

Successful Negotiation

The Sedona Conference



Successful Negotiation

Consistency, candor, and professionalism are hallmarks of the best and most successful litigators. To have the best chance for success in a litigated matter, a lawyer must possess *knowledge*, *skill*, *preparation*, and *attitude* from the first telephone call with opposing counsel¹ to a formal meet and confer to a mediation, arbitration, or trial. Consider the application of these characteristics to negotiation at a meet and confer involving discovery of electronically stored information.

Knowledge

Before going to a meet and confer, in order to focus on what is needed to resolve the case, counsel must:

- 1. Know the case.** Only lawyers with a full understanding of the factual issues in dispute, the elements of a cause of action, and the defenses to the cause of action can truly comprehend the limits of relevant evidence and the scope of discovery in a case.² Ultimately, unless something is admissible in a case or will lead to the discovery of admissible evidence, money, time, and effort will be wasted on finding, reviewing, and producing it. Even information that is admissible may not be important enough to expend undue effort and expense subject to proportionality or priority in discovery efforts. The ability to make these tough calls requires a lawyer's judgment with full understanding of the case. This is why judges want lawyers with the knowledge and authority to make tough calls to be involved in meet and confer sessions and in hearings on discovery matters.
- 2. Know the client.** Counsel must have sufficient client control to obtain appropriate authority to effectively handle discovery and negotiation. Client control is obtained by a full understanding of what is required by law in a given case and informed consent of the client on a direction for discovery and case strategies. Are the client and the client's staff informed, knowledgeable, and reliable enough to safely base planning and decision-making on information received from them or is further verification required? Does the client fully understand the ramifications of failure to comply with preservation and discovery requirements?
- 3. Know the law.** Before engaging in negotiations involving what is discoverable and must be produced, counsel must understand what is required under the rules of procedure,³ case law,⁴ rules of ethics and professional conduct,⁵ local rules and guidelines,⁶ and any order entered by the judge in the case. There is discretion on the part of the court in managing discovery; rules, case law, guidelines, or standard orders, especially in the case of ESI, may require special consideration and

handling. Knowledge of the limits and requirements of all legal standards controlling discovery in the case is essential to successfully negotiate and to avoid sanctions.

4. Know the technology and systems involved. Under current ethical standards, competency to take on a legal matter requires not only knowledge of the subject area but sufficient knowledge and understanding of technology to effectively represent the client. The legal decision-maker negotiating discovery must understand enough about technology, information culture, and the systems and devices of the client, opposing party, and third parties that may contain ESI in order to plan negotiations and to ask and answer the right questions before and during the meet and confer. Issues about location, amounts of information, form of production, accessibility, cost of review, undue burden, and proportionality require technical knowledge or the immediate ability to secure such knowledge from the client, colleagues, experts, or other sources. How can a lawyer meaningfully and authoritatively negotiate on issues involving ESI without such knowledge?

5. Know your opponent (lawyer and opposing party). The tone, depth, and success of negotiation is impacted by the abilities and propensities of the opponent. The level of trust attributable to the opponent is but one factor. Is the other side *ready* and *able* to negotiate at the time of the meet and confer? How well does opposing counsel know technology, the client's systems, and law of electronic discovery? Will opposing counsel have control of the client? Will opposing counsel be favorably influenced by give and take or will disclosure be a one-way street? Will the opponent hide information or obfuscate facts or circumstances? Will inequality of needs in discovery be an obstacle to fair negotiation? Find out as much as possible while planning for the meet and confer. Waiting to learn this information at the meet and confer session can result in delay, miscommunication, and failure to make meaningful progress.

6. Know the judge. Find out as much as possible about the judge assigned to the case and the judge's knowledge, propensities, requirements, and guidelines with regard to eDiscovery. Is the assigned judge a federal judge who helped administer the Seventh Circuit Electronic Discovery Principles or is the judge a state court judge recently transferred from the juvenile Court Division? Is the judge likely to enforce discovery requirements and issue sanctions if necessary? Will the judge expect or require communication and cooperation between the parties before resorting to court action?²⁷ The level to which parties may rely on the judge to assist in enforcing discovery rules and law is an important component in dealing with the opponent.

Skill

Before taking on a case involving eDiscovery, counsel is ethically required to have the requisite skill and ability to handle the matter. A skill that is sometimes overlooked but absolutely essential to conduct a successful meet and confer is the negotiation skill set. Negotiated discovery of electronically stored information involves a different advocacy skill set than trying a case or taking

an adverse deposition. While some aspects of the general advocacy skill set overlap with the negotiation skill set employed during the meet and confer, the successful negotiator needs enhanced focus and the ability to:

1. **Listen** to and **understand** the needs and requirements of the client and the opposing party. Listening is one of the most important skills for a lawyer (and judge), but it is one of the most difficult to develop and is remarkably rare among litigators notwithstanding its importance.
2. **Appreciate** and **address opposing counsel's legitimate concerns.**⁸
3. Seek out a meaningful and realistic **middle ground** that is acceptable, while not ideal, to both sides.
4. Maintain **flexibility** to adjust the plan when the situation dictates.
5. Remain **civil** and **calm** despite adversity or challenges in the process.
6. **Outlast** any distractions, distasteful tactics, or roadblocks attempted by the opponent or one's own client.

Negotiation skill is a learned behavior. A worthwhile and effective resource on tips and strategies for persuasive negotiation is *Getting to Yes: How to Negotiate Agreement Without Giving In* by Roger Fisher, which is based on the work of the Harvard Negotiation Project. The book is a must-read for lawyers, judges, and mediators. *Getting to Yes* teaches negotiators to separate the people from the problem and to *focus on interests instead of positions*. Good negotiators make every effort to get the opponent to work together with them to find or create options that will satisfy the needs of both parties.

Preparation

Like most every challenging effort in litigation, thorough preparation is essential to success at the meet and confer.

1. **Obtain the requisite knowledge** to handle the meeting as described above.
2. **Contact opposing counsel** and try to determine the opponent's expectations for the meeting and to eliminate as many surprises as possible. If both parties enter the negotiations with a common objective and consistent expectations, the opportunity for success is enhanced considerably.

3. **Carefully plan** for the meeting, subject to flexibility to adjust as necessary at the meeting. The better the planning, the more likely that unexpected contingencies will be avoided.
4. **Develop a clear set of prioritized strategies and objectives** for resolution at or before the conference.
5. **Secure full authority** reasonably anticipated for the meeting.
6. **Bring the information and staff necessary to get the job done.** If expert assistance,⁹ technical staff, or further client authority or clarification will be needed, ensure such resources will be available.

Attitude, Behavior, and Persuasiveness

Develop and maintain the appropriate and necessary attitude and positive effect to enhance credibility, persuasiveness, and effectiveness at the negotiation and beyond. Maintaining confidence and trust in the cooperative process is essential to meaningful progress. Both counsel and client must understand the necessity of creating and maintaining credibility with the court, opposing counsel, and opposing parties. Effective advocacy is based on trust, and for a lawyer, the credibility of the attorney transcends any particular case or client.¹⁰

Positive behavior entails courtesy, respect, dialogue, candor and avoidance of confrontation without purpose. Such behavior is manifested in speech, demeanor and body language. The tone set by counsel and the party he or she represents can determine how much power they have with the opponent and with the judge. In general, openness, candor, and cooperation evince a strong substantive case; while deception, obfuscation, and delay signal weakness and fear. Roadblocks and bluster should not concern the well-prepared client and counsel. Instead, such behavior opens the opportunity for gaining a credibility advantage with the court or even sanctions. When opposition or confrontation is necessary, it is much stronger and more effective when preceded by consistently respectful behavior and delivered with reasonable tone.

Appropriate negotiation techniques include:

1. **Behave consistently with courtesy and with candor from the outset and from case to case.** Fair or not, lawyers are judged by past behavior and reputation among colleagues, clients, and judges.
2. **Be firm but fair on the borders between protection and disclosure.** Try to fashion reasonable protective efforts rather than barring access, if appropriate.

3. **Do not deign to negotiate concessions from the opponent by offering what the opposing party is entitled to anyway.**
4. **Provide real and honest rationale for requests as well as for negative responses to opposing requests.** Feigning needs or barriers to disclosure are improper, counterproductive, and potentially sanctionable when they lead to undue cost or delay. A lawyer who does not have an accurate answer should not try to give one.
5. **Determine the abilities and understanding of opposing counsel and parties and take that into account in strategy and tactics.** However, it is counterproductive to talk down to an opponent or berate their knowledge or intent. Always treat the opposing counsel and the opposing party respectfully if you want the best chance for cooperation from the opposing side. The best way to deal with a disrespectful, dishonest, or distasteful opposing opponent is to take them on in court and win the case instead of name-calling or disrespect in discovery. Name-calling and disrespectful behavior is selfish and counterproductive to real goals in the case.
6. **Determine what the opposing party needs and see whether you can help with those needs.** In a case in which ESI discovery is unbalanced in amount or need, determine whether the opponent has needs outside of production of ESI that can be provided, such as admissions as to fact or issue, concessions on foundation for evidence, waiver of time limits, sharing of ESI technical resources, or concessions in non-production discovery.
7. **Determine whether factual disputes can be resolved to avoid need for expense of production.**
8. **Plan negotiation in a way that best secures prioritized needs.** The opponent may not be ready to make a concession on a specific item until negotiations show your good faith and willingness to make appropriate concessions. It may be best to open with less controversial issues or requests.
9. **Remain flexible enough to move off planned limits or requests if the situation dictates.**
10. **Find and identify open, economical alternative avenues for information if your client or the opposing party cannot economically provide requested information.** Do not require the opposing party to produce duplicate information or information obtainable easily or less expensively in another manner, unless there is a legitimate reason for the production from the opponent (such as foundation or confirmation of a receipt by the opponent). Consider requesting admissions or

stipulations rather than duplicate or unduly expensive production. As a requesting party, remain willing to accept substitute sources of information or, if appropriate, review more easily accessible data before insisting on sources of information that are more difficult to locate or produce.¹¹

11. **Remain willing to think outside the box.**
12. **Consider proportionality from the outset rather than having the court impose it.**
13. **Resolve all issues possible before resorting to court assistance.**
14. **When obstacles occur that prevent full resolution, try to resolve as many issues as possible.** Prevent disagreements on particular issues from becoming impediments to broader progress. Avoid keeping score or having an obstacle or negative outcome on one matter attain undue importance to overall progress. Be flexible and try to find other paths that may allow a return to and resolution for the obstacle in the end result. If necessary, keep dialogue open and schedule a plan to address any remaining issues at a follow-up meeting.
15. **Share the meeting rather than seeking to control it.** Trust and confidence of the opposing party will erode if they feel they are being railroaded or directed to an outcome. The form of resolution that will lead to a continued beneficial, cooperative relationship through the remainder of the case occurs when both sides feel invested in achieving the result.
16. **Remain transparent and thorough about preservation practices.** A requesting party will be more amenable to staged or limited discovery if the party is confident that the information not immediately collected and produced is preserved in case it is needed later.¹²
17. **Work together with the opposing party to protect privileged information, trade secrets or information subject to privacy laws.** As a requesting party, anticipate and honor legal constraints to production and try to develop solutions that comply with the legal requirements. Likewise, producing parties should look for reasonable solutions so as to not invoke privacy laws simply as a tactic to avoid production.¹³ Ethical rules do not subordinate the duty to cooperate to the duty of confidentiality.¹⁴ However, cooperative strategies can actually assist the lawyers in protecting their respective clients' private and privileged information in a planned and balanced fashion if the parties. Reach early agreement on such issues as privilege and trade secrets to ensure an economical and less risky exchange of information.

17. **Work together with the opposing party early on form of production issues to avoid duplicate production and promote efficient and economic exchange of information.**¹⁵

Conclusion

Knowledge, forethought, preparation, flexibility, and a consistently respectful attitude establish the basis for a positive outcome. However, every meet and confer is different. Developing and refining superior negotiation skills will result in better performance at meet and confer conferences and many other aspects of litigation and professional life.

¹ Early conversations set the tone for the relationship during the case, so counsel should approach each other respectfully and with professionalism. *See The Sedona Conference Cooperation Guidance for Litigators & In-House Counsel*, Mar. 2011 Version at p. 3.

² *Id.* at p. 2.

³ The federal rules of procedure and state counterparts promote and assume cooperation between the parties during discovery. *See The Case for Cooperation*, 10 Sedona Conf. J. 339, 348-50.

⁴ *See, e.g.*, Kleen Products LLC v. Packaging Corp. of Am., No. 10 C 5711, 2012 WL 4498465, at *1, 19 (N.D. Ill. Sept. 28, 2012); *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354, 357-58 (D. Md. 2009).

⁵ The duty to cooperate is embodied in the professional conduct rules and by an attorney's ethical duties as an officer of the court to opposing counsel, opposing parties, third parties, the tribunal, and the judicial system as a whole. *See The Case for Cooperation, supra* n. 3 at pp. 351-52.

⁶ Discovery Guideline 1 of the Discovery Guidelines for the United States District Court for the District of Maryland, D. Md. Loc. R. App. A (July 1, 2011), <http://www.mdd.uscourts.gov/localrules/LocalRules.pdf>.

⁷ U.S. Dist. Judge Paul Grimm, D. Md., DISCOVERY ORDER, Para. 3 (Cooperation During Discovery).

⁸ Appreciating and addressing the opposing party's legitimate concerns is important to cooperative fact-finding. *See The Sedona Conference Cooperation Guidance for Litigators & In-House Counsel, supra* n.1 at p. 4-6.

⁹ Experts may provide the parties with additional solutions and provide both sides with greater confidence that their discovery agreements will be implemented appropriately. *Id.* at p. 8

¹⁰ *See The Case for Cooperation, supra* n.2 at p. 360.

¹¹ *See The Sedona Conference Cooperation Guidance for Litigators & In-House Counsel, supra* n.1 at p. 7.

¹² *Id.* at p. 8.

¹³ *Id.* at pp. 8-9.

¹⁴ *See The Case for Cooperation, supra* n.3 at p. 354.

¹⁵ *See The Sedona Conference Cooperation Guidance for Litigators & In-House Counsel, supra* n.1 at p. 9.