



Consensus: What is it, and how do we know when we've achieved it?

In December 2022, we will celebrate The Sedona Conference's 25th anniversary. During that quarter-century, Sedona has evolved from a series of small, advanced legal education retreats into a broad-based legal think tank with global influence. And it did so entirely on volunteer effort, without the structural support of any academic institution, the political backing of any government entity, or funding of any well-heeled foundation.

The open secret to Sedona's success all along has been "consensus." After 25 years, it is time to revisit what we mean by consensus, why we value it, how we strive to achieve it, and how we know whether we have succeeded.

I. Why "Consensus" Matters to The Sedona Conference

In its first few years, The Sedona Conference's program consisted of three gatherings per year in the resort town of Sedona, Arizona, known for its stunning red rock formations and mysterious air of spirituality, dating back to Indigenous settlement. The concept was to assemble a group of legal thought leaders for intensive dialogue on a cutting-edge legal topic, with the goal of finding consensus on unresolved issues. The mission was to "move the law forward in a reasoned and just way" through education and publications.

There was little distinction at these early sessions between "faculty" and "audience," encouraging full participation by all attendees. Draft papers would be presented, and dialogue leaders would tee up questions for attendees to explore. The authors would then be given the opportunity to consider the comments received and publish their papers in the annual *Sedona Conference Journal*.

This model was dubbed the "anti-Continuing Legal Education" approach by Sedona's founder and first CEO Richard Braman, who compared it to the conventional Continuing Legal Education (CLE), in which a legal academic or senior legal practitioner would lecture on a topic, accompanied by a wordy set of slides or overheads, while the attendees sat in the back and either took notes or did crossword puzzles, depending on their level of interest, in order to collect their

mandatory CLE credit. Others compared the Sedona experience to a graduate seminar, as opposed to an undergraduate survey course. Whatever analogy was used, the intent was that the dialogue would not be an end-in-itself; it would lead to publications and broader education addressing these cutting-edge legal issues and proposing solutions of immediate, practical value to the bench and bar.

In order to avoid becoming just another legal talk shop, Braman would start every meeting with the admonition that participants should view themselves not as advocates for particular interests but as citizens of the legal community, striving for the solutions that are best for the legal system as a whole. The mantra was “dialogue, not debate,” explained by using a passage from Daniel Yankelovich’s 2001 book, *The Magic of Dialogue*:

Dialogue: Assuming that many people have pieces of the answer and that together they can craft a solution.

Debate: Assuming there is a right answer and that you have it.

Dialogue: Listening to understand, find meaning and agreement.

Debate: Listening to find flaws and make counter arguments.

Dialogue: Admitting that other’s thinking can improve on your own.

Debate: Defending one’s own views against those of others.

Dialogue: Discovering new options, not seeking closure.

Debate: Seeking a conclusion or vote that ratifies your position.

Shortly into Sedona’s activities, participants realized that to achieve the vision of “moving the law forward,” they needed to do more than gather in an idyllic setting a few times a year and publish papers under individual authors’ names in a relatively obscure journal. At a Sedona Conference on “complex litigation,” the advances in information and communications technology were identified as presenting novel challenges to the civil discovery process, requiring novel solutions—the emergence of what we now call “eDiscovery.” At the conclusion of the Conference, a decision was made to keep the dialogue going by establishing a “Working Group” that would continue to meet and draft a set of recommendations for courts and practitioners.

Instead of producing a collection of individual law review articles, the group would utilize the dialogue process to produce one consensus-based publication. And to assure that all points of view would be represented in that dialogue, pains were taken to make sure that the Working Group’s membership would include participants from a wide variety of backgrounds and experiences, with the caveat that they pledge to engage in dialogue to reach consensus and “leave their adversarial hats at the door.” In addition, the Working Group’s draft would be published initially for public comment, to assure that it meets its self-imposed standards of scholarship, balance, and practical utility.

The result of that first Working Group effort is now considered a milestone in American legal history—the publication of *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* in March 2003. While still in draft form, it was cited favorably by the court in two decisions in the landmark *Zubulake v. UBS Warburg LLC* case at 216 F.R.D. 280 and 217 F.R.D. 309 (S.D.N.Y. 2003). It has since been updated, expanded, and cited in more than 200 subsequent court decisions, more than any other treatise or law review article on the subject.

Since 2003, the Sedona Conference Working Group Series has grown from one Working Group addressing eDiscovery to a dozen active and past Working Groups addressing other issues in the management of complex litigation, intellectual property litigation, antitrust law, data security and privacy law, cross-border electronic data flows, and trade secrets. To date, according to a Westlaw search, Sedona Conference Working Group Series publications have been cited in at least 491 U.S. court decisions and 48 reported trial court orders.

The influence of The Sedona Conference has been felt outside of the United States. Justice Frank Clarke of the Irish Supreme Court, in his foreword to the first edition of *The Good Practice Guide to Electronic Discovery in Ireland*, recommended that Irish practitioners read *The Sedona Principles*:

Those principles are, in my view, essential reading for anyone who has any interest in ensuring that discovery remains an important tool for establishing the truth while at the same time ensuring that the cost and complexity of discovery does not, of itself, become a barrier to the truth being established.

Sedona Conference Working Group Series publications have been cited in opinions from the High Court of Ireland and the High Court of England and Wales (Chancery Division). In 2017, the Supreme Court of Israel provided an in-depth review of the *Sedona Principles* and relied on them to develop a framework for the disclosure of electronic evidence in criminal proceedings.

In Canada, the CanLII database reports 40 court opinions citing Sedona Conference Working Group Series publications. And the Ontario courts incorporated a flagship Working Group Series publication by reference into the Ontario Rules of Civil Procedure:

Rule 29.1.03

Principles re Electronic Discovery

(4) In preparing the discovery plan, the parties shall consult and have regard to the document titled “The Sedona Canada Principles Addressing Electronic Discovery” developed by and available from The Sedona Conference. O. Reg. 438/08, s. 25.

Courts are favorably inclined to rely on and cite Sedona Conference publications because of Sedona’s reputation for scholarship and balance—a direct result of the dialogue and consensus process—and they state so in reported decisions:

U.S. District Judge Michael Baylson (E.D. Pa.): “[T]his Court's decision is informed by the principles of the Sedona Conference, a nonprofit think tank that sponsors conferences and publishes reports which have contributed valuable guidance on many topics.”

U.S. District Judge Gershwin Drain (E.D. Mich.): “The Sixth Circuit and this Court have recognized that the Sedona Conference's resources provide persuasive authority regarding discovery best practices and principles.”

U.S. Magistrate Judge Celeste Bremer (S.D. Iowa): “The Sedona Conference is a nonprofit legal policy research and education organization that is comprised of judges, attorneys, and electronic discovery experts who are dedicated to resolving electronic document production issues.”

U.S. District Judge Cynthia Rufe (E.D. Pa.) “The Court commends to the Parties *The Sedona Conference Cooperation Proclamation* and strongly suggests they take its call for ‘cooperative, collaborative, [and] transparent discovery’ seriously.”

U.S. Magistrate Judge Richard L. Bourgeois Jr. (M.D. La.): “District courts within the Fifth Circuit have acknowledged that the ‘*Sedona Principles* and related Sedona commentaries are the leading authorities on electronic document retrieval and production.”

U.S. Magistrate Judge Andrew M. Edison (S.D. Tex.): “Created by a leading group of judges, lawyers, and academics, the *Sedona Principles* are recognized as a foundational guide for courts and lawyers confronting the challenges of e-discovery.”

It is clear that The Sedona Conference’s past success is due in large part to its reputation for inclusion, dialogue, and consensus. The question is how to maintain this well-deserved reputation as The Sedona Conference moves into its second quarter-century, welcomes new volunteers, and develops new leadership.

II. Defining “Consensus”

In Saint and Lawson, *Rules Reaching Consensus*, 21 (Pfeiffer & Company, 1994), the authors suggest that “consensus is a state of collective agreement” under which “all legitimate concerns of individuals have been addressed to the satisfaction of the group.” The Sedona Conference defines consensus as a resolution acceptable to the entire body of the membership, even if there are aspects that one or more individuals do not fully support. Given the size and diversity of views within The Sedona Conference, it would not be practical for consensus to be synonymous with unanimity, but it is achieved when the group arrives at decisions that all can live with, through a framework that allows everyone to express his or her views and have those views seriously considered.

This process-oriented definition of consensus is to be contrasted with a “majority rule,” “adversarial,” or “hierarchical” group decision-making processes, whereby individual viewpoints may be expressed and sought, but at a predetermined point in the process a vote is taken or resolution declared, and dissenting views are dismissed in order to move the process along. Under these approaches, participants in the majority do not feel a compulsion to reach a mutually acceptable consensus view and do not invest the time and hard work needed to achieve consensus. These approaches may be more “efficient” in that they take less time and resources, but the result will not be considered as authoritative as a consensus and will likely be subject to ongoing question or debate.

Consensus, therefore, is defined less by the “decision rule” and more by the quality of the process used to reach that decision. The Sedona Conference uses the dialogue model in an effort to reach collective wisdom, taking into consideration all viewpoints and perspectives, with the goal that the resulting content is truly nonpartisan and not driven by any agenda beyond helping to make the legal system work better for all stakeholders.

III. The Process of Reaching Consensus

The process for reaching genuine consensus has six characteristics:

1. Agreement Seeking: All participants in the process strive to generate as much agreement as possible.
2. Collaboration: Participants contribute to a shared proposal and address concerns of all group members as much as possible.
3. Cooperation: Participants strive to reach the best possible decision for the entire group, rather than competing for personal preferences.
4. Egalitarianism: All participants are afforded equal input to the process.
5. Participation: The process actively solicits the input and participation of all stakeholders.
6. Inclusivity: As many stakeholders as possible are allowed to participate in the process.

All participants in the process must act in good faith to achieve consensus, which requires placing the good of the whole above individual or partisan interests or preferences.

Unlike most organizations that employ consensus decision making to make a single decision, The Sedona Conference seeks consensus at each stage in the development and publication of a nonpartisan consensus commentary. Consensus is sought first among the members of the brainstorming group, then the drafting team, then Working Group members providing constructive comments, then the Steering Committee, and then, finally, the organization’s

professional staff (Program and Legal Program Managers, Senior Program Attorneys, Staff Editor, Deputy Executive Director, and Executive Director).

IV. The “Decision Rule”

The process of achieving consensus cannot go on forever. At some point, a “decision rule” must be applied to declare that consensus has been reached. The literature on consensus building identifies the following decision rules:

1. Unanimous agreement
2. Unanimous consent (absence of a reasonable objection; an individual can declare reservations but stand aside and not oppose consensus)
3. Unanimous agreement minus one or two votes
4. Unanimous consent minus one or two votes
5. Super-majority thresholds (90%, 80%, 75%, 66.66%, and 60% are common)
6. Simple majority
7. An Executive Committee decides
8. An individual leader decides

Regardless of the decision rule employed, the process only results in genuine consensus if it embodies the value of striving for full agreement or consent.

Groups that have a decision rule of unanimity (or unanimity minus one or two votes) can fail to reach consensus because of the objections of only a few participants. These groups generally require that any such “blocking objection” be “principled,” in that the proposal under consideration violates the mission of the group or endangers the group or its participants. Groups that follow a decision rule of unanimity have facilitators or leaders who can determine whether an objection truly is principled and reasonable, or whether the objector is acting in his or her self-interest and without concern for the entire group. In addition, groups that successfully employ a decision rule of unanimity typically have the following characteristics:

- The group is relatively small.
- The participants in the group share a common religion, culture, history, values, locality, etc. (e.g., Anabaptists, Mennonites, Quakers).
- The consensus decision only controls the group’s own activity.

Groups employing a decision rule of unanimity generally lack the desired levels of diversity and inclusion that we want in The Sedona Conference, nor do they intend to make consensus decisions that will be persuasive to the rest of the world outside the group.

Critics of unanimity rules argue that allowing a blocking objection unnecessarily preserves the status quo. The group can be held hostage by an inflexible minority or individual. Permitting a blocking objection rewards the least accommodating group members and punishes the most accommodating. It can result in stagnation of the group, which, in turn, can cause the group to split up or cause people to leave or be excluded.

The Sedona Conference has never announced a bright-line decision rule for its consensus decision making. Within The Sedona Conference, the emphasis has been on the use of dialogue, not debate, as an essential element of a process that seeks agreement through collaboration, cooperation, egalitarianism, inclusivity, and full participation. In practice, the decision rule employed by The Sedona Conference has been unanimous consent minus an unspecified small number of objections.

The Sedona Conference believes it is appropriate to dismiss objections that are not principled, although it raises the very important questions of who decides whether an objection is principled and how that determination is made. An objection is generally raised on behalf of a significant stakeholder group that claims the proposition under consideration will significantly harm its interests. The test of whether this objection is principled, and therefore defeats consensus, is whether other participants representing that stakeholder group agree. If a large majority of participants representing that stakeholder group do not share the objection, then the objection is not considered principled, and consensus can be declared.

Some members are better than others at seeing more than one side of an issue, seeing the greater good, finding acceptable compromises, being flexible, and reaching consensus. Because consensus decision making in The Sedona Conference is central to our success and occurs at each stage in the development and publication of nonpartisan consensus commentaries, it is important that members tasked with responsibility for the development of the commentaries be disposed to achieve consensus, act in good faith, and employ the consensus-building process we have outlined. And beyond the development of publishable commentaries, we ask that the concept of consensus be central to all activities, and that consensus-building behavior be modeled at all levels of leadership.

V. Consensus in Action: The Working Group Commentary Publication Process

The process that The Sedona Conference follows in creating its Working Group commentaries is structured to facilitate dialogue and reach consensus. While the details and timeline of the process may vary from Working Group to Working Group, and from project to project, every commentary goes through at least the following steps:

1. Articulation of a project mission statement
2. Articulation of a Project Charter
3. Initial drafting by a representative drafting team

4. Dialogue and review by the broader Working Group membership
5. Redrafting by the drafting team to reflect Working Group consensus (a “post-WGS comment draft”)
6. Publication of a “public comment version” and solicitation of public comments
7. Final drafting by the drafting team, after consideration of the public comments
8. Publication of a “post-public comment” or “final” version

This publication process is closely supervised and governed by the Working Group Steering Committee, which is made up of individuals representative of the diversity of stakeholders in the Working Group’s particular area of law—plaintiff and defense counsel, technical experts, judges, public- and private-sector counsel—whatever significant interest should be “at the table” for the Working Group’s output to be considered nonpartisan, objective, and well-informed. The process is managed by a designated Managing Editor (typically the designated Program Manager from the Phoenix office), who is appointed by, and reports to, the Executive Director.

At the outset, the Steering Committee articulates a mission statement for the drafting project, requesting input as necessary from the membership from a broad-based “brainstorming group.” The brainstorming group, selected by the Steering Committee to be representative of the diverse backgrounds, expertise, and viewpoints needed for well-rounded consideration of the issues, is tasked with drafting a proposed Project Charter, including a detailed outline defining the scope of coverage of the proposed publication. The proposed Project Charter is reviewed and revised as appropriate by the Steering Committee, and upon approval, the Steering Committee forms the drafting team and appoints a drafting team leader or Editor-in-Chief to lead the drafting team.

A working draft is prepared by the drafting team, and when it is ready for broader comment and input, it is posted on The Sedona Conference website and otherwise distributed for all Working Group members to review and make comments or suggest edits. The draft may also be discussed during all-team conference calls or at in-person Working Group meetings to further the dialogue. The Editor-in-Chief, with support from the Managing Editor, is responsible for ensuring that all timely comments received throughout the process are considered by the drafting team, which evaluates each comment and addresses it appropriately in a “post-member-comment” draft. While not all comments or suggested edits will be accepted, all are to be fairly considered by the drafting team.

The post-WGS-comment draft is reviewed by the Steering Committee to ensure that it meets The Sedona Conference’s standards for legal scholarship, nonpartisanship, thought leadership, and practicality. If found acceptable, it is approved for publication on the Sedona Conference website as a “public comment version.” As with the initial draft, the Editor-in-Chief, with support from the Managing Editor, is responsible for ensuring that all timely comments received throughout the process are considered by the drafting team, which evaluates each comment and addresses it appropriately in the final version. And as with the post-WGS-comment draft, the final version is

reviewed by the Steering Committee and must be approved before publication to ensure that it meets The Sedona Conference brand promise of “content of immediate and practical benefit to bench and bar.”

Issues occasionally arise in the drafting, Working Group comment, public comment, or review processes on which consensus is difficult to reach. Mindful of our call to “dialogue, not debate,” we address differences of opinion on several levels. In the first instance, we look to the balanced and representative drafting team, under the leadership of the Editor-in-Chief, to resolve the differences through creative compromise or the development of novel solutions that meet the concerns of the parties and move the law forward. The drafting team may be assisted by posing the question, and possible solutions, to the larger Working Group online, in a conference call, or at a Working Group meeting. Consensus on the commentary as a whole often can be reached by including a respectful presentation of the dissenting view in the final publication.

If consensus cannot be reached at the drafting team level, or if comments are received that indicate a lack of substantial Working Group consensus on any significant issue, the Editor-in-Chief elevates the issue to the Steering Committee to provide direction as to how the difference or comment should be considered and addressed in the publication. The Steering Committee, in turn, may choose to refer the issue to the Executive Director, who may convene a panel of neutral and qualified judges, senior practitioners, and legal academics drawn from The Sedona Conference Advisory Committee to propose a solution. Ultimately, it is up to the Steering Committee to decide when the requisite level of consensus has been reached for the commentary to be published as “final.” It should be noted that every commentary has an escape hatch for those with strongly opposing views, in that the disclaimer at the beginning of each commentary clearly states that it does not necessarily reflect the views of the authors, their employers, or their clients.

A final word about the word “final.” Consistent with the common law tradition in the United States, a commentary labeled as “final” may be selected for review and updating at any time based on developments in law, technology, or public policy subsequent to its initial publication.

VI. Alternatives to Consensus Within The Sedona Conference

Not all Sedona Conference activities necessarily require consensus. Sedona provides other avenues for individuals or small groups to publish articles that further its mission. These avenues include *The Sedona Conference Journal*, background materials assembled for high-level law and policy conferences, instructional materials assembled for The Sedona Conference Institute (TSCI) CLE programs or webinars, and background articles distributed to inform Sedona Conference Working Group Series members on noteworthy developments in case law, rulemaking, or legislation.

Webinars and “town halls” provide forums for airing diverse viewpoints. The Sedona Conference has sponsored “one-shot” high-level conferences on specific topics that serve as “exploratory” conferences to test the viability of a future Working Group. These programs rely in large part on existing Working Group Series publications and Working Group members as faculty but are not limited to those sources. And conferences on entirely novel topics cannot rely on existing Working Group publications or expertise. Therefore, they provide opportunities for Working Group members—whether or not they are members of the conference faculty—to publish useful, thought-provoking articles on new topics, either as conference materials or as articles in *The Sedona Conference Journal*. These publications are also highly respected and often cited, although they are not subject to the same peer-review process as the Working Group Series commentaries and are not identified as “consensus” work product.

Occasionally consensus cannot be reached on projects in which the participants have invested considerable time and energy attempting to achieve consensus. It is possible that a Working Group’s Steering Committee will reach consensus that consensus can’t be reached. That does not mean that the investment is lost. Individuals or small groups may recast their contribution as an article for *The Sedona Conference Journal* or may seek alternative publishing outlets with the assistance of The Sedona Conference staff.

VII. Conclusion

The Sedona Conference Working Group Series commentaries are the crown jewels of The Sedona Conference, and like all gems, they are the product of a long, intense, and occasionally heated process. Their value derives from their basis in consensus, achieved through many months of drafting, solicitation of a wide range of views, and dialogue. And like all gems, they are rare. More common are articles written by individuals or small groups. These contribute to the dialogue but don’t necessarily represent consensus—but they may become the basis for a future consensus. As with the Working Group commentaries, we strive to maintain the Sedona brand promise by publishing articles that represent superior legal scholarship on cutting-edge issues, designed to move the law forward in a reasoned and just way, and we welcome ideas, inquiries, and submissions from all our members.