

## The Judicial Mandate for Early Case Assessment and Cooperation – *Mancia v. Mayflower Textile Services Co.*

By Kenneth Rashbaum, Esq., Director, Fios Consulting

*“If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attitudes”*

Oklahoma Western District Judge Wayne Alley’s words, written in the “BDD” era (1989, “before data deluge”) have recently been elevated to a call for action by Magistrate Judge Paul Grimm (D. Md.), who cited them in his opinion in *Mancia v. Mayflower Textile Services Co.*, 2008 WL 4595175 (D. Md. Oct. 15, 2008). The Federal Rules of Civil Procedure, he wrote, *require* counsel to actively cooperate on the parameters of ESI discovery demands and responses. In a discussion of the burdens of extended discovery disputes on the courts and litigants, Judge Grimm, citing the Sedona Conference Cooperation Proclamation and a plethora of federal decisions bemoaning how discovery disputes have become a very expensive tail-wagging-the-judicial-process dog, served notice that – to paraphrase the late Paddy Chayefsky in the movie *Network* – the federal bench is mad as hell and isn’t going to take it anymore. Counsel will be required, under threat of sanctions, to assess each case at a very early stage, hone their discovery demands and responses according to the value of the case and requirements of its merits, and be prepared to agree with their adversaries on how to tailor the discovery process to provide for an expeditious resolution of the case.

Too often, Judge Grimm wrote, the merits of the claim have taken a back seat to disputes over minutiae of discovery. Judge Grimm evaluated the discovery demands in *Mancia*, a Fair Labor Standards Act case involving allegations of failure to pay overtime wages, as disproportionate to the potential damages available to the plaintiffs. At the same time, he expressed concern about the defendants’ objections, which were phrased in time-worn argot, with each response preceded by the phrase “overbroad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence.” Judge Grimm advised counsel that the discovery disputes could be “resolved, or substantially minimized by greater cooperation and communication between counsel.” His written opinion was designed to provide guidance to the litigants in *Mancia* and, clearly, to the bar and bench.

The theme of the decision is that cooperation between counsel is not just a courtesy, but a requirement of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 26(g) requires that discovery demands and responses be made only “after reasonable inquiry.” The Rule stipulates that the attorney must fully assess his or her case early in the proceedings and tailor the demands or responses, including objections, to the requirements of the case, taking into account it’s the scope of the discovery and value of the case.

While most of Judge Grimm’s ire was reserved for the “knee-jerk” objections of the defendants, he placed proponents of standardized discovery demands on notice as well by stating that if a lawyer certifies discovery documents “without substantial justification, the court (on motion or *sua sponte*) *must* impose an appropriate sanction . . . caused by (this) violation (of Fed.R.Civ.P.26(g)(3).” If Judge Grimm’s analysis were to become a national standard (and he cites a large number of cases in which boilerplate demands and responses were held to be violations of Rule 26(g), such demand phrases as “any and all . . .” and response objections, which begin with the mantra “overbroad, burdensome . . .,” would go the way of carbon paper, Wite-Out and the floppy disk.

According to Judge Grimm, recourse to such hackneyed verbiage, which more often than not leads to motion practice that pours molasses onto the wheels of the judicial merit-finding

machinery, can be avoided by cooperation between counsel. This includes a candid discussion of the potential value of the case, the costs of discovery given the sources of that information and its accessibility, and the volume of information each side really needs to prove its case. In other words, cooperation entails working to make sure discovery is more surgical rather than shotgun. Advantages to the responding parties would be reduced legal fees and third-party costs for both parties.

Such cooperation, though, requires information. Prepared lawyers should be willing to cooperate; those without complete knowledge of their case and their goals would inevitably resort, as stated in The Sedona Conference Cooperation Proclamation, to the “hide-the-ball” tactics of their early training. The Proclamation, cited by Judge Grimm, is “a national drive to promote open, forthright sharing of information, dialogue and . . . the development of practical tools to facilitate cooperative, collaborative, transparent discovery.” Over-aggressive discovery, the Proclamation continues, “is a cost that has outstripped any advantage in the age of ESI and the data deluge.” If there is any doubt of the Proclamation’s authority, even after its citation by Judge Grimm, one need only look to the Appendix, in which the Proclamation is endorsed by more than 20 federal and state judges.

The Proclamation makes a number of recommendations. One of the most significant is a call for full-scope assessment of the case at an early stage by ESI-knowledgeable point persons, such as party employees, litigation support personnel or third-party consultants, who can assist counsel in the preparation of demands and responses, and be present at meetings in which cooperation in discovery are discussed. This is a the trend that *Mancia* presages and which, as Judge Grimm has eloquently stated, is in fact required by the Federal Rules of Civil Procedure.

#### **About the Author:**

Kenneth N. Rashbaum, Esq. has 30 years' experience as a litigator, representing clients on e-discovery issues in both state and federal courts. He comes to Fios after serving as a partner and Electronic Discovery Practice Group co-chair with the Amlaw 200 law firm Sedgwick, Detert, Moran & Arnold. Rashbaum has vast experience counseling multinational corporations in the U.S., Europe and Asia on compliance with privacy, security and data protection matters as they pertain to cross-border data preservation, collection and production of electronically stored information (ESI), with a focus on international and healthcare law. He is an active member of The Sedona Conference® and is co-editor of the forthcoming white paper, "The Sedona Conference® Framework for Analysis of Cross Border Conflicts: A Practical Guide to Navigating the Competing currents of International Privacy and e-Discovery." Rashbaum has authored numerous articles on of the management and discovery of ESI and is a frequent speaker on these topics in the United States and Europe. As a director in Fios Consulting, he advises clients on best practices on electronic document management, litigation discovery and compliance protocols. He holds a J.D. from Hofstra University School of Law and a B.A., summa cum laude, from the State University of New York, College at New Paltz.