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## **QUANTITATIVE ANALYSIS OF COURTS' APPLICATION OF COOPERATION IN DISCOVERY DISPUTES FROM JULY 1, 2008 TO NOVEMBER 1, 2016**

By David J. Kessler, Andrea D'Ambra and Alex Altman<sup>1</sup>

### **I. Introduction**

The Federal Rules of Civil Procedure and most state civil procedure rules both expressly and impliedly reinforce the idea that parties in civil litigation must cooperate in civil discovery. This requirement has been lauded in legal commentary and repeatedly cited by courts dealing with difficult discovery battles. To date, however there has not been an in-depth analysis of how courts and litigants are defining the scope of the duty to cooperate. What appears to be reasonable and appropriate behavior to a party responding to a discovery request can appear to be unreasonable stubbornness in the eyes of a requesting party or, more importantly to the below analysis, a court considering a motion for sanctions. As detailed below, failures to cooperate (or be perceived as cooperating) may result in wildly different consequences depending on whether the party is a requestor or a responder.

This article is intended to explore empirically how the principle of cooperation has been applied in discovery disputes in state and federal courts. By comprehensively surveying the recent case law, we attempt to provide metrics that will allow the bench and bar to consider the practical results of the growing importance of cooperation in civil discovery. Some questions that the analysis below is intended to address include:

- Do courts understand “cooperation” to mean merely compliance?
- Does the obligation of cooperation fall evenly on both requesting and responding parties?
- Where courts find that the cooperative process has failed, what are the practical consequences for the parties?
- Do the consequences of cooperation failures generally fall more heavily on one party?

Instead of reviewing and analyzing a handful of prominent cases in-depth, we have attempted to analyze how courts are addressing cooperation across cases by reviewing “all” cases where cooperation was addressed by the courts in discovery in a civil litigation. We put “all” in quotes, because we did not review all cases, but rather created a reasonable search for these cases that we believe creates an unbiased population for us to examine. Below we briefly review the rules, cases

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and commentary driving cooperation. We then describe our methodology, setting out the criteria we used to define the population of cases to review as well as the metrics we have gathered and analyzed. We finally provide a numerical breakdown of cases based on those metrics as well as brief interpretations of those findings. It is our hope that this initial analysis will inform the bench and bar on how the Courts are practically applying cooperation and how that may be different than the commonly understood theory behind it.

## **II. Executive Summary**

We have searched for, reviewed and analyzed 397 cases at the state and federal level that mention “cooperation” and “discovery.” As explained more thoroughly below, as part of our analysis, we determined whether each case actually touched on the topic of cooperation in discovery, whether a party was cited for their lack of cooperation, what the consequences of failures in cooperation courts have imposed and other related procedural and substantive metrics. We then aggregated the data from our analysis to see if any trends emerged with respect to how courts and parties interpret the principle of cooperation in discovery.

As discussed by the Sedona Conference and other commentators, cooperation is an obligation of both responding and requesting parties, but our analysis of recorded cases shows that courts overwhelmingly apply it against responding parties. While it is possible that either responding parties are somehow inherently less cooperative than requesting parties or that responding parties do not raise cooperation as much as requesting parties, the more likely cause for the dramatic asymmetry are courts applying a more rigorous cooperation standard to responding parties. Courts are implicitly expecting more from responding parties in order for them to establish they have cooperated and, therefore, more responding parties are not meeting that threshold.

Moreover, while cooperation is often one of many issues in a discovery dispute, it appears that responding parties are punished more severely than requesting parties when they are found to be non-cooperative. In fact, while responding parties get punished with adverse inferences, attorney’s fees, evidence preclusion and the loss of their claims and defenses, the overwhelming majority of requesting parties are asked to conduct further meet and confers or propound new or different discovery.

The potential consequences of these results are significant. Beyond whether cooperation is being applied fairly to responding and requesting parties, there is even a deeper issue. For cooperation to have meaning, for it to be more than simply an amorphous concept, the failure to cooperate needs to be equally applied to create incentives on both sides to work together to resolve disputes. If one side realizes they will not be considered uncooperative and even if they are, they will not be punished for it, then they have no incentive to not take unreasonable positions or to move from them. Thus, by potentially not applying cooperation equally across the parties, courts could be inhibiting cooperation and transforming it into simply a compliance standard for responding parties where they are expected to “voluntarily” be transparent.



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### **III. The Duty to Cooperate in Civil Discovery.**

Despite a recent emphasis on cooperation, the principle that adversaries should cooperate with each other (and the court) in civil discovery is nothing new. As currently applied, however, the principle of cooperation is informed by the Federal Rules of Civil Procedure, a growing body of case law, and commentary from the legal community.

#### **A. *The Federal Rules of Civil Procedure***

The term “cooperation” does not appear in the Federal Rules of Civil Procedure and, until the December 1, 2015 amendments, it did not appear in the Advisory Committee Notes either.

The Federal Rules of Civil Procedure (the “Rules”) call for cooperation between parties both impliedly through the text of the Rules themselves as well as explicitly through the Advisory Committee Notes.

##### *1. Rule 1*

Rule 1 provides that the Rules “should be construed, and administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” Rule 1 was amended in 2015 to specify that the responsibility for administration of the Rules fell upon the court as well as the parties. There is an implied principle of general cooperation in the Rule, but the Advisory Committee Notes make this principle more explicit:

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. . . . Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.<sup>2</sup>

Lest the reader conclude that Rule 1 creates a duty to cooperate, however, the Notes go on to warn that the amended rule “does not create a new or independent source of sanctions.”<sup>3</sup> Although the Advisory Committee (tasked with drafting the preliminary amendments) had considered amending Rule 1 to state that parties “should cooperate,” this was ultimately rejected because such a directive seemed “too vague, and thus fraught with the mischief of satellite

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<sup>2</sup> 2015 Advisory Committee Notes to Fed. R. Civ. P. 1.

<sup>3</sup> *Id.*



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litigation.”<sup>4</sup> Thus, although courts have yet to thoroughly flesh out the application of Rule 1, it does not appear to create a specific “duty to cooperate,” a breach of which would be sanctionable.

## 2. *Rule 26*

Rule 26 also contains implied exhortations for parties to cooperate specific to civil discovery. Under Rule 26(f)(1), parties “must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).” to plan for discovery. Again, the word “cooperate” does not appear in the rule, but by requiring parties to confer before appearing before the court the rule drives cooperation to limit the points of contention before court intervention is required. Rule 26(f)(2) is more explicit, requiring parties to confer as to “possibilities for promptly settling or resolving the case” and “attempt[] in good faith to agree on the proposed discovery plan.” The Advisory Committee Notes once again provide an explicit call for cooperation, noting that “it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention.”<sup>5</sup>

## 3. *Rule 37*

Federal Rule of Civil Procedure 37 entitled “Failure to Make Disclosures or to Cooperate in Discovery; Sanctions” does not specifically state an obligation for parties to cooperate in discovery. The Rule, however, does provide that a motion to compel “must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.”<sup>6</sup> Similarly, when moving to sanction a party for failure to respond to a discovery request, the movant must certify that it “has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.”<sup>7</sup>

### ***B. Calls for Cooperation from the Sedona Conference***

The most prominent voice in the discussion of cooperation has been the Sedona Conference (“Sedona”). In July 2008, Sedona published the Cooperation Proclamation (the “Proclamation”), in which it called “for a paradigm shift for the discovery process.”<sup>8</sup> Recognizing that costs and inefficiencies that contentious discovery disputes have engendered with the rise in electronically stored information, Sedona issued the Proclamation to begin “a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of

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<sup>4</sup> Duke Subcommittee Conference Call Notes, 9, October 22, 2012), copy at [https://law.duke.edu/sites/default/files/images/centers/judicialstudies/Panel\\_4-Background\\_Paper\\_2\\_1.pdf](https://law.duke.edu/sites/default/files/images/centers/judicialstudies/Panel_4-Background_Paper_2_1.pdf).

<sup>5</sup> 2000 Advisory Committee Notes to Fed. R. Civ. P. 26.

<sup>6</sup> Fed. R. Civ. P. 37(a)(1).

<sup>7</sup> Fed. R. Civ. P. 37(d)(1)(B).

<sup>8</sup> The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, July 2008, p.3 (available at <https://thesedonaconference.org/cooperation-proclamation>).



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practical tools to facilitate cooperative, collaborative, transparent discovery.”<sup>9</sup> As explained below, we have therefore chosen the publication of the Proclamation to help define the scope of the cases reviewed in the analysis.

In 2009, Sedona followed up on the Proclamation with the publication of *The Case for Cooperation*.<sup>10</sup> Sedona reinforced that “the explosion of ESI has made the development of parameters to guide cooperation in discovery more essential than ever.”<sup>11</sup> Seeking to allay fears that cooperation necessarily means capitulation, Sedona noted “cooperation — in the sense intended by the Proclamation — and zealous advocacy are not conflicting concepts under professional conduct rules. Cooperation requires neither conceding nor compromising the client’s interests.”<sup>12</sup> As detailed above, in *The Case for Cooperation*, Sedona described the basis of cooperation in the Federal Rules of Civil Procedure.<sup>13</sup> Sedona also set forth bases for cooperation in the various rules of professional conduct<sup>14</sup> as well as the pre-Proclamation case law.<sup>15</sup>

### ***C. The Enduring Impact of Mancía***

The first notable judicial decision to discuss discovery cooperation after publication of the Proclamation was *Mancia v. Mayflower Textile Servs. Co.*<sup>16</sup> In light of successive discovery disputes between the parties, then Magistrate Judge Paul W. Grimm, a prominent voice in the realm of discovery and cooperation, provided an impassioned and detailed argument for cooperation in discovery between parties. Specifically, Judge Grimm was simultaneously confronted with both requests that “were excessively broad and costly, given what is at stake in this case”<sup>17</sup> from plaintiffs and “boilerplate, non-particularized objections” from defendants.<sup>18</sup> Relying heavily on the certification requirements of Rule 26(g), Judge Grimm explained:

It cannot seriously be disputed that compliance with the “spirit and purposes” of these discovery rules requires cooperation by counsel

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<sup>9</sup> *Id.* at 1.

<sup>10</sup> The Sedona Conference, *The Case for Cooperation*, *The Sedona Conference Journal*, Vol. 10, (available at [https://thesedonaconference.org/system/files/caseforcooperation\\_0.pdf](https://thesedonaconference.org/system/files/caseforcooperation_0.pdf)).

<sup>11</sup> *Id.* at 342.

<sup>12</sup> *Id.* at 344.

<sup>13</sup> *Id.* at 345-350.

<sup>14</sup> *Id.* at 351-354. Specifically, Sedona asserted that “[c]ooperation in discovery planning is thus assumed not only by the Civil Rules, it is among the obligations of Rule 3.2 of the [Model Rules of Professional Conduct],” which requires attorneys to make reasonable efforts to expedite litigation. *Id.* at 352. Sedona also asserted that cooperation in discovery is implied by Rule 3.4 of the Model Rules of Professional Conduct, which prohibits a party from obstructing another party’s access to evidence or unlawfully altering, destroying, or concealing a document or other material having potential evidentiary value. *Id.* at 353-354.

<sup>15</sup> *Id.* at 354-356.

<sup>16</sup> 253 F.R.D. 354 (D. Md. 2008).

<sup>17</sup> *Id.* at 356.

<sup>18</sup> *Id.* at 363.



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to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake in the litigation. Counsel cannot “behave responsibly” during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation.<sup>19</sup>

Judge Grimm also favorably cited the Proclamation, explaining that “If [the Proclamation’s] goals are achieved, the benefits will be profound.”<sup>20</sup> Judge Grimm ultimately ordered the parties to meet and confer in good faith to attempt to come to an agreement on the outstanding discovery issues in dispute.<sup>21</sup> Due in part to its vociferous exhortation for cooperation and detailed direction to the parties, *Mancia* has been cited in over 110 cases in federal courts from nine Circuits, an impressive feat for a Magistrate Judge’s discovery decision resulting in neither sanctions, an order to compel, or a protective order. It stands as one of, if not the, leading decision on the importance of cooperation in discovery.

#### **IV. What is Cooperation**

As the Sedona Conference stated in the Case for Cooperation: “There is no precise definition of ‘cooperation,’ as there are no precise definitions of good faith or reasonableness.”<sup>22</sup>

The dictionary definition of cooperation is relatively straightforward: “The action of co-operating, *i.e.* of working together towards the same end, purpose, or effect; joint operation,”<sup>23</sup> but it is not particularly helpful in determining what it means for parties in discovery disputes or how courts should use it in resolving disputes. Based on the general definition, one would expect courts to view cooperation as a “give-and-take” effort pointed toward a single goal for all parties. Similarly, courts would stress the importance of dialog and solution-oriented approaches to discovery disputes.

To provide more practical guidance, the Sedona Conference has developed a discovery-focused description:

Cooperation in this context is best understood as a two-tiered concept. First, there is a level of cooperation as defined by the Federal Rules, ethical considerations, and common law. At this level, cooperation requires honesty and good faith by the opposing parties. Parties must refrain from engaging in abusive discovery practices. The parties need not agree on issues, but they must make a good faith effort to

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<sup>19</sup> *Id.* at 357-358 (quoting Advisory Committee Notes to Fed. R. Civ. P. 26 (1983)).

<sup>20</sup> *Id.* at 363.

<sup>21</sup> *Id.* at 364.

<sup>22</sup> Case for Cooperation, p. 342.

<sup>23</sup> *Oxford English Dictionary*, Oxford University Press (2016).



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resolve their disagreements. If they cannot resolve their differences, they must take defensible positions.

Then, there is the second level of cooperation. While not required, this enhanced cooperative level offers advantages to the parties. At this level, the parties work together to develop, test, and agree upon the nature of the information being sought. They will jointly explore the best method of solving discovery problems, especially those involving ESI. The parties jointly address questions of burden and proportionality, in order to narrow discovery requests and preservation requirements as much as reasonable. At this level, cooperation allows the parties to save money, maintain greater control over the dispersal of information, maintain goodwill with courts, and address the litigation’s merits at the earliest practicable time.<sup>24</sup>

A review of the cases show that when a court becomes frustrated with the parties lack of cooperation it is not because of an egregious failure on the first tier of cooperation, but the court’s belief that a party has failed to make a good faith attempt at the second. The courts are not saying an agreement had to be made – though that is the clear preference – but they believe honest effort was not made to reach a compromise that would be beneficial to all sides.

From this perspective, cooperation should be symmetric. It applies to both parties equally. Responding parties are not obligated to cooperate more than requesting parties. Cooperation is about process and the resources, position, or stance of the parties does not appear to impact a party’s ability or obligation to cooperate.

## **V. Review Population and Methodology**

Before we could begin our analysis of the case law, we needed to identify the population of cases that address cooperation in civil discovery disputes in the U.S. Our goal was to review all cases where the court considered and substantively addressed cooperation in resolving a discovery dispute in a civil litigation and then objectively analyze them to determine how the judiciary was applying cooperation. Our search, detailed below in Section V(A), is designed to find such cases, but it is by definition imperfect and is guaranteed to miss cases where cooperation played a role in the court’s decision. For example, to the extent cooperation was raised by the parties and was considered by the court *sub silentio*, our search did not identify that case for review and analysis.

In assessing the efficacy and impact of cooperation requirements, we searched for cases using the search criteria detailed below in Section V(A). We then evaluated the cases returned using the review metrics detailed in Section V(B). We then provide an analysis of our findings.

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<sup>24</sup> Case for Cooperation, p. 342.





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### *A. Search Criteria*

To isolate cases relevant to our analysis we conducted an initial search using LexisAdvance with the following criteria:

- All federal and all state cases;
- Decision date is between July 1, 2008 and November 1, 2016;
- The word “cooperation” appears within 10 words of “discovery” or the phrase “cooperation proclamation” appears in the text (the “Base Search Terms”); and
- The wildcard-expanded “cooperat!” appears at least three times (the “Limiting Term”) within the text of the decision.

The date restriction of July 1, 2008 was chosen to coincide with the publication of the Proclamation<sup>25</sup> that we hypothesized would account for an uptick in relevant cases. This was borne out by the evidence that showed that from January 1, 1898<sup>26</sup> to June 30, 2008, approximately 1,200 results met the Base Search Terms, an average of approximately 10 cases per year. From July 1, 2008 (the approximate date of the Proclamation) to November 1, 2016, however, the Base Search Terms brought back 1072 results, an average of approximately 126 cases per year. In contrast, in the 8 years preceding publication of the Proclamation, Lexis shows 443 results, an average of 55 cases per year.

The Base Search Terms were chosen to target the decisions most likely to contain substantive discussion of cooperation in discovery. It was assumed that anything containing “cooperation proclamation” would be relevant and that cases with the word “cooperation” within 10 words of “discovery” would likely contain relevant discussion. Using these search terms alone and with a beginning date restriction of July 1, 2008 yielded 1072 results (the “Expanded Results”). This seemed to be an unwieldy number of cases to research, therefore a limiting term atleast3(cooperat!) was tested to aid in honing in on the most substantive cases. This brought the results list down to 426 (the “Targeted Results”). We reviewed a random sample of 30 cases from the Expanded Results that did not appear in the Targeted Results and found that only three cases contained substantive discussion on the role of cooperation in discovery. This is 10%. Extrapolated out to the number of cases not included in the Targeted Results list, this would have resulted in approximately 60 more cases. We therefore felt that the Targeted Results list provided a sufficiently accurate body of cases from which to perform our substantive review. After removal

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<sup>25</sup> See *supra*, n.6.

<sup>26</sup> 1898 was the earliest year that LexisAdvance returned for cases that met the Base Search Terms.





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of duplicate results (due either to oversights in Lexis or results from multiple reporters), we reviewed a final body of 397 cases (the “Review Population”).

## ***B. Review Metrics***

Once we identified the Review Population, we conducted a linear, substantive review of the cases. We reviewed each result for content and gathered metrics as follows.

### *1. Relevance*

Not all cases in the Review Population were relevant to the topic of this article. Although the Base Search Terms, Limiting Term and date restrictions assisted in targeting relevant cases, we then conducted a relevance determination for each case. There were three general categories of cases in the Review Population deemed not relevant for this paper:

- **Criminal Cases**: We found 51 criminal cases in the review population, often due to the fact that many discussed the role of cooperators (or conspirators). As the focus of this paper is on civil discovery, we excluded these cases from the final analysis. Also excluded were several *habeas corpus* cases which, although civil in nature, were not relevant to the analysis. These cases are listed in Appendix B.
- **Divorce Cases**: 19 state cases involving divorce and custody decisions were found in the Review Population. Often, one party in such cases is cited for various failures in cooperating with the court or the opposing party on a variety of matters, sometimes including discovery. Unless a party was specifically cited by the court for their cooperation in discovery, we excluded such cases from the analysis. These cases are listed in Appendix C.
- **Non-Responsive or Bare Mentions of Cooperation**: Some cases make bare reference to the importance of cooperation in discovery, without discussing the cooperative efforts of any party. For example, decisions from then Magistrate Judge Paul Grimm of the District Court for the District of Maryland often append his standing Discovery Order that specifically orders parties to cooperate in the discovery process. Other search results included case briefs, not judicial decisions. Unless a case made some mention of one or more party’s failure or success in cooperation, we excluded such cases from the analysis. These cases are listed in Appendix D.

With these and other non-relevant cases filtered out, we arrived at a final population in the below analysis of 207 cases (the “Cooperation Cases”, see Appendix A).



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## 2. *Motion at Issue*

The cases reviewed most often pertained to one of four motions: (1) motions to compel, (2) motions for a protective order, (3) motions to quash subpoenas; and (3) motions for sanctions. Not all motions were presented to courts in such clear cut terms, however. For example, some motions were styled as motions to dismiss where a party is actually seeking a sanction of dismissal for an opposing party's discovery failures. Similarly, some motions were brought seeking attorney's fees related to discovery failures. These, too, were categorized as motions for sanctions. Although several cases involved cross-motions for various issues, such cases were categorized based on the motion or motions that turned on cooperation-related issues.

## 3. *Motion Disposition*

For the cooperation-related motions, we categorized cases by disposition: (1) granted, (2) denied, or (3) adjourned.

## 4. *Cooperating Party*

In a small number of cases, the court commends a party for their sufficient or even robust cooperation efforts. We categorized such cases by (1) requesting party (i.e. the party requesting discovery) and (2) responding party (i.e. the party responding to the discovery with production of documents or written answers).

## 5. *Non-Cooperating Party*

In a larger number of cases, the court chastised one or more parties for failing to cooperate with discovery. We also broke down cases by (1) requesting party and (2) responding party. We further analyzed whether the non-cooperating party was either (1) a legal entity or (2) a natural person. Finally, we determined whether a non-cooperating party was a (1) plaintiff or (2) defendant.

## 6. *Sanctions or Curative Measures*

Where a decision discusses cooperation failures of one or more parties, we determined which, if any, sanctions or other curative measures the court ordered. For each case reviewed, we tagged one or more of the following choices:

- **Adverse Inference** = if the court ordered either an adverse inference jury instruction or a presumption that presumed that lost information was unfavorable to a party.
- **Attorney's Fees** = if the court ordered the non-cooperating party to pay any costs or fees related to the subject motion.



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- **Dismissal of Claims or Defenses** = if the court ordered dismissal of a claim, dismissal of a defense, or the striking of pleadings for a non-cooperating party.
- **Evidence Preclusion** - if the court precluded a party from offering evidence related to the subject matter with which they failed to cooperate
- **Fines** - if the court ordered any other monetary penalty apart from costs and attorney's fees.
- **Further Discovery** = if the court ordered further discovery from alternative sources or using other means of obtaining information.
- **Meet and Confer** = if the court ordered the parties to further discuss the disputed discovery issues.
- **Other** - if the court ordered highly specific, non-conventional measures.<sup>27</sup>

#### 7. *Cooperation Failure*

Where the court determined that a party failed to cooperate in discovery, we cataloged the area of insufficient cooperation. Below is a list of cooperation failures that were considered along with exemplar questions asked to determine when a failure should be tagged:

- **Custodians**: Did a party unreasonably insist upon or refuse to include certain custodians in a search for information?
- **Data Sources**: Did a party unreasonably insist upon or refuse to search particular data sources, including backup tapes?
- **Deposition Scheduling or Conduct**: Did a party fail to schedule or appear at a deposition? Was a party non-responsive or otherwise non-cooperative at deposition? Did counsel make excessive or improper objections?
- **Discovery Schedule**: Did a party fail to cooperate with another party in establishing a schedule for discovery?
- **Expert Discovery**: Did a party refuse to reasonably consider the scope of expert discovery?

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<sup>27</sup> See, e.g., *Sec. Nat'l Bank of Sioux City v. Abbott Labs.*, 299 F.R.D. 595, 610 (N.D. Iowa July 28, 2014) (ordering counsel to "write and produce a training video" with respect to proper conduct in defending depositions).



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- **Format of Production**: Did a party unreasonably insist upon or refuse to produce documents in a specified format?
- **Insufficient Discovery Response**: Did a party fail to respond adequately to interrogatories or requests for the production of documents?
- **Insufficient Production**: Did a party refuse to produce information to which an opposing party was entitled?
- **Issue Scope**: Did a party unreasonably insist upon or refuse to limit the scope of issues in discovery?
- **Medical Records Release**: Most often in the personal injury context, did claimant refuse to produce medical records?
- **Meet & Confer**: Did a party fail to meet and confer before bringing a discovery dispute to the court?
- **Predictive Coding/TAR**: Did a party unreasonably insist upon or resist the use of Technology Assisted Review or did a party unreasonably employ TAR without consulting the opposing party?
- **Preservation**: Did a party's cooperation failure result in the loss of relevant information?
- **Privilege**: Did a party fail to cooperate on the scope of attorney-client privilege or work product protection?
- **Search Terms**: Did a party fail to employ reasonable search terms or discuss/disclose the scope of search terms with an opposing party?
- **General/Unspecified**: Did the court simply chastise a party for a failure to cooperate without detailing the specific failures?

## VI. Findings and Analysis

### A. *Who Are the Courts Finding are Not Cooperating?*

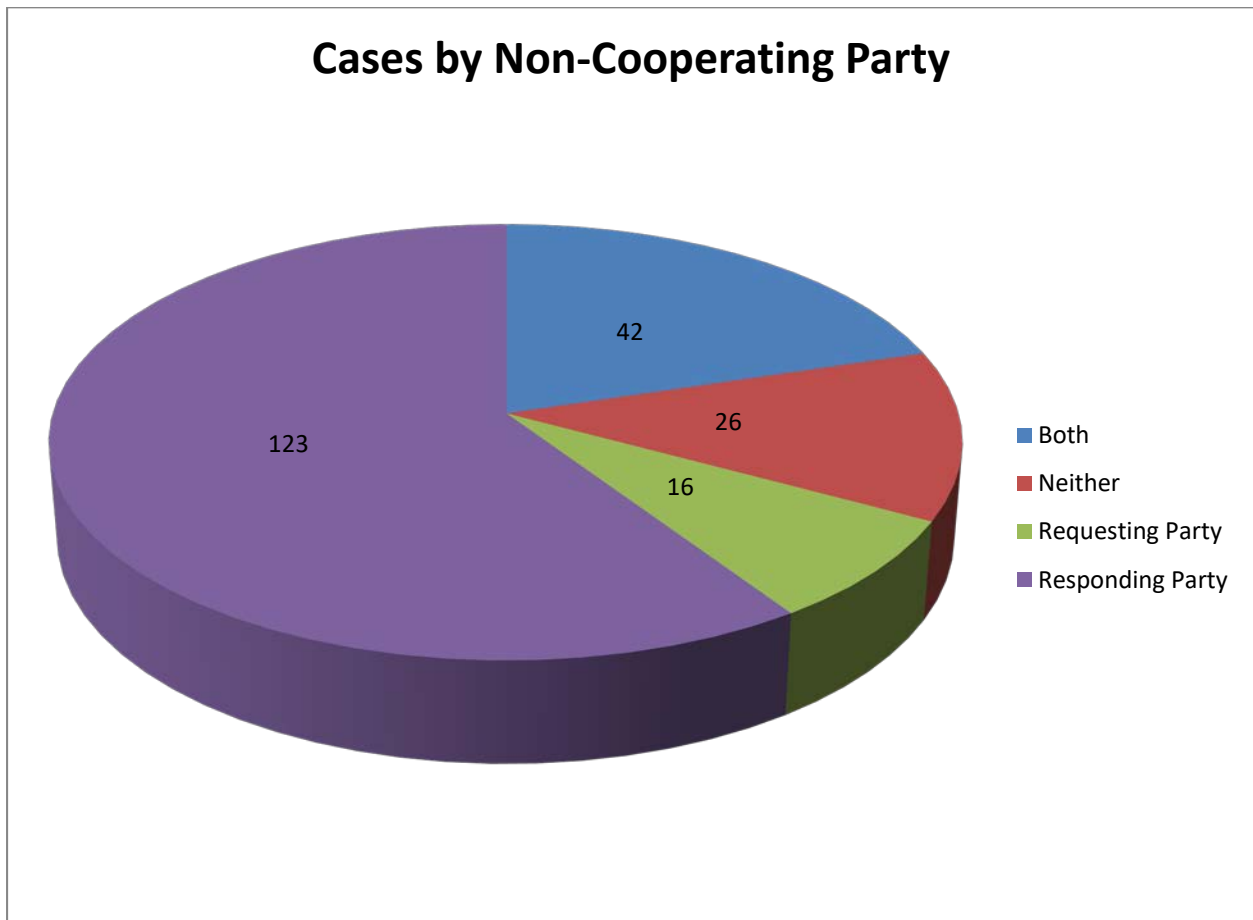
One of the fundamental questions explored in the research is who was blamed by the courts for not cooperating. In 123 cases, the court cited the responding party for a failure to cooperate. In comparison, the Court cited the requesting parties in only 16 cases. However, in 42 cases,



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including *Mancia*<sup>28</sup>, the court castigated both parties for failing to cooperate. Lastly, in 26 cases, the court did not cite a specific party for a failure to cooperate in discovery. Thus, Courts are disciplining responding parties between almost 8 times and almost 3 times more often than requesting parties for failing to cooperate.



There are several possible conclusions that may be drawn from this data. First, it is possible that responding parties or their counsel are, by nature, truly less cooperative than requesting parties and their counsel. While possible, this seems unlikely. There is no reason to believe that responding parties or their counsel are inherently less likely to comply with discovery requirement's or to engage in uncooperative behavior. Even if there was some bias in that behavior, would that account for the very large disparity in how courts are applying cooperation to resolve disputes (123 to 16, or 165 to 58 when joint findings are included)?

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<sup>28</sup> See *supra*, n.14.



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Second, even if responding parties and requesting parties are “not cooperating” about the same amount of the time, responding parties are not raising the requesting parties’ failure to cooperate as often or as effectively with the court. Maybe responding parties do not believe such arguments would be successful or they do not think the disputes are worth the effort. There is no objective reason to believe that responding parties would not raise these issues and, as discussed above, the nature of cooperation is meant to be symmetric: the requesting party has the same obligations to cooperate as the responding party.

Third, and most likely, is that courts and parties place a heavier burden on responding parties to cooperate. Responding parties know more about the information being requested than anyone else in the case and thus have more opportunities to appear intransigent or generally non-cooperative. Moreover, it is possible that the courts are using the language of “cooperation” when they actually mean “compliance” or “capitulation.” Instead of confining discussions of “cooperation” to instances where parties must work together to reach a mutually acceptable solution (e.g., determining document custodians), courts may be including failures where the requesting party is the only one with a say in the matter (e.g., producing a witness for deposition) in the realm of non-cooperation.

This answer, however, is still troubling. Cooperation is often touted as a symmetric “obligation” of both requesting and responding parties and as a tool to resolve discovery disputes. By punishing only responding parties because either they are the ones ultimately saying “no” or are the ones with the information, courts are arguably transforming “cooperation” into a constructive obligation of responding parties to be transparent regarding their IT or discovery processes without any of the procedural protections inherent in the rules. Moreover, if the requesting party has failed to offer something of value in exchange for the transparency or an agreement from requesting party, then should the responding party be blamed for saying “no”?

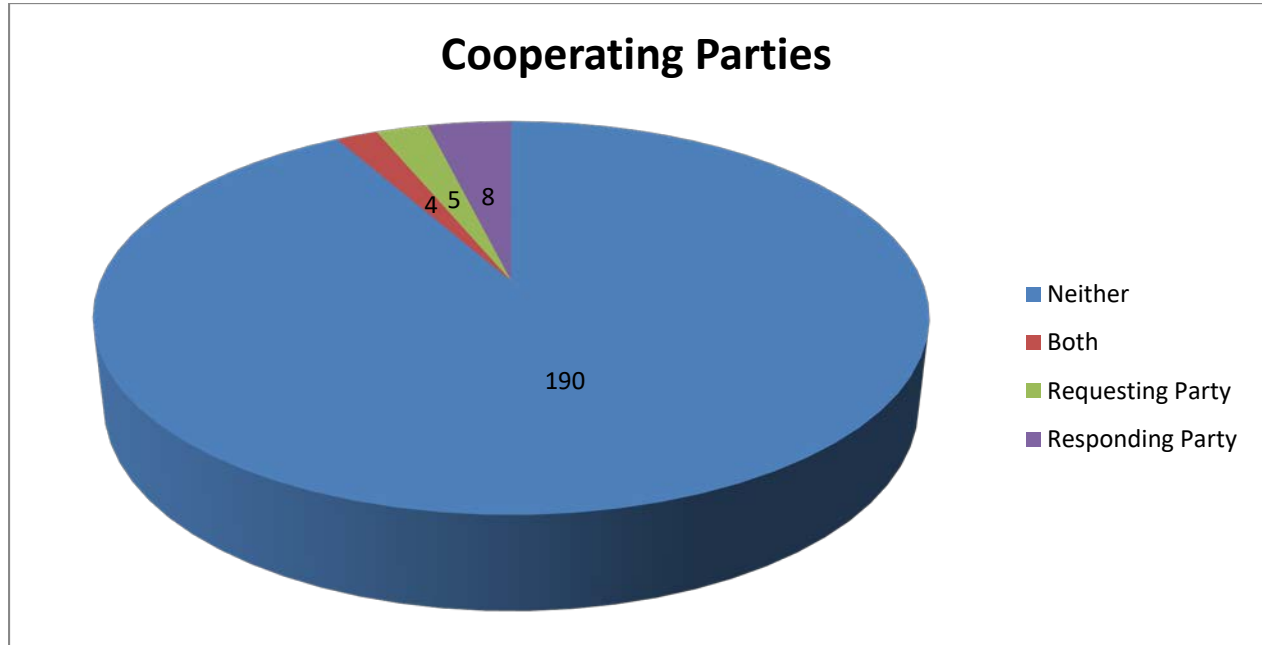
#### **B. *Who Is Cooperating?***

In the Cooperation Cases, courts rarely found a reason to compliment a party for its cooperation efforts. Out of the 207 Cooperation Cases, only 17 mentioned a party’s affirmative cooperation. Of those, eight cases noted the responding party’s efforts.



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This data is unsurprising. Parties do not generally call upon the court to issue praise; they ask courts to settle disputes. It is notable, however, that the majority of the cases where a party is praised for its cooperation efforts cite responding parties positively. This reinforces the inference that responding parties often bear the burden of appearing cooperative.

#### *C. How are These Issues Coming to the Court's Attention?*

We were interested in understanding the context in which courts were being presented with cooperation issues. We therefore assigned one or more motion types to each of the Cooperation Cases.<sup>29</sup> Unsurprisingly, the most common motion was one for sanctions (128), followed by motions to compel (52).

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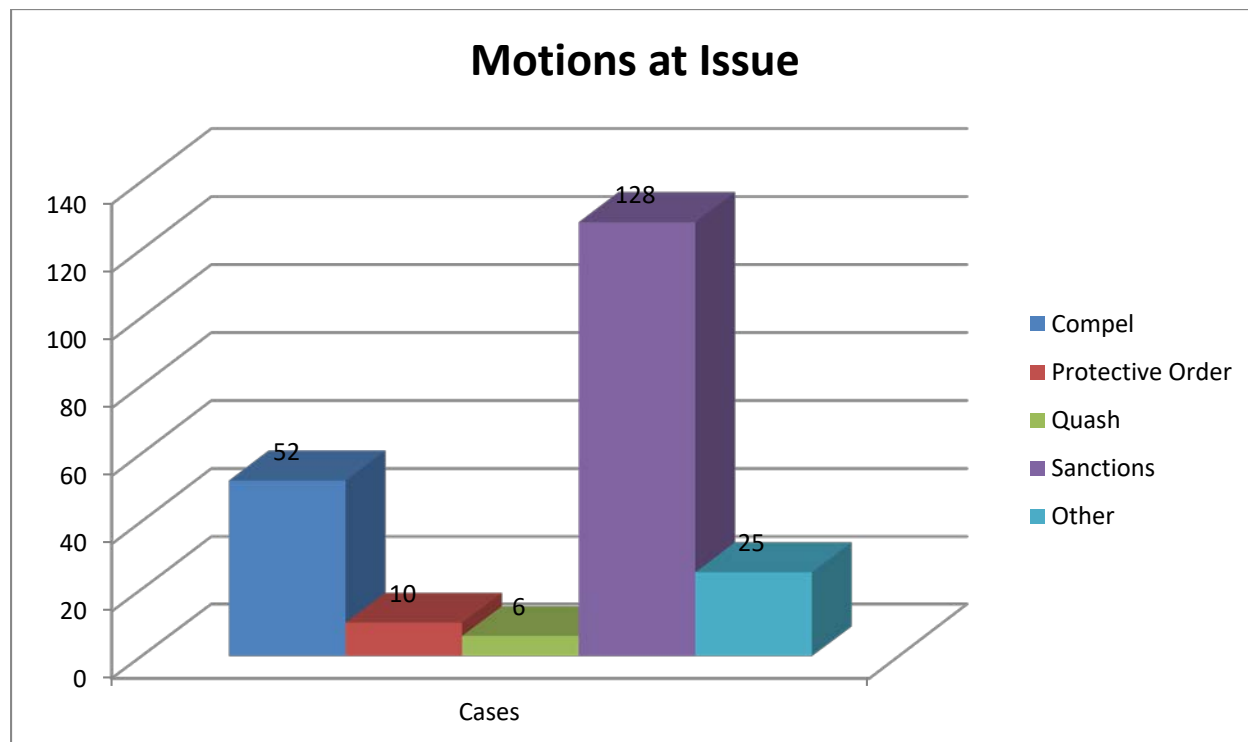
<sup>29</sup> Because more than one motion may have been at issue in a given case, the total reflected in the chart is 231.





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It is rare that a motion will appear before a court solely on the basis that a party is being uncooperative. The cooperation calculus interacts with numerous other issues (e.g., negligent loss of ESI), but it appears that a party moving for sanctions is more likely to invoke the talisman of cooperation than in other circumstances.

#### ***D. Where is Cooperation Breaking Down?***

There are numerous ways in which courts find that parties have failed to cooperate. Each case was assigned one or more failure types.<sup>30</sup> The most common area of non-cooperation was with respect to insufficient discovery responses (58 cases), often because of a complete failure to respond to interrogatories or document requests. These also include failures to object with specificity to requests. Interestingly, the next most common failure was with respect to deposition scheduling or conduct (57 cases). Many of these cases involve parties failing to appear at deposition or refusing to answer questions. As touched upon above, *Sec. Nat'l Bank of Sioux City v. Abbott Labs.*, this category also includes counsel making excessive or improper objections.<sup>31</sup> A substantial number of cases, 29, also characterize failures to produce documents as lapses in

<sup>30</sup> Because more than cooperation failure may have occurred in a given case, the total reflected in the chart is 251

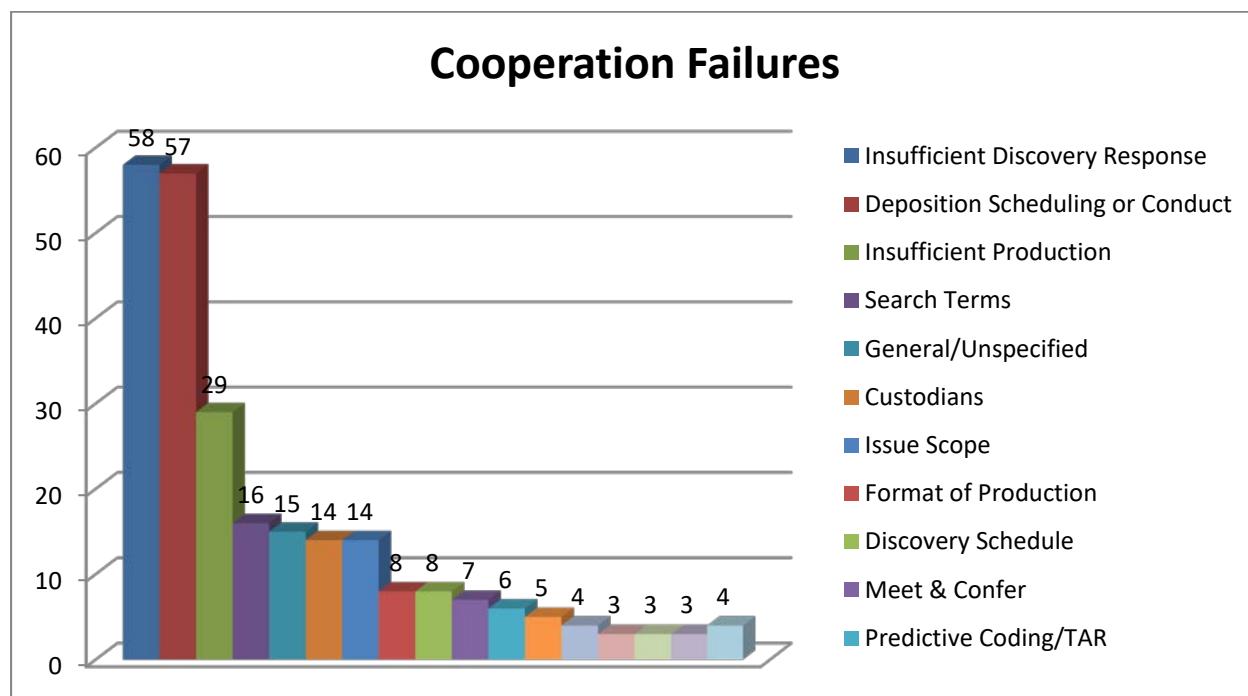
<sup>31</sup> See *supra*, n.22



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cooperation. The prominence of these top three failures raises the question of whether courts use the language of “cooperation” in place of “compliance” or “capitulation.”



The data further reinforce the idea that responding parties bear a greater burden of demonstrating cooperation. Vague or incomplete discovery responses and insufficient document productions are responding parties’ bailiwick and a failure to cooperate in these areas will weigh most heavily on responding parties. One may also deduce from the data that areas most susceptible to a back-and-forth exchange between parties are less often the subject of cooperation disputes. Intransigence over search terms, custodians, production format, review methodology, scheduling and data sources – those areas where cooperation responsibilities would be most reciprocal – do not seem to end up before the courts. In one sense, then, it is possible that the principle of cooperation is taking hold. Parties seem to be deciding those discovery issues most subject to compromise without court intervention.

#### ***E. How are Court’s Dealing with Cooperation Failures?***

Courts have ordered a wide variety of relief when faced with failures in cooperation.<sup>32</sup> The most prominent form of relief was the imposition of case-ending sanctions (59 cases). This includes dismissal of claims and defenses, as well as orders for default judgment. The imposition of

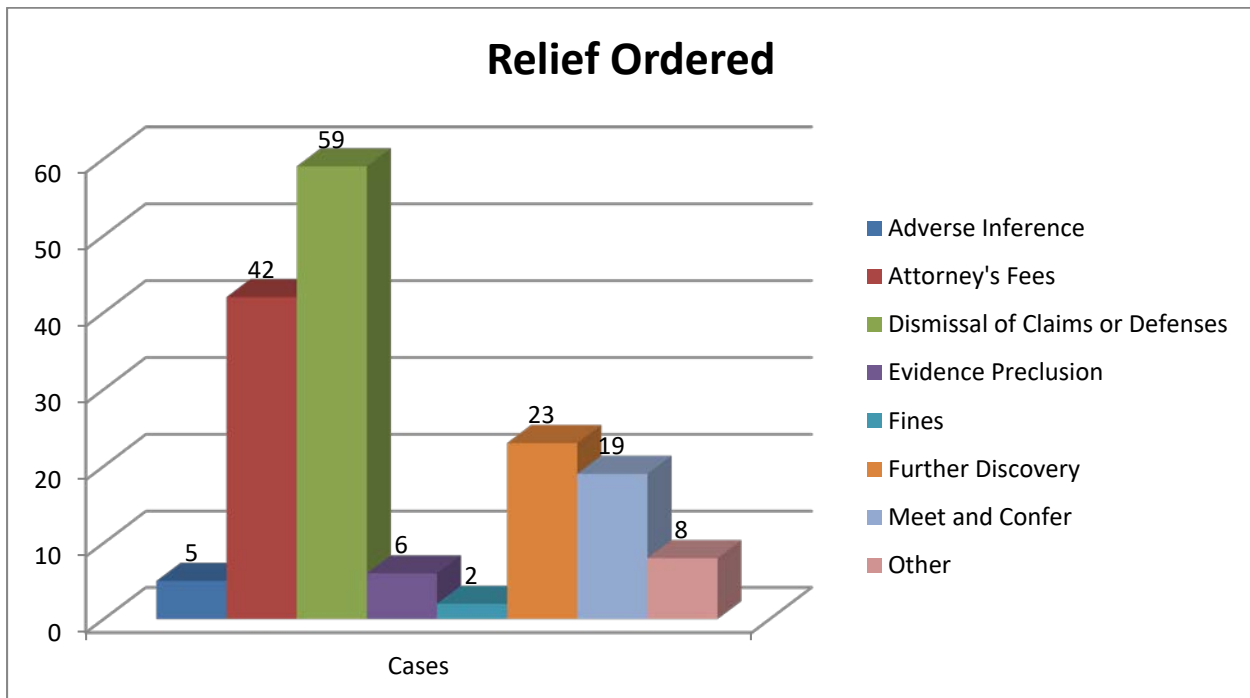
<sup>32</sup> Because no relief (or, conversely, multiple forms of relief) may have been ordered in a given case, the total in the accompanying chart (164) does not equal the number of Cooperation Cases (207).



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attorney’s fees is also a popular remedy (42 cases), indicating that courts are often more comfortable managing cooperation in a less aggressive manner.



The comfort with which courts appear to dispose of entire cases due to a lack of cooperation at first blush appears alarming. Viewing this data point in isolation could give a more panic-prone attorney the disturbing impression that merely standing by one’s principals and being a zealous advocate may result in case-ending sanctions. Viewed in the context of the other data points gathered, however, this fear seems a bridge too far. First, as discussed above, cooperation failures rarely arise in isolation. Other discovery misbehavior, such as spoliation, may impel a court to sanction a party harshly. This data point, taken in context, further reinforces the concept that courts may be invoking language of cooperation where compliance or capitulation may be more accurate concepts. A party that willfully fails to follow a court order, for example, is more likely to face dispositive sanctions than a party that simply takes an unreasonably narrow position on the search terms it intends to apply to its ESI.

#### ***F. How Does Relief Differ Between Parties?***

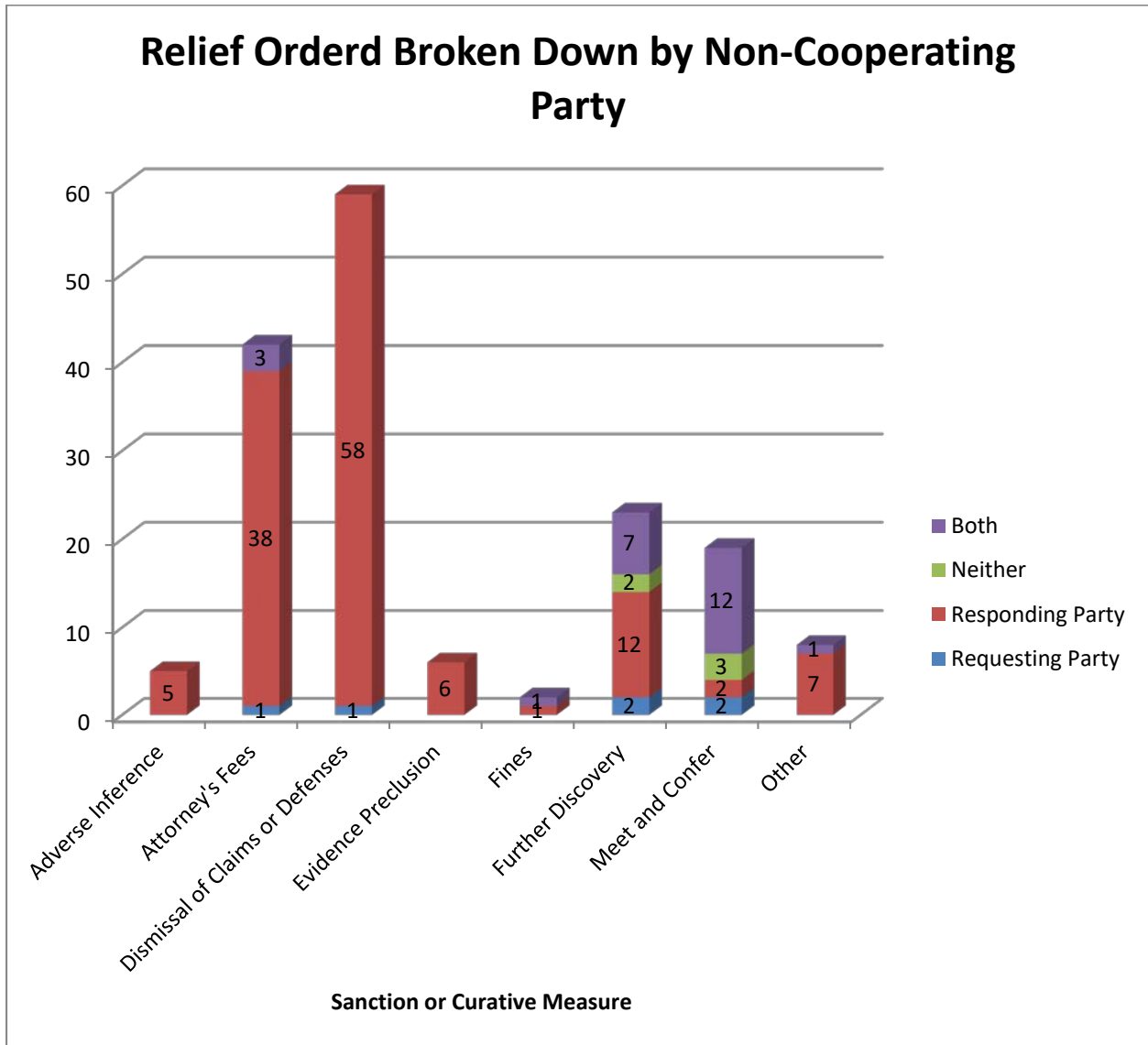
We were particularly interested in observing how the various forms of relief were applied to parties based on their roles as either requestor or responder. By their nature, certain discovery sanctions fall upon responding parties more often (it is hard to see where a failure to cooperate in drafting a narrow request or the scope of production would lead to an adverse inference). However, the more



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significant discovery sanctions (adverse inference, dismissal of claims or defenses, and evidence preclusion) are imposed on responding parties much more often than on requesting parties at a ratio of 69-to-1.



The discrepancy in the severity of sanctions cannot be explained entirely by the character of the sanction. A court could conceivably strike a claim or defense of a requesting party if it failed to cooperate in discovery. It certainly could require a non-cooperating requesting party to pay



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attorneys' fees, but they do not. Only 4 out of 27 requesting parties "sanctioned" for non-cooperation had to pay attorney's fees (14.8%), while 41 out of 165 responding parties did (24.8%).

Thus, not only are responding parties faulted more often for failing to cooperate, but they are much more likely to receive more severe punishment for their failure to cooperate. We note, however, that sanctions do not necessarily punish cooperation failures in isolation. For example, although spoliation may be accompanied by an apparent lack of cooperation, it is likely that the spoliation would have resulted in sanctions regardless of any purported cooperation failure. It is unclear from the data how punishment is meted out due to cooperation failures in isolation.

The observed trend, however, is that responding parties are often faced with harsher consequences for perceived cooperation shortcomings and requesting parties rarely face severe sanctions for failing to cooperate. It would appear, therefore, that a prominent inequity is being worked in the discovery process. Not only are responding parties disproportionately responsible for cooperation, they also bear a disproportionate level of punishment for such failures. Intransigence on the part of requesting parties, on the other hand, almost invariably consist of an admonition to "go back to the drawing board" to see if cooperation may yield results where there have been none before, which arguably encourages requesting parties not to cooperate because they are disproportionately getting a second chance. The problem with this dichotomy is that there are real costs associated with a requesting party's failure to cooperate including attorneys' fees for unnecessary meet and confers and motion practice, and the costs collecting, reviewing and producing an overly broad universe of documents. A failure to provide requesting parties with any sincere disincentive to non-cooperation only propounds overly broad discovery – from vague document requests to unsupportable search terms to "put the company on hold" preservation demands. A requesting party has little to lose by taking, and sticking to, unreasonable positions.

## **VII. Conclusion**

The principle of cooperation in civil discovery is firmly entrenched, but not always clearly defined. While the bench and bar has had much to say on the subject, its practical implications are not readily observed. Our review of cases, from the publication of the Sedona Cooperation Proclamation in 2008 to the present, shows that courts are increasingly invoking the principle of cooperation when faced with lapses in discovery. Most often, responding parties are cited for failures to cooperate. This is due, in part, to the fact that the affirmative responsibilities of responding parties are the most well defined and failures to comply with those responsibilities are often easiest to punish. "Cooperation," on the other hand, may better serve the bench and bar by being reserved for those instances in which parties remain unreasonably intractable and unwilling to engage in the discovery process. However it is framed, responding parties bear an outsized risk compared to requesting parties. Much more significant sanctions loom large over the allegedly non-cooperative responding party as compared to the requesting party who often gets a "do over"



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when its intransigence is highlighted. A more balanced application of the principle of cooperation would stand a better chance of achieving the unified goal of “secur[ing] the just, speedy, and inexpensive determination of every action and proceeding.”<sup>33</sup>

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<sup>33</sup> Fed. R. Civ. P. 1.



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## APPENDIX A

### THE COOPERATION CASES

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*Adesanya v. Novartis Pharms. Corp.*, 2016 U.S. Dist. LEXIS 108056 (D.N.J. Aug. 15, 2016)

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*Ali Joobeen v. City of Phila. Police Dep't*, 2011 U.S. Dist. LEXIS 19216 (E.D. Pa. Feb. 28, 2011)

*Allstate Ins. Co v. ASKO Appliances Inc.*, 2011 U.S. Dist. LEXIS 125659 (N.D. Cal., Oct. 31, 2011)

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*Anderson v. Reliance Std. Life Ins. Co.*, 2011 U.S. Dist. LEXIS 117058 (D. Md. Oct. 11, 2011)

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*Bethesda Softworks LLC v. Interplay Entm't Corp.*, 2011 U.S. Dist. LEXIS 44397 (D. Md. Apr. 25, 2011)

*Bicek v. C&S Wholesale Grocers, Inc.*, 2013 U.S. Dist. LEXIS 152367 (E.D. Cal. Oct 17, 2013)

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*Bldg. Erection Servs. Co., L.C. v. Am. Bldgs. Co.*, 2010 U.S. Dist. LEXIS 2625 (D. Kan. Jan. 13, 2010)

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*Brown v. Tellermate Holdings Ltd.*, 2014 U.S. Dist. LEXIS 90123 (S.D. Ohio July 1, 2014)

*Bryant v. Quaboag Transfer, Inc.*, 2012 Mass. Super. LEXIS 104 (Mass. Super. Ct., Mar. 5, 2012)

*Burd v. Ford Motor Co.*, 2015 U.S. Dist. LEXIS 88518 (S.D. W. Va., July 8, 2015)

*Burnett v. Ford Motor Co.*, 2015 U.S. Dist. LEXIS 88519 (S.D. W. Va., July 8, 2015)

*Bussa v. MTA N.Y. City Transit*, 2011 U.S. Dist. LEXIS 153185 (E.D.N.Y. Nov. 1, 2011)

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*Coleman v. Evans*, 2010 U.S. Dist. LEXIS 130553 (M.D. La., Dec. 9, 2010)

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*Cook v. UGN, Inc.*, 2012 U.S. Dist. LEXIS 125943 (W.D. Tenn. Aug. 10, 2012)

*Coop. Elevator Co. v. Aventine Renewable Energy - Aurora West, LLC*, 2015 U.S. Dist. LEXIS 177331 (D. Neb. Jan 6, 2015)

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*Crissen v. Gupta*, 2014 U.S. Dist. LEXIS 51100 (S.D. Ind. Apr. 14, 2014)

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*Danubis Grp., LLC v. Landmark Am. Ins. Co.*, 2015 U.S. Dist. LEXIS 27186 (M.D. Fla. Jan. 28, 2015)

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*Deckers Outdoor Corp. v. TKM Forest Hills, LLC*, 2014 U.S. Dist. LEXIS 128028 (E.D.N.Y. July 10, 2014)

*DeGeer v. Gillis*, 755 F. Supp. 2d 909 (N.D. Ill. Dec. 8, 2010)

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*Direct Line Corp. v. Carrington*, 2012 U.S. Dist. LEXIS 178114 (M.D. Tenn. June 6, 2013)

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*Headington Oil Co., L.P. v. White*, 287 S.W.3d 204 (Tx. App. 14th Dist. 2009)

*Hernandez v. Mario's Auto Sales, Inc.*, 617 F. Supp. 2d 488 (S.D. Tex. 2009)

*Hewlett-Packard Fin. Servs. Co. v. Alternative Graphics, Inc. (In re Alternative Graphics, Inc.)*, 2015 Bankr. LEXIS 3696 (9th Cir. BAP Sept. 24, 2015)

*Hinterberger v. Catholic Health Sys.*, 2013 U.S. Dist. LEXIS 73141 (W.D.N.Y. May 21, 2013)

*Howard v. Cargill, Inc.*, 2009 U.S. Dist. LEXIS 68412 (W.D. Tenn. May 19, 2009)

*Hunting v. BASF Corp.*, 398 Fed. Appx. 61 (5th Cir. 2010)

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*Ike-Ezunagu v. Deco, Inc.*, 2010 U.S. Dist. LEXIS 123393 (D. Md. Nov. 22, 2010)

*In re Actos (Pioglitazone) Prods. Liab. Litig.*, 2014 U.S. Dist. LEXIS 86101 (W.D. La. June 23, 2014)

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*Jorgensen v. Trees Acquisition, Inc.*, 2013 U.S. Dist. LEXIS 17051 (D. Utah Feb. 7, 2013)

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*Kelley v. Smith's Food & Drug Ctrs., Inc.*, U.S. Dist. LEXIS 162850 (D. Nev. Nov. 19, 2014)

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*Lechase Const. Servs., LLC v. Info. Advantage*, 20 N.Y.S.3d 292 (Sup. Ct. Monroe Cty. 2012)

*Lee v. Palma*, 2009 Minn. Dist. LEXIS 45 (Minn. Sup. Ct. Ramsey Cty. Feb. 5, 2009)

*Liberty Mut. Ins. v. Huggins*, 2016 N.J. Super. Unpub. LEXIS 1276 (N.J. App. Div. June 3, 2016)

*Locasto v. City of Chicago*, 2014 IL App (1st) 113576 (2014)

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*Mekonen v. Zewdu*, 2014 Wash. App. LEXIS 460 (Wash. Ct. App., Mar. 3, 2014)

*Menchu v. Legacy Health*, 2014 U.S. Dist. LEXIS 86543 (D. Or. May 13, 2014)

*Merriman v. Minn. Life Ins. Co.*, 2012 U.S. Dist. LEXIS 124854 (E.D. Wis. Aug. 31, 2012)

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*Mickens v. Cargill, Inc.*, 2009 U.S. Dist. LEXIS 68414 (W.D. Tenn. May 29, 2009)

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*Miller v. Westfield Steel, Inc. (In re Elrod Holdings Corp.)*, 426 B.R. 106 (D. Del. 2010)

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## APPENDIX B

### CRIMINAL CASES EXCLUDED FROM ANALYSIS

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*Cassidy v. United States*, 2016 U.S. Dist. LEXIS 66096 (D.N.M. May 19, 2016)

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*Davis v. United States*, 2009 U.S. Dist. LEXIS 77466 (E.D. Mo. Aug 31, 2009)

*McKenzie-Jackson v. United States*, 2014 U.S. Dist. LEXIS 103784 (M.D. Iowa July 30, 2014)

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*Pizzuti v. United States*, 809 F. Supp. 2d 164 (S.D.N.Y. 2011)

*Quintana v. Doe*, 2010 U.S. Dist. LEXIS 65507 (D. Colo. June 30, 2010)

*Roberson v. United States*, 2015 U.S. Dist. LEXIS 162384 (S.D. Ga. Dec. 3, 2015)

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*United States v. Boney*, 2012 U.S. Dist. LEXIS 145557 (D. Del. Oct. 9, 2012)

*United States v. Bowser*, 2011 U.S. Dist. LEXIS 44790 (W.D. Mich. Apr. 26, 2011)

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*United States v. Piper*, 2012 U.S. Dist. LEXIS 86237 (M.D. Pa. June 20, 2012)

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*United States v. Stacy*, 696 F. Supp. 2d 1141 (S.D. Cal. 2010)

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*Venable v. Virga*, 2015 U.S. Dist. LEXIS 103439 (C.D. Cal. June 1, 2015)

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## APPENDIX C

### **DIVORCE/CUSTODY CASES EXCLUDED FROM ANALYSIS**

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- Bennett v. Rector*, 389 S.C. 274 (S.C. Ct. App. 2010)
- Bodkin v. Bodkin*, 388 S.C. 203 (S.C. Ct. App. 2009)
- Caruso v. Leneghan*, 2014 Ohio App. LEXIS 1789 (Ohio Ct. App. May 1, 2014)
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- Coleman v. Coleman*, 2013 Tenn. App. LEXIS 617 (Ct. App. May 21, 2013)
- Donfield v. Donfield*, 2011 N.J. Super. Unpub. LEXIS 2158 (App. Div. May 31, 2011)
- Fitzwater v. Fitzwater*, 396 S.C. 361 (Ct. App. 2011)
- Gitter v. Gitter*, 2015 S.C. App. Unpub. LEXIS 75 (Ct. App. Feb. 11, 2015)
- In re Marriage of Patel*, 2013 IL App (1st) 112571 (6<sup>th</sup> Div. 2013)
- Lion v Yalkut*, 2011 N.Y. Misc. LEXIS 7057 (Sup. Ct. Bronx Cty. Oct. 12, 2011)
- Neumann v. Neumann*, 2012 Ohio App. LEXIS 515 (Ct. App. 8<sup>th</sup> Dist. Feb. 16, 2012)
- Ramin v. Ramin*, 2012 Conn. Super. LEXIS 2098 (J.D. Stamford Aug. 16, 2012)
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- Strauss v. Strauss*, 2011 Ohio App. LEXIS 3231 (Ct. App. 8<sup>th</sup> Dist. Aug. 4, 2011)
- Styracula v. Styracula*, 2011 Conn. Super. LEXIS 873 (J.D. Stamford Apr. 5, 2011)
- Wilkinson v. Wilkinson*, 2013 Ohio App. LEXIS 3753 (Ct. App. 10<sup>th</sup> Dist. Aug. 23, 2013)
- Wojdacz v. Blackburn*, 2014 U.S. Dist. LEXIS 119494 (D. Colo. Aug. 5, 2014)



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## APPENDIX D

### NON-RESPONSIVE CASES EXCLUDED FROM ANALYSIS

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*Am. Trust & Sav. Bank v. Communs. Prods. Corp.*, 2013 WI App 30 (Ct. App. Jan. 31, 2013)

*Antero Res. Corp. v. Strudley*, 2015 CO 26 (2015)

*Auto-Owners Ins. Co. v. Premiere Restoration & Remodeling, Inc.*, 2014 U.S. Dist. LEXIS 177525 (N.D. Ala. Dec. 29, 2014)

*Bash v. Laikin (In re Fair Fin. Co.)*, 2013 Bankr. LEXIS 5663 (N.D. Ohio Oct. 24, 2013)

*Bd. of Prof'l Responsibility v. Vannoy*, 2013 WY 11 (2013)

*Blanding v. Mendez (In re Mendez)*, 444 B.R. 439 (Bankr. D.N.M. 2011)

*Blocker v. Cmty. Educ. Ctrs., Inc.*, 2015 U.S. Dist. LEXIS 21654 (E.D. Pa. Feb. 24, 2015)

*Boardley v. Household Fin. Corp. III*, 2015 U.S. Dist. LEXIS 70098 (D. Md. June 1, 2015)

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*City of Missoula v. Mt. Water Co.*, 384 Mont. 193, 378 P.3d 1113 (2016)

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*Crisma, Inc. v. SG Communs., LLC*, 2010 U.S. Dist. LEXIS 67465 (M.D. Tenn. June 10, 2010)

*DeBruce v. Campbell*, 2010 U.S. Dist. LEXIS 146375 (N.D. Ala. Aug. 4, 2010)

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*Dispatch & Tracking Solutions v. City of San Diego*, 2016 Cal. App. Unpub. LEXIS 2572 (4th App. Dist. Apr. 8, 2016)

*Drazin v. Horizon Blue Cross Blue Shield of N.J., Inc.*, 832 F. Supp. 2d 432 (D.N.J. 2011)

*Dye v. Barnes*, 2015 U.S. Dist. LEXIS 120088 (E.D. Cal. Sept. 9, 2015)

*Elhelou v. Lipinski Outdoor Servs.*, 2015 N.J. Super. Unpub. LEXIS 1644 (App. Div. Mar. 11, 2015)

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*Hartz Constr. Co. v. Vill. of W. Springs*, 965 N.E.2d 1159 (Ill. Ct. App. 2012)

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*High Point Sarl v. Sprint Nextel Corp.*, 2012 U.S. Dist. LEXIS 8435 (D. Kan. Jan. 25, 2012)

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*Hyles v. New York City*, 2016 U.S. Dist. LEXIS 100390 (S.D.N.Y. Aug. 1, 2016)

*In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, 733 F. Supp. 2d 997 (E.D. Wis. 2010)

*In re Std. & Poor's Rating Agency Litig.*, 949 F. Supp. 2d 1360 (J.P.M.L 2013)

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*In re Best Buy Co., Price Match Mktg. & Sales Practices Litig.*, 672 F. Supp. 2d 1375 (J.P.M.L 2010)

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*In re NHC Nashville Fire Litig.*, 293 S.W.3d 547 (Tenn. Ct. App. 2008)

*In re Noble*, 2016 Cal. App. Unpub. LEXIS 5721 (6th App. Dist. Aug. 3, 2016)

*In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249 (E.D. Pa. 2012)

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*Krentz v. Carew Trucking, Inc.*, 2014 U.S. Dist. LEXIS 69001 (E.D. Wis. May 20, 2014)

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