

A CIVILITY CHECKLIST



Judge Suzanne H. Segal

Checklists are often easier to follow than general advice. Why not a checklist for civility? This list is organized loosely according to the Federal Rules of Civil Procedure and the Central District of California Local Rules. While these suggestions follow the federal rules, the underlying concepts apply equally to practice in state court.

1. Initiate the rule 26 meeting with a diplomatic e-mail.

The Rule 26(f) meeting is a unique opportunity to set a positive and respectful tone for the entire life of the case. Start with a diplomatic email—or better still, call—using language that conveys a sincere interest in working cooperatively with your opponent. Of course, you may also include references to your client’s view of the case, to allow the other side to understand your client’s perspective. Just use diplomatic language—language really matters when trying to work cooperatively with an opponent.

Rule 26(f) requires that parties confer “as soon as practicable” or at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b). It is easy to take the Rule 26(f) meeting for granted, perhaps as an annoying obligation, but it is truly an opportunity. You can use it to establish an expectation of civility for the entire case, particularly in the way you approach the “easy gives,” i.e., the time, place and manner of the meeting. When and where the meeting takes place will not change the outcome of the case, but if you offer to meet in person at your opponent’s office, on their

schedule, at their convenience, you will begin the relationship with your opponent in a positive way. Offering to meet on your opponent’s schedule communicates that you respect them. Rule 26 does not dictate who initiates the meeting. You will enhance the likelihood of a good relationship with the other side by starting off with a professional and diplomatic call or email at the earliest possible moment with an invitation to meet.

2. Educate your client on the benefits of civility.

Clients may complain that if you are too accommodating from the outset, you will be seen as not truly “fighting” on their behalf. The possibility of this concern suggests a need for a different type of early meeting—an early meeting with the client. From the beginning of the case, your client should have a clear understanding of how you intend to interact with your opponent. Emphasize to the client that you expect to advocate fiercely on their behalf, but that it is important for you to remain civil and professional at all times. You may need to explain that it is always in the client’s best interest that correspondence or emails (which often become exhibits in discovery disputes) are phrased in a respectful manner, even when disagreements with the other side arise.

Approaching the Rule 26 meeting with diplomacy in mind does not mean sacrificing advocacy. The best lawyers make their Rule 26 initial disclosures as complete as possible, prior to the early meeting, and use the Rule 26 meeting to demonstrate their level of preparation and command of the case. The message from your first email and the early meeting disclosures should be that, although you are very interested in a cooperative relationship with opposing counsel, you are more than prepared for the adversarial battle that may lie ahead.

3. Discovery for the purpose of discovery.

It is easy to approach discovery practice as a less meaningful aspect of a case, or as a necessary evil to be dealt with by using form interrogatories or form requests for production. However, when you draft your discovery requests carefully, with focus and purpose, you can advance your case without antagonizing your opponents. This kind of discovery is proportional to the case, limited to the essential information necessary to resolve the issues in dispute, and served in a manner that is consistent with civility. In addition to developing useful information earlier than if you invite opposition, appropriate discovery can open the door to productive settlement discussions—by serving targeted but not abusive discovery, you force your opponent to reflect on aspects of the case that might prompt settlement. However, if discovery is used exclusively as a weapon, to inflict pain on an opponent by the burden imposed or served in a manner that would antagonize any reasonable party, it is likely to impede any effort to get along with opposing counsel and may interfere with efforts to settle. It will also be transparent to the court that you are using discovery for improper purposes. Use discovery for the purpose of discovery, and your opponent and the court will recognize your efforts as legitimate investigation and pretrial preparation.

4. Avoid the “drive-by” meet and confer.

Like the Rule 26(f) conference, approach the Rule 37 meet and confer as an opportunity to create more goodwill. Avoid the “drive-by” meet and confer, even if your opponent seems to prefer that approach. As with the Rule 26 meeting, pick up the phone or send a diplomatic email to initiate the meet and confer, and be cooperative regarding the date and location of the meeting. You will earn goodwill from your opposing counsel by reducing the stress in their life—show up in person and on time, and go to your opponent’s office when it is convenient for them. Although Local Rule 37 requires opposing counsel to attend the meet and confer at the moving counsel’s office, the rule also provides that the parties may agree to meet “someplace else.” Provide whatever responses you can to demonstrate that you intend to fairly and honestly litigate the case. At the very least, you will narrow the

discovery issues in dispute, reducing the cost of the litigation for your client and allowing the court to focus on the most difficult disputes. At best, you might settle the case.

5. Take advantages of informal discovery conferences with the court.

In 2015, Rule 16 was amended to include the following language: “The scheduling order may: . . . (v) direct that before moving for an order relating to discovery, the movant must request a conference with the court.” The Advisory Committee notes discussing the amendment observed: “Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion” These “informal discovery conferences” are now required by almost every Magistrate Judge in the Central District prior to the filing of a discovery motion, and are also used by many state court judges. Take advantage of the opportunity to have a judge participate in your discovery meet and confer, helping you and your opponent find reasonable solutions to your discovery disagreements. Start the conference by saying something positive about your opponent in front of the judge. This will set an optimistic tone for the conference and may increase the likelihood that your opponent will work cooperatively with you. By using the informal discovery conference, you may resolve discovery disputes in a less combative environment and avoid potential friction with your opponent.

6. Always rise above.

Lawyers often suggest that they were “dragged” into a conflict by their opposing counsel’s combative or abusive behavior. While opposing counsel’s conduct should not be condoned, it is best to “rise above” it and not sink down to the level that someone else may want you to sink to. If your opposing counsel is antagonizing you, remember that the more respectful and polite you are in the face of such behavior, the better you and your client will look before the court.

7. Focus on meaningful motion practice.

Are Rule 12 motions to dismiss (demurrers in state court) simply delay tactics? Or do they actually move the case

forward? The answer is probably yes and yes. Sometimes early motion practice is for the purpose of delay, but on other occasions, a Rule 12 motion is necessary to resolve a fundamental legal question. To increase the likelihood of civility (and to improve your relationship with the court), avoid the “delay tactic” motions, even if your client wants you to file them.

Local Rule 7 requires that parties hold a meet and confer prior to filing any motion. Some lawyers may be skeptical of this requirement. Why would an opponent change a significant position in the case, simply because of a meeting? It is true that the Local Rule 7 meeting may be most effective for motions involving non-dispositive relief, i.e., motions that do not resolve ultimate issues in a case. However, even if you are meeting to discuss an issue that you do not believe your opponent will compromise on, the meeting can be yet another opportunity to develop a productive relationship with your opponent. View the Local Rule 7 meeting as another diplomatic mission: Even if you do not resolve the motion, you may lay the foundation for settlement.

8. Set yourself up to settle well.

I once had a supervisor who frequently reminded me that, in his view, I had only two goals as a litigator—to win or settle well. As a judge who has conducted hundreds of settlement conferences, I can comfortably say that personal animosity between clients or lawyers is one of the most common impediments to “settling well.” Strong feelings of anger or resentment, which sometimes increase over the life of a case, greatly interfere with the logical decision-making necessary for effective negotiations. If civility has not been your priority from the outset, or if civility was lost along the way, it is difficult to recover a cooperative working relationship with your opponent when you attempt to settle a case.

9. Improve your trial preparation experience with cooperation.

Possibly the most painful phase of a case, if lawyers are not getting along, is the trial preparation phase. No other phase requires more cooperation between the lawyers than preparation of the pretrial documents. Local Rule 16 requires joint exhibit lists, joint jury instructions, joint witness lists,

and a joint pretrial conference order, among other things. The requirement that documents, exhibits, orders, jury instructions, and other items be prepared jointly means that your life will be far simpler if you have already established a cooperative relationship with opposing counsel. At the end of the trial, remember to either win with humility or lose with grace. Whatever the outcome, you want the judge, the jurors, your opponent and your client to view you as someone who knows how to handle the situation with professionalism and dignity.

10. Forgive yourself, forgive others.

Following this checklist does not mean that you will never have bad days. You will make mistakes. You will make decisions you regret. You might lose your temper or say something you wish you could take back. Or you might take a position in a case that antagonizes someone, even if your position is completely justified.

When you make a mistake, fix it; apologize if appropriate; learn from it; forgive yourself; and move on. If you took a position that aggravated your opponent, look for an opportunity to repair that relationship.

Forgiveness is powerful. Try to recall a moment where someone forgave you for a mistake or showed you that they were willing to forget a past conflict. Remember how positive that experience was and apply it to your professional life. Putting aside past conflict, moving on, and seeking to develop new friendships are the building blocks for civility to spread. Start your case with diplomacy, maintain civility and professionalism throughout and forgive mistakes and it’s possible that, win or lose, you may end the case with a new professional colleague or at least a respectful opponent.

Hon. Suzanne H. Segal is a United States Magistrate Judge in the Central District of California.