



*An Introduction to  
The Sedona Conference Cooperation  
Proclamation “Resources for the Judiciary”*

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- ❖ Lead Author, *Managing Discovery of Electronic Information, Third Edition* (Federal Judicial Center: 2017)
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- ❖ Co-Chair, New York State Bar Association Technology and the Legal Profession Committee
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# Hon. Kristen L. Mix

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- ❖ United States Magistrate Judge, District of Colorado
- ❖ President Elect, Federal Magistrate Judges Association (FMJA)
- ❖ Judicial contributor, *Commentary on Rule 34 and Rule 45 “Possession, Custody, or Control”*, 17 Sedona Conf. J. 467 (2016)
- ❖ Author, *Discovery of Social Media*, 2011 Fed. Cts. L. Rev. 5 (November 2011)
- ❖ Recipient, Federal Magistrate Judges Association Distinguished Service Award (2019)
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- ❖ Former Senior Education Attorney and Research Associate, Federal Judicial Center
- ❖ Co-author, *Electronic Discovery and Digital Evidence: Cases and Materials* (West Academic Publishing: 2009-2015)
- ❖ Author, *Risk Aversion, Risk Management, and the Overpreservation Problem in Electronic Discovery*, *South Carolina Law Review* (2013)
- ❖ Co-author, *Living Daily with Weekley Homes*, *Texas State Bar Advocate* (2010)
- ❖ Author, *Ephemeral Data and the Duty to Preserve Discoverable Electronically Stored Information*, *University of Baltimore Law Review* (2008)



# Disclaimer

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- ❖ The information in these slides and in this presentation is not legal advice and should not be considered legal advice
- ❖ This presentation represents the personal views of the presenters and does not reflect the views of any court, firm, or client
- ❖ This presentation is offered for informational and educational uses only



# The Sedona Conference

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- ❖ Nonprofit 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust, intellectual property, and complex litigation
- ❖ Transcending traditional continuing legal education to combine experience with dialogue, outside of the adversarial system, to contribute to the reasoned and just development of law and policy
- ❖ Supporting Working Groups to develop principles, guidelines, and best practices in targeted areas “ripe” for development



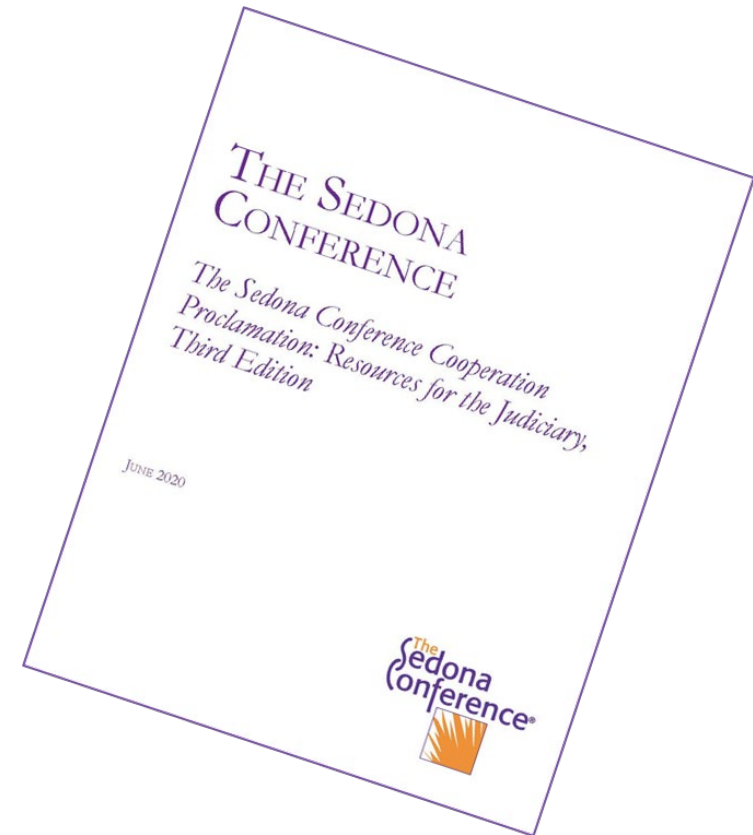
# The Cooperation Proclamation

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- ❖ Introduced in 2008
- ❖ 200+ judicial endorsements
- ❖ Scores of citations in court decisions, law review articles
- ❖ Fundamental concepts:
  - ❖ Cooperation is required by rules
  - ❖ Cooperation is not a violation of any ethical duty of “zealous advocacy”
  - ❖ Cooperation reduces costs and speeds resolution

# The *Resources for the Judiciary*

- ❖ In your materials
- ❖ Also available free for download from [https://thesedonaconference.org/publication/Resources\\_for\\_the\\_Judiciary](https://thesedonaconference.org/publication/Resources_for_the_Judiciary)







# The *Resources for the Judiciary*

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- ❖ 2011: First edition of the *Resources for the Judiciary*
- ❖ 2014: Second edition of the *Resources*
- ❖ 2015: Significant amendments to the Federal Rules of Civil Procedure affecting discovery
  - ❖ Several states and specialized courts follow suit
- ❖ 2020: Third edition of the *Resources*
- ❖ 2021: *Post-pandemic supplement in the works*

# Civil Case Management During the Pandemic

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Extraordinary advance planning and cooperation needed for effective:

- ❖ Virtual depositions
- ❖ Virtual conferences
- ❖ Virtual hearings
- ❖ Virtual trials, nonjury or jury



# The Structure of the Resources

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- ❖ Introduction (page 1)
- ❖ Review of Existing Literature on eDiscovery for Judges (page 5)
- ❖ General Recommendations for Judges (page 7)
- ❖ The Stages of Litigation from a Judge's Perspective (page 10)
  - ❖ Issues Presented
  - ❖ Suggested Judicial Management Strategies
  - ❖ Representative Decisions
  - ❖ Further Reading



# General Recommendations for Judges

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- ❖ Establish a hands-on approach to case management
- ❖ Establish and hold parties to deadlines
- ❖ Demand attorney competence
- ❖ Encourage party-led development of realistic discovery plans
- ❖ Encourage proportionality



# General Recommendations for Judges

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- ❖ Use judicial management tools to control disproportionate discovery
- ❖ Award sanctions if necessary
- ❖ Consider appointment of a special master if appropriate
- ❖ Take care to utilize all available tools to manage “small” civil actions



# The Stages of Civil Litigation

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- ❖ Preservation
- ❖ Parties' Early Case Assessment
- ❖ Initial Scheduling Order
- ❖ The Conference Between the Parties
- ❖ Case Management Order
- ❖ Scope of Discovery
- ❖ Proportionality



# The Stages of Civil Litigation

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- ❖ Identification of “Not Reasonably Accessible”
- ❖ Search and Collection Methodologies
- ❖ Form or Forms of Production
- ❖ Confidentiality and Public Access
- ❖ Protection of Attorney-Client Privilege and Work Product
- ❖ The Privilege Log
- ❖ Allocation of Costs During Litigation



# The Stages of Civil Litigation

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- ❖ Discovery from Non-Parties
- ❖ Discovery Motion Practice
- ❖ Evidential Foundation
- ❖ Presentation of Electronic Evidence at Trials
- ❖ Sanctions
- ❖ Post-Judgment Costs





# Example of a Stage: Preservation

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- ❖ Issues Presented
- ❖ Suggested Judicial Management Strategies
- ❖ Representative Decisions
  - ❖ *See, e.g., Williams v. UnitedHealth Group, No. 2:18-cv-2096, 2020 WL 528604 (D. Kan. Feb. 3, 2020)*



# Example of a Stage: Proportionality

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- ❖ Issues Presented
- ❖ Suggested Judicial Management Strategies
- ❖ Representative Decisions
  - ❖ *See, e.g.,* Gross v. Chapman, No. 19-cv-2743, 2020 WL 4336062 (N.D. Ill. July 28, 2020)



# Proportionality and “Small” Cases

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- ❖ Ask for litigation budgets
- ❖ Set firm trial date
- ❖ Discuss “value” of the case vs. discovery costs
- ❖ Limit scope of discovery
- ❖ Pursue proportionality through party agreements or orders
- ❖ Phase discovery
- ❖ Encourage informal presentation and resolution of discovery disputes
- ❖ Discuss privilege logs and nonwaiver agreements

- G.S. Freeman, P.S. Grewal, R.J. Hedges & C.B. Shaffer,  
“Active Management of ESI in ‘Small’ Civil Actions” (in materials)



# Example of a Stage: Form or Forms of Production

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- ❖ Issues Presented
- ❖ Suggested Judicial Management Strategies
- ❖ Representative Decisions
  - ❖ *See, e.g.,* Corker v. Costco Wholesale, No. C19-0290, 2020 WL 1987060 (W.D. Wash. Apr. 27, 2020)



# Example of a Stage: Privilege and Work Product

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- ❖ Issues Presented
- ❖ Suggested Judicial Management Strategies
- ❖ Representative Decisions
  - ❖ *See, e.g., In re 3M Combat Arms Earplug Prods. Liab. Litig. No. 3:19-md-02885, 2020 WL 1321522 (N.D. Fla. Mar. 20, 2020)*



# Example of a Stage: Privilege and Work Product

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## The “hierarchy” of Fed. R. Evid. 502:

- ❖ No Agreement – Rule 502(b)
- ❖ Agreement – Rule 502(e)
- ❖ Order – Rule 502(d)



# Example of a Stage: Sanctions

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- ❖ Issues Presented
- ❖ Suggested Judicial Management Strategies
- ❖ Representative Decisions
  - ❖ *See, e.g., WeRide Corp. v. Kun Huang*, No. 5:18-cv-07233, 2020 WL 1967209 (N.D. Cal. Apr. 24, 2020)



# Example of a Stage: Sanctions

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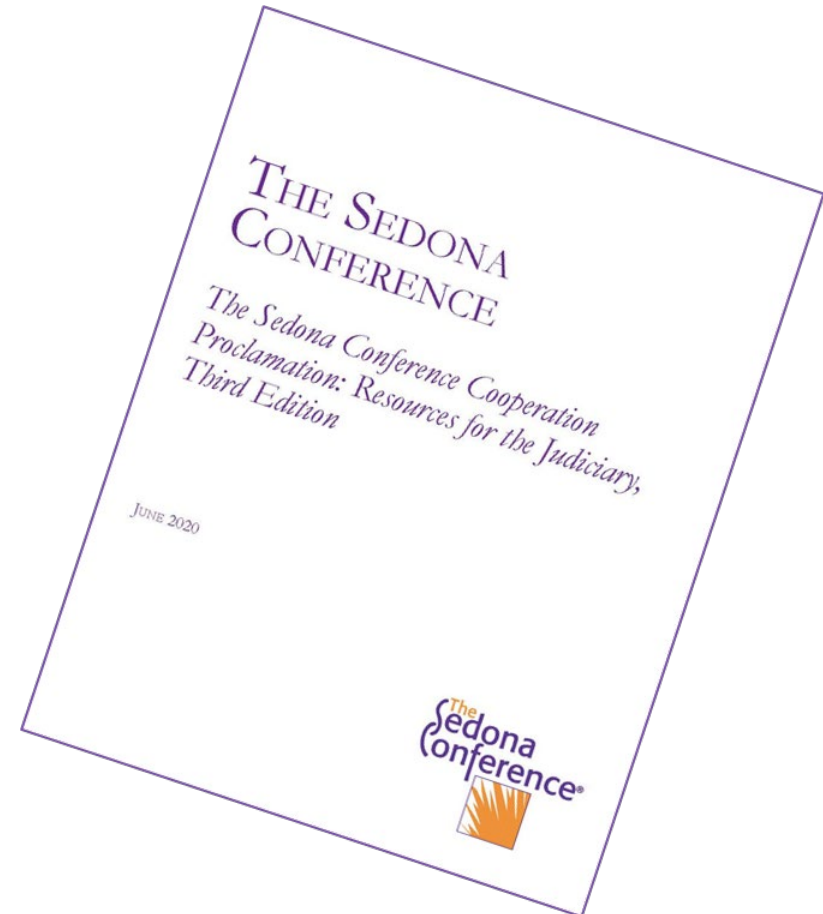
Sources of authority (among others) to impose sanctions:

- ❖ Rule 37(b) (“failure to comply with a court order”)
- ❖ Rule 37(e) (“failure to preserve electronically stored information”)
- ❖ Rule 45(g) (failure “without adequate excuse to obey the subpoena or an order related to it”)
- ❖ Contempt
- ❖ Inherent Power (maybe)



# The *Resources for the Judiciary*

- ❖ In your materials
- ❖ Also available free for download from [https://thesedonaconference.org/publication/Resources\\_for\\_the\\_Judiciary](https://thesedonaconference.org/publication/Resources_for_the_Judiciary)
- ❖ Membership in the Sedona Conference “Working Group Series” is free to all judges and court personnel



# Additional Sedona Resources



- ❖ Abstracts of 25 Commentaries in your materials
- ❖ Full text of each is available free for download from <https://thesedonaconference.org/publications>



# Additional Sedona Resources

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Sedona Working Group 1 (Electronic Document Retention & Production) 2021 Midyear Meeting, Wednesday-Thursday afternoons, April 28-29, 2021

- ❖ Recent eDiscovery Case Law
- ❖ Re-Imagining the Privilege Log
- ❖ Filing eDiscovery Under Seal
- ❖ Discovery of the “Internet of Things”
- ❖ Diversity in the eDiscovery World
- ❖ Judicial Roundtable

# Comments? Questions?

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# Thank you for attending!

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