

ARTICLE

“THE [JUDICIAL] BEATINGS WILL CONTINUE UNTIL MORALE IMPROVES”: THE PRISONER’S DILEMMA OF COOPERATIVE DISCOVERY AND PROPOSALS FOR IMPROVED MORALE

**By: The Honorable Paul W. Grimm¹ & Heather Leigh
Williams²**

INTRODUCTION

Judges, courts, legal institutions, and legal commentators long have stressed the value of cooperative discovery. Through judicial rulings, sanction awards, the creation of local rules and discovery guidelines, and the formation of aspirational documents designed to promote cooperation, courts and legal commentators have attempted to drill the value of cooperation in the discovery process into the hearts and minds of litigants and their counsel. While the judicial beatings are likely to continue until morale improves, some thought should be devoted to why morale is low on the cooperation front and what efforts can be made to improve it.

In this article, we argue that cooperative discovery, a concept promoted by the Federal Rules of Civil Procedure, the local rules of a number of United States District Courts, case law, and legal scholarship, presents a prisoner’s dilemma: Despite the fact that it is in the best interest of parties and their counsel to cooperate in the discovery process, they largely fail to do so. When the discovery game becomes iterative—that is, when it is played over and over again

¹ The Honorable Paul. W Grimm is a United States District Judge for the United States District Court for the District of Maryland. Judge Grimm received a B.A., *summa cum laude*, from the University of California, Davis, and graduated *magna cum laude* from the University of New Mexico School of Law. Judge Grimm retired as Lieutenant Colonel in the U.S. Army Reserve. He has written numerous books and articles on civil procedure, evidence, and trial practice, and currently serves as an adjunct faculty member at the University of Baltimore and University of Maryland Schools of Law. The opinions expressed herein are those of the authors themselves, and do not purport to be those of the federal judiciary, or of the United States District Court for the District of Maryland.

² Heather Leigh Williams received a B.A. from the University of Rochester, and graduated *cum laude* from the University of Maryland School of Law. Ms. Williams had the privilege of serving as the law clerk to the Honorable Paul W. Grimm in 2011–2012. She currently practices in Maryland state and federal courts.

by the same players—the actors’ conduct may shift, becoming more or less cooperative depending on the nature of the interactions, and the success of efforts at cooperation over time. Many factors, whether institutional, strategic, or attitudinal, may dissuade a party or its counsel from cooperating. We consider these factors throughout this article, proceeding as follows: In Part I, we explain the prisoner’s dilemma theory and provide a brief background of game theory and its application to the legal field. In Part II, we outline the theory that cooperative discovery presents a prisoner’s dilemma. In so doing, we identify and describe conceptions of cooperation in the American discovery model and consider, with the help of examples drawn from the case law, how this model creates a prisoner’s dilemma for its participants. In Part III, we consider ways to move beyond the prisoner’s dilemma, offering suggestions for ways that our discovery model may be tweaked so that its participants are no longer trapped inside the game’s boxes.

I. THE PRISONER’S DILEMMA

The so-called prisoner’s dilemma, as originally imagined by Merrill Flood and Melvin Dresher in 1950, and named by A.W. Tucker soon thereafter,³ involves a scenario where two prisoners, separately detained and under questioning or interrogation, must decide whether “to stay silent or to squeal on their confederate.”⁴ More generally, the prisoner’s dilemma is used as a model to describe any “game”⁵ in which “two parties acting individually wind up with an outcome worse for both of them than the outcome that they could obtain through cooperation.”⁶

³ ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 216 (rev. ed. 2006).

⁴ Steven Gensler, *Some Thoughts on Lawyer’s E-Volving Duties in Discovery*, 36 N. KY. L. REV. 521, 551 n.171 (2009) (citing John K. Seatar, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B. U. L. REV. 569, 578 (1989)).

⁵ The prisoner’s dilemma is one of many models in the field of game theory. See ROGER B. MYERSON, *GAME THEORY: ANALYSIS OF CONFLICT* 1 (1997); DOUGLAS G. BAIRD, *GAME THEORY & THE LAW* 1 (1994). Game theory provides a mechanism for understanding how rational, self-interested individuals interact with each other. *Id.* A “game” is played “whenever the fate of an individual in [a] group depends not only on his actions but also on the actions of the rest of the individuals in the group.” KEN BINMORE, *ESSAYS ON THE FOUNDATIONS OF GAME THEORY* 1 (1990).

⁶ Setear, *supra* note 4, at 578; see also AXELROD, *supra* note 3, at 7 (explaining that the basic problem in the prisoner’s dilemma “occurs when the pursuit of self-interest by each leads to a poor outcome for all”).

The basic model for the prisoner's dilemma is represented by the following figure and framed as follows: Two players (the column player and the row player) each have two choices—cooperate or defect.⁷ Each player must decide whether to cooperate or defect simultaneously and independently, without knowing what the other player will do.⁸ The results of those choices are displayed in the figure's matrix: Both players could cooperate, resulting in each player doing equally and fairly well, as represented by the value of three shown in the figure.⁹ That value could be a dollar payoff, or a benefit of some kind incurred over the other player.¹⁰ In the traditional conception of the prisoner's dilemma, the numerical values represent the number of years each player would spend in jail.¹¹ Alternatively, either player could defect while the other player cooperates.¹² In that scenario, the defecting player obtains the game's highest possible payoff (five), while the non-defecting player gets nothing—the so-called “sucker's payoff.”¹³ Lastly, both players could defect, resulting in each obtaining an equal, but smaller, payoff.¹⁴

Column Player:

| | | | |
|--------------------|------------------|------------------|---------------|
| <u>Row Player:</u> | | Cooperate | Defect |
| | Cooperate | 3, 3 | 0, 5 |
| | Defect | 5, 0 | 1, 1 |

The strategic problem presented by the game is this: If both players cooperate, each player undoubtedly is better off than if both players defect.¹⁵ However, it is in each player's individual self-interest to defect, regardless of what that player thinks the other player will do.¹⁶ Why? If the row player cooperates, the column player obtains a higher payoff by defecting (five versus three). If the row player defects, the column player again obtains a higher payoff by defecting (one versus zero). As a result, regardless of what the column player

⁷ AXELROD, *supra* note 3, at 7–8.

⁸ AXELROD, *supra* note 3, at 7–8.

⁹ AXELROD, *supra* note 3, at 8.

¹⁰ AXELROD, *supra* note 3, at 8.

¹¹ AXELROD, *supra* note 3, at 8.

¹² AXELROD, *supra* note 3, at 8.

¹³ AXELROD, *supra* note 3, at 8.

¹⁴ AXELROD, *supra* note 3, at 8.

¹⁵ See Julia Y. Lee, *Gaining Assurances*, 2012 WIS. L. REV. 1137, 1142 (2012).

¹⁶ See *id.*

thinks the row player will do (cooperate or defect), it is in the column player's interest, from a purely payoff-focused perspective, to defect.¹⁷ But, the same rationale applies for the row player too. From the row player's perspective, which is equally focused on individual payout, the best choice is to defect.

Thus, both players, acting only in their own self-interest and focused only on obtaining their own optimal payouts, are motivated to defect.¹⁸ Unfortunately for everyone involved, the result of mutual defection is that both players get a payout of one, which is worse than the payout of three that they could have gotten by both cooperating.¹⁹ The focus on individual interest and payouts leads to a worse outcome for both players than could be achieved through cooperation.

Game theory, and specifically the prisoner's dilemma, has long been applied to the legal field. In recent years, the prisoner's dilemma has been used to understand the choices made by litigants and their attorneys in various phases of litigation, from alternative dispute resolution²⁰ to the decision to oppose a motion for summary judgment filed by a co-party.²¹ As other commentators have pointed out, parties and attorneys involved in discovery often end up in a prisoner's dilemma, with each side using discovery abusively in anticipation that the other party will do the same.²² We add to this discussion by considering the discovery dilemma in the context not only of abusive discovery, but another frequent problem is evasive and non-responsive discovery. We also consider how the discovery game changes over iterations, meaning in multiple games played by the same players. Finally, we offer suggestions for tweaking our discovery model so that its participants can step outside of the game's boxes.

¹⁷ AXELROD, *supra* note 3, at 9.

¹⁸ Lee, *supra* note 15, at 1142.

¹⁹ AXELROD, *supra* note 3, at 9.

²⁰ See, e.g., DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND APPLICATIONS* 25–26 (1989).

²¹ See, e.g., Jonathan A. Wolfson, *Warring Teammates: Standing to Oppose a Co-Party's Motion for Summary Judgment*, 60 *DRAKE L. REV.* 561, 570–72 (2012) (using the prisoner's dilemma to understand a party's decision to oppose a motion for summary judgment filed by a co-party in the context of antitrust, tort, and civil rights cases).

²² See, e.g., Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 *TEX. L. REV.* 1329, 1355 (2012); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 *COLUM. L. REV.* 509, 514–15 (1994); Seatear, *supra* note 6, at 584–86.

II. COOPERATIVE DISCOVERY AS A PRISONER'S DILEMMA

A. *Cooperative Discovery*

Cooperative discovery is an approach to discovery endorsed by numerous judges throughout the country, and embodied in documents such as the Sedona Conference's 2009 Cooperation Proclamation.²³ The goal of the Cooperation Proclamation is to ensure zealous advocacy and decrease litigation costs through cooperation, collaboration, and transparency in the discovery process.²⁴ The notion of discovery as a cooperative, rather than a combative, endeavor is articulated clearly by the Federal Rules of Civil Procedure, which encourage counsel to coordinate and cooperate throughout the discovery process. For example, under Rule 26(f), the parties are directed to confer as early as possible in the litigation to discuss potential issues and develop a proposed discovery plan.²⁵ Under Rule 26(c), any motion seeking a protective order must be accompanied by a certification that the moving party in good faith has conferred, or attempted to confer with opposing counsel, to resolve the dispute without court intervention.²⁶ Likewise, under Rule 37(a), any motion to compel discovery or disclosure must be accompanied by a certification of good faith.²⁷ As a general matter, Rule 37 authorizes sanctions for failure to cooperate in discovery, although without explicitly defining what cooperation means or requiring it in the text of the rule itself.²⁸

Beyond the provisions of the Federal Rules of Civil Procedure that encourage conference and cooperation in discovery, many United States District Courts have implemented local rules addressing cooperation. For example, "in the interest of reducing delay and expense," the United States District Court for the Southern District of Illinois mandates that counsel coordinate to create "cooperative discovery arrangements."²⁹ The District Court for the District of Massachusetts encourages "cost effective discovery by means of

²³ The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009) [hereinafter *Cooperation Proclamation*].

²⁴ *Id.*

²⁵ FED. R. CIV. P. 26(f)(1).

²⁶ *See* FED. R. CIV. P. 26(c)(1).

²⁷ FED. R. CIV. P. 37(a)(1).

²⁸ *See generally* FED. R. CIV. P. 37.

²⁹ S.D. Ill. R. 26.1(d).

voluntary exchange of information among litigants and their attorneys,” and recommends both formalized discovery stipulations, as well as “informal, cooperative discovery practices in which counsel provide information to opposing counsel without resort to formal discovery procedures.”³⁰

In several districts, the Local Rules announce the Court’s expectations with regard to discovery. In the District Courts for the Eastern and Southern Districts of New York, “counsel are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be courteous in their dealings with each other, including in matters relating to scheduling and timing of various discovery procedures.”³¹ The Districts of Oregon and Wyoming feature nearly identical rules, with the District of Oregon adding that the Court “may impose sanctions if it finds that counsel has been unreasonable in not accommodating the legitimate requests of opposing counsel.”³² Where attorneys’ fees are applicable, “the Court may take a lack of cooperation into consideration in setting the fee.”³³

The District Court for the District of Maryland has further expounded upon the notion of cooperative discovery in its detailed Discovery Guidelines.³⁴ The Guidelines provide that all “parties and counsel have an obligation to cooperate in planning and conducting discovery to tailor the discovery to ensure that it meets [the Guidelines’] objectives [of satisfying the Federal Rules’ goals of proportionality and the just, speedy, and inexpensive conduct of discovery].”³⁵ Under the Guidelines, “counsel have a duty to confer early and throughout the case as needed to ensure that discovery is planned and conducted consistent with these requirements and, where necessary, make adjustments and modifications in discovery as

³⁰ D. Mass. R. 26.1(a).

³¹ See generally E.D.N.Y. Civ. R. 26.4; S.D.N.Y. Civ. R. 26.4. The Local Rules in the Eastern and South Districts of New York (which are identical) also offer a helpful way of thinking about the common problem of evasive or non-responsive discovery responses: “Discovery requests shall be read reasonably in the recognition that the attorney serving them generally does not have the information being sought and the attorney receiving them generally does have such information or can obtain it from the client.” E.D.N.Y. Civ. R. 26.4(b); S.D.N.Y. Civ. R. 26.4(b).

³² D. Or. R. 83.8(b); D. Wyo. Civ. R. 83.3.

³³ D. Or. R. 83-8(b). Even if not embodied in a specific rule, many courts do this.

³⁴ See generally D. Md. Loc. Adm. R., App’x A, Discovery Guidelines [hereinafter Discovery Guidelines].

³⁵ *Id.*, Guideline 1.a.

needed.”³⁶ The court encourages counsel, during their consultation, “to think creatively and to make proposals to one another about alternatives or modifications to the discovery otherwise permitted that would permit discovery to be completed in a more just, speedy, inexpensive way.”³⁷ Moreover,

[a]ttorneys are expected to behave professionally and with courtesy towards all involved in the discovery process, including but not limited to opposing counsel, parties and non-parties. This includes cooperation and civil conduct in an adversary system. Cooperation and civility include, at a minimum, being open to, and reasonably available for, discussion of legitimate differences in order to achieve the just, speedy, and inexpensive resolution of the action and every proceeding. Cooperation and communication can reduce the costs of discovery, and they are an obligation of counsel.³⁸

With regard to discovery disputes, the Guidelines reaffirm Rule 37(a)’s requirement that, whenever possible, “attorneys are expected to communicate with each other in good faith throughout the discovery process to resolve disputes without the need for intervention by the Court, and should do so promptly after becoming aware of the grounds for the dispute.”³⁹

Cooperative discovery is not just an aspirational notion contained in the Federal Rules of Civil Procedure and the accompanying local rules of many federal district courts. Instead, it is a notion actively demanded by judges throughout the country. For example, the United States District Court for the Eastern District of Arkansas has acknowledged that “the Federal Rules of Civil Procedure and [various] Rules of Professional Conduct—not to mention the various codes of civility—contemplate cooperation among counsel during the discovery

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*, Guideline 1.d.

³⁹ *Id.*, Guideline 1.f.

process.”⁴⁰ According to the Arkansas court, such cooperation “manifestly includes responding to telephone calls and other communications” of opposing counsel.⁴¹ Where parties fail to cooperate, it adds to the cost of litigation and leads to “escalating vexation and imbroglios.”⁴² Similarly, the United States District Court for the Northern District of California noted in a recent case that counsel’s failure to provide prompt disclosures regarding the scope and nature of their cases and defenses, and their corresponding failure to cooperate to define the counters of appropriate discovery, “threatens the fair and cost-effective exchange of relevant discovery.”⁴³ As the United States District Court for the District of Maryland has stated, the cost of discovery is “widely criticized as being excessive—to the point of pricing litigants out of court.”⁴⁴

Cooperative discovery is particularly important in cases involving extensive discovery of electronically stored information (“ESI”), where the sheer amount of information to be retrieved, sorted, and processed complicates discovery and increases the costs of litigation, as does the need to retain experts who are well-versed in generating ESI search terms, retrieving information from ESI, and converting ESI into a useable and manageable format.⁴⁵ As the United States District Court for the Southern District of New York has noted, cases involving ESI particularly require “cooperation between opposing counsel and transparency in all aspects of preservation and production,” especially with regard to generating and testing keyword searches with the assistance of the ESI’s custodians.⁴⁶ Thus, in the federal court’s view, “the best solution in the entire area of electronic discovery is cooperation among counsel.”⁴⁷ This view is endorsed by Federal Rule of Civil Procedure 26(f), which requires that the parties meet and confer with an eye towards developing a plan for producing

⁴⁰ *Baptists Health v. Smith*, 393 F. Supp. 2d 719, 721 (E.D. Ark. 2005).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Oracle USA, Inc. v. SAP AG*, 264 F.R.D. 541, 543 (N.D. Cal. 2009).

⁴⁴ *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 359 (D. Md. 2008).

⁴⁵ Paul W. Grimm *et al.*, *New Paradigm for Discovery Practice: Cooperation*, MD. B.J. 26, 28 (Nov./Dec. 2010).

⁴⁶ *William A. Gross Constr. Assocs., Inc. v. Am. Manuf. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009).

⁴⁷ *Id.* (explicitly and strongly endorsing *The Sedona Conference Cooperation Proclamation*).

any discoverable ESI, a process that cannot occur without cooperation.⁴⁸

In an older case, the Seventh Circuit reminded its bar that the real victims of uncooperative discovery are the parties.⁴⁹ The record in the case, *Sweat v. Peabody Coal Co.*,⁵⁰ reflected “a discovery phase in which the parties’ respective counsel were combative, obstinate, and wholly uncooperative in the process of exchanging information pertinent to the litigation.”⁵¹ Plaintiff’s counsel claimed that the defendant was “continuously dragging its feet, refusing to comply with various discovery requests,” while defense counsel complained that Plaintiff’s demands were unrealistic and that Plaintiff’s counsel “declined to be flexible concerning the scheduling and timing of [the defendant’s] compliance.”⁵² The Court noted that this was the latest in a string of discovery disputes, stating that, from the record, it was unable to “discern whether either party possesses a monopoly on the contumacious conduct displayed” throughout discovery.⁵³ The Court was not “happy with the progress, or should say lack of progress, relating to getting this case ready for trial.”⁵⁴ It was apparent to the Court that counsel in the case did not like each other, would not get along, and would not cooperate in discovery. “The people who suffer when this happens,” the Court stated bluntly, “are the parties.”⁵⁵

From the above discussion, there seem to be many reasons for counsel to engage in cooperative discovery, including direction from the Federal Rules of Civil Procedure and the local rules of many federal district courts and the guidance of judges across the country. Moreover, it seems to be widely understood that failure to engage in cooperative discovery is likely to increase the costs, and complexity, of litigation to the detriment of everyone involved.⁵⁶ Why, then, is cooperative discovery not more widely practiced by litigants and their attorneys?

⁴⁸ See FED. R. CIV. P. 26(f) (discussing the material to be included in a discovery plan).

⁴⁹ See *Sweat v. Peabody Coal Co.*, 94 F.3d 301 (7th Cir. 1996).

⁵⁰ *Id.*

⁵¹ *Id.* at 306.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Sweat*, 94 F.3d at 306.

⁵⁶ *Cooperation Proclamation*, *supra* note 27, at 361.

B. *The Cooperative Discovery Dilemma*

Cooperative discovery presents a prisoner's dilemma for various institutional, attitudinal, and strategic reasons. Each party anticipates or expects that the other party will approach discovery uncooperatively, or engage in discovery that is abusive or evasive, and so responds in kind.⁵⁷ The "fear of being disadvantaged if the other side were to take a non-cooperative approach to discovery" often leads both sides to reject cooperation, despite the fact that approaching discovery cooperatively could reduce overall discovery expense for both sides, while still allowing each party to obtain essential information to which it is entitled.⁵⁸

The cooperative discovery dilemma may be attitudinal. It has long been thought that discovery should be a game, where players stall, obfuscate, and contest all discovery and produce only that which they cannot find an excuse for withholding.⁵⁹ Cooperation and courtesy to opposing parties and their counsel has been seen as weakness, which has been taken advantage of by dilatory, evasive, or abusive tactics of less cooperative or courteous counsel. As a result, cooperation and courtesy is discouraged to the disadvantage of all.

Likewise, the dilemma may be the result of strategy. A party or their counsel may perceive that it could obtain a strategic advantage over the opposing party by "employing obstructionist, overreaching or combative tactics," potentially limiting the opponent's ability to obtain needed and discoverable information, while itself "reaping the benefits of receiving full discovery from its more cooperative opponent."⁶⁰ Aware of this perception, both sides end up adopting a non-cooperative approach as a defensive strategy, so that neither side benefits from a "unilateral advantage" over the other.⁶¹ Unfortunately, when these "hardball discovery"⁶² tactics are used, both parties end up worse off, with the failure to cooperate prolonging discovery and generating unnecessary expense, and with neither party gaining the strategic high ground.

⁵⁷ Bone, *supra* note 26, at 1355.

⁵⁸ The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 361 (2009) [hereinafter *Case for Cooperation*].

⁵⁹ Grimm, *supra* note 53, at 27.

⁶⁰ *Case for Cooperation*, *supra* note 66, at 361.

⁶¹ See generally *Cooperation Proclamation*, *supra* note 27.

⁶² *Network Computing Servs. Corp. v. Cisco Sys., Inc.*, 223 F.R.D. 392, 395 (D.S.C. 2004).

In a recent case, the United States District Court for the District of South Carolina encountered a common example of the cooperative discovery dilemma when calculating the lodestar amount for purposes of awarding attorney's fees to a prevailing plaintiff.⁶³ The court characterized the underlying merits of the case as straightforward. The Plaintiff, a company in the business of designing and creating newsletters for multi-unit apartment and residential complexes and franchise businesses, brought suit against an employee for misappropriation of trade secrets and confidential information.⁶⁴ At trial, the jury returned a verdict for the plaintiff company and, shortly thereafter, the plaintiff moved for, and was awarded, attorney's fees.⁶⁵

Despite the straightforward nature of the claim, the court noted that the parties, from the initiation of the lawsuit, set about making the litigation "as complicated, onerous and time-consuming as possible."⁶⁶ In reviewing the plaintiff's time records, submitted in support of its requested fee award, the court found that the company "spent an inordinate amount of time on unnecessary and/or duplicative motions," including discovery motions, and noted that "the docket reveals that the parties often initiated or opposed motions on matters which most litigants resolve by consent, including motions for extensions of time."⁶⁷ Likewise, the parties refused to participate in cooperative discovery, "resorting to filing competing motions to compel and/or motions for protective orders."⁶⁸ A significant amount of time was devoted to a dispute among the parties regarding the breadth and scope of e-discovery in the case.⁶⁹ The court acknowledged that discovery of ESI may interject "an element of complexity into an otherwise routine matter."⁷⁰ However, rather than resolving their e-discovery issues by collaborating and cooperating with their respective experts, "each party held steadfast in their positions concerning the scope of electronic discovery without compromise which needlessly increased" litigation costs.⁷¹ The court made clear that the disputes related to e-discovery, and the parties'

⁶³ *Uhlig, LLC v. Shirley*, No. 6:08-cv-01208-JMC, 2012 WL 4478365, at *1, *5 (D.S.C. Sept. 25, 2012).

⁶⁴ *Id.* at *1, *4.

⁶⁵ *Id.* at *2-3.

⁶⁶ *Id.* at *4.

⁶⁷ *Id.* at *5.

⁶⁸ *Id.*

⁶⁹ See *Uhlig, LLC*, 2012 WL 4478365, at *5.

⁷⁰ *Id.*

⁷¹ *Id.*

motions requesting broader discovery, in the end, “did not materially impact the case” in any way.⁷²

If we were to evaluate this case in terms of the prisoner’s dilemma, the case might be summarized in the following figure. (Recall that in the traditional prisoner’s dilemma, the payoff values represented years in jail. Here, the payoff values represent some strategic benefit that would be obtained by each party, so that the goal is to obtain the highest payoff value possible.)

Plaintiff Company:

Defendant
Employee:

| | Cooperate and collaborate with opposing experts to develop ESI plan | Refuse to cooperate and collaborate |
|--|--|--|
| Cooperate and collaborate with opposing experts to develop ESI plan | 3, 3 | 0, 5 |
| Refuse to cooperate and collaborate | 5, 0 | 1, 1 |

Thus, were both parties to cooperate and coordinate with opposing counsel and their experts to develop an ESI plan, both would obtain necessary and discoverable information at less expense, resulting in an equally good payoff of 3 for both parties. However, apparently stuck on the notion that discovery is a game involving obfuscating, stalling, and contesting wherever possible, neither party cooperates, refusing to offer their ESI experts for collaboration and refusing to coordinate with the opposing party’s experts. This notion is grounded, at least in part, on fear that one-sided cooperation, unreciprocated by the opposing side, leaves a party vulnerable, having provided too much information, and not obtaining equally candid responses or information in return, as represented by the 5-0 and 0-5 values. The

⁷² *Id.*

result of mutual non-cooperation is a smaller payoff of 1 for both parties, where that lower value represents the additional costs incurred in requesting, obtaining, sorting, and processing voluminous ESI.

The figure could be modified to show payoff values that represent costs incurred by each party in pursuing discovery. In that instance, the figure would appear as follows, and each party's aim would be to obtain necessary and discoverable information through the discovery process while incurring the smallest cost possible. Thus, were both parties to cooperate to limit the scope of ESI and to develop the best search terms, the costs of requesting, producing, obtaining, reviewing, sorting, and processing ESI for each party might be approximately \$3,000. However, out of fear of providing opposing counsel with access to their experts and/or search terminology without obtaining the same in return (as represented by the \$5,000-\$1,000 value and the \$1,000-\$5,000 value, where the party that does cooperate ends up giving opposing counsel cheaper and easier access to its material, while not obtaining the same benefit), both parties end up not cooperating and, consequently, spending more on e-discovery.

Plaintiff Company:

| | | |
|--|--|--|
| <u>Defendant Employee:</u> | Cooperate and collaborate with opposing experts to develop ESI plan | Refuse to cooperate and collaborate |
| Cooperate and collaborate with opposing experts to develop ESI plan | \$3,000; \$3,000 | \$1,000; \$5,000 |
| Refuse to cooperate and collaborate | \$5,000; \$1,000 | \$7,000; \$7,000 |

In the case described above, the court reduced the plaintiff's requested fee award by sixty percent, based in part on the excessive

amount of time devoted to discovery.⁷³ In doing so, it noted that much of the information obtained through e-discovery “did not materially impact the case.”⁷⁴ Cooperation by counsel could have ensured that discovery was more narrowly tailored and limited to the matters at issue in the case, thereby significantly decreasing the costs and burden of production.⁷⁵ Instead, the parties’ inability to coordinate with their respective experts with regard to ESI resulted in both parties spending more money to request and produce discovery, the results of which were largely immaterial to the final disposition of the case.

The problem of non-responsive, evasive answers to discovery requests likewise present a classic prisoner’s dilemma. Experience shows that non-specific, boilerplate objections to discovery requests, and non-responsive, evasive answers, are all too commonplace and pose a serious barrier to conducting discovery in a timely and cost-efficient manner, as they tend to generate motions to compel.⁷⁶ Take the following scenario: A Scheduling Order is issued in a federal case, and discovery requests are promptly served by both parties. Were both parties to provide responsive, non-evasive answers to the discovery requests and/or specific, non-boilerplate objections—as the Federal Rules plainly require⁷⁷—both parties would obtain an equally good payoff of 3. Even if motions to compel are necessary, the cost of litigating such motions will be substantially decreased, as the parties already will have outlined their objections in detail, allowing the opposing party to promptly raise their counterpoints and enabling the court to make a prompt decision.⁷⁸ However, because experience in practice has led many lawyers to believe that the opposing side will present only evasive, incomplete, and non-responsive answers and/or boilerplate objections to their discovery requests, and because strategic or attitudinal considerations may enforce that belief, both sides are likely to defect, resulting in a lower payoff for both parties (as

⁷³ *Id.* at *7, *10.

⁷⁴ *Id.* at *5.

⁷⁵ Paul W. Grimm, *The State of Discovery Practice in Civil Cases: Must the Rules Be Changed to Reduce Costs and Burden, or Can Significant Improvements Be Achieved Within Existing Rules?*, 12 SEDONA CONF. J. 47, 60 (2011).

⁷⁶ See generally *Mancia*, 253 F.R.D. at 362.

⁷⁷ FED. R. CIV. P. 33(b)(4) (interrogatories); Fed. R. Civ. P. 34(b)(2)(B) (document requests); D. Md. Loc. R. 104.6; *Hall v. Sullivan*, 231 F.R.D. 468, 470 (D. Md. 2005); *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 199 F.R.D. 168, 173 (D. Md. 2001); *Marens v. Carrabba’s Italian Grill, Inc.*, 196 F.R.D. 35, 38–39 (D. Md. 2000).

⁷⁸ *Case for Cooperation*, *supra* note 66, at 343.

represented by the 1-1 payoff).⁷⁹ The motivation to defect is enhanced by the fear (represented by the 5-0 and 0-5 payoffs) that the provision of responsive, non-evasive answers and non-boilerplate objections by one party will provide the opposing party a strategic advantage, assuming the same kinds of responses are not provided in return.⁸⁰ Indeed, where one party provides responsive, non-evasive answers and non-boilerplate objections, the cost of the opposing party litigating any motions to compel arising from the discovery responses is likely to be smaller than if the first party had provided evasive answers and boilerplate objections.⁸¹

Party 1:

Party 2:

| | Provide responsive, non-evasive answers and non-boilerplate objections to discovery requests. | Provide non-responsive, evasive answers and boilerplate objections to discovery requests |
|---|--|---|
| Provide responsive, non-evasive answers and non-boilerplate objections to discovery requests | 3, 3 | 0, 5 |
| Provide non-responsive, evasive answers and boilerplate objections to discovery requests | 5, 0 | 1, 1 |

⁷⁹ See *Case for Cooperation*, *supra* note 66, at 361.

⁸⁰ *Case for Cooperation*, *supra* note 66, at 361.

⁸¹ *Case for Cooperation*, *supra* note 66, at 343.

Thus, a number of possible factors may dissuade cooperation. Another example of an instance in which cooperative discovery often breaks down is where one party is proceeding in an action without legal representation.⁸² Given the complexity of the rules governing discovery, and the likelihood that a *pro se* party has no legal training, frustrations commonly arise on both sides, with the *pro se* litigant often feeling abused or overburdened by the opposing side's discovery requests, and opposing counsel experiencing frustrations related to the insufficiency, or lack entirely, of discovery responses.⁸³ It is not uncommon, additionally, for *pro se* litigants to become frustrated by objections raised to their discovery requests, even legitimate, non-boilerplate objections, due to a lack of familiarity with legal jargon or rules.⁸⁴ As a result, the *pro se* party may be predisposed against cooperation, while the party proceeding with counsel may have its own apprehensions regarding cooperation with a *pro se* litigant, leading both parties to choose defection and antagonism over cooperation and courtesy, to the detriment of all.

It may be that the notion that discovery, and particularly e-discovery, is a prisoner's dilemma is, as Maura Grossman noted in a recent article, a self-fulfilling prophesy, "with the effect of incentivizing counsel for either party to engage in bad behavior, in the belief that it is the rational choice under the circumstances."⁸⁵ Regardless of the precision with which each unique discovery dispute will fit into the squares of the prisoner's dilemma, the perception that opposing counsel is likely to engage in bad discovery behavior, and

⁸² Calhoun v. Robinson, No. C08-5744 RJB/KLS, 2009 WL 3326760, at *5 (W.D. Wash. Oct. 13, 2009) ("Contention may defeat cooperation and effective discovery and this process may be exacerbated when one party is pro se."). See generally, e.g., Adams v. Sharfstein, No. CCB-11-3755, 2012 WL 2992172 (D. Md. July 19, 2012).

⁸³ See, e.g., Adams, 2012 WL 2992172, at *6 (noting a *pro se* Plaintiff's request that the Court oversee all discovery in the case based on her perception that defense counsel was using discovery against her in an abusive fashion); Dancy v. Univ. of N.C. at Charlotte, No. 3:08-CV-166-RJC-DCK, 2009 WL 2424039, at *1 (W.D.N.C. Aug. 3, 2009) (noting the defendant's frustration with the *pro se* plaintiff's failure to respond to various discovery requests).

⁸⁴ See Adams, 2012 WL 2992172, at *6.

⁸⁵ Maura R. Grossman, *Some Thoughts on Incentives, Rules, and Ethics Concerning the Use of Search Technology in E-Discovery*, 12 SEDONA CONF. J. 89, 97 (2011) (explaining that, in e-discovery, several elements of the basic prisoner's dilemma are missing: (1) the requirement that each party make an "irrevocable choice of strategy" without knowledge of the other party's choice; (2) the requirement that bad behavior on the part of one party reduces the impact of another party's bad behavior; and (3) the requirement that the game be played only once).

the counterbalancing incentive to do the same, poses a real problem toward achieving cooperative discovery.

III. STEPPING OUTSIDE THE BOXES

In 2008, the United States District Court for the District of Maryland opined that while “judges, scholars, commentators and lawyers themselves long have recognized the problems associated with abusive discovery, what has been missing is a thoughtful means to engage all the stakeholders in the litigation process—lawyers, judge and the public at large—and provide them with the encouragement, means and incentive to approach discovery in a different way.”⁸⁶ While strides have been made in recent years to provide such encouragement and incentives, continued engagement with the topic of facilitating cooperative discovery remains necessary.

The discovery “game” can be ended, and the prisoner’s dilemma solved, in a number of possible ways, all geared toward encouraging and facilitating cooperation among the parties and their counsel. First, unlike in the classic prisoner’s dilemma, where the actors’ choices are made alone, and without supervision and guidance, discovery occurs in a context where an “intervening enforcement authority” may promote cooperation over defection.⁸⁷ Of course, trial judges cannot possibly hear and decide every possible discovery dispute that arises among parties and counsel, given high caseloads and other limitations on their time.⁸⁸ Instead, early and proactive judicial management of discovery may provide a solution.⁸⁹ A number of studies conducted and commentaries made in recent years, including those undertaken by the American Bar Association⁹⁰ and the Institute for the Advancement of the American Legal System,⁹¹ have concluded that “the most

⁸⁶ *Mancia*, 253 F.R.D. at 363.

⁸⁷ See *Case for Cooperation*, *supra* note 66, at 362.

⁸⁸ Gensler, *supra* note 4, at 535-36; *The Case for Cooperation*, *supra* note 66, at 343.

⁸⁹ The Sedona Conference, *The Sedona Conference Cooperation Proclamation: Resources for the Judiciary*, 9 (Aug. 2011) [hereinafter *Resources for the Judiciary*].

⁹⁰ See generally ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT (2009), available at http://www.americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report_aba_report.authcheckdam.pdf.

⁹¹ See generally IAALS, 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM: PILOT PROJECT RULES (2009), available at <http://www.actl.com/am/template.cfm?section=home&template=/cm/contentdisplay.cfm&contentid=4509>; IAALS, 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP

effective way to control litigation costs is for a judge to take charge of the case from its inception and to manage it aggressively through the pretrial process by helping shape, limit, and enforce a reasonable discovery plan,” and by keeping the case on a strict schedule to ensure that disposition of the matter is as expeditious as possible.⁹²

Thus, judges could control discovery, and preemptively limit discovery disputes and foster cooperative discovery, by issuing, along with their standard Scheduling Order, a Discovery Order that will guide discovery in each case. The purpose of such a Discovery Order is not to change the party-driven nature of discovery.⁹³ Rather, as the Sedona Conference has explained, active case management “provides a strong framework in which the parties should develop and execute their own cooperative discovery plans.”⁹⁴ Discovery Orders would operate to provide “a clear set of expectations” that push “the evidence-gathering phase of the litigation forward in a speedy and inexpensive way, without the cost, delay, and gamesmanship associated with unmanaged discovery.”⁹⁵ The following types of guidelines could be put into place by such an Order, all of which together should have the impact of eliminating needless discovery disputes and encouraging the parties to confer and cooperate throughout discovery:

- **Early Disclosure of Damages Claims and Relief Sought.** Pursuant to Federal Rule of Civil Procedure 26(a)(1), judges may direct any party asserting a claim against another party to serve on that party and provide to the Court information relating to the calculation of damages and a particularized statement regarding any non-monetary relief sought. In requiring that such disclosures be made early in the litigation, a judge encourages the parties to focus on what is directly at issue in the case and to consider the proportionality of their discovery requests vis à vis the ultimate relief sought. With such information identified early, the parties are more likely to

FOR REFORM: CASE FLOW MANAGEMENT GUIDELINES (2009), available at <http://www.uscourts.gov/uscourts/RulesandPolicies/rules/Duke%20Materials/Library/IAALS,%20Roadmap%20for%20Reform,%20Civil%20Caseflow%20Management%20Guidelines.pdf>.

⁹² Grimm, *supra* note 86, at 49.

⁹³ *Resources for the Judiciary*, *supra* note 101, at 4.

⁹⁴ *Resources for the Judiciary*, *supra* note 101, at 4.

⁹⁵ *Resources for the Judiciary*, *supra* note 101, at 4.

cooperate, particularly because any later requests for attorney's fees relating to time spent conducting discovery or engaging in discovery disputes will be measured against what is at stake in the case.⁹⁶

- **Phased Discovery.** Pursuant to Federal Rules of Civil Procedure 26(b)(2)(C) and 26(g)(1)(B)(ii)–(iii), a judge may direct the parties to conduct discovery in phases, thereby eliminating many preliminary disputes regarding the scope of discovery, allowing the parties to obtain essential information early in the case so that later requests may be more narrowly tailored and less likely the subject of objection and dispute, and saving time and cost. A phased approach to discovery might proceed as follows: In the first phase, the parties are directed to focus on those facts that are most essential to resolving the case—whether by trial, settlement, or dispositive motion. Thus, the parties may seek any non-privileged, non-work product information that is likely to be admissible under the Federal Rules of Evidence and that is material to proof of claims and defenses raised in the pleadings. By narrowing the scope of information that is discoverable in Phase 1 to exclude information that might otherwise be discoverable under the broad scope of Federal Rule of Civil Procedure 26(b)(1), a judge encourages the parties to focus on what is most essential to their claims and defenses.

In the second phase, upon a showing of good cause, the parties may be permitted to seek the information contemplated by Rule 26(b)(1)—any non-privileged, non-work product information that is relevant to the claims and defenses pleaded or more generally to the subject matter of the litigation. The necessary showing of good cause must demonstrate that any additional discovery undertaken in Phase 2 will be proportional to the issues at stake in the litigation, taking into consideration

⁹⁶ See, e.g., *Oracle*, 264 F.R.D. at 543 (stating that “the Court has repeatedly emphasized that the scope of this case required cooperation in prioritizing discovery and in being mindful of the proportionality requirement of Federal Rule of Civil Procedure 26,” and noting that counsel’s failure to provide prompt disclosure of their damages claims and “failure to cooperate on defining the contours of appropriate discovery . . . threaten[ed] the fair and cost-effective exchange of relevant discovery” in the case).

the costs already incurred in Phase 1 and the factors stated in Rule 26(b)(2)(C)(i)–(iii). If additional discovery is permitted in Phase 2, the party seeking such discovery may be required to show cause as to why it should not be ordered to pay all or a part of the cost of the additional discovery sought.

Phased discovery facilitates cooperation by eliminating variables that tend to dissuade cooperation. Where the scope of discoverable information is phased and limited, parties must be reflective, and will be discouraged from issuing the kind of overbroad, unlimited discovery requests that tend to lead to disputes and generate additional costs. Further, where the cost of additional discovery in Phase 2 is presumed to be imposed on the party seeking such additional discovery, that party is less likely to engage in any game play. Indeed, judges who have ordered phased discovery have found that the parties rarely return for Phase 2.⁹⁷ Instead, the parties cooperate to identify what questions should be asked, what information must be gathered, and the most efficient means of obtaining it.

- **Impact of Failing to Cooperate.** A Discovery Order may provide that the failure of a party or counsel to cooperate throughout discovery will be relevant to resolving any discovery disputes, including whether the Court will permit discovery beyond Phase 1, and if so, who will bear the cost of that additional discovery. Likewise, an Order may provide that whether a party or counsel has cooperated during discovery will be relevant in determining whether sanctions should be imposed when ruling on discovery motions.
- **Limitations on Filing Discovery Motions.** Despite the good faith certificate requirement stated throughout the federal discovery rules, experience has shown that parties nonetheless fail to confer and cooperate prior to filing discovery motions, or at least fail to do so in any meaningful fashion. Thus, a Discovery Order might require the parties to request a telephone conference with the Court prior to filing a discovery motion, with an aim toward resolving the dispute informally and fostering a cooperative spirit among counsel. Only where

⁹⁷ Grimm, *supra* note 86, at 60.

the request for a conference is denied, or where the conference fails to resolve the dispute, will a motion be permitted.

- **Effect of Boilerplate Objections and Evasive, Non-Responsive Answers to Discovery Requests.** Pursuant to Federal Rule of Civil Procedure 37(a)(4), the judge may remind counsel and the parties in a Discovery Order that any boilerplate objections to discovery requests and/or any evasive, non-responsive answers to discovery requests will be treated as a failure to answer and/or will result in waiver of the objections. A significant amount of time, energy, and expense is spent in motions practice related to a party providing responses to discovery requests that are evasive and non-responsive, or that contain boilerplate, nonspecific objections.⁹⁸ A reminder about the impact of boilerplate objections and evasive answers is likely to facilitate cooperation, particularly as sanctions may be awarded for the failure to answer, and cooperation in discovery is a factor to be considered in determining the nature and amount of such sanctions.
- **Production of ESI.** A Discovery Order may dictate that the parties are to cooperate to develop search methodology and criteria that will achieve proportionality in ESI discovery, including the appropriate use of computer-assisted search methodology. This may require coordination with the opposing party's ESI experts. Where such cooperation is dictated, the parties may be less likely to attempt to hide the ball with regard to search methodology development. Additionally, a Discovery Order may limit the scope of ESI discovery, eliminating the possibility of the kind of cooperative breakdown discussed above. For example, a judge may order that, absent a showing of good cause or stipulation by the parties, a party from whom ESI is requested will not be required to search for responsive ESI: (1) from more than ten key custodians; (2) that was created more than five years before the lawsuit was filed; (3) from sources not reasonably accessible without undue burden or cost; or (4) for more than a

⁹⁸ See, e.g., *Lynn v. Monarch Recovery Mgmt., Inc.*, 285 F.R.D. 350 (D. Md. 2012); *Mezu v. Morgan State Univ.*, 269 F.R.D. 565 (D. Md. 2010); *Corsair Special Situations Fund, L.P. v. Engineered Framing Sys., Inc.*, 694 F. Supp. 2d 449 (D. Md. 2010); *Sabol v. Brooks*, 469 F. Supp. 2d 324 (D. Md. 2006).

set number of hours, exclusive of time spent reviewing the ESI determined to be responsive for privilege or work-product protection, provided that the producing party can demonstrate to the court and its adversary that the search was effectively designed and efficiently conducted.⁹⁹

- **Agreements Regarding Non-Waiver of Attorney-Client Privilege or Work Product Protection.** A Discovery Order may further encourage cooperation during discovery by requiring that the parties consider whether the costs and burdens of discovery, especially discovery of ESI, may be reduced by entering into a non-waiver agreement pursuant to Federal Rule of Evidence 502(e). To the extent that the Court adopts the parties' agreement as a Court Order, it will limit waiver in any other state or federal proceeding,¹⁰⁰ which should have the effect of calming counsel's nerves regarding inadvertent disclosure and thereby facilitating cooperation. In addition, the Order may encourage the parties to discuss whether to use computer-assisted search methodology to facilitate pre-production review of ESI to identify information that is beyond the scope of discovery because it is attorney-client privileged or work product protected material.

A number of courts have adopted local rules that address cooperative discovery, acknowledging that “[w]hen the parties and lawyers know at the outset what the court expects, and that if they fail to behave accordingly, they will suffer meaningful adverse consequences, they are far more likely to fall into line.”¹⁰¹ While

⁹⁹ See Ronald J. Hedges, *The Sedona Conference Points the Way Toward Control of the Costs and Burden of E-Discovery*, 59 FED. LAW. 46, 47 (Jan./Feb. 2012) (stating that cooperation in e-discovery may be achieved by: “using internal ESI discovery ‘point persons’ to assist counsel in preparing requests and responses; exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of ESI; jointly developing automated search and retrieval methodologies to cull relevant information; promoting early identification of form or forms of production; developing case-long discovery budgets based on proportionality principles; and considering the use of court-appointed experts . . . to resolve discovery disputes.”).

¹⁰⁰ Fed. R. Evid. 502(d). For more on rule 502, see generally Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, 17 RICH. J. L. & TECH. 8 (2011).

¹⁰¹ Grimm, *supra* note 86, at 61.

individual judges may issue Discovery Orders, or may make judicial rulings regarding cooperative discovery, formalizing the requirement that discovery be cooperative in a local rule reinforces the uniformity of the requirement among the judges of a given court and establishes a court-wide expectation for litigants and their attorneys that is not likely to be ignored.¹⁰² These local rules may take a number of forms, as illustrated above. As Professor Steven Gensler has noted, local rules that elaborate on duties established by the Federal Rules tend to be particularly helpful.¹⁰³ For example, where local rules elaborate on what is required in the Rule 26(f) conference, lawyers who read the local rules “will be hard pressed to argue that they did not fully appreciate the scope of issues they are required to discuss and about which they are required to pursue agreement in good faith.”¹⁰⁴ And for some lawyers, the “extra guidance might be genuinely educational.”¹⁰⁵ Likewise, rules that encourage cooperation more broadly may “help lawyers better appreciate their cooperation duties or lead lawyers to give increased thought to the benefits of voluntary cooperation.”¹⁰⁶

As the foregoing reveals, a variety of options are available to judges and courts in their quest to encourage and facilitate cooperation. It seems, however, that no matter the amount of judicial encouragement, in the form of judicial rulings, local rules, or discovery orders, or even in the form of allegedly deterrent sanctions orders, real change must begin with the parties themselves, and with their counsel. How can parties and their counsel be encouraged to stop playing the “discovery game” and move toward cooperative discovery?

Game theory teaches us that iterative games—those played repeatedly over time—tend to generate cooperation, rather than defection, as the players are forced to consider how cooperation or defection in one instance will impact their payoffs in the future.¹⁰⁷ Thus, when the discovery game is iterative, the conduct of parties and their counsel may shift, becoming more or less cooperative, depending on how cooperative the opposing side was in the past.¹⁰⁸ Where a

¹⁰² See Grimm, *supra* note 86, at 61.

¹⁰³ Gensler, *supra* note 4, at 374.

¹⁰⁴ Gensler, *supra* note 4, at 373.

¹⁰⁵ Gensler, *supra* note 4, at 373.

¹⁰⁶ Gensler, *supra* note 4, at 374.

¹⁰⁷ See, e.g., *Case for Cooperation*, *supra* note 66, at 361; Grossman, *supra* note 96, at 97.

¹⁰⁸ David Hyman, *When Rules Collide: Procedural Intersection & Rule of Law*, 71 TUL. L. REV. 1389, 1426 (1997) (“Discovery . . . is a two-way street, and at least

party has been burned in the past, they are less likely to choose cooperation with the offending party or person.¹⁰⁹ Where, however, experience with an opposing party or an opposing counsel has, in the past, been cooperative, facilitating discovery at a lower cost, everyone involved is likely to choose cooperation.¹¹⁰ Of course, some games may never be iterative: A party may encounter an opposing party or an opposing counsel only once (particularly where the opposing party is *pro se*), and so that discovery game will never benefit from the cooperation engendered by multiple interactions, unless a party or attorney's capacity for cooperation becomes a part of the reputation that proceeds them, and the party or attorney is committed to maintaining that reputation.¹¹¹ However, where a party appears or an attorney practices regularly in a particular court, the same kind of iteration-created cooperation may occur, as parties or attorneys would benefit, over time, from being favorably viewed by the court as cooperative.¹¹²

Both attorneys and their clients may need to make an attitude adjustment when it comes to cooperating in discovery. For some clients, who approach litigation with a "kill or be killed" strategy, cooperation may be a tough sell.¹¹³ Attorneys should be prepared to explain the value of cooperation to their clients: The failure of a party to cooperate in discovery "may trigger non-cooperative conduct" from the opposing party, thus prolonging discovery and generating unnecessary expense.¹¹⁴ Uncooperative conduct could "lead to an adverse decision or sanctions" in any future discovery disputes.¹¹⁵ Cooperative discovery therefore is in the client's best interests as it is "likely [to] result in less production, fewer court filings," lower costs,

has the potential to proceed as a classic iterative prisoner's dilemma, with the parties tailoring their requests and responses based on their perception of how the other side is behaving.").

¹⁰⁹ See Cat Casey, *A Game Theorist Perspective on E-Discovery*, HUDSON LEGAL BLOG: DISCOVERY IN PRACTICE (Feb. 21, 2012), <http://hudsonlegalblog.com/e-discovery/game-theorist-perspective-e-discovery.html>.

¹¹⁰ See Seatear, *supra* note 4, at 616, 619.

¹¹¹ See *Case for Cooperation*, *supra* note 66, at 361.

¹¹² See *Case for Cooperation*, *supra* note 66, at 362 ("Indeed, that attorneys will again appear before the courts, and their clients may as well, creates a dynamic in which the threat of future obstructionist conduct by opponents, or risk of gaining a reputation among the judiciary as unduly combative during discovery, encourages [cooperation].").

¹¹³ Grimm, *supra* note 53, at 31.

¹¹⁴ Grimm, *supra* note 53, at 31.

¹¹⁵ See Grimm, *supra* note 53, at 31.

and a more favorable position in any future disputes.¹¹⁶ For attorneys needing an attitude adjustment, a number of helpful materials have been provided and are being developed by The Sedona Conference and other institutions, which are designed to educate attorneys about the value of cooperation and to develop tools and suggest techniques for facilitating cooperative discovery.¹¹⁷ With regard to attorneys, it makes sense that a change in attitudes toward cooperative discovery should begin in law schools.¹¹⁸ While law schools generally have not focused on discovery practice outside of 1L Civil Procedure courses,¹¹⁹ a shift in attitudes within legal education is beginning to surface, as more law schools offer courses in practical litigation skills.¹²⁰ These courses should lay the groundwork for future cooperative discovery by training the next generation of lawyers in the skills necessary to facilitate and achieve such discovery.

IV. CONCLUSION

Cooperative discovery has been stressed by judges, courts, legal institutions, and legal commentators through judicial rulings, sanction awards, local rules and discovery guidelines, and aspirational documents, praising the value of such cooperation for years. Nonetheless, cooperation in discovery remains lacking in many instances. One explanation for this phenomenon is that cooperative

¹¹⁶ See Grimm, *supra* note 53, at 31.

¹¹⁷ See, e.g., Sedona Conference Webinar, *Cooperation Guidance for Litigators & In-House Counsel* (June 7, 2011), available at <https://thesedonaconference.org/conference/2011/cooperation-guidance-litigators-house-counsel>. See generally *Cooperation Proclamation*, *supra* note 27, at 332–33 (noting intent to develop and distribute “toolkits to train and support lawyers, judges, other professionals, and students in techniques of discovery cooperation, collaboration, and transparency,” components of which will include “training programs tailored to each stakeholder; a clearinghouse of practical resources, including form agreements, case management orders, discovery protocols, etc.; court-annexed e-discovery ADR with qualified counselors and mediators, available to assist parties of limited means; . . . [and] law school programs to train students in the technical, legal, and cooperative aspects of e-discovery”).

¹¹⁸ Grimm, *supra* note 86, at 58.

¹¹⁹ See Grimm, *supra* note 86, at 58.

¹²⁰ For example, at the University of Baltimore School of Law, a course is offered in Discovery Practice & Procedure, which focuses on best practices and proposals for reform of discovery under the state and federal rules of civil procedure. The law school also offers an Electronic Evidence and Discovery Workshop. See Univ. of Balt. School of Law, *Elective Courses*, <http://law.ubalt.edu/academics/jd-program/courseofferings/electivecourses.cfm> (last published Jan. 4, 2013).

discovery presents a prisoner's dilemma for attorneys and litigants. In this Article, we have presented a number of suggestions for stepping outside of the prisoner's dilemma's boxes. These suggestions include proactive judicial case management in the form of Discovery Orders designed to provide a clear set of expectations for cooperation and to create deadlines and obligations that facilitate cooperative behavior, the institution of local rules and discovery guidelines by courts, and attitudinal adjustments for attorneys and their clients. Where the rules that govern the prisoner's dilemma game are taken away, by adding an intervening enforcement authority that encourages and facilitates cooperation among the players, encouraging players to consider the iterative nature of the litigation game, and encouraging attitudinal shifts from the ground up, we may achieve cooperative discovery after all.