LITIGATORS CORNER:
How Do You Force a Trouble-Maker to Cooperate?

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Everyone who litigates sooner or later runs into the trouble-maker. Some are simple bullies, like Bart Simpson's ne'er-do-well acquaintance, Nelson Muntz. You know the type. An inch or two taller than everyone in sixth grade, he enjoys beating up littler kids while no adult is around to see what's happening.

Other trouble-makers are more clever. They push you around, but in a much subtler way. Sly enough to be angels in the classroom, they resume their mischief out of the teacher's sight — in the schoolyard, or on the way home after school. Some are so good at it that they make you look troublesome and uncooperative for going to the teacher to complain. Through manipulation, they have the teacher believing you are the quarrelsome and unreasonable one.

Bullies are still with us. But now, they've grown up, wear suits, and go to court. Some bullies figure they can win without ever really fighting: they threaten you with sanctions. Other bullies figure all is fair in war and discovery; for example, they instruct witnesses not to answer questions in depositions because the questions are, in their opinion, irrelevant. They threaten to "shut this deposition down," as though they were the judges. They give you interrogatory responses that say they can't answer because they won't have all the facts until discovery is over. Still others try to overwhelm you with discovery requests for every fact under the sun.

My experience is that many district judges regard discovery disputes as if they were trips to the dentist sans novocaine. Some districts even go so far as to limit how many motions to compel can be filed by a party; I know of one district where the limit is two. Of course, there isn't any provision in the Federal Rules of Civil Procedure imposing such limits, and the Federal Rules should override local rules or practices to the contrary. One judge in our district attempted to order the clerk not to accept motions to compel for filing. The clerk refused.

Nevertheless, few of us want to start arguments with a district judge about whether a local rule is lawful. (This, of course, may be a great opportunity for a "bully lawyer" to abuse discovery, knowing that your chances to do something about it are limited.) Wily litigators know that if they get away with discovery abuse in the district court, it is unlikely that it will be addressed by a higher court later on. They know that district judges don't care for discovery disputes, shipping them off to magistrates on a regular basis. In any event, the pressure not to bring discovery disputes to court has increased, even to the extent that local rules or practices seek to forbid you from employing Rule 37 of the Federal Rules of Civil Procedure to obtain the discovery your client needs. So, too, has the displeasure that may greet you upon filing such a motion increased. Sometimes the movant seems to be blamed for making more work. That is a peculiar result for a party which has no remedy, other than Rule 37, for an uncooperative adversary.

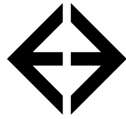
It is true that our courts are very busy. They want disputes held to a minimum, and want litigants to cooperate. But cooperation is impossible unless one of two conditions prevail: first, the parties must be genuinely willing to work with each other. Unfortunately, this first condition does not often exist. With a two-party suit, there are four possible combinations: both parties are cooperative; one is willing to cooperate and the other is not, or vice versa; or neither is cooperative. All other things being equal, this means there is only a one-in-four chance that both parties are truly interested in cooperation. In the other three combinations, 75% of the time, cooperation is not likely.

The second condition leading to cooperation is more akin to self-interest: each has something the other needs. Here, the parties aren't interested in cooperation for its own sake, or because it will make their lives easier and the suit less expensive. They engage in some horse-trading because it is necessary at that time. As soon as the deal is done and the truce over, they retreat to their respective trenches. This kind of cooperation is only occasional and unpredictable. It has no continuity.

In most cases, therefore, circumstances will not lend themselves to ongoing cooperation between the parties. What do you need to do to protect your client?

The answer lies in following the rules, and particularly Rule 37, even if your judge doesn't like such motions, and even if the same judge will participate in settlement negotiations. President Reagan commented about arms negotiations with the former Soviet Union: "Trust, but verify." I would like to amend this to say "Don't trust, and verify." Do not accept an adversary's blather that it will provide discovery some day. If it hasn't been provided, use the remedy the rule-makers have provided.

A recent case, *Carefree Trading, Inc. v. Life Corporation*, __ F.3d __, Slip Op. 00-1274 (Fed. Cir. August 16, 2001), illustrates my point. It is an unusual appeal because its resolution turned on the issue of fairness in discovery. In the district court, Life filed a motion for summary judgment. Carefree, the party opposing the summary judgment motion, argued that it had been denied discovery, and that the discovery would show the existence of disputed facts that would preclude summary judgment. Carefree filed the right motion, under Rule 56(f) of the Federal Rules of Civil Procedure, seeking discovery that was needed to oppose the summary judgment motion. That motion was followed later by a second Rule 56(f) motion seeking discovery for another summary judgment motion. The summary judgment movant, Life, sought a stay of discovery, declined to provide discovery, even though no stay was in effect, and moved for expedited consideration of its summary judgment motions.



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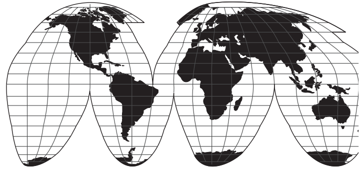

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A change of judges complicated things. At a status hearing before the new judge, Carefree said it had been unable to get discovery needed to oppose the summary judgment motions. Evidently its 56(f) motions were not enough; the district court suggested it seek relief, and told it to make an appropriate motion. Carefree moved to compel (which should not have been necessary in light of the 56(f) motions), and its motion was granted. Carefree then got some testimony, but it was too late to do any good. The district court granted the remaining summary judgment motion, even though Carefree argued that the recent testimony should have been considered in deciding the motion for summary judgment.

In my experience, it is rare for the Federal Circuit to reverse because of a discovery issue. I cannot recall another case where the Federal Circuit did so. Nevertheless, the Federal Circuit did reverse in the "unique circumstances of this case." It remanded for further proceedings. However, after discussing all of the discovery disputes, the appellate court stated, a bit grandly, "It is expected that the parties will cooperate so that discovery is promptly completed." I have no idea why the Federal Circuit would expect cooperation in a case involving two 56(f) motions, a motion to compel, a motion to stay discovery, a unilateral stay, and a motion to expedite rulings on summary judgment motions.

Carefree and its opponent did not cooperate in the proceedings leading to the appeal. But Carefree did have one important thing going for it. Carefree had done everything the Federal Rules require in order to obtain discovery, and thus created a record that protected its position and enabled it to win on appeal. Better late than never.

In one of our cases a few years ago, we tried the cooperation tack on the theory that it was better to minimize the number of disputes that our judge would have to resolve. Our adversary had refused our requests for discovery. We contemplated filing a motion to compel production of that discovery. In an untranscribed conference in chambers, however, our district judge suggested that we defer the motion to compel until after a settlement conference. We genuinely hoped for a settlement, and did not wish to appear quarrelsome to the "teacher." Not wanting to irritate the judge who would be making important decisions in our case, we acceded and did not file the motion to compel. But as soon as the settlement conference concluded unsuccessfully, the opposing party moved for summary judgment. We responded to the summary judgment motion and, like Carefree, filed a motion under Rule 56(f) arguing that we had been denied discovery relevant to the motion.

But it was too late. Our judge rationalized his way through the summary judgment motion and granted it. Not particularly experienced in patents, engineering, or business, he concluded that we "did not need" the discovery sought by our Rule 56(f) motion. He completely ignored our decision to avoid confronting him with another dispute, as well as our deference to his request that we postpone our motion to compel. Leo Durocher was right in this case: we tried to be the nice guy, and we finished last. Our efforts to reduce the workload on the court blew up. One good turn may have deserved another, but our judge couldn't have cared less. He just wanted the case off his docket.

To this day, I regret not running the risk of irritating the judge with a motion to compel. If we had had that motion on file, it might have been granted. If, like Carefree, we had moved to compel right away, we could have said that we had sought discovery long before the summary judgment motion was filed by our opponent. That might have given us the edge. Our 56(f) motion may have looked like an excuse to our judge, or perhaps he was just coming up on his Biden Report, which lists a judge's pending matters and how old they are.

I draw two lessons from all of this. One, you can't expect cooperation between lawyers as the norm. Trouble-makers by definition do not "cooperate," which means that you must be able to prove that you have done those things within your power to force discovery. If you are being denied depositions or documents, you must pursue them promptly with a conference and, if necessary, a motion to compel. If your adversary gives you an unsatisfactory answer to a discovery request, you must pursue it with a conference and a motion to compel. Do not rely on your adversary's empty promises to supplement later.

Second, do not expect to be rewarded by your judge for avoiding a motion, or taking work off his plate. You won't be rewarded, and might be penalized. If you do nothing, your opponent will get away with refusing discovery. Your judge may not be happy to see a motion, may criticize both of you and will probably ask you to cooperate. Your job is to advocate, and if that means incurring a judge's displeasure in order to protect your client's rights, then you must do so. Remember, you cannot make a trouble-maker cooperate. IPT