



Negotiating E-Discovery

Obstacles and Pathways to Success



MODERATOR



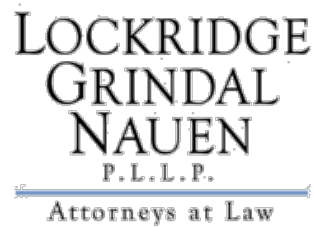
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The opinions expressed today by the moderator and panelists do not necessarily reflect the position of their company, law firm, or any client.

Additionally, we respectfully request that there be no attribution of anything said today to any individual, company, law firm, or client.

Thank you!

Discussion Outline

Obstacles and Pathways to Success

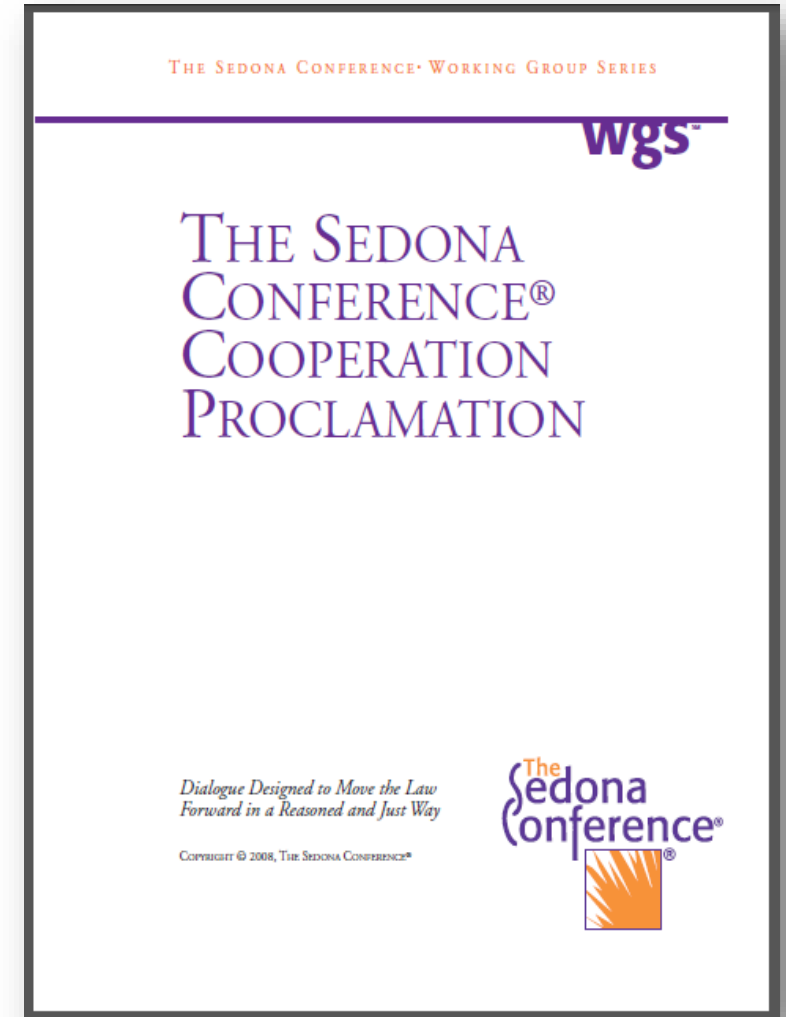
- Foundational Elements
- Roles and Building Trust
- Negotiating Styles & Behaviors
- Creating an ESI Protocol

TOPIC 1: FOUNDATIONAL ELEMENTS

The Cooperation Proclamation (2008)

“Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court. Cooperation does not conflict with the advancement of their clients’ interests - it enhances it. **Only when lawyers confuse advocacy with adversarial conduct are these twin duties in conflict.**”

- Publicly endorsed by over 150 federal and state judges
- Justice Stephen G. Breyer publicly endorsed the principles of the Cooperation Proclamation in the Sedona Conference® Journal
- Cited in over 50 Federal Court published opinions



Rule 1 – FRCP

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Committee Notes on Rules – 2015 Amendment

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. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.

The Sedona Principles, Third Edition (2017)

Principle 6. Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.

Comment 6.b.

In addition to what is required by those Rules, it is generally in the best interests of the responding party to engage in meaningful cooperation with opposing parties to attempt to reduce the costs and risk associated with the preservation and production of ESI. If both requesting and responding parties voluntarily elect to cooperatively evaluate and agree upon the appropriate procedures, methodologies, and technologies to be employed in the case, both may potentially achieve significant monetary savings and non-monetary efficiencies.¹⁰⁴ *See also* Principle 3.

104. *See The Sedona Conference, Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009 Supp.).

TOPIC 2:

ROLES AND BUILDING TRUST



TOPIC 3: NEGOTIATING STYLES & BEHAVIORS

TOPIC 4:

CREATING AN ESI PROTOCOL

QUESTIONS?