E-Discovery: Can't We All Just Get Along?

By Eric Sinrod,

Here's the "Grimm" news: Parties and counsel must cooperate when it comes to e-discovery in civil litigation. Judge Paul W. Grimm, of the United States District Court of Maryland, while handling a discovery dispute in the recent case of *Mancia v. Mayflower Textile Services Co.*, has taken the opportunity to pontificate as to why working together collaboratively is essential for e-discovery to be meaningful and fair within our judicial system.

While the particular discovery dispute in the *Mancia* case is not so noteworthy, Judge Grimm's broad vision of e-discovery certainly is worthy of consideration. Judge Grimm begins by looking to Federal Rule of Civil Procedure (FRCP)
26(g).

That rule requires that an attorney of record sign every discovery disclosure, request, response or objection. The attorney's signature "certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry," the request is reasonable and the disclosure is complete and correct. Judge Grimm expresses concern that counsel do not necessarily perform a "reasonable inquiry" before propounding and responding to discovery requests.

Judges in other cases have required at a minimum that outside counsel interview information technology employees and custodians of records to determine and understand where responsive electronic data is stored. Without conducting such an investigation, an attorney cannot fully certify a discovery response, for example.

Too often, attorneys, in shoot-from-the-hip fashion, propound broad discovery requests and respond with boilerplate objections to discovery requests. Indeed, Judge Grimm was dealing with just that scenario in the *Mancia* case, which is what prompted his cooperation tutorial.

Importantly, FRCP 26(g) requires the imposition of mandatory sanctions when the rule is violated without substantial justification; indeed, judges are entitled to issue sanctions even when not requested on a motion. Rule 26(g), according to Judge Grimm, is one of the least abided discovery rules. And that is because sanctions have not been routinely and automatically applied by judges when violations occur.

Thus, while counsel, on behalf of their clients, do not always conduct reasonable inquiries when it comes to e-discovery, the judiciary is complicit in the problem, by not issuing sanctions for violations. Without the real threat of sanctions, improper e-discovery requests and responses will continue and threaten the integrity of the judicial system.

According to Judge Grimm, "the failure to engage in discovery as required by Rule 26(g) is one reason why the cost of discovery is so widely criticized as being excessive to the point of pricing litigants out of court."

Judge Grimm goes on to quote Harvard Professor Lon L. Fuller for the proposition that "partisan advocacy is a form of public service so long as it aids the process of adjudication; it ceases to be when it hinders that process, when it misleads, distorts, and obfuscates, when it renders the task of the deciding tribunal not easier, but more difficult . . . ."

For parties and counsel who are dealing with oppressive or obstructionist adversaries, they might consider encouraging cooperation by providing a copy of Judge Grimm's *Mancia* decision to other side. If that does not work, the next step might be to enlist more active judicial support by relying upon *Mancia* by way of a discovery motion and a request for sanctions.

At the end of the day, Judge Grimm is right. E-discovery should not be used as a weapon or a shield. Counsel really must dig in before propounding and responding to e-discovery requests. And yes, judges must be willing to issue sanctions for violations.

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