

Give Peace a Chance

Lawyers Are Ethically Obligated to Cooperate in Discovery

By Michael D. Berman, Litigation News Associate Editor

In *Mancia v. Mayflower Textile Services Co.*, ethical principles and discovery rules, combined with the Sedona Conference's "Cooperation Proclamation," led the court to resolve difficult discovery issues using a common sense, real-world approach.

Mancia presented a Fair Labor Standards Act claim by six collective action plaintiffs against seven defendants. The plaintiffs asserted irregularities in their pay, and propounded wide-ranging interrogatories and document requests. The defendants responded with boilerplate objections of overbreadth, undue burden, and relevance. Faced with motions to compel, the court applied ethical and procedural principles to resolve the issues in a novel way.

The court raised Federal Rule of Civil Procedure 26(g), describing the rule as "[o]ne of the most important, but apparently least understood or followed, of the discovery rules." Known as the "stop and think" rule, it is the discovery analog to Fed.R.Civ. P. 11, mandating a reasonable inquiry before signing a disclosure, discovery request, or response.

Among other things, the rule states that a signature on a discovery request or response certifies that it is neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery, the amount in controversy, and the importance of the issues. Promulgated in 1983, FRCP 26 also figured prominently in the \$8.5 million sanction in *Qualcomm Inc. v. Broadcom Corp.*

The ethical implications of the rule are clear. By signing a discovery request, a lawyer certifies that it is warranted by the rules and existing law. The *Mancia* court noted that Model Rule of Professional Conduct 3.4(d) parallels FRCP 26(g) and provides that a law-

yer cannot make a frivolous discovery request. Similarly, under FRCP 26(g), a responding party cannot obstruct a proper request, and Model Rule 4.4 provides an analog, requiring reasonable diligence in responding to discovery.

The court also cited the Sedona Cooperation Proclamation. The Sedona Conference is a charitable research and educational institute that sponsors think tanks for the advancement of law and policy. Its Cooperation Proclamation states that discovery cooperation and the "just, speedy, and inexpensive determination of every action" is one of the "the fundamental ethical principles governing our profession." In short, compliance with FRCP 26(g) is both a procedural and an ethical obligation.

Under *Mancia*, counsel cannot meet the obligations unless they act with "cooperation rather than contrariety" and "communication rather than confrontation." "[K]neejerk discovery requests," as well as objecting "reflexively—but not reflectively" with boilerplate objections, present ethical problems.

Quoting Professor Lon Fuller, the court wrote that a lawyer's "highest loyalty" is to democratic institutions and procedures; the attorney is a trustee for the fundamental processes of government, and hindering those processes violates the duties that the adversary system was designed to serve. Similarly, the Sedona Conference has concluded that attorneys "bear a professional obligation to conduct discovery in a diligent and candid manner."

The court directed counsel to evaluate the range of possible outcomes and develop a "discovery budget." Counsel were directed to confer, discuss what discovery was needed in light of the budget, attempt to reach agreement, consider "phased discovery," and report

back to the court. In short, the court noted that cooperation in discovery avoids wasteful disputes and is both ethically mandated and good business.

Michele D. Hangle, cochair of the Section of Litigation Ethics and Professionalism Committee, feels that the court did an "admirable job of managing the litigation" and should be "applauded" for its "very sensible" directions. She notes that, while all discovery requests should be narrowly tailored, attorneys have a duty to the client and should not be sanctioned based simply on a disagreement over the value of a case.

The decision "is a wakeup call for all of us that ethics permeates discovery in all of its phases," according to Paul Mark Sandler, cochair of the Section's Special Institute for Trial Training. "If we fail to progress in diminishing costs and time of discovery, the invisible hand over time will eviscerate the civil justice system. Trial lawyers will be relics of the past," he says.

"Who then will be available and trained to fight for justice in the civil courts?" Sandler asks. "Following ethical precepts in discovery, the most costly part of most cases, will help save the system by helping to reduce costs and expedite the process of reaching trial," he says.

RESOURCES

- 1 Mancia v. Mayflower Textile Servs. Co., 2008 U.S. Dist. LEXIS 83740 (D. Md. Oct. 15, 2008).
- 2 The Sedona Conference "Cooperation Proclamation," thesedonaconference.org/content/tsc_cooperation_proclamation/Proclamation.pdf.
- 3 Qualcomm Inc. v. Broadcom Corp., 2008 U.S. Dist. LEXIS 911 (S.D. Cal. Jan. 7, 2008) (subsequent decisions omitted).