grimm of the U.S. District Court for the District of Maryland in *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354 (D. Md. 2008). That “must read” 30-page opinion presents a solid argument for a more cooperative approach to e-discovery, and is also the first case to provide legal support for the then recently issued The Sedona Conference Cooperation Proclamation.

In this issue, one of the cases discussed is *William A. Gross Constr. Assocs v. Amer. Mfrs. Mut. Ins. Co.*, 2009 U.S. Dist. LEXIS 22903 (S.D.N.Y. March 19, 2009), in which the court warns the parties to be more cooperative and references the above opinion of Judge Grimm as well as the Proclamation. At the end of the case law discussion, we also reprint The Sedona Conference Cooperation Proclamation for those of you who may have missed it or would like to review it.

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## **RECENT COURT DECISIONS**

### **DISCOVERY SEARCH TERMS: COLLABORATION BETWEEN PARTIES**

*William A. Gross Constr. Assocs v. Amer. Mfrs. Mut. Ins. Co.*, 2009 U.S. Dist. LEXIS 22903 (S.D.N.Y. March 19, 2009). The U.S. District Court for the Southern District of New York had to craft a search term methodology for the parties, while admonishing them on the need for cooperation and advance planning. The case involved a multi-million dollar dispute over alleged defects and delay in the construction of the Bronx County Hall of Justice. The Dormitory Authority of the State of New York (DASNY) “owned” the project, and Hill International, a non-party, was its construction manager. The issue before the court was how to craft search terms that would separate out Hill’s e-mails that were relevant to the project. DASNY proposed a small list of terms, but Hill did not contribute any terms. The other parties proposed thousand of additional terms related to construction, and DASNY pointed out that such an extensive search would produce Hill’s entire e-mail database. The court was left in the “uncomfortable” position of crafting a search methodology without adequate information from the parties. The court quoted decisions by Magistrate Judges Facciola and Grimm on the proper selection of search terms, and told the parties they had to be more cooperative in the future, consistent with the Sedona Conference Cooperation Proclamation. The court also acknowledged that another search might be required.

**NEW YORK PRACTICE: ZUBALAKE COST-SHIFTING FACTORS**

*T.A. Ahern Contractors Corp. v. Dormitory Authority of N.Y.*, 2009 Misc. LEXIS 662 (N.Y. Sup Ct. March 19, 2009). The New York Supreme Court ruled that cost-shifting precedents such as found in Zubalake were inapplicable pursuant to a New York statute obligating the requesting party to bear the cost of discovery. In this state contract case, both parties sought discovery of e-mails. The Dormitory Authority of N.Y. (“the Authority”), noting that its employees did not segregate their e-mail into project-specific folders, argued that it would be necessary to hire a vendor to search an estimated 35 gigabytes of data for responsive documents. The Authority agreed to produce the data if T.A. Ahern Contractors (“Ahern”) agreed to pay the estimated \$35,000 for the vendor. Ahern filed a motion to compel the Authority to produce the e-mail, arguing that the Authority should either pay the cost or give Ahern access to the files so it could search them at its own cost. The court, however, found that neither N.Y. case law nor statute allowed it to order the Authority to pay the production cost because in N.Y. state courts, the requesting party is responsible for paying the cost of responding to discovery. The court then ordered each party to produce electronically stored information once the other party agreed to pay for the cost.

**SAFE HARBOR PROVISION: LACK OF RETENTION POLICY**

*Philip M. Adams & Associates, LLC v. Dell Inc.*, 2009 U.S. Dist. LEXIS 26964 (D. Utah) March 27, 2009). In this patent infringement action, the U.S. District Court of Utah concluded that the safe harbor provision of F.R.C.P. 37© did not apply and Dell should be sanctioned for spoliation. Philip M. Adams & Associates (“Adams”) claimed Dell reverse engineered Adams’ patented programs for disk controllers. Adams sought sanctions against Dell for spoliation when discovery from Dell, compared to the volume of e-mail and other evidence provided by Dell in other litigation, provided no evidence that the company had infringed upon Adams’ patents. Dell countered that the lesser amount of e-mail was because their e-mail servers were “not designed for archival purposes,” and their employees were instructed to only preserve e-mail of “long term value.” The court found that Dell’s restric-

tive e-mail preservation did not establish a “good faith” practice, and F.R.C.P. 37© did not provide a “safe harbor” for e-mail not saved by employees. The court noted that Dell had servers on which it backed up and stored financial data, demonstrating that Dell “does know how to protect data it regards as important.” The court determined Dell’s lack of a retention policy was responsible for the lack of data, and sanctions against the company were appropriate.

**THE SEDONA CONFERENCE COOPERATION PROCLAMATION**

The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information (“ESI”). In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction and extensive, but unproductive, discovery disputes – in some cases precluding adjudication on the merits altogether – when parties treat the discovery process in an adversarial manner. Neither law nor logic compels these outcomes.

With this Proclamation, The Sedona Conference launches a national drive to promote open and forthright information sharing, dialogue (internal and external), training and the development of practical tools to facilitate cooperative, collaborative, transparent discovery. This Proclamation challenges the bar to achieve these goals and refocus litigation toward the substantive resolution of legal disputes.

**Cooperation in Discovery is Consistent with Zealous Advocacy**

Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court. Cooperation does not con-

flict with the advancement of their clients' interests – it enhances it. Only when lawyers confuse *advocacy* with *adversarial conduct* are these twin duties in conflict.

Lawyers preparing cases for trial need to focus on the full cost of their efforts – temporal, monetary and human. Indeed, all stakeholders in the system – judges, lawyers, clients and the general public – have an interest in establishing a culture of cooperation in the discovery process. Over-contentious discovery is a cost that has outstripped any advantage in the face of ESI and the data deluge. It is not in anyone's interest to waste resources on unnecessary disputes, and the legal system is stained by “gamesmanship” or “hiding the ball” to no practical effect.

The effort to change the culture of discovery from adversarial conduct to cooperation is not utopian. <sup>1</sup>It is, instead, an exercise in economy and logic. Establishing a culture of cooperation will channel valuable advocacy skills toward interpreting the facts and arguing the appropriate application of law.

### Cooperative Discovery is Required by the Rules of Civil Procedure

When the first uniform civil procedure rules allowing discovery were adopted in the late 1930s. “discovery” was understood as an essentially cooperative, rule-based, party-driven process, designed to exchange relevant information. The goal was to avoid gamesmanship and surprise at trial. Over time, discovery has evolved into a complicated, lengthy procedure requiring tremendous expenditures of client funds, along with legal and judicial resources. These costs often overshadow efforts to resolve the matter itself. The 2006 amendments to the federal rules specifically focused on discovery of “electronically stored information” and emphasized early communication and cooperation in an effort to streamline information exchange, and avoid costly unproductive disputes.

Discovery rules frequently compel parties to meet and confer regarding data preservation, form of produc-

tion and assertion of privilege. Beyond this, parties wishing to litigate discovery disputes must certify their efforts to resolve their difficulties in good faith.

Courts see these rules as a mandate for counsel to act cooperatively. <sup>2</sup>Methods to accomplish this cooperation may include:

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

### The Road to Cooperation

It is unrealistic to expect a *sua sponte* outbreak of pre-trial discovery cooperation. Lawyers frequently treat discovery conferences as perfunctory obligations. They may fail to recognize or act on opportunities to make discovery easier, less costly and more productive. New lawyers may not yet have developed cooperative advocacy skills, and senior lawyers may cling to a long-held “hide the ball” mentality. Lawyers who recognize the value of resources such as ADR and special masters may nevertheless overlook their application to discovery. And, there remain obstreperous counsel with no interest in cooperation, leaving even the best-intentioned to wonder if “playing fair” is worth it.

This “Cooperation Proclamation” calls for a paradigm shift in the discovery process; success will not be instant. The Sedona Conference views this as a three-part proc-

ess to be undertaken by The Sedona Conference Working Group on Electronic Document Retention and Production (WG1):

Part I: Awareness – Promoting awareness of the need and advantages of cooperation, coupled with a call to action. This process has been initiated by The Sedona Conference Cooperation Proclamation.

Part II: Commitment – Developing a detailed understanding and full articulation of the issues and changes needed to obtain cooperative fact-finding. This will take the form of a “Case for Cooperation” which will reflect viewpoints of all legal system stakeholders. It will incorporate disciplines outside the law, aiming to understand the separate and sometimes conflicting interests and motivations of judges, mediators and arbitrators, plaintiff and defense counsel, individual and corporate clients, technical consultants and litigation support providers, and the public at large.

Part III: Tools – Developing and distributing practical “toolkits” to train and support lawyers, judges, other professionals and students in techniques of discovery cooperation, collaboration and transparency. Components will include training programs tailored to each stakeholder; a clearinghouse of practical resources, including form agreements, case management orders, discovery protocols, etc.; court-annexed ADR with qualified counselors and mediators, available to assist parties of limited means; guides for judges faced with motions for sanctions; law school programs to train students in the technical, legal and cooperative aspects of e-discovery; and programs to assist individuals and businesses with basic e-record management, in an effort to avoid discovery problems altogether.

## Conclusion

It is time to build upon modern Rules amendments, state and federal, which address e-discovery. Using this springboard, the legal profession can engage in a comprehensive effort to promote pre-trial discovery cooperation. Our “officer of the court” duties demand no less.

This project is not utopian; rather, it is a tailored effort to effectuate the mandate of court rules calling for a “just, speedy and inexpensive determination of every action” and the fundamental ethical principles governing our profession.

<sup>1</sup>Gartner RAS Core Research Note G00148170, *Cost of eDiscovery Threatens to Skew Justice System*, 1D#G001148170, (April 20, 2007), at <http://www.h5technologies.com/pdf/gartner0607.pdf>. (While noting that “several...disagreed with the suggestion [to collaborate in the discovery process] ...calling it ‘utopian,’” one of the “take-aways” from the program identified in the Gartner Report was to “[s]trive for a collaborative environment which it comes to eDiscovery, seeking to cooperate with adversaries as effectively as possible to share the value and reduce costs.”).

<sup>2</sup>See, e.g., *Board of Regents of University of Nebraska v. BASF Corp.*, No. 4:04-CV-3356, 2007 WL 3342423, at \*5 (D. Neb. Nov. 5, 2007). (“The overriding theme of recent 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. [citations omitted]. If counsel fail in this responsibility – willfully or not – these principles of an open discovery process are undermined, coextensively limiting the courts’ ability to objectively resolve their clients’ disputes and the credibility of its resolution”).