

# THE SEDONA CONFERENCE

*The Sedona Conference Cooperation  
Proclamation: Resources for the Judiciary,  
Third Edition*

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**The Sedona Conference Cooperation Proclamation:  
Resources for The Judiciary, Third Edition  
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## Introduction to the *Supplement*

The third edition of the *Judicial Resources* (“*Third Edition*”) was published on June 1, 2020. Thereafter, the world—and every federal and state court in the United States—changed. Those courts strove to remain functional, even if physical courthouses closed or physical access became severely restricted. Online business collaboration tools and social media platforms were adapted to serve the needs of the civil (and to an extent, criminal) justice systems, with varying degrees of success. Along the way, mistakes were made, some of which were amusing<sup>1</sup> and others deeply concerning.<sup>2</sup>

Despite some early stumbles, judges and court staff managed to develop tools and procedures that provided unexpected benefits. Counsel did not need to travel for conferences or hearings. Clients and witnesses did not need to spend hours waiting to testify or otherwise appear. In most instances, the media and public had remote access to proceedings. Historically disadvantaged parties did not have to choose between work and childcare responsibilities or appearing (virtually) in court, resulting in more favorable outcomes for defendants in routine collection, traffic, family, and housing matters.<sup>3</sup>

Several courts and bar associations conducted detailed, in-depth studies of these new remote and hybrid procedures and concluded that they produced more than just public health benefits. Overall, remote and virtual proceedings reduced cost and delay and were worthy of further study and refinement.<sup>4</sup> To borrow the infamous motto of Silicon Valley, the justice system “ran fast and broke things.” What might have otherwise required a decade or more of slow technological development and adoption was compressed into a few months, with generally positive results.

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<sup>1</sup> See, e.g., Daniel Victor, *I’m Not a Cat, Says Lawyer Having Zoom Difficulties*, N.Y. TIMES, May 6, 2021, <https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html>.

<sup>2</sup> See, e.g., U.S. Attorney’s Office for the Eastern District of Michigan, Federal, State, and Local Law Enforcement Warn Against Teleconferencing Hacking During Coronavirus Pandemic (Apr. 3, 2021), <https://www.justice.gov/usao-edmi/pr/federal-state-and-local-law-enforcement-warn-against-teleconferencing-hacking-during>.

<sup>3</sup> Hon. Samuel A. Thumma et al., *Post-pandemic Recommendations: COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup, Post-Pandemic Recommendation*, 75 SMU L. REV. F. 1 (2022).

<sup>4</sup> See, e.g., Thumma, *id.*; New Jersey State Bar Association, Comments on the Future of Court Operations (Aug. 16, 2021), <https://tcms.njsba.com/personifyebusiness/Portals/0/NJSBA-PDF/Reports%20&%20Comments/NJSBA CommentsonFutureofCourtOperations08162021.pdf>; Judicial Council of California Workgroup on Post-Pandemic Initiatives, Interim Report: Remote Access to Courts (Aug. 16, 2021), <https://newsroom.courts.ca.gov/sites/default/files/newsroom/2021-08/P3%20Workgroup%20Remote%20Access%20Interim%20Report%2008162021.pdf>, resulting in California Senate Bill 241, amending court rules to allow electric stenography, remote proceedings, and electronic service of documents, CAL. CIV. PROC. CODE § 367.75, [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=20210220SB241](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=20210220SB241); THOMPSON REUTERS INSTITUTE, THE IMPACTS OF THE PANDEMIC ON STATE & LOCAL COURTS (2021), <https://legal.thomsonreuters.com/en/insights/reports/impacts-of-the-pandemic-on-state-local-courts/>.

It is now accepted that remote and hybrid proceedings are here to stay. At one end of the spectrum—such as routine case status conferences—telephonic proceedings have been the norm for decades, as reflected in the Federal Rules of Civil Procedure and its state equivalents.<sup>5</sup> The use of video teleconferencing platforms not only extended that well-established practice but made it practicable to accommodate the presentation of witness testimony and documentary evidence. Some courts went so far as to conduct jury selection and jury trials remotely.<sup>6</sup>

There is now a body of practical guidance on conducting remote and hybrid proceedings in civil litigation.<sup>7</sup> This *Supplement* assembles some of the best of that guidance from court orders, case law, and other legal writings, and organizes that guidance to track the organization of the *Third Edition*. Consider this *Supplement* to be a “pocket part” to the *Third Edition*. It begins with a review of existing literature on eDiscovery and general recommendations for judges, followed by twenty stages of civil litigation. Some of these stages, such as the meet-and-confer requirement under Rule 26(f) or the conduct of depositions, do not involve the court directly but benefit from court guidance and level-setting to prevent delay and potential disputes. Others, such as evidentiary hearings, require more hands-on judicial management. Other case management issues have arisen during the pandemic that fall outside the typical stages of civil litigation (and therefore outside the scope of the *Third Edition*), such as questions around First Amendment and common law rights of public access to judicial records and court proceedings when those proceedings are not held in open court, but are instead conducted virtually.<sup>8</sup>

Before turning to the text of the *Supplement*, several overarching themes are worthy of note:

First, successful remote and hybrid proceedings require an even greater degree of cooperation between the parties than is strictly required by the rules. No longer can opposing counsel appear at a deposition and blithely agree to the “usual stipulations,” whatever those might be. In the remote or hybrid environment, all pretrial proceedings require advance planning and agreement on the platform to be used, the persons to be involved, the handling of evidence, etc.

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<sup>5</sup> Federal Rule of Civil Procedure 16 was amended in 1983, and the accompanying Advisory Committee Note expressly allowed courts to waive formal in-person conferences and obtain necessary information for a case management order from the parties by “telephone, mail, or otherwise.”

<sup>6</sup> Hon. Pamela Gates, Jeffrey Frederick & Karen Lisko, *Virtual Juries: We Can, But Should We? And If So, How?*, 47 LITIGATION, no. 4, Summer 2021, at 1.

<sup>7</sup> See, e.g., National Center for State Courts, *The Use of Remote Hearings in Texas State Courts: The Impact on Judicial Workload* (December 2021), <https://www.ncsc.org/newsroom/public-health-emergency/texas-remote-hearings>.

<sup>8</sup> See, e.g., *Stevens v. Boyd*, No. 1:18-cv-757, 2021 WL 5364814 (W.D. Mich. Nov. 16, 2021) (rejecting argument that First Amendment right of access attaches to audio recordings of court proceedings when transcripts are available).

Second, courts must be assertive, not only in requiring joint planning by the parties but in setting out basic ground rules, especially if a court will eventually need to review testimony or evidence or if the parties wish to take advantage of court-provided telecommunications software or facilities.

Third, and flowing from the above, every “actor” in the litigation process must have at least a fundamental understanding of the technologies involved, and preferably some training and experience. Courts have stepped up the training of judges and court staff and made training and practice facilities available to counsel. The American Bar Association has recognized the duty of competence under Model Rule of Professional Conduct 1.1 to encompass the benefits and risks of technology.<sup>9</sup>

Fourth, although beyond the scope of the *Judicial Resources*, is that the interpersonal, professional, and advocacy skills that lawyers developed for the “real world” are often inadequate in the remote or hybrid environment. Jury consultants and trial practice training programs will likely take up this challenge over the next few months and years, so stay tuned for further developments.

A final theme, which is also beyond the scope of the *Judicial Resources*, is addressing the most significant drawback of remote or hybrid proceedings: bridging the “digital divide” to make sure that rural and historically underserved urban populations have access to the internet and sufficient training to participate fully in this new form of civil justice delivery. The editors of this *Supplement* applaud the courts, bar associations, law libraries, and others who have recognized this challenge and are working to meet it.

The editors would like to thank our 2021 summer law school extern, Eric S. McKee, for his dogged pursuit of myriad orders, memos, protocols, and announcements from courts large and small across the country. We also thank the judges and counsel from The Sedona Conference Working Groups for sending us leads and suggestions. And most importantly, we thank our panel of Judicial Reviewers, named on the title page, for making sure that the recommendations that follow meet the tests of practicality, efficacy, and neutrality.

These are the twenty stages of litigation identified in the *Third Edition*.

1. Preservation
2. Parties’ early case assessment
3. Initial scheduling order
4. The conference between parties to formulate a discovery plan
5. Case management order
6. Scope of discovery
7. Proportionality
8. Identification of “not reasonably accessible” sources of ESI

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<sup>9</sup> ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 498 (Mar. 10, 2021) (discussing best practices for virtual practice), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba-formal-opinion-498.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-498.pdf).

9. Search and collection methodologies
10. Form or forms of production
11. Confidentiality and public access
12. Protection of attorney-client privilege and work product
13. The privilege log
14. Allocation of costs during litigation
15. Discovery from non-parties
16. Discovery motion practice
17. Evidential foundations
18. Presentation of electronic evidence at trial
19. Sanctions
20. Post-judgment costs

The *Supplement* will not address every stage identified above. Instead, it will refer to specific stages relevant to new content while attempting to maintain the organizational structure of the *Third Edition*, in which each stage included an introduction, issues presented, suggested judicial management strategies, representative decisions, and further reading.

Before turning to those stages, however, the following is added to the “Review of Existing Literature on eDiscovery for Judges.” *Note, however, that this “literature” is focused on court operations rather than eDiscovery.*

- 2.5 National Center for State Courts, Coronavirus and the Courts, <https://www.ncsc.org/newsroom/public-health-emergency> (last visited Feb. 9, 2022). This website collects orders, protocols, bench books, and other resources addressing court operations during the pandemic from state courts nationwide.
- 2.6 U.S. Courts, Court Orders and Updates During COVID-19 Pandemic, <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic> (last visited Feb. 9, 2022). This website collects court orders and memoranda addressing court operations during the pandemic from federal courts nationwide.
- 2.7 S.A. Thumma, *A Virtual Step Forward: Remote Court Hearings in Response to the Pandemic* (ASU Morrison Inst. For Pub. Policy: 2021), <https://morrisoninstitute.asu.edu/sites/default/files/thumma-sparked-2021.pdf>. This monograph summarizes the “Post-Pandemic Recommendations” of an emergency workgroup of the Arizona Supreme Court, available at <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1039&context=smulrforum>.
- 2.8 E.C. Wiggins, *Remote Participation in Bankruptcy Court Proceedings*, FEDERAL JUDICIAL CENTER (2017), [https://www.iiiglobal.org/sites/default/files/media/Remote\\_Participation\\_Bankr\\_0.pdf](https://www.iiiglobal.org/sites/default/files/media/Remote_Participation_Bankr_0.pdf). This guide was released before the pandemic. It is intended to provide an overview of “distance participation” and, among other things, “encourage the use of DP technology so as to promote access to the courts, make the best use of existing judicial resources, and contain costs.”

- 2.9** Brooke Meyer & Natalie Anne Knowlton, *LAALS' Comment to the Michigan Supreme Court on Virtual Proceedings and Lessons Learned from the Pandemic*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (Nov. 15, 2021), <https://iaals.du.edu/blog/iaals-comment-michigan-supreme-court-virtual-proceedings-and-lessons-learned-pandemic>. These comments, in response to the preliminary findings, best practices, and recommendations from the Michigan State Court Administrative Office, collects and draws on the experiences of various state courts to suggest “the importance of retaining some of the virtual proceeding processes in place during the pandemic.
- 2.10** New Jersey Supreme Court, Notice to the Bar and Public, Future of Court Operations—Continuation of Both In-Person and Virtual Court Operations (Nov. 18, 2021), <https://www.njcourts.gov/notices/2021/n211118a.pdf?c=CQ1>.
- 2.11** U.S. District Court for the District of New Jersey, Standing Order 2021-11, In re: Court Operations Under the Exigent Circumstances Created by COVID-19 (Dec. 29, 2021), [SO2021-11COVID-19ExigentCircsFinal.pdf](https://www.uscourts.gov/court-records/2021-11-covid-19-exigent-circumstances).
- 2.12** Judicial Branch of California, California Courts Newsroom, Judicial Branch Emergency Actions, <https://newsroom.courts.ca.gov/covid-19-news-center/judicial-branch-emergency-actions> (last visited Feb. 5, 2022).
- 2.13** Supreme Court of Texas, Forty-Seventh Emergency Order Regarding the COVID-19 State of Disaster,” Misc. Docket No. 22-9005, [229005.pdf](https://www.txcourts.gov/229005.pdf) (txcourts.gov).
- 2.14** New York State Unified Court System, Coronavirus and the New York State Courts, <https://nycourts.gov/latest-AO.shtml> (last visited Feb. 5, 2022).
- 2.15** California Rules of Court, Rule of Court 3.672 Remote Proceedings (effective Jan. 1, 2022), [https://www.courts.ca.gov/cms/rules/index.cfm?title=three&linkid=rule3\\_672](https://www.courts.ca.gov/cms/rules/index.cfm?title=three&linkid=rule3_672).
- 2.16** CAL. CIV. PROC. CODE § 367.75 - Parties appearing remotely; conducting conferences, hearings and proceedings (effective Jan. 1, 2022), <https://casetext.com/statute/california-codes/california-code-of-civil-procedure/part-2-of-civil-actions/title-3-of-the-parties-to-civil-actions/chapter-1-general-provisions/section-36775-parties-appearing-remotely-conducting-conferences-hearings-and-proceedings>.
- 2.17** New Jersey Courts, COVID-19 Guidance for Attorneys and Litigants, <https://www.njcourts.gov/> (last visited Feb. 5, 2022).

Turning to the stages of civil litigation:



## Stage 3      Initial Scheduling Order

### 3.2      Issues presented

**3.2.3** The pandemic has led to what is likely to be a fundamental shift in how discovery and judicial proceedings will be conducted. Rather than in-person depositions and case-management related events, remote and hybrid ones should be planned for by parties and judges. The Initial Scheduling Order offers judges the opportunity to remind attorneys and parties that they should consider what discovery or case management events might take place other than on an in-person basis, discuss this topic during the Rule 26(f) conference, and be prepared to address it at the first Rule 16(b) conference. Reference might be made to Rule 30(b)(4)—or its state equivalent—which allows for remote depositions by stipulation or order in the event of a dispute.

### 3.3      Suggested judicial management strategies

**3.3.6** Remind the parties that consistent with the goals of Rule 1, their best interests and those of the court might be served by remote or hybrid depositions rather than in-person ones. In doing so, the parties should be reminded of the formalities required by Rules 28 and 30 that must be adhered to so that the deposition and documents identified at it might be used in subsequent proceedings, including trials. During the pandemic, many court reporting services developed expertise in virtual depositions, often hosting the video platform and giving lawyers tips on how to effectively handle documents and create the video record.

### 3.4      Sample orders

**3.4.3** New York State Uniform Rules for the Supreme and County Courts (Rules of Practice for the Commercial Division), Rule 36 (effective Dec. 13, 2021), *available at* <https://www.nycomdiv.com/wp-content/uploads/sites/381/2021/10/AO-299.pdf>, allowing video technology for evidentiary hearings or nonjury trials, provided that the “technology must enable:

- i. a party and the party’s counsel to communicate confidentially;
- ii. Document, photos, and other things that are delivered to the court to be delivered to the remote litigants;
- iii. Interpretation services for a person of limited English proficiency;
- iv. a verbatim transcript of the hearing or trial; and
- v. public access to remote proceedings.”

**3.4.4** *State v. Biden*, Civil Action No. 3:21-CV-065 (S.D. Tex. July 28, 2021) (setting forth “basic instruction on how to use Zoom” for virtual initial and other pretrial conferences and including this note: “you are NOT required to wear formal courtroom attire during the videoconference. You are, however, required to wear clothes.”)



**Stage 4      The conference between parties to formulate a discovery plan**

**4.3      Suggested judicial management strategies**

**4.3.6** Remind that parties that, consistent with 3.3.6 above, it might be appropriate to conduct depositions on a remote basis and that, when appropriate, the court will allow judicial proceedings such as status conferences or discovery disputes to occur on a remote or hybrid basis.

**Stage 14      Allocation of costs during litigation**

**14.1** The conduct of remote and hybrid proceedings may result in significant pretrial and trial cost reduction. The refusal to engage in remote or hybrid proceedings, without good cause, may be a consideration in the allocation of costs.

**Stage 16      Discovery motion practice**

**16.3      Suggested judicial management strategies**

**16.3.9** In the event that a hearing is necessary to resolve a discovery dispute, encourage the parties to agree to a video hearing to keep discovery moving and to help reduce the overall cost of litigation.

**16.4      Representative decisions**

**16.4.2** *Alcorn v. City of Chicago*, 336 F.R.D. 440 (N.D. Ill. 2020) (collecting cases addressing use of video recordings of remote depositions and suggesting procedures that parties might stipulate to).

**16.4.2** *Florida Bar v. James*, No. SC20-128, 2021 WL 5365639 (Fla. Nov. 18, 2021) (imposing 91-day suspension of attorney’s license for texting his client with answers to questions during telephonic deposition).

**16.4.4** *Stowe v. Alford*, No. 2:19-cv-01652 KJM AC, 2021 WL 2073750 (E.D. Cal. May 24, 2021) (setting forth protocol for remote deposition of plaintiff).

**Stage 18      Presentation of electronic evidence at trials**

**18.5      Representative decisions (new)**

**18.5.1** *In the Interest of E.B.*, 2022 COA 8 (Colo. App. Jan. 6, 2022) (reversing termination of parental rights and remanding for new hearing when parent unable to participate remotely).

- 18.5.2** In the Matter of Registrant J.P.A., Docket No. A-0452-20 (N.J. Super. Ct. App. Div. Jan. 12, 2022) (*per curiam*) (reversing sex offender classification and remanding for new hearing as respondent, not familiar with English, may not have understood how to appear virtually).
- 18.5.3** Joffe v. King & Spalding LLP, 17-CV-3392 (VEC) (S.D.N.Y. Dec. 10, 2021) (overruling plaintiff's objection to exclusion of unvaccinated potential jurors).
- 18.5.4** Kinder Morgan Prod. Co., LLC v. Scurry County Appraisal Dist., No. 11-20-00258 (Tex. Ct. App. Dec. 30, 2021) (granting new trial after failure of remote protocol and technical difficulties with attorney participation in remote voir dire).
- 18.5.5** Nuvasive, Inc. v. Absolute Medical, LLC, Case No. 6:17-cv-2206-CEM-GJK (M.D. Fla. Jan. 10, 2022) (vacating arbitration award and issuing show-cause order in response to text messaging between one party's corporate president and a witness during latter's remote testimony).
- 18.5.6** Pain Relief Centers, P.A., et al., Cases 10–CA–260563, et al., fn. 2 (National Labor Relations Board, Feb. 23, 2022) (“[T] the courtroom deputy’s role is purely administrative: ensuring that the hearing runs smoothly, allowing the judge to focus on the witness testifying, and mitigating technological glitches. As the judge advised the parties at the outset of the hearing, the courtroom deputy is ‘not here in an attorney rol[e] but rather, as a Courtroom Deputy to assist me and to assist you, if necessary, with technical Zoom-related issues. She has a lot of experience with Zoom and she won’t be answering any of your legal-related questions or rule on any issues; that’s for me. But she is here to help us manage transfer of documents and just help us as needed with Zoom issues.’”)

## **Stage 20      Post-judgment costs**

- 20.2.3** The reasonable expenses associated with the conduct of remote or hybrid proceedings may be recoverable as costs. Conversely, the refusal to engage in remote or hybrid proceedings, without good cause, may be a consideration in reducing or reallocating the cost recovery.