

Attorneys Admonished by Judge Nolan Not to “Confuse Advocacy with Adversarial Conduct” and Instructed on the Proportionality Doctrine

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Attorneys Admonished by Judge Nolan Not to “Confuse Advocacy with Adversarial Conduct” and Instructed on the Proportionality Doctrine

(http://ralphlosey.files.wordpress.com/2012/10/judge_nolan1.png) On September 28, 2012, United States Magistrate Judge Nan R. Nolan issued a 53 page order in *Kleen Products* that begins by admonishing counsel *not to confuse advocacy with adversarial conduct*. *Kleen Products, LLC, et al. v. Packaging Corp. of Amer., et al.* (http://ralphlosey.files.wordpress.com/2012/10/kleen_productions_cooperation_order.pdf), Case: 1:10-cv-05711, Document #412 (ND, Ill., Sept. 28, 2012). This opinion from a jurist well-known for kindness and e-discovery expertise advances the jurisprudence on the all-important lawyer best practice of **Cooperation**. This is the fifth step of the new *attorney-centric* EDBP (<http://edbp.com>) (Electronic Discovery Best Practices) work flow chart, which anyone is free to copy or make contributions to.



The *Kleen Products* opinion also provides an excellent collection of legal authority on a basic component for cooperation, namely *proportionality*. I for one am sorry to hear that Judge Nolan retired on October 1, 2012.

Judge Nolan concluded this opinion with three specific best practice suggestions, which have already been incorporated into the Cooperation page (<http://www.edbp.com/cooperation/>) of EDBP. Further, all of the best practices developed by the Seventh Circuit Electronic Discovery Committee, with which Judge Nolan is actively involved, and were set forth in their *Principles Relating to the Discovery of*

Electronically Stored Information (<http://www.discoverypilot.com/sites/default/files/Phase-Two-Final-Report-Appendix.pdf>) (Rev. 08/01/2010), have also been included in the EDBP. So too have the New York State Bar Associations Best Practices In E-Discovery In New York State and Federal Courts (<http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=58331>) (2011). Although the EDBP (<http://edbp.com>) is still far from complete, and will, in any event, always remain an open and evolving project, almost half of the best practices are now at least somewhat described. See the Preservation (<http://www.edbp.com/preservation/>) page, the Cooperation (<http://www.edbp.com/cooperation/>) page, and the Review (<http://www.edbp.com/search-review/>) page.

Cooperation in Discovery is an Ethical Imperative

Judge Nolan begins her opinion with a quote from The Sedona Conference® Cooperation Proclamation (<https://thesedonaconference.org/cooperation-proclamation>), 10 Sedona Conf. J. 331, 331 (2009).

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

So many lawyers do not understand this, especially the ones my age who were raised in a culture of *litigation as war*. They seem to have forgotten the oaths they swore long ago when first admitted to the Bar and allowed to practice as officers of the court. They seem to have forgotten their basic ethical duties of Candor to the Tribunal. See ABA Model Rule of Professional Responsibility, Rule 3.3 Candor Toward Tribunal. Not to mention their ethical duty under Rule 3.2 to *Expedite Litigation*, and duty under Rule 4-3.4 of *Fairness To Opposing Party and Counsel*. The actual language of Rule 4-3.4 bears repetition:

A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act.

Cooperation in Discovery is Required by Rules of Procedure

(http://ralphlosey.files.wordpress.com/2012/10/judge_paul_grimm.png) Many attorneys and judges also seem to have forgotten what Judge Paul Grimm in *Mancia* called the most misunderstood and under-utilized Federal Rule of Civil Procedure, Rule 26(g). *Mancia v. Mayflower Textile Services Co* (<http://ralphlosey.files.wordpress.com/2008/10/manciavmayflower.pdf>), 253 F.R.D. 354 (D. Md. 2008). Rule 26(g) is the Rule 11 of discovery. Under 26(g) an attorney's signature on a discovery request or response "certifies" that the request is reasonable and the disclosure is complete and correct, and the discovery is "not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."



As Judge Grimm's *Mancia* opinion goes on to explain in great detail, cooperation in discovery is not only required by professional ethics, but also by many of our rules of

civil procedure, including especially Rule 1. *Also see Gensler, The Bull's-Eye View of Cooperation in Discovery*, 10 Sedona Conf. J. 363, at 363 (2009 Supp.); Sedona Conference, *The Case for Cooperation*, 10 Sedona Conf. J. 339 (2009 Supp.); Losey, R., *Mancia v. Mayflower Begins a Pilgrimage to the New World of Cooperation*, ([http://www.thesedonaconference.org/dltForm?did=Supplement to Volume 10 of The Sedona Conference Journal Cooperation.pdf](http://www.thesedonaconference.org/dltForm?did=Supplement%20to%20Volume%2010%20of%20The%20Sedona%20Conference%20Journal%20Cooperation.pdf)) 10 Sedona Conf. J. 377 (2009 Supp.); Waxse, J., *Cooperation—What Is It and Why Do It?* (<http://jolt.richmond.edu/v18i3/article8.pdf>), XVIII Rich. J. L. & Tech. 8 (2012); Losey, R., *Judge David Waxse on Cooperation and Lawyers Who Act Like Spoiled Children* (<http://e-discoveryteam.com/2012/03/30/judge-david-waxse-on-cooperation-and-lawyers-who-act-like-spoiled-children/>) (2012); Losey, R., *Ethics of Electronic Discovery* (<http://e-discoveryteam.com/2012/03/04/ethics-of-electronic-discovery-part-one/>) (2012).

Plaintiff's Motions in Kleen Products

(http://ralphlosey.files.wordpress.com/2012/10/judge_nolan_artistic1.png) After beginning the opinion with the quote from *Cooperation Proclamation* (<https://thesedonaconference.org/cooperation-proclamation>), Judge Nolan goes on to explain the series of discovery motions recently filed in this class action antitrust case.

- ∞ Plaintiffs' Motion to Compel Defendants to Produce Documents and Data from All Reasonable Accessible Sources
- ∞ Plaintiffs' Motion to Compel Temple-Inland to Include Additional Document Custodians
- ∞ Plaintiffs' Motion to Compel International Paper Company to Include Additional Document Custodians
- ∞ Defendant Georgia-Pacific LLC's Motion for Protective Order



Judge Nolan then goes on to recount the other discovery issues that the parties had previously resolved without her having to enter an order. Judge Nolan did, however, have many, many, hearings on these issues, and made rather suggestive statements of her thoughts, statements that indicated how she would probably rule.

The biggest dispute the parties resolved after days and days of help by Judge Nolan concerned predictive coding. This is the much discussed (<http://www.clearwellsystems.com/e-discovery-blog/2012/08/24/clean-sweep-in-keen-products-predictive-coding-battle-not-exactly/>) dispute where the plaintiffs were trying to force the defendants into a "redo" of their prior search and production that did not use predictive coding. The plaintiffs claimed that the keyword search used by defendants likely only found 25% of the relevant documents, whereas a predictive coding search would likely retrieve 70%. The plaintiffs had a good argument from an abstract point of view, but it was flawed procedurally. It came too late, after the plaintiff's production was substantially complete. Plus, as Judge Nolan pointedly observed in the hearings to help persuade the plaintiffs to back-off:

Sedona Principle 6, "[r]esponding parties are best situated to evaluate the procedures, methodologies, and techniques appropriate for preserving and producing their own electronically stored information." *See The Sedona Conference, The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 Sedona Conf. J. 189, 193 (Fall 2007).

Plaintiffs wanted to use the latest *new age* methods of search, but approached the problem

with decidedly *old school* adversarial methods. It was an odd mix doomed to failure. You have got to have both, especially when you are in front of a sophisticated, *Sedona-schooled* judge like Nan Nolan. If you are really after truth and justice in today's world of exponentially growing ESI, and not just playing a refashioned game of hassle the other side, both your technology and your culture need to be *new age*. As Jason R. Baron puts it:

[T]he challenge is how best to reasonably (not perfectly) manage the exponentially growing amount of ESI caught in, and subject to, modern-day discovery practice. The answer lies principally in culture change (i.e., fostering cooperation strategies), combined with savvier exploitation of a range of sophisticated software and analytical techniques."

Baron, J., *Law In The Age of Exabytes*, XVII RICH. J.L. & TECH. 9, at pg. 5 (2011).

Interrogatory Six and Proportionality

(http://ralphlosey.files.wordpress.com/2012/10/judge_nolan_smudge.png) Still, even though the predictive coding battle settled, many other discovery disputes remained, including Defendant Georgia-Pacific LLC's Motion for Protective Order. In this motion Judge Nolan was asked to *quash* Plaintiffs' Sixth Interrogatory. The *rog* requested *various background information over an eight-year period for each of the approximately 400 persons on the litigation-hold list*. The defendant claimed that this request was too burdensome, that it would take 800 hours to try to answer, and specified the details of what would be required. Plaintiff's responded by saying the Sixth Interrogatory "is hardly burdensome" and can be "answered by a small production of paper." *Id.* at pg. 17.



The court did not buy the plaintiff's *easy button* argument. In fact, Judge Nolan found it disingenuous, and invoked the all important *proportionality* constraints that govern all discovery. Here is her ruling:

First, issuing the Sixth Interrogatory within days of receiving the list of litigation-hold recipients violated the spirit of cooperation that this Court has encouraged the parties to pursue. ...

Second, GP has established an undue burden in responding to the Sixth Interrogatory. "All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)." Fed. R. Civ. P. 26(b)(1). The Rule 26 proportionality test allows the Court to "limit discovery if it determines that the burden of the discovery outweighs its benefit." *In re IKB Deutsche Industriebank AG*, No. 09 CV 7582, 2010 WL 1526070, at *5 (N.D. Ill. Apr. 8, 2010). Rule 26(b)(2)(C)(iii) requires a court to limit discovery if it determines that "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." In other words, "Rule 26(b)(2)(C)(iii) empowers a court to limit the frequency or extent of discovery if it determines that the burden or expense of the proposed discovery outweighs its likely benefit or that it is unreasonably cumulative or duplicative." *Sommerfield v. City of Chicago*, 613 F. Supp. 2d 1004, 1017 (N.D. Ill. 2009) objections overruled, 06 C 3132, 2010 WL 780390 (N.D. Ill. Mar. 3, 2010). "The 'metrics' set forth in Rule 26(b)(2)(C)(iii) provide courts significant flexibility and discretion to assess the circumstances of the case and limit discovery

accordingly to ensure that the scope and duration of discovery is reasonably proportional to the value of the requested information, the needs of the case, and the parties' resources." The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 Sedona Conf. J. 289, 294 (2010); see *Sommerfield*, 613 F. Supp. 2d at 1017 ("The application of Rule 26(b)(2)(C)(iii) involves a highly discretionary determination based upon an assessment of a number of competing considerations.").

Id. at 19, 20. As a strong proponent of proportionality I was glad to see Judge Nolan add to the growing jurisprudence in this area.

Custodian Count and Proportionality

(http://ralphlosey.files.wordpress.com/2012/10/judge_nolan_artistic2.png)

There was also a battle over scope of discovery centered around custodians. The plaintiffs wanted the ESI of 35 more custodians from two defendants. The defendants were willing to add 30 more custodians, but wanted limits on the sources of ESI that would be included for the additional custodians.

Judge Nolan begins her analysis of this issue by noting that anti-trust cases take an *expansive view of relevance* and allow for *broad discovery*. *Id.* at 27. But she also noted once again the importance of proportionality:

However, "[a]ll discovery, even if otherwise permitted by the Federal Rules of Civil Procedure because it is likely to yield relevant evidence, is subject to the court's obligation to balance its utility against its cost." *U.S. ex rel. McBride v. Halliburton Co.*, 272 F.R.D. 235, 240 (D.D.C. 2011) (Facciola, M.J.); see Fed. R. Civ. P. 26(b)(2)(C).

Id. at 28.

Plaintiff's argued that the proposed additional custodians and ESI sources should be included because they were all senior executives with responsibilities over the pricing issues in the case who "exchanged an unusually large" number of emails with top sales and marketing executives already named as custodians. *Id.* at 29. Judge Nolan rejected this argument:

But just because a proposed custodian exchanged a large number of emails with a current custodian does not mean that the proposed custodians will have a significant number of important, non-cumulative information. Further, until Plaintiffs have had an opportunity to review the huge quantity of information already produced from the existing custodians, it is difficult for the Court to determine the utility of the proposed discovery. See *McBride*, 272 F.R.D. at 241 ("Without any showing of the significance of the non-produced e-mails, let alone the likelihood of finding the 'smoking gun,' the [party's] demands [for additional custodians] cannot possibly be justified when one balances its cost against its utility."); *Jones v. Nat'l Council of Young Men's Christian Ass'ns of the United States*, No. 09 C 6437, 2011 WL 7568591, at *2 (N.D. Ill. Oct. 21, 2011) ("The Court finds that Plaintiffs' untargeted, all-encompassing request fails to focus on key individuals and the likelihood of receiving relevant information."); *Garcia v. Tyson Foods, Inc.*, No. 06-2198, 2010 WL 5392660, at *14 (D. Kan. Dec. 21, 2010) (Waxse, M.J.) ("Plaintiffs present no evidence that a search of e-mail repositories of the 11 employees at issue is likely to reveal any additional responsive e-mails. . . . Plaintiffs must present something more than mere speculation that responsive e-mails might exist in order for this Court to compel the searches



and productions requested.”).

Id. at 30.

Judge Nolan also pointed out that one of the two defendants at issue here had already produced the ESI of 75 custodians, and the other of 28 custodians. But she also noted:

[T]he selection of custodians is more than a mathematical count. The selection of custodians must be designed to respond fully to document requests and to produce responsive, nonduplicative documents during the relevant period. *See, generally, Eisai Inc. v. Sanofi-Aventis U.S., LLC*, No. 08-4168, 2012 WL 1299379, at *9 (D.N.J. April 16, 2012).

Id. at 30-31.

Judge Nolan then goes on to grant plaintiffs’ motion to compel, in part, basically because the two defendants failed to back-up their allegations of undue burden with specific facts:

While a discovery request can be denied if the “burden or expense of the proposed discovery outweighs its likely benefit,” Fed. R. Civ. P. 26(b)(2)(C)(iii), a party objecting to discovery must specifically demonstrate how the request is burdensome. *See Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 598 (7th Cir. 2011); *Sauer v. Exelon Generation Co.*, No. 10 C 3258, 2011 WL 3584780, at *5 (N.D. Ill. Aug. 15, 2011). This specific showing can include “an estimate of the number of documents that it would be required to provide . . . , the number of hours of work by lawyers and paralegals required, [or] the expense.” *Heraeus Kulzer*, 633 F.3d at 598. Here, TIN’s and IP’s conclusory statements do not provide evidence in support of their burdensome arguments.

Id. at 32.

Rule 26(b)(2)(B) and Timing

Plaintiffs also sought to compel all defendants to search their backup tapes. Defendants invoked the protection of Rule 26(b)(2)(B), claimed their backup tapes were not reasonably accessible, and that Plaintiffs had shown good cause to require their production. *Id.* at 35.

Judge Nolan begins her analysis of this straight-forward dispute by analysis of existing case law on 26(b)(2)(B). She also examines case law dealing with back up tapes. It is a good collection of legal authorities on both the general and specific issues.

The defendants here did more than make general allegations of burden, they submitted affidavits showing costs just to restore their tapes ranging from a high of one million dollars for one defendant, to a low of *only* two hundred thousand dollars for another. Plaintiffs disputed these cost estimates and suggested defendants could reduce the tape restoration costs by *sampling the media to determine whether they contain responsive nonduplicative information*. *Id.* at 37.

Judge Nolan sidestepped these issues by holding that the plaintiffs motion was *premature*. She noted that *there is no discovery cutoff date in this case, and plaintiffs are only 20% complete with their first level review of Defendants’ documents*. *Id.* Judge Nolan ordered plaintiffs to complete their review of the readily accessible ESI produced before clamoring for production of inaccessible data. This is in accord with the rules and commentary thereon:

The volume of—and the ability to search—much electronically stored information means that in many

cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs.

Fed. R. Civ. P. 26(b)(2), advisory committee's note (2006). Accordingly, Judge Nolan denied plaintiff's motion to compel without prejudice.

Conclusion

(http://ralphlosey.files.wordpress.com/2012/10/judge_nolan_artistic3.png) Judge Nan Nolan, who is a great lover of art and always embodies the *glass half-full* attitude, concluded the *Kleen Products* order (http://ralphlosey.files.wordpress.com/2012/10/kleen_productions_cooperation_order.pdf) on a positive note. She points to a number of courts that have already *instituted model orders to assist counsel in transitioning to the cooperative discovery approach*. Seventh Circuit Electronic Discovery Pilot Program, *Model Standing Order* (<http://www.discoverypilot.com>); Southern District of New York Pilot Program (<http://www.nysd.uscourts.gov>); District of Delaware, *Default Standard for Discovery* (<http://www.ded.uscourts.gov>).



Judge Nolan then draws three lessons from *Kleen Products* about Cooperation:

First, the approach should be started early in the case. It is difficult or impossible to unwind procedures that have already been implemented. Second, in multiple party cases represented by separate counsel, it may be beneficial for liaisons to be assigned to each party. Finally, to the extent possible, discovery phases should be discussed and agreed to at the onset of discovery.

Id. at 39.

For how these three best practice recommendations fit into the larger picture of Electronic Discovery Best Practices, see the page at EDBP.com (<http://edbp.com>) on the fifth step of **Cooperation** (<http://www.edbp.com/cooperation/>) under the **26(f) Conferences** (<http://www.edbp.com/cooperation/26f-conferences/>) and **Proportionality** (<http://www.edbp.com/cooperation/proportionality/>) sub-headings. While you are at it look at the cooperative **Dialogues** sub-heading of the EDBP page for **Predictive Coding** (<http://www.edbp.com/search-review/predictive-coding/>). That is part of the seventh step of C.A.R. (*Computer Assisted Review* (<http://www.edbp.com/search-review/>)). The current outer limits of cooperation in the context of predictive coding are examined, including the hotly debated issues of disclosure, or not, of search method and irrelevant seed set documents.

The current position of EDBP on this cooperation issue is equivocal, sometimes yes, sometimes no, it all depends. See the first case approving predictive coding protocols: *Da Silva Moore v. Publicis Groupe*, __ F. Supp. 2d __, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012) (*affirmed* in *Da Silva Moore v. Publicis Groupe*, 2012 WL 1446534, at *2 (S.D.N.Y. Apr. 26, 2012)). Got an opinion on these issues? Want to provide input on what the best practice should be? Leave a comment at the bottom of the [Predictive Coding](http://www.edbp.com/search-review/predictive-coding/) (<http://www.edbp.com/search-review/predictive-coding/>) page of EDBP.

Judge Nolan concludes by calling upon all attorneys to conduct discovery in a cooperative manner, which she calls a *paradigm shift*.

The Cooperation Proclamation calls for a “paradigm shift” in how parties engage in the discovery process. The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 Sedona Conf. J. 331, 332–33 (2009). In some small way, it is hoped that this Opinion can be of some help to others interested in pursuing a cooperative approach. The Court commends the lawyers and their clients for conducting their discovery obligations in a collaborative manner.

Unfortunately, Judge Nan Nolan is correct in endorsing the Sedona *paradigm shift* observation. I say unfortunately because, unlike Judge Nolan, I sometimes see the glass half-empty. Since long-standing rules of ethics and civil procedure have always required cooperative discovery, what does the *paradigm shift* observation say about our existing legal system?

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