

**Cooperation-What is it and why do it?**

David J. Waxse  
United States Magistrate Judge  
District of Kansas  
November 9, 2012

---

---

---

---

---

---

---

---

- Litigation is a method of resolving disputes that is too costly and time consuming for most parties involved in disputes.

**Cooperation-What is it and why do it?**

---

---

---

---

---

---

---

---

- The 2010 Conference on Civil Litigation held at Duke Law School explored the current costs of civil litigation in Federal Court, particularly electronic discovery, and discussed possible solutions.

**Cooperation-What is it and why do it?**

---

---

---

---

---

---

---

---

- There was a clear consensus among the participants that civil litigation takes too long and costs too much.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- The ultimate purpose of the conference was to try to find ways to effectuate the purposes of the Federal Rules of Civil Procedure -

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- "to secure the just, speedy, and inexpensive determination of every action and proceeding."
- Fed. R. Civ. P. 1

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- Although there were suggestions for changes in the Federal Rules of Civil Procedure, no clear consensus on any specific changes was reached.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- Among the other areas the participants discussed were increased judicial involvement in case management and the use of sanctions for improper behavior.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- The suggestion I made, along with many other participants, was to encourage cooperation in the discovery process, a suggestion that did become a consensus recommendation.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- What is cooperation and why will it work as a solution to the problems of increased costs and delay in litigation?

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- There are numerous references to cooperation in the interdisciplinary fields of systems analysis, social science research and brain research.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- The research shows that cooperation can be taught and that cultural mechanisms help develop cooperation.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- That understanding helped in the development of The Sedona Conference's "Cooperation Proclamation" in 2008.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- The Sedona Conference Cooperation Proclamation can be found in full at: <http://www.thesedonaconference.org/dltForm?did=proclamation.pdf>

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- The Cooperation Proclamation starts:
- "The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system."

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- The Cooperation Proclamation acknowledged that what is required is a "paradigm shift for the discovery process"

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- To provide tools to promote cooperation, The Sedona Conference® created "Resources for the Judiciary" and "Cooperation Guidance for Litigators & In-House Counsel"

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- How does the idea of cooperation exist in an adversary system where each lawyer has a duty of zealous advocacy?

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

Canon 7 of the ABA Model Code of Professional Responsibility stated: "A Lawyer Should Represent a Client Zealously within the Bounds of the Law".

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- Lawyers and judges should consider that the former ethical obligation for zealous advocacy was removed when the ABA Model Rules of Professional Conduct replaced the Code in 1983.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- In the current version of the Model Rules of Professional Conduct, that explicit obligation of zealous advocacy does not exist.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- With there no longer existing an ethical obligation of zealous advocacy, the Sedona Conference'® provides the following response in its Guidance for Outside Litigators:  
**Cooperation-What is it and why do it?**

---

---

---

---

---

---

---

---

- Litigators are, of course, expected and ethically required to be advocates for their clients.  
**Cooperation-What is it and why do it?**

---

---

---

---

---

---

---

---

- They are also expected and ethically required to conduct discovery in a diligent, efficient, and candid manner.  
**Cooperation-What is it and why do it?**

---

---

---

---

---

---

---

---



- 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

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- Following the creation of the Cooperation Proclamation, many courts have now written opinions urging counsel to be cooperative.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- For example, Judge Paul Grimm, in *Mancia v. Mayflower Textile Services. Co.*, wrote:

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

• “Although judges, scholars, commentators and lawyers themselves long have recognized the problems associated with abusive discovery, ...

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

• 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

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

• “provide them with the encouragement, means and incentive to approach discovery in a different way.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- In *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, ...

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- Many of the motions filed have addressed matters that the Court would have expected the parties to be able to resolve without judicial involvement.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- 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.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- To assist the Court in accomplishing this goal, the parties are encouraged to resolve discovery and other pretrial issues without the Court's involvement.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- To help the parties and counsel understand their discovery obligations, counsel are directed to read the Sedona Conference Cooperation Proclamation,"

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- Why is cooperation not happening often enough and what can be done to increase cooperation in litigation?

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- There are numerous reasons why cooperation is often not happening.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- One is the misconception I have already discussed, that lawyers have an ethical obligation of zealous advocacy in every aspect of litigation.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- Another reason is that lawyers who become litigators often have personalities that love conflict and competition.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- Another reason that is not often discussed is that the hourly billing system used by many law firms is an incentive to engage in conflict instead of cooperation.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- So what can the courts and the profession do to increase cooperation in litigation?

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- Judges and lawyers have to take the position that the goal of litigation is the "just, speedy and inexpensive determination"...

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- To reach that goal, lawyers need to follow, and judges need to require compliance with, several other FRCP's that imply cooperation but are not used enough to promote cooperation

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- Fed. R. Civ. P. 26(b)(2)(C) requires that the court limit discovery in certain instances. Lawyers who are cooperating would do this on their own.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- Fed. R. Civ. P. 26(f) is another rule that promotes cooperation by setting out the parties' planning conference duties.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- They must consider the following:
- ...the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case;

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- Fed. R. Civ. P. 26(g) is a Rule where the court can insure that lawyers are not being uncooperative by making improper discovery requests and responses.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- Fed. R. Civ. P. 26(g)(3) provides an enforcement tool the Court are required to use.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---



- These rules, if actually understood and used by counsel, provide a clear path to cooperation.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- Finally, it may be helpful for a few counsel to be reminded that cooperation is something they should have learned in school and it is never too late to learn how to cooperate.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- Some, who can't seem to learn to cooperate, might be helped if they were provided this list from a website for K-5 elementary school teachers:

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

• HOW TO BE A COOPERATIVE PERSON

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

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

• HOW TO BE A COOPERATIVE PERSON

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

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

• HOW TO BE A COOPERATIVE PERSON

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

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

• HOW TO BE A COOPERATIVE PERSON

- 4. COMPROMISE when you have a serious conflict.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

• HOW TO BE A COOPERATIVE PERSON

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

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

• HOW TO BE A COOPERATIVE PERSON

- 6. SHOW APPRECIATION to people for what they contribute.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

• HOW TO BE A COOPERATIVE PERSON

- 7. ENCOURAGE PEOPLE to do their best.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

• HOW TO BE A COOPERATIVE PERSON

- 8. MAKE PEOPLE FEEL NEEDED. Working together is a lot more fun that way.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

• HOW TO BE A COOPERATIVE PERSON

- 9. DON'T ISOLATE OR EXCLUDE ANYONE. Everybody has something valuable to offer, and nobody likes being left out.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---

- It is never too late to learn how to be cooperative even if you are now a litigator in Federal Court.

Cooperation-What is it and why do it?

---

---

---

---

---

---

---

---