

The Sedona Conference Institute Program on eDiscovery Negotiation Training: Practical Cooperative Strategies, Purpose, Overview and Instructions

The Sedona Conference



Welcome

Welcome to eDiscovery Negotiation Training: Practical Cooperative Strategies (formerly entitled “The Cooperation Training Program”), presented by The Sedona Conference Institute (TSCI). The Sedona Conference, a nonprofit, 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of eDiscovery, complex litigation, cross-border discovery and data protection laws, international data transfers, information governance, data security, patent litigation, patent damages and remedies, and trade secrets, will continue its innovative concept in eDiscovery education in 2022 virtually via Zoom. Earlier installments of the Program were held in Phoenix in 2013, Chicago in 2014, Atlanta in 2015, Washington, D.C. in 2016, Miami in 2017, New York in 2018, Washington, D.C. in 2019, New York in 2020, and virtually via Zoom in 2021.

Program Purpose

During the Program, we explore this question: Can opposing counsel effectively cooperate and help each other in discovery, even when they continue to compete intensely to outmaneuver one another in the case itself? Regrettably, few law schools and even fewer law firms focus on cooperative strategies and tactics as a path to successful negotiation and litigation. With enormous costs in resources, time, and stress at risk when eDiscovery opponents are at loggerheads, the culture of discovery practice must evolve to meet the goals and requirements of Rule 1 and its state court equivalents of securing the “just, speedy, and inexpensive determination of every action and proceeding,” and to satisfy the increasing demand of clients for economical resolution of their cases. In order to achieve this end, lawyers must develop the skill set and understanding of rules and current litigation culture needed to persuasively and successfully cooperate with the opponent, while also advancing the client’s budgetary and discovery interests. eDiscovery Negotiation Training will assist participants in doing so.

Program Overview

The virtual, three-day Program features (1) pre-recorded client meeting demonstrations by the faculty; (2) three mock Rule 26(f) conferences covering (a) preservation, scope of discovery, and form of production; (b) privilege issues, and (c) social media issues; and (3) a mock Rule 16(b) case management conference – all in the context of the scenario laid out in the Program’s employment discrimination litigation hypothetical (the *Capriotti v. Pure Markets* case file in the Program materials). Additionally – and new for 2022 – the Program will feature a demonstration and panel discussion entitled “How to Deal With a Difficult Opponent: A View from the Trenches.”

While the Program is designed around an Age Discrimination in Employment Act (ADEA) scenario, the focus of the Program involves the issues in negotiating discovery of evidence – and especially electronic evidence. To assist participants who may not be as familiar with ADEA litigation to identify the types of evidence that would be relevant and proportional in the case without the need to do research, the materials include a brief ADEA primer, together with a couple of exemplary cases and a portion of certain standard jury instructions.

Program Format

Team Roles

Each participant will be assigned to either a plaintiff's counsel team or a defense counsel team.

- Plaintiff's counsel teams (Team P): Plaintiff Maria Capriotti is represented by the Phoenix law firm of Davidson and Van Allen, a well-established 48-attorney firm located in uptown Phoenix, with satellite offices in Glendale and Mesa. They are a sophisticated and politically connected general practice law firm, concentrating in real estate, small business, estate planning, and related litigation. They rarely represent individual plaintiffs in employment actions, but the senior partner took this case as a favor to Monsignor Coughlin at St. Michael's Parish Church, attended by Ms. Capriotti, as the firm routinely represents the Diocese in real estate and land use matters, and Monsignor Coughlin sits on the Diocese's real estate management committee.
- Defense counsel teams (Team D): Defendant Pure Markets is represented by the Phoenix office of Baker, Skadden & Latham, one of the ten largest firms in the U.S., headquartered in New York. BSL also represents Pure Markets' parent company, Pure Holdings & Investments (PHI), which was formed three years ago for the purpose of acquiring Pure Markets. BSL has all the resources you would expect from a top-tier firm, but PHI and Pure Markets are relatively small (and highly leveraged) clients.

Mock Client Meetings

As part of the materials distributed to participants in advance of the program, participant teams will observe separate demonstrative client meeting recordings (one confidential recording for plaintiff, and a second confidential recording for defendant), both as performed by faculty members. The meetings will involve typical issues and methodology for conducting client meetings involving ESI. The information gleaned at these meetings will be used in the participant teams' conduct of subsequent mock Rule 26(f) conferences as well as the mock Rule 16(b) case management conference. For that reason, defense counsel teams observe only the defense counsel-client meeting demonstration and plaintiff's counsel teams observe only the plaintiff's counsel-client meeting demonstration.

Mock Exercise Scenarios

Each mock exercise involves two teams of participants facing one another. Each participant will be part of the same team throughout all of the exercises. In addition, each team will oppose the same team in each mock exercise.

Teams should assume that litigation has been filed (see the mock Complaint and Answer in the materials), and that the parties will be required to appear before the judge at a Rule 16(b) case management conference approximately two weeks after their Rule 26(f) conferences to present their:

- Discovery plans regarding scope of document and ESI discovery, including topics, custodians, search parameters/methodology, and timing;
- Stipulations for the judge to endorse as orders; and
- Disagreements for the judge to resolve.

The teams will either reach agreement or articulate their differences for judicial resolution at the case management conference.

Preservation, Scope of Discovery, and Form of Production Conference

This conference deals specifically with preservation, scope, and form of production issues. Plaintiff's requests for raw data (for example) relate to hiring, pay, training, promotion, evaluation, discipline, and termination of all employees of Pure Markets and related entities since 1993, to provide to its labor statistics expert for evaluation. Defendant's requests focus (for example) on information that would undermine the plaintiff's employment claim, including the activities plaintiff may have engaged in that conflicted with carrying out employment responsibilities.

The teams will either reach agreement or articulate their differences for judicial resolution at the Rule 16(b) conference.

Privilege Conference

For the past ten years, the Pure Markets' Human Resources department has maintained a close relationship with its outside employment law firm, Mandel & Lender. While the relationship has evolved over the years, generally there has been a senior partner at Mandel & Lender designated as the person in charge of the client relationship, with an associate and a legal assistant assigned on an as-needed basis, as well as other law firm support staff. Pure Markets has developed the habit of reflexively copying outside counsel on every documented personnel decision, from the most consequential to the most mundane, whether or not legal advice is being sought. The primary form of communication is email, and whenever there is any back-and-forth on a decision, outside counsel is included in the email thread that develops. The Human Resources department now has tens of thousands of email threads, only a fraction of which can genuinely be considered attorney-client communication or protected work product.

Plaintiffs have requested all documents related to the specific personnel decisions at hand, plus all documents related to the reduction-in-force decisions. For their part, Pure Markets is eager to produce documents that demonstrate the reasonableness of its decisions, both in regard to the named plaintiffs and the reduction-in-force in general, but has no intention of waiving any legitimately applicable privilege. Document-by-document review of the Human Resources department email collection for

relevance and privilege will require weeks of costly attorney time and threatens to hold up the entire discovery calendar. The defendant has requested a conference on this issue.

The teams will either reach agreement or articulate their differences for judicial resolution.

Social Media Conference

This conference addresses pertinent eDiscovery issues involving social media ESI of Pure Markets and Ms. Capriotti. In particular, plaintiff may request production of the following content of/associated with Pure Markets' Facebook and Twitter webpages/accounts, generated during the time period of May 1, 2019, through January 2, 2020, or such a time frame as counsel considers relevant to the proceedings:

- All posts and/or tweets (including, but not limited to, text, pictures and videos, or any combination thereof), regardless of the privacy settings for these posts and/or tweets at any time, and regardless of whether these posts and/or tweets have since been deleted;
- All comments on—and/or replies to—posts and/or tweets, regardless of whether these comments and/or replies have since been deleted;
- All shares of posts generated on the Pure Markets' Facebook webpage during the aforementioned time period;
- All retweets of tweets generated on the Pure Markets' Twitter webpage during the aforementioned time period;
- All private and/or direct messages sent to and from Pure Markets' Facebook and Twitter webpages/accounts, regardless of whether these messages have since been deleted; and
- All metadata associated with the aforementioned ESI from Pure Markets' Facebook and Twitter webpages/accounts.

The teams will either reach agreement or articulate their differences for judicial resolution.

Rule 16(b) Case Management Conference

Assume the full Rule 26(f) conference was completed in a timely fashion. The parties will appear before the judge to present the results of their Rule 26(f) conference, particularly their discovery plan *as it relates to ESI*, focusing on the matters set forth in Rule 26(f)(3). The hearing should address ESI issues as they relate to matters delineated in Rule 16(b)(3) and (4). The hearing will be conducted by the judge in the same manner that they conduct actual pretrial conferences in civil cases. (Note: the parties may choose specific issues of focus that may take up the allotted time. Do not worry about conducting a full case management conference in the time allotted.)

Session Format

Each of the aforementioned mock Rule 26(f) conferences will take place in the context of a breakout session, followed by a corresponding plenary session. The Rule 16(b) case management conference will only take place during a plenary session.

Breakout Sessions

Breakout groups will be comprised of a P team, D team, and two to four faculty members. In the breakout sessions, all teams will engage in a mock exercise, with the exception of one set of two teams who will observe a mock exercise (or prepare for their next exercise); those two teams will engage in their mock exercise in front of the full group in the subsequent plenary session. Following the mock exercise, the faculty members in each breakout group will offer personalized critique and feedback to the teams.

In breakout sessions, the time allotment is as follows:

- 75 minutes total session time, including:
 - 45 minutes for the mock exercise, and
 - 30 minutes for critique, feedback, and questions from, and dialogue with, faculty members.

Plenary Sessions

In all plenary sessions, one set of two teams only (chosen randomly, and who will not have participated in the preceding breakout session¹) will engage in their mock exercise in front of the full participant group, followed by critique and feedback from the faculty members on the panel, and questions from and dialogue with the full group of participants.

In plenary sessions, the time allotment is as follows:

- 90 minutes total session time, including:
 - 5 minutes for panel introduction by panel leader;
 - 45 minutes for the mock exercise; and
 - 40 minutes for critique, feedback, and questions from – and dialogue with – the panel, other faculty members and the full participant group.

In plenary sessions, participants who engaged in a mock exercise during the immediately preceding breakout session will also be encouraged to speak about the results of their exercises². All program

¹ Please note that the Rule 16(b) mock exercise will only take place in a plenary session. Necessarily, there will not be a preceding breakout session. One set of two teams, who will be selected randomly, will participate in the Rule 16(b) mock exercise in the plenary session.

² With the exception of the Rule 16(b) plenary session, as there will be no preceding breakout session for the Rule 16(b) session. In the Rule 16(b) plenary, program participants who do not engage in the Rule 16(b) exercise should be prepared to discuss strategies and tactics they would have used had they participated.

participants and faculty should dialogue about their exercise (whether held in the preceding breakout session³ or in the plenary) and, in particular, the cooperative strategies and tactics they observed that were effective and those that were not. Additionally, the full group of program participants will be encouraged to suggest alternative approaches they feel would work, given the circumstances of the litigation hypothetical. Of course, all participants can and should ask the expert panel of faculty members (and any of the other faculty members) questions about the exercise or about cooperative discovery.

Evaluation and Dialogue Following Mock Exercises

Mock exercises in both the breakout sessions and plenary sessions will be supervised by experienced judges, lawyers and eDiscovery experts with a high instructor-participant ratio. There will be an opportunity for dialogue with the faculty on skills, strategies, and techniques for successful negotiation under the Rules of Civil Procedure.

After each mock exercise, faculty members will dialogue with the participants regarding **strategies** and **tactics** employed by each side. Some of the questions posed to participants *may* include:

- What was the most important thing you felt you needed to accomplish at the conference, and what did you do to make that happen? Did you accomplish your goal(s)?
- What else did you try to achieve, and how did you go about doing that?
- What was the most successful **tactic** or **strategy** your side employed? What was the least effective (in outcome)?
- What was the most successful tactic or strategy your opponents employed? What was the least effective (in outcome)?
- In retrospect, is there anything you would have done differently to advance discovery?
- Is there anything your opponent could have done differently that would have resonated with you?
- Was there a mutually beneficial middle ground available to you and your opponent that you did not achieve? If not, why do you think you did not achieve it?
- Was there anything your opponent did that surprised you or took you off guard? If so, did it help or hurt your goals or your opponents' goals, and why?
- What are reasons why the two sides might approach the conference differently? Do these differences necessarily preclude cooperation? If not, why not?

³ Again, with the exception of the Rule 16(b) plenary session, as there will be no preceding breakout session for the Rule 16(b).

- Of the resources and background materials that you were provided with in advance of the exercise, which, if any, were useful or provided guidance in developing goals, **strategies**, and **tactics**? To the extent that any of the materials were useful, how were they helpful?

For purposes of this exercise, a **strategy** is a devised plan of action to achieve a goal. A strategy can be specific to a discovery outcome; i.e., a plan to ultimately obtain all relevant emails over a certain period of time from several specific custodians in a form that is searchable and usable. A strategy can be general and basic, such as establishing a rapport and level of trust with opposing counsel so discovery can be economically and efficiently exchanged.

A **tactic** is a method or technique used to achieve a more immediate or short-term goal in advancement of strategic goals. For example, a tactic may be an opening offer to immediately provide any and all relevant discovery in an expedited fashion, or an offer to supplement follow-up discovery requests without the formality of a 30-day waiting period unless privileged data is involved.

Instructions for Program Participants

With regard to scope of discovery in particular, P and D teams may, but are not required, to exchange two-page outlines of what they plan to discuss or propose at the Rule 26(f) conferences, including topics, custodians, search parameters or methodology, and timing. Additionally, as applicable to any and all mock exercises, if teams feel it would be helpful in their preparation, they should feel free to send the opposing team queries or requests or exchange any positions or initiate negotiations in advance of the program.

Furthermore, once team assignments are made, each team will receive specific materials that pertain to its client, including its client's data map. A team will only receive the data map of the opposing team's client in the event the opposing team decides to disclose it in advance of, or during, the exercise.

Teams should caucus in advance of the exercises to discuss strategy and formulate negotiating positions, as advance preparation is essential to getting the most out of the Program. There will **not** be time set aside on the first day of the Program for team members to meet virtually. Each team is assigned a "faculty advisor," with whom you may correspond by email if you have questions or to seek guidance. That advisor is strictly neutral and has limited time availability, so please use this privilege judiciously.

These exercises and the litigation hypothetical present numerous issues that may be addressed. Participants are expected to prioritize what they want to address, negotiate and resolve in the mock conferences and pretrial hearing. Participants should be prepared to defend and explain their strategy, decisions and methods used in their preparation for the exercises and the exercises themselves.

Hints to Participants for Preparation

Advancing the client's case requires knowledge of your client's case, the ESI that your client has, the ESI the opponent has or is likely to have, and a pathway to resolution that involves negotiated advancement of discovery from both sides in a Rule 1 "inexpensive" fashion. In order to achieve this,

the lawyer must know: what is discoverable and what is not; what is likely to be difficult to obtain or produce and what can easily be discovered; what ESI contains privileged or trade secret information, and what does not. These are distinctions normally made by trial lawyers, not by staff, clients, vendors, or outside counsel. The more you know about your case and the information subject to discovery, the more prepared you will be to conduct a Rule 26(f) conference. At a minimum, be sure to review the following toolkit provided to you as a resource: The Sedona Conference *Cooperation Guidance for Litigators & In-House Counsel* (included in the Program materials).

Litigation is a remarkable civil exercise because opponents are often ready, willing, and, in many cases, able to upend the best laid plans. Good preparation and forethought will allow you to predict some—but usually not all—of your opponent’s tactics and strategies. Counsel must be prepared to respond to unpredictable events. While some unpredictable events or tactics will be favorable to your cause, others will be unfavorable. Your reaction to an unpredictable favorable event can have significant effects on the discovery process. A measured reaction can lead to greater (or more economical) success than you predicted. Conversely, if you are inflexible or unprepared to capitalize, the outcome will likely be less favorable. Negative reactions to unpredictable unfavorable events can likewise benefit or doom the cause of efficient or effective discovery. Attorneys’ reactions to unpredictable events are what make trial practice an art, in which skill and forethought are essential to success.

Finally, participants should be aware there is no “right” answer in these exercises. Creativity in finding mutually advantageous solutions to litigation problems is encouraged, but so is effective advocacy on behalf of your client. The key is striking the right balance. While the goal of these exercises is cooperation, to quote the past Litigation Director of the National Archives, Jason Baron, “cooperation is not capitulation.” There are times when cooperation is strained by the duty to the client to give up only that which is required under the circumstances because to do otherwise would be expensive or counter to client interests. Simply giving in every time in the name of cooperation is not necessarily in the client’s best interests. Cooperation is perhaps best understood as reasonable transparency and above all the absence of gamesmanship. At the same time, reasonable transparency should not be measured against “zealous advocacy.” In fact, the term “zealous advocacy” was so misunderstood and misapplied that it was actually removed from the Model Rules of Professional Conduct in 1983, and every state version of the Model Rules since. The current Model Rule of Professional Conduct 1.3 states, “A lawyer shall act with reasonable diligence and promptness in representing a client.” The comment to this rule states: “A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.” So, a lawyer owes a primary duty of loyalty to the client and the client’s best interests, within the rules, the duty of candor to the court, and the obligation not to unfairly obstruct opposing counsel. In their critique of your team’s performance, the faculty will be looking at how well you carry out these duties. For more extensive guidance on this tender and significant balance, refer to The Sedona Conference *Cooperation Proclamation* and The Sedona Conference *Cooperation Guidance for Litigators & In-House Counsel* (included in the Program materials).