COOPERATION AND LITIGATION
THOUGHTS ON THE AMERICAN EXPERIENCE

Richard Marcus

[Notes for Nov. 9 KU School of Law Program "Advocacy Under the Federal Rules of Civil Procedure After 75 Years." These are in no sense final, and this presentation will evolve as the program draws nigh. Please do not cite or quote without author's permission.]

> "Contemporary German civil process is *cooperative*. It facilitates reaching judgments quickly and cheaply based on substantive truth and law. It is an explicit rejection of process that predated the Code of Civil Procedure in 1877, which had been based, like American process still is, on a kind of 'battle-between-the-parties' model."[1]

I grew up in the age of Rambo litigation. But from what I've read since leaving practice for teaching more than 30 years ago, litigators (and other American lawyers) may well be more adversarial and less cooperative than ever. Some suggest that this tendency results in part from client domination of lawyers. Far from serving as the learned counselors that Dean Kronman applauded as representative of a lost golden era of lawyering,[2] today's litigator gets the case by winning a "beauty contest" and remains thereafter under the client's thumb. No longer does the lawyer tell the client what to do in the litigation; the client -- implementing a litigation budget -- may control the day-to-day details of what the lawyer does. And the client does not want to hire a "cooperator," but rather a bulldog.

There must be much wrong with this picture, including its accuracy. Even Republican candidates now emphasize their enthusiasm for bipartisan cooperation to overcome voters' dislike for uncooperative legislative posturing.[3] Surely lawyers are not really so adversarial as portrayed by Hollywood.

American procedure has assumed that, in some ways, they are. But that's not entirely a new thing. Indeed, one of the prime things Roscoe Pound decried in his famous 1906 speech to the ABA

---

[1] James R. Maxeiner, Failures of American Civil Justice in International Perspective 171 (2011).

[2] See Anthony Kronman, The Lost Lawyer.

[3] See Jennifer Steinhauer & Jonathan Weisman, Some Republicans Try Out a New Campaign Theme: Bipartisanship, N.Y. Times, Sept. 16, 2012, at A16.

was the extreme adversarialism of American litigation then.[4] One of his goals was to equip judges to contain and constrain that adversarialness. The Federal Rules, now approaching their 75th anniversary, were in some ways efforts to move away from the pettifogging adversarial behavior Pound found so lamentable. They sought to replace pleading wars and games with simplified pleading, in some ways realizing the mid-19th century dream of David Dudley Field that pleading niceties would not enable sneaky lawyers to torpedo valid claims.[5] They introduced broad discovery to enable parties to find out about the evidence and avoid the sort of "trial by ambush" Pound described.[6] And they stressed flexibility, with Rule 1 emphasizing from the outset that the rules should be construed to achieve justice.

Rambo tactics are not the only way to achieve justice, perhaps not even a plausible way to do so. I intend to try to introduce the question of cooperation in litigation in three pieces. First, I'll try to reflect at a very general level on why we might *want* litigators to be pretty adversarial, and recoil somewhat at their trying instead to be cooperative. Second, I'll sketch very briefly and in great generality the sorts of problems that seem to arise when laws command cooperative behavior, which should make us cautious about moving too far toward legal commands to cooperate. Finally, I'll recognize that 21st century litigation -- particularly involving E-Discovery -- makes substantial and substantive cooperation essential and effective.

I'm delighted and daunted to share the podium with two judges whose experience and expertise cannot be exceeded. Judge Lee Rosenthal knows more about -- and has had a larger role in developing -- litigation rules than any other American federal judge. Judge David Waxse -- a former member of the Jayhawk football team -- has particularly strong credentials in addressing cooperation, a subject on which he's written.[7] So maybe I can set the scene so these more expert judges can elaborate.

---

[4] See Roscoe Pound, The Causes of Popular Dissatisfaction With the Administration of Justice, 29 Rep. of the A.B.A. 395 (1906).

[5] See Richard Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433 (1986).

[6] See generally, Stephen Subrin, Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules, 39 Bos. Col. L. Rev. 691 (1998).

[7] See, e.g., David J. Waxse, Cooperation During EDD Made Easy, Law Technology News, June 25, 2012, at 13.

I. EMBRACING RAMBO: THE LAWYER AS GUARDIAN

In ordinary life, cooperation is generally valued, and for good reason. If everyone insisted on having everything his own way, ordinary life would not be possible, or at least it would be pretty disagreeable. We even have a term for people who insist on having their own way all the time -- "high maintenance." Cooperation and accommodation have been essential to the development of complex societies; the lone cave-dweller might not need to worry about what other people wanted, but the modern city-dweller must. Most of the time, no dispute occurs even when people don't get their first choice.

That general attitude of compromise (or at least tolerance) explains something that academics emphasized a generation ago as the ADR movement began to attract followers -- the low level of formal litigation in comparison to the number of disputes that arise in society. A leading article presented a "dispute pyramid" that graphically demonstrated that only a tiny fraction of actual disputes lead to litigation.[8] These academic presentations were designed to emphasize that -- contrary to one theme often sounded in the 1970s and 1980s -- Americans are not singularly litigious.

Probably all would agree that it's a good thing Americans are not actually as litigious as some assert they are. The point for our purposes is that sometimes one might think it right for people not to be cooperative, and recognize instead that they should stand and resist accommodating the desires of others. Legal rights, after all, are often designed to protect the less powerful. At a minimum, they may counteract the insistence of some people on having their way. As one scholar put it: "The claim that people have common interests can be a way of misleading the less powerful into collaborating with more powerful in schemes that mainly benefit the latter."[9]

The basic point is that the argument can be made against cooperation, particularly when legal rights are involved and litigation is an option. Thus, Judge Edwards warned against

---

[8] See _____ Miller & Austin Sarat, Grievances, Claims and Disputes: Assessing the Adversary Culture, 14 Law & Soc'y Rev. 525, 537 (1981); see also Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 U.C.L.A. L. Rev. 4, 11-18 (examining the attrition rate among potential disputes before a third party -- such as a lawyer -- is called upon).

[9] J. Mansbridge, Beyond Adversarial Democracy 5 (1983).

unthinking embrace of ADR during the 1980s:

> [O]ne essential function of law is to reflect the public resolution of such irreconcilable differences; lawmakers are forced to choose among these differing visions of the public good. A potential danger of ADR is that disputants who seek only understanding and reconciliation may treat as irrelevant the choices made by our lawmakers and may, as a result, ignore public values reflected in rules of law."[10]

At some level, then, we *want* people to say "no." But we may be concerned that they will find it difficult to do so. To take a recurrent example, many have written about the risk that in marital breakups the dominant partner -- often the man -- will take advantage of the other spouse.[11]

This is often where lawyers come in. They are, in a real sense, spine stiffeners. They can tell clients what their legal rights actually are. They can encourage clients to stand up for their rights. They can go into court and seek to vindicate those rights.

Besides these points, in a common law system the result of private litigation is a body of case law that guides others in their out-of-court interactions. Thus, to some extent we *want* people to fight through to the end sometimes so that we can get a judicial resolution of a dispute.[12] Indeed, the urge to cooperate may compromise those very legal principles. Consider the attitude of a mediation enthusiast in relation to divorce mediation:

---

[10] Harry Edwards, Alternative Dispute Resolution: Panacea or Anathema, 99 Harv. L. Rev. 668, 676-77 (1986).

[11] See, e.g., Martha Fineman, Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking, 101 Harv. L. Rev. 727 (arguing that the introduction of social workers as mediating influences in child custody situations has produces a "disaster" imposed on women due to social workers' preference for shared parenting). See also Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. 1545 (1991); Richard Delgado, et al., Fairness and Formality, Minimizing the Risks of Prejudice in Alternative Dispute Resolution, 1985 Wis. L. Rev. 1359.

[12] See Edward Brunet, Questioning the Quality of Alternative Dispute Resolution, 62 Tulane L. Rev. 1, 19-20 (1987) (emphasizing that the absence of judicial decisions could increase disputes because of unresolved issues about what the law requires).

> Divorce mediation rejects the idea that legal rules should be used as weapons to improve one party's position at the expense of the other. Similarly, it rejects the idea that these legal rules and principles embody any necessary wisdom or logic. It fact, it views them as being arbitrary principles, having little to do with the realities of a couple's life and not superior to the judgments that the couple could make on their own.[13]

Surely there is a valid argument that lawyers may resist this notion and insist on pursuing their clients' legal rights.

That's all heady stuff, the sort of speech lawyers who are enthusiasts for private litigation offer when opposing any imposition on their freedom to insist on their way intone whenever proposals are made to curtail that freedom. But it's also a critical starting point in assessing our commitment to cooperation -- recognizing that cases in court represent failures of cooperation in which one side or the other claims that legal rules require an outcome the other side won't accept cooperatively.

Should lawyers routinely engage in spine stiffening, encouraging their clients to take the most aggressive stance? Obviously not; at a minimum that stance must be supported by law for a lawyer to endorse it.[14]

So the question is when lawyers should urge clients to compromise, or at least to be collaborative, even though their legal rights support combat. Perhaps the strongest argument for resolute insistence on the full measure of legal rights exists for the criminal defense lawyer. That lawyer represents somebody -- often truly "disempowered" -- faced by the full power of the State. For at least some,[15] that lawyer is duty-bound to consider only her client's interests and to advance them wherever not forbidden to do so.

It may sometimes seem that for criminal defense lawyers refusal to cooperate in regard to anything is the order of the day. If the prosecution is having difficulty locating a witness

---

[13] Marlow, The Rule of Law in Divorce Mediation, 9 Mediation Q. 5, 5-6 (1985).

[14] Cf. Fed. R. Civ. P. 11(b)(2) (treating a lawyer's signature on a paper filed in court as certifying that the contentions made "are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law").

[15] Cite Monroe Freeman.

and the speedy trial limits on when the case must be brought to trial will shortly expire, could counsel justify "cooperating" with the prosecution to enable it to present the witness? If the defendant is incompetent to stand trial due to mental illness, should counsel encourage the client to take medication that might overcome the illness?[16] It sometimes seems that any trick in the book is fair game for the criminal defense lawyer, who may appear to regard her main job as obstructing the prosecution. Nearly a half century ago Judge Henry Friendly asked "Is Innocence Irrelevant?"[17] Maybe it can be for the criminal defense lawyer.

But at the same time, it does not seem that the cooperation movement is nearly as broadly touted for criminal litigation as for civil litigation. One reason might be the absence of something Dean Kronman deplored about the "lost" lawyer -- the much greater client dominance achieved by some private clients, particularly large corporations. The disempowered criminal defendant is not in a similar position to compel his lawyer to do his bidding. Usually that lawyer will be hired by the State, not the defendant. Sometimes, that lawyer can overtly undercut his client's interest in court.[18]

Should lawyers in civil cases adopt a similar "take no prisoners" attitude? At least in some sorts of cases, that seems counterproductive. Family law again presents a good example. Should lawyers encourage divorcing spouses to insist on the full measure of their legal rights and fight to the bitter end? That bitterness itself might poison the lives of the couple's children, which explains why many states require mediation whenever child custody is at issue in divorce cases. Indeed, familiar lore has it that lawyers do not often have to encourage their clients to take aggressive stances in divorce cases; to the contrary, they may more often be the ones urging moderation to avoid an outcome like the one in the movie "The War of the Roses."

Perhaps it's time for a similar attitude to prevail in all civil litigation. About 40 years ago, the federal judiciary took up Dean Pound's cudgel and rejected the extreme adversarial attitude. One sparkplug was a speech by then-Judge Frankel,

---

[16] cite recent U.S. Supreme Court case.

[17] See Henry Friendly, Is Innocence Irrelevant? __ L. Rev. ___.

[18] See, e.g., Nix v. Whiteside, 475 U.S. 151 (1986) (6th Amendment right to effective assistance of counsel not violated when defense counsel threatened to withdraw and impeach client's testimony during murder trial if client insisted on taking stand and committing perjury).

urging that the search for truth be elevated to primacy among counsel's obligations.[19] More generally, federal judges have embraced the case management movement and strived to regulate lawyer behavior in civil litigation.[20] This attitude has largely depended on cooperative behavior by the lawyers before them; in the absence of such cooperation, judges may find that they cannot easily design specific directives for given cases.

So we are left with two competing concerns. On the one hand, the desire of litigants for justice -- a decision according to governing legal principles -- and, on the other hand, a realistic appreciation that compromise is a generally desirable thing. Lawyers are likely to find that they are regularly tugged in two directions by these ideals. Judges must similarly keep both in mind.

II. THE CHALLENGES OF MANDATED COOPERATION

Appreciating the competing tensions underlying the cooperation debate, one can consider whether cooperation itself should -- or could -- become a mandate. In this section, I hope to present a very brief sketch of several areas of law in which the effort to enforce cooperation has proven difficult for judges. Each of these areas of law could be explored at much greater length, and this presentation will oversimplify and perhaps distort them. But the goal is only to show that the judiciary has experience with the difficulty of enforcing such commands.

A. THE DUTY OF LABOR AND MANAGEMENT TO BARGAIN IN "GOOD FAITH"

An initial example is the duty of management and unions to bargain in good faith. The declining importance of private sector unions in recent decades has meant that this statutory duty is not nearly as prominent as it was in the past. But it was an integral piece of the overall statutory arrangement underlying the National Labor Relations Act.

[This section will elaborate on the experience under the NLRA, emphasizing that courts actually have not had a significant role in "enforcing" the duty to bargain in good faith. To the contrary, they become involved only later, when the question whether strikers could be replaced reaches court. Then the

---

[19] Marvin Frankel, The Search For Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031 (1975).

[20] See generally Richard Marcus, Reining in the American Litigator: The New Role of American Judges, 27 Hast. Int'l & Compar. L. Rev. 3 (2003).

question is whether they were "economic" or "unfair labor practice" strikers. That factual determination can depend on whether an impasse in bargaining was the result of good faith or not.]

B. CONTRACTUAL DUTIES TO NEGOTIATE

[This section will follow up more generally on the question of judicial enforcement of agreements to "agree," building on a seminal article by my colleague Chuck Knapp, Enforcing the Contract to Bargain, 44 N.Y.U. L. Rev. 673 (1969).]

C. THE INSURED'S DUTY TO COOPERATE

[This section will focus on the duty to cooperate in insurance policies. For discussion, see §§ 39; 40 of the ALI Principles of the Law of Liability Insurance (Prelim. Draft No. 5, Aug. 24, 2012). I expect to find that this also involves largely a limited "duty" and an after-the-fact determination in unusual cases that the insured is without coverage due to violation of this duty. It is notable that insurer and insured have an unavoidable potential conflict between themselves even though they are, in important senses, on the same side.]

D. THE DUTY TO MEDIATE

[This section will treat the recurrent problem what a court can do to require parties to attempt to resolve their disputes. For example, when a court-annexed mediation program requires that the parties collaborate to attempt to resolve their dispute, how should the court approach "intransigence" by a party that insists on its day in court. For general discussion, see Sherman, Court-Mandated Alternative Dispute Resolution, 46 S.M.U. L. Rev. 2079 (1993). I expect to report that the task is very delicate because courts cannot insist that people agree to settle, but can insist that they participate with a mind open to settling.]

E. SUMMARY

This discussion should illustrate that the judicial experience with enforcing a "duty" to cooperate has not been entirely satisfactory. There seems inevitably to be considerable difficulty determining when those whose interests stand in tension cross a line by taking unreasonable positions instead of cooperating with their adversaries. A part of the court-annexed ADR repertoire is the appreciation that negotiation alone is not sufficient to resolve disputes. One can push pretty hard for settlement, but not too hard; parties do have a right to come to court for a decision.

But there surely are myriad topics on which parties might cooperate in the *conduct* of litigation even if they can't agree

on the ultimate resolution. Are those different? Consider the thoughts of a recently-appointed Magistrate Judge in the N.D. Cal:

> [L]awyers do advocate for their clients -- fight about deadlines and where the deposition should take place. Things like that, that I think to people who have not been involved in civil litigation before can seem petty. But I know from having done civil litigation, sometimes those seemingly small fights end up being an essential part of the eventual outcome of the case. So I understand.[21]

The problem, then, is to determine how the courts should approach these kinds of issues. There is likely no legal "rule" that precisely resolves such disputes. Should the lawyers be commanded to cooperate in resolving them? Would the judge be doing her job if she announced that on such matters, in the absence of an agreement, she would simply pick the position she regarded as most reasonable, and not split the baby? That might be a practical way to prompt cooperation -- fear the judge would opt for the other side's proposal as slightly more reasonable than mine. For the lawyers (addressed later in the day), these kinds of questions present other issues; particularly in regard to E-Discovery there is a very strong argument that cooperation is good practice, and may be the only practice that protects the client's interests. But at least it seems we have reached the heartland of appropriate judicial insistence on lawyer cooperation.

III. AMERICAN PROCEDURAL COOPERATION COMMANDS

The German procedure code "imposes on parties a duty of cooperation in clarifying the issues in the case."[22] Section 1 of the Korean Civil Practice Act "imposes on the parties a duty to cooperate in good faith."[23] There has been at least some discussion of adding a comparable cooperation plank to Rule 1 of the Federal Rules of Civil Procedure, but misgivings have also been expressed that this sort of rule provision would be more likely to invite conflict than to prompt actual cooperation.

Rules commanding cooperation have appeared, however, in a number of places. The local rules of the District of Maryland, for example, invoke the goals of Rule 1 -- just, speedy, and inexpensive conduct of discovery -- and add: "The parties and

---

[21] Technology Is Great, But Have a Backup Plan (interview with Hon Nathaneal Cousins), S.F. Recorder, May 7, 2012. at 8.

[22] Maxeiner, supra note __, at 177.

[23] Id. at 198.

counsel have an obligation to cooperate in planning and conducting discovery to tailor the discovery to ensure that it meets these objectives."[24] The Southern District of New York similarly says in its complex litigation pilot project that the parties are required to cooperate.[25] The Sedona Cooperation Proclamation emphasizes the same sort of impulse.[26] Something like 100 judges have signed on. Surely many other examples exist.

Without a cooperation provision in Rule 1, the Federal Rules of Civil Procedure nonetheless urge or require behavior that could be called cooperative in a number of places:

> Rule 26(f) directs the parties to confer early in the case, and contains several provisions that direct cooperation, at least as compared to the "trial by ambush" ethos of Roscoe Pound's day:
>
> > The parties must "consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case."
> >
> > The parties must "discuss any issues about preserving discoverable information."
> >
> > The parties must "attempt[] in good faith to agree on [a] proposed discovery plan."
> >
> > The discovery plan must include a wide variety of details, including the subjects on which discovery is needed, any issues about E-Discovery, and any issues about preserving privilege.
>
> Rule 16(f)(1)(B) authorizes sanctions against a party or attorney who "does not participate in good faith" in a pretrial conference.
>
> Rule 37(a)(1) requires that a motion to compel discovery be supported by a certification "that the movant has in good faith conferred or attempted to confer . . . in an effort to obtain [the desired discovery] without court action." (A similar requirement appears in Rule 37(d)(1)(B) even though

---

[24] Local Rules, U.S. District Court, District of Maryland, Appendix A, Guideline 1(a). See also Mancia v. Mayflower Textile Services Co., 253 F.R.D. 354, 357-58 (D. Md. 2009) (further explaining the duty to cooperate).

[25] Cite SDNY provision.

[26] Cite Sedona Proclamation

that provision applies only in situations in which the other side has completely failed to respond to the discovery.)

Rule 16(a) authorizes the court to order pretrial conferences for various purposes including "discouraging wasteful pretrial activities" and "encouraging settlement."

Rule 16(c)(1) commands each party to "authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference." Rule 16(c)(2) lists 15 categories of topics suitable for discussion at such a conference, and then adds that such a conference may also consider "facilitating in other ways the just, speedy, and inexpensive disposition of the action."

Rule 11(b)(1) makes an attorney's signature on a filing in court a certification that the positions it takes are "not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."

Taken together, these provisions might appear to empower an American judge to insist on something approaching what the German or Korean judge expects in the way of cooperation.

There are significant reasons, however, for a judge to exercise caution in using this power to require cooperation on settlement of the claims or defenses asserted in the case. True, parties often desire active involvement of the judge in promoting settlement. Sometimes, the judge's role may be to get the client to see reason even though the lawyer has not succeeded in getting the client to do so.[27] Most cases settle, and continued litigation might often be a tactic to achieve settlement advantage rather than a path to vindication in court. Yet at some point courts might well be reluctant to insist on "cooperation" among disputing parties that coerces them to drop their claims or defenses.

Contrast, however, the very wide range of other topics on which parties and lawyer dispute. How often is the place or time of a deposition a matter of real moment? How often might posturing about such things reflect a strategy to achieve litigation advantage? Perhaps it is true, as the magistrate judge quoted above suggests, that knock-down, drag-out fights about such topics actually achieves such importance that it ends

---

[27] Recall that Fed. R. Civ. P. 16(c)(1) authorizes the court to require that a represented party be present "to consider possible settlement."

up driving the settlement or other resolution.[28]

But should courts be patient with such posturing? Frankly, it's likely that the posturing will vanish or at least recede in the presence of the judge. Indeed, the difference in demeanor of counsel when the judge is there to watch is sometimes very striking. One possible solution to that problem is for judges to be more available to address mundane discovery matters like time and place of a deposition. It is certainly said that judges who do make themselves available actually have to resolve very few discovery disputes. Somehow "cooperation" occurs before the matter must be presented to the judge. Indeed, many lawyers call this sort of judicial behavior "adult supervision."

Why can't lawyers behave like adults when the judge is not there? Most can and do. Perhaps that behavior is more prominent in litigation in which the lawyers deal with one another regularly than litigation involving lawyers who have no track record with one another. That might explain why, despite the tendency mentioned above of criminal defense counsel to exploit everything they can use to frustrate the prosecution, judges often report that the lawyers in their criminal cases are much more cooperative than litigators in civil cases.

Perhaps that behavior also reflects client preferences or imperatives in civil litigation more frequently than in civil litigation. For a variety of reasons, clients in civil cases may want to game the system as long as possible. For a variety of reasons, they may regard devious activity as what lawyers provide, and expect to get their own share.[29] For a variety of reasons, parties do not readily take account of the weaknesses in their cases, or the strengths in the other side's case; that's one of the reasons for judges to insist that the clients show u for settlement conferences. Perhaps clients who are prone to fighting over everything and other forms of misbehavior look for and find lawyers for whom that is the modus operandi; at some point it is permissible to punish the client for what the lawyer did because the client selected the lawyer.[30]

---

[28] See supra text accompanying note __ (quoting recently-appointed magistrate judge).

[29] Consider, for example the movie "Liar, Liar," about the lawyer who suddenly is prevented from telling a lie and finds he can't do his job.

[30] See, e.g., Link v. Wabash R.R. Co., 370 U.S. 626, ___ (1962) ("Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.").

No doubt zealous representation would be at least an excuse for obstructive or disruptive lawyer behavior in situations in which the real reason is less savory. At a minimum, judges can expect that lawyers will not succumb to the temptation to impolite or overbearing tactics. They can try to inspire cooperation as well, without lowering the boom as authorized by the many rules listed above. Probably the way judges can further this goal is diligent case management. More than 30 years ago, Judge Peckham, one of the pioneers in the case management movement, stressed that holding an early case management conference (not then required by the rules) "warns the attorneys that they have a vigilant judge," and alerts the judge to whether the case involves "a particularly combative attorney who, if the case is not actively managed during pretrial, might succeed in turning a trial that should be a molehill into a mountain."[31] This technique is much more widespread now, and it still should work.

An abstract requirement of "cooperation," on the other hand, seems less suited to achieving practical results. There certainly has been some discouraging recent history with efforts by rule to encourage improved attorney behavior. The 1983 amendments to Rule 11 were intended in part to upgrade attorney behavior, but were widely criticized for ushering in a decade of corrosive finger-pointing. A "cooperation" requirement might lead in a similar direction. But the unequaled latitude that American procedure -- particularly broad discovery -- confers on American lawyers surely makes cooperation on at least the details of discovery something that lawyers ought to ensure. The real question is not what they should do, but how to get them to do it.

CONCLUSION

Aspirational statements may sometimes seem toothless, but they can produce results. Maybe Sedona has it right in producing what is in large measure an aspirational endorsement of cooperation. At some point, it takes two to cooperate. But it's also true that one or the other has to begin. Sometimes it takes an authority figure to break the ice.

Self interest is the best lubricant. And it may be that good lawyers will recognize that. Consider the recent recommendations of a nationally renowned E-Discovery lawyer about how to move to the newest darling technique of the area, predictive coding:

---

[31] Robert H. Peckham, The Federal Judge as Case Manager: The New Role in Guiding a Case From Filing to Disposition, 69 Calif. L. Rev. 770, ___ (1981).

> Whether a court smiles on a methodology may not be the best way to conclude it's the better mousetrap. Keyword search and linear review enjoy de facto court approval; yet both are deeply flawed and brutally inefficient. The imprimatur that matters most is "opponent approved." Motion practice and false starts are expensive. The most cost-effective method is one the other side accepts without a fight, i.e., the least expensive method that affords opponents superior confidence that responsive and non-privileged material will be identified and produced. Don't confuse that with an obligation to kowtow to the opposition simply to avoid conflict. The scenario I'm describing is a true win-win.[32]

These sorts of issues are likely to be a focus of later panels at this program, and the good lawyers on those panels likely will echo these sentiments.

Not all lawyers are good lawyers. Not all lawyers will see the light on issues like predictive coding. But rules to control the behavior of bad lawyers may not be an improvement. The 2006 E-Discovery amendments to the Civil Rules, for example, largely rely on the parties (and the lawyers) to design sensible protocols for specific cases rather than prescribing specifics.[33] Trying to provide those specifics was too difficult.[34] Specifics on "cooperation" would likely be more difficult yet to prescribe. Judges who see uncooperative lawyers impeding progress in cases before them have an array of formal (and many more informal) ways to respond to their erring ways. They probably can't change the general culture of lawyering; if Rambo tactics are still frequent individual judges likely can't end them. But they can deal fairly effectively with them when the do see them. Probably that's as much as rules of cooperation can ever aspire to do.

---

[32] Craig Ball, Imagining the Evidence, S.F. Recorder, Aug. 13, 2012, at 15.

[33] See Richard Marcus, E-Discovery Beyond the Federal Rules, 37 U. Balt. L. Rev. 321, ___-___ (2008) (making this point).

[34] I am here recalling the drafting work on those amendments, which extended over many years and explored a variety of possible specifics on topics that eventually were left to party agreement.