Give Peace a Chance

Lawyers Are Ethically Obliged 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 reasonableness determination of every action. It is one of 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 confrontation” and “communication rather than confrontation.” “Kneejerk 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. Hangley, 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


The Sedona Conference “Cooperation Proclamation,” thesedonaconference.org/content/tsc_cooperation_proclamation/Proclamation.pdf.