

COOPERATION—WHAT IS IT AND WHY DO IT?

By David J. Waxse*

Cite as: David J. Waxse, *Cooperation—What Is It and Why Do It?*, XVIII RICH. J. L. & TECH. 8 (2012), <http://jolt.richmond.edu/v18i3/article8.pdf>.

[1] Litigation is a method of resolving disputes that is too costly and time consuming for most parties involved. As a Federal Magistrate Judge involved in case management on a day-to-day basis, I often see evidence of this. I also participated in the 2010 Conference on Civil Litigation held at Duke Law School¹ and sponsored by the Federal Judicial Conference Standing Committee on Rules of Practice and Procedure.² The conference explored “the current costs of civil litigation in Federal Court, particularly discovery, and discuss[ed] possible solutions.”³ As part of the conference, the Federal Judicial Center presented its research findings on its study of the costs of litigation in federal court.⁴ Further, all of the papers submitted

* David J. Waxse is a United States Magistrate Judge in the District of Kansas. The author thanks Ken Withers, Director of Judicial Education for The Sedona Conference®, for his insight and support, as well as my wife, Judy Pfannenstiel, and my law clerk Brenda Yoakum-Kriz, for their assistance with editing and revising this article. The views expressed in this article are those of the author alone and not the United States District Court for the District of Kansas.

¹ See *Conference Panelists*, 2010 CIVIL LITIG. CONF., 4 (May 10-11, 2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Panelists.pdf>.

² 2010 CIVIL LITIG. CONF., <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DukeWebsiteMsg.aspx> (last visited Feb. 12, 2011).

³ *Id.*

⁴ See JUDICIAL CONF. ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONF. ON CIVIL LITIG. (May 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Report%20to>

to the conference are available on the U.S. Courts' website for the conference.⁵

[2] Many articles and reports have been written about the conference, but in my view there was a clear consensus among the participants that civil litigation takes too long and costs too much. The ultimate purpose of the conference was to try to find ways to effectuate the purposes of the Federal Rules of Civil Procedure—"to secure the just, speedy, and inexpensive determination of every action and proceeding."⁶ As the Report to the Chief Justice of the United States on the conference indicates, participants provided many specific and general suggestions for changes in both rules and litigation practices.⁷

[3] Although there were suggestions for changes in the Federal Rules of Civil Procedure, the participants were unable to reach any clear consensus on any specific changes.⁸ Among the other areas the participants discussed were increased judicial involvement in case management and the use of sanctions for improper behavior.⁹ The suggestion I made, along with many other participants, was to encourage cooperation in the discovery process, a suggestion that became a consensus recommendation.¹⁰

%20the%20Chief%20Justice.pdf (reporting on the overall purpose of the conference as well as the schedule).

⁵ See 2010 CIVIL LITIG. CONF., *supra* note 2 (click on "Papers Submitted by Conference Panelists").

⁶ *Id.* (quoting FED. R. CIV. P. 1).

⁷ See generally JUDICIAL CONF. ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE AND PROCEDURE, *supra* note 4.

⁸ See *id.* at 12 (highlighting "two particular areas that merit the Rules Committees' prompt attention," rather than recommending specific changes).

⁹ See *id.* at 8-10.

¹⁰ See *id.* at 10.

[4] What is cooperation and why will it work as a solution to the problems of increased costs and delay in litigation? According to the Merriam-Webster Dictionary, cooperation is “the action of cooperating” and cooperating is “to act or work with another . . . for mutual benefit.”¹¹

[5] Before I talk about cooperation in the litigation context, I want to explore what scientific research has shown on why humans cooperate. Although lawyers and judges do not need to fully understand the science on why humans cooperate, I think it is helpful to understand that there are scientific grounds for why cooperation occurs. For example, Russell Hardin, in a portion of the abstract to his article “The Genetics of Cooperation,” says:

Much of the literature . . . supposes that we must explain directly the cooperative tendency, whether by individual or group selection. A more effective way to go is to find something more general and likely more deeply embedded in personal traits that enables and even enhances cooperation. [Several scholars], long ago proposed a psychological phenomenon now called mirroring, which induces good relations through shared sentiments in a way that is essentially hard-wired. Mirroring indirectly contributes to cooperativeness. There may be other similarly indirect ways to account for human cooperativeness.¹²

James H. Fowler, Laura A. Baker, and Christopher T. Dawes, in their paper titled “The Genetic Basics of Political Cooperation,” say in the abstract: “Cooperation has been a focus of intense interest in the biological

¹¹ *Cooperation*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/cooperation> (last visited Feb. 13, 2012); *Cooperating*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/cooperate> (last visited Feb. 6, 2012).

¹² Russell Hardin, *The Genetics of Cooperation*, 28 ANALYSE & KRITIK 57, 57 (2006), available at www.analyse-und-kritik.net/2006-1/AK_Hardin_2006.pdf.

and social sciences. . . . These results suggest that humans exhibit genetic variation in their tendency to cooperate and that biological evolution has played an important role in the development of political cooperation.”¹³ More recently in an October 2011 blog post in the “Anthropology in Practice,” section of *Scientific American*, Krystal D’Costa stated:

Cooperation confounds us: Humans are the only members of the animal kingdom to display this tendency to the extent that we do, and it’s an expensive endeavor with no guarantee of reciprocal rewards. While we continue to look for answers about how and why cooperation may have emerged in human social and cultural evolution, we are beginning to trace the developmental roots of prosocial behaviors.¹⁴

[6] There are also numerous references to cooperation in the interdisciplinary fields of systems analysis,¹⁵ social science research,¹⁶ and

¹³ James H. Fowler, Laura A. Baker & Christopher T. Dawes, *The Genetic Basics of Political Cooperation*, DIGITAL COMMONS@U. NEB. - LINCOLN, 1 (Oct. 9, 2006), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1007&context=politicalsciencehendricks>.

¹⁴ Krystal D’Costa, *Cooperation Is Child’s Play*, SCI. AM. (Oct. 10, 2011), <http://blogs.scientificamerican.com/anthropology-inpractice/2011/10/10/cooperationinnisc-hilds-play>. But see Eric Michael Johnson, *On the Origin of Cooperative Species: New Study Reverses a Decade of Research Claiming Chimpanzee Selfishness*, THE PRIMATE DIARIES (Aug. 8, 2011), <http://blogs.scientificamerican.com/primate-diaries/2011/08/08/origin-of-cooperative-species/> (“But a new study reveals for the first time that thinking of others unites humans and chimpanzees in a cooperative bond that reaches across two epochs to the very evolutionary ancestor Darwin predicted.”).

¹⁵ See, e.g., Otto Pulkkinen, *Emergence of Cooperation and Systems Intelligence*, in SYSTEMS INTELLIGENCE AND LEADERSHIP IN EVERYDAY LIFE 251 (Raimo P. Hämäläinen & Esa Saarinen eds. 2007), available at <http://www.sal.tkk.fi/publications/pdf-files/rpul07.pdf>.

¹⁶ See, e.g., Ming Ming Chiu, *Group Problem-Solving Processes: Social Interactions and Individual Actions*, 30 J. THEORY SOC. BEHAV. 27, 36, available at http://gse.buffalo.edu/fas/chiu/pdf/Group_Problem_Solving_Processes.pdf.

brain research.¹⁷ In many of these fields researchers are using brain scans to track what causes humans to cooperate.¹⁸ Other clear messages from the research are that cooperation can be taught and that cultural mechanisms help develop cooperation.¹⁹

[7] That understanding helped in the development of The Sedona Conference®²⁰ “Cooperation Proclamation”²¹ in 2009. As of September 2010, I, along with over 100 other judges, have endorsed the Cooperation Proclamation.²² The Cooperation Proclamation begins with this observation:

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

¹⁷ See, e.g., Christie Nicholson, *Brains Built to Cooperate*, SCI. AM. (Nov. 6, 2011), <http://www.scientificamerican.com/podcast/episode.cfm?id=brains-built-to-cooperate-11-11-06>.

¹⁸ See, e.g., James K. Rilling et al., *A Neural Basis for Social Cooperation*, 35 NEURON 395 (2002), available at <http://www.sciencedirect.com/science/article/pii/S0896627302007559>.

¹⁹ See *id.* at 403.

²⁰ *Frequently Asked Questions*, THE SEDONA CONFERENCE®, <http://www.thesedonaconference.org/content/faq> (last visited Feb. 6, 2012) (introducing The Sedona Conference® as a nonprofit, 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights).

²¹ See The Sedona Conference®, *The Sedona Conference® Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009).

²² *Id.* at 336.

cases precluding adjudication on the merits altogether—when parties treat the discovery process in an adversarial manner [sic]. Neither law nor logic compels these outcomes.²³

[8] The Cooperation Proclamation acknowledges that what is required is a “paradigm shift for the discovery process.”²⁴ The Sedona Conference®, in the Proclamation, envisions a three-part process:

- (1) Awareness (the Proclamation itself);
- (2) Commitment (the writing of a Brandeis style brief “The Case for Cooperation” to develop a “detailed understanding and full articulation of the issues and changes needed to obtain cooperative fact-finding”); and
- (3) Tools (“[d]eveloping and distributing practical ‘toolkits’ to train and support lawyers, judges, other professionals, and students in techniques of discovery cooperation, collaboration, and transparency.”).²⁵

As part of the effort to provide tools to promote cooperation, The Sedona Conference® created “Resources for the Judiciary”²⁶ and “The Sedona Conference® Cooperation Guidance for Litigators & In-House Counsel.”²⁷

²³ *Id.* at 331.

²⁴ *Id.* at 332.

²⁵ *Id.* at 332-33.

²⁶ THE SEDONA CONFERENCE®, THE SEDONA CONFERENCE® COOPERATION PROCLAMATION: RESOURCES FOR THE JUDICIARY 2 (2011), *available at* http://www.thesedonaconference.org/dltForm?did=Judicial_Resources.pdf.

²⁷ THE SEDONA CONFERENCE®, THE SEDONA CONFERENCE® COOPERATION GUIDANCE FOR LITIGATORS & IN-HOUSE COUNSEL 1 (2011), *available at* <http://www.thesedon>

[9] The Sedona Conference® Cooperation Guidance for Litigators & In-House Counsel discusses an issue often raised by lawyers when presented with the idea of cooperation: How does the idea of cooperation exist in an adversary system where each lawyer has a duty of zealous advocacy?²⁸ Lawyers and judges should consider that the ABA Model Rules of Professional Conduct removed the former ethical obligation for zealous advocacy from the ABA Model Code of Professional Responsibility when the ABA Model Rules of Professional Conduct replaced the Code in 1983.²⁹

[10] Prior to that, Canon 7 of the ABA Model Code of Professional Responsibility stated: “A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.”³⁰ Even in 1983, under Canon 7, Ethical Consideration [EC 7-39] discussed cooperation.³¹ It stated:

In the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of tribunals and make their decisional processes prompt and just, without impinging upon the

conference.org/dltForm?did=Cooperation_Guidance_for_Litigators_and_In_House_Counsel.pdf.

²⁸ See *id.* at 2, 17.

²⁹ See Elizabeth Mary Kameen, *Rethinking Zeal: Is It Zealous Representation or Zealotry?*, 44 APR. MD. B.J. 4, 6 (2011) (“Thus in 1983, the Model Rules moved the discussion of zealous representation from the body of the Rules to the Preamble.”); see also Michael H. Rubin, *The Ethical Utah Lawyer: What Are the Limits in Negotiation?*, 21 APR. UTAH B.J. 15, 15 (2008) (“In fact, ‘zealous advocacy’ has not been a requirement of national lawyers’ codes since 1983 . . .”).

³⁰ MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1980).

³¹ MODEL CODE OF PROF’L RESPONSIBILITY EC 7-39 (1980).

obligation of lawyers to represent their clients zealously within the framework of the law.³²

In the current version of the Model Rules of Professional Conduct, this explicit obligation of zealous advocacy no longer exists.³³ Zealous advocacy is mentioned only in the Preamble and in the comment to Rule 1.3.³⁴ The Preamble to the Model Rules provides an overview of the role of a lawyer. More specifically it provides:

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.³⁵

Model Rule of Professional Conduct 1.3 states, "A lawyer shall act with reasonable diligence and promptness in representing a client."³⁶ The

³² *Id.*

³³ See Rubin, *supra* note 29, at 15.

³⁴ See MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (2006); MODEL RULES OF PROF'L CONDUCT PREAMBLE (2006).

³⁵ MODEL RULES OF PROF'L CONDUCT Preamble (2006).

³⁶ MODEL RULES OF PROF'L CONDUCT R. 1.3 (2006).

comment to this rule mentions zealous advocacy. It provides as follows: “A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.”³⁷

[11] The Model Rules make clear that this discussion of zealous advocacy in the Preamble and in a comment do not create an ethical obligation of zealous advocacy.³⁸ More explicitly, the last paragraph of the Scope of the Model Rules states: “The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”³⁹

[12] With that knowledge of the history of the no longer existing ethical obligation of zealous advocacy, the Sedona Conference® provides the following response in its Guidance for Litigators & In-House Counsel:

Litigators are, of course, expected and ethically required to be advocates for their clients. They are also expected and ethically required to conduct discovery in a diligent, efficient, and candid manner. The tone of a case is usually set at the beginning, so it is important for all counsel to abide by and advance the principles of cooperative discovery at the outset of the case.⁴⁰

³⁷ MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt (2006).

³⁸ See MODEL RULES OF PROF’L CONDUCT Scope (2006).

³⁹ *Id.*

⁴⁰ THE SEDONA CONFERENCE® COOPERATION GUIDANCE FOR LITIGATORS & IN-HOUSE COUNSEL, *supra* note 27, at 2.

[13] The Guidance identifies opportunities for constructive, mutually beneficial cooperation with opposing counsel, and provides pointers on how to take advantage of such opportunities.⁴¹

[14] Following the creation of the Cooperation Proclamation, many courts have now written opinions urging counsel to be cooperative.⁴² For example, Judge Paul Grimm, in *Mancia v. Mayflower Textile Services Company*, wrote:

Although judges, scholars, commentators and lawyers themselves long have recognized the problems associated with abusive discovery, what has been missing is a thoughtful means to engage all the stakeholders in the litigation process—lawyers, judges and the public at large—and provide them with the encouragement, means and incentive to approach discovery in a different way. The Sedona Conference, a non-profit, educational research institute best known for its *Best Practices Recommendations and Principles for Addressing Electronic Document Production*, recently issued a *Cooperation Proclamation* to announce the launching of “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.” . . . In the meantime, however, the present dispute evidences the need for clearer guidance how to comply with the requirements of Rules 26(b)(2)(C) and 26(g) in order to ensure that the Plaintiffs obtain appropriate discovery to support their claims, and the Defendants are not unduly burdened by discovery

⁴¹ See *id.* at 3.

⁴² See, e.g., *Gipson v. Sw. Bell Tel. Co.*, No. 08-2017-EFM-DJW, 2008 U.S. Dist. LEXIS 103822 (D. Kan. Dec. 23, 2008); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008).

demands that are disproportionate to the issues in this case.⁴³

In one of my opinions, *Gipson v. Southwestern Bell Telephone Company*, I stated:

As of the date of the discovery conference, more than 115 motions and 462 docket entries had been filed in this case, even though the case has been on file for less than a year. Many of the motions filed have addressed matters that the Court would have expected the parties to be able to resolve without judicial involvement.

This Court's goal, in accordance with Rule 1 of the Federal Rules of Civil Procedure, is to administer the Federal Rules of Civil Procedure in a "just, speedy and inexpensive" manner. To assist the Court in accomplishing this goal, the parties are encouraged to resolve discovery and other pretrial issues without the Court's involvement. To help the parties and counsel understand their discovery obligations, counsel are directed to read the Sedona Conference Cooperation Proclamation, which this Court has previously endorsed.⁴⁴

[15] There are now numerous opinions making the same point about cooperation, yet it appears that cooperation is not being used enough as a method of obtaining the "just, speedy, and inexpensive determination of"

⁴³ *Mancia*, 253 F.R.D. at 363 (footnote call numbers omitted) (quoting The Sedona Conference®, *The Sedona Conference® Cooperation Proclamation*, *supra* note 21, at 331) (citing THE SEDONA CONFERENCE®, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2004), *available at* [http://www.thosedonaconference.org/content/miscFiles/SedonaPrinciples 200401.pdf](http://www.thosedonaconference.org/content/miscFiles/SedonaPrinciples%200401.pdf)).

⁴⁴ *Gipson*, 2008 U.S. Dist. LEXIS 103822, at *4 (quoting FED. R. CIV. P. 1).

the action.⁴⁵ Why is cooperation not happening often enough and what can be done to increase cooperation in litigation?

[16] There are numerous reasons why cooperation is often not happening. One is the misconception I have already discussed—that lawyers have an ethical obligation of zealous advocacy in every aspect of litigation. Another reason is that lawyers who become litigators often have personalities that love conflict and competition. They do not enjoy cooperation as much as they enjoy conflict. Some lawyers may also be operating under the impression that their clients are impressed by shows of aggression. In addition, combative pretrial behavior may be an attempt to avoid or postpone something that some lawyers fear, and that is an actual trial on the merits.

[17] Another reason that is not openly discussed often is that the hourly billing system used by many law firms is an incentive to engage in conflict instead of cooperation.⁴⁶ It takes more time to fight over everything than it takes to cooperate. Thus, when the lawyer is paid based solely on how much time they spend working, there is a disincentive to cooperate and therefore a potential conflict with the client's interest in resolving the litigation in a cost effective manner.

[18] So, what can the courts and the profession do to increase cooperation in litigation? Judges and lawyers have to take the position that the goal of litigation is the “just, speedy and inexpensive determination” of the matter as Rule 1 of the Federal Rules of Civil Procedure already makes clear.⁴⁷

⁴⁵ FED. R. CIV. P. 1.

⁴⁶ See David J. Waxse, *Ethical Implications of Hourly Billing*, 67 DEC. J. KAN. B. ASS'N 2, 2 (1998).

⁴⁷ FED. R. CIV. P. 1.

[19] To reach that goal, lawyers need to follow, and judges need to require compliance with, several other Federal Rules of Civil Procedure that imply cooperation but are not used enough to promote cooperation. For example, Fed. R. Civ. P. 16 provides that the Court may enter orders for the following purposes:

Rule 16. Pretrial Conferences; Scheduling; Management

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

- (1) expediting disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) *discouraging wasteful pretrial activities*;
- (4) improving the quality of the trial through more thorough preparation; and
- (5) facilitating settlement.⁴⁸

Fed. R. Civ. P. 26(b)(2)(C) requires that the court limit discovery in certain instances.⁴⁹ Cooperative lawyers would do this on their own. For those who are not cooperating, this rule provides the following:

When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

⁴⁸ FED. R. CIV. P. 16 (emphasis added).

⁴⁹ See FED. R. CIV. P. 26(b)(2)(C).

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.⁵⁰

[20] Fed. R. Civ. P. 26(f) is another rule that promotes cooperation by setting out the parties' planning conference duties.⁵¹ Parties must consider "the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan."⁵² The Rule also establishes that "[t]he attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court . . . a written report outlining the plan."⁵³

[21] Fed. R. Civ. P. 26(g) allows the court to insure that lawyers are not being uncooperative by making improper discovery requests and responses.⁵⁴ The Rule provides:

⁵⁰ *Id.*

⁵¹ *See* FED. R. CIV. P. 26(f).

⁵² FED. R. CIV. P. 26(f)(2).

⁵³ *Id.*

⁵⁴ *See, e.g.,* *Mezu v. Morgan St. Univ.*, 269 F.R.D. 565, 585—86 (D. Md. 2010) (ordering counsel to submit written verification that they carefully read Federal Rule of Civil Procedure 26, stating that "the 'spirit and purposes' of these discovery rules requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither 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.⁵⁵

Fed. R. Civ. P. 26(g)(3) provides courts with an enforcement tool.⁵⁶ It states:

seeking discovery the cost and burden of which is disproportionately large to what is at stake" (quoting *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357-58 (D. Md. 2008)) (internal quotation marks omitted); *see* FED. R. CIV. P. 26(g).

⁵⁵ FED. R. CIV. P. 26(g)(1).

⁵⁶ *See* FED. R. CIV. P. 26(g)(3); *Mancia*, 253 F.R.D. at 357 (discussing the court's ability to impose "an appropriate sanction" for a discovery violation).

If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.⁵⁷

[22] In addition to the Rules of Civil Procedure, Congress arms courts with a statutory provision designed to enforce cooperation.⁵⁸ 28 U.S.C. § 1927 states:

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.⁵⁹

[23] Provided that counsel actually use and understand the Rules and the enforcement statute, they provide a clear path to cooperation.⁶⁰ They also provide judges with sufficient tools to insure that counsel are focused on the goals enumerated in Rule of Civil Procedure 1, and that they use

⁵⁷ FED. R. CIV. P. 26(g)(3).

⁵⁸ See 28 U.S.C. § 1927 (2006); Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1073-74 (1994) (noting that through § 1927, courts may impose such sanctions "[u]nder their inherent judicial power").

⁵⁹ 28 U.S.C. § 1927.

⁶⁰ See *Mezu v. Morgan St. Univ.*, 269 F.R.D. 565, 585-86 (D. Md. 2010) (lamenting counsel's "deficient knowledge of fundamental rules of procedure, local rules, discovery guidelines, and decisional authority which, collectively unambiguously establish the Court's expectation about how discovery is to be conducted to achieve the aspirations of Fed. R. Civ. P. 1").

cooperation to reach those goals.⁶¹ If counsel understand that courts expect their cooperation, it is more likely to occur. This is also another consensus from the Duke Conference.⁶² Lawyers are more cooperative when they know that the judge is watching (providing “adult supervision”) and enforcing cooperation responsibilities.⁶³

[24] Finally, it may be helpful for a few lawyers to remind them that cooperation is something they should have learned in school. Some, who cannot seem to learn to cooperate, might benefit from this list for elementary school teachers, explaining how to be a cooperative person:

LISTEN carefully to others and be sure you understand what they are saying.

SHARE when you have something that others would like to have.

TAKE TURNS when there is something that nobody wants to do, or when more than one person wants to do the same thing.

COMPROMISE when you have a serious conflict.

DO YOUR PART the very best that you possibly can. This will inspire others to do the same.

SHOW APPRECIATION to people for what they contribute.

ENCOURAGE PEOPLE to do their best.

⁶¹ See FED. R. CIV. P. 1; *see also id.*

⁶² See Mary Mack, *Duke Conference on Civil Procedure and eDiscovery- Day 2*, DISCOVERY RESOURCES (May 11, 2010), <http://www.discoveryresources.org/library/case-law-and-rules/duke-conference-on-civil-procedure-and-ediscovery-day-2/> (stating that there was a consensus at the conference that it was necessary to educate the bar on procedural e-discovery issues and expectations).

⁶³ See Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 734-37 (2010) (noting the inevitable “struggle to control costs if lawyers continue to act like spoiled children”).

MAKE PEOPLE FEEL NEEDED. Working together is a lot more fun that way.
DON'T ISOLATE OR EXCLUDE ANYONE. Everybody has something valuable to offer, and nobody likes being left out.⁶⁴

It is never too late to learn how to be cooperative—even for litigators in federal court. Both judges and lawyers must stay focused on securing “the just, speedy, and inexpensive determination of every action and proceeding,”⁶⁵ and cooperation is the best way to reach that goal.

⁶⁴ *How to Be a Cooperative Person, Teaching Guide: COOPERATION for Grades K-5*, GOODCHARACTER.COM, <http://www.goodcharacter.com/YCC/Cooperation.html> (last visited Feb. 6, 2012).

⁶⁵ FED. R. CIV. P. 1.