

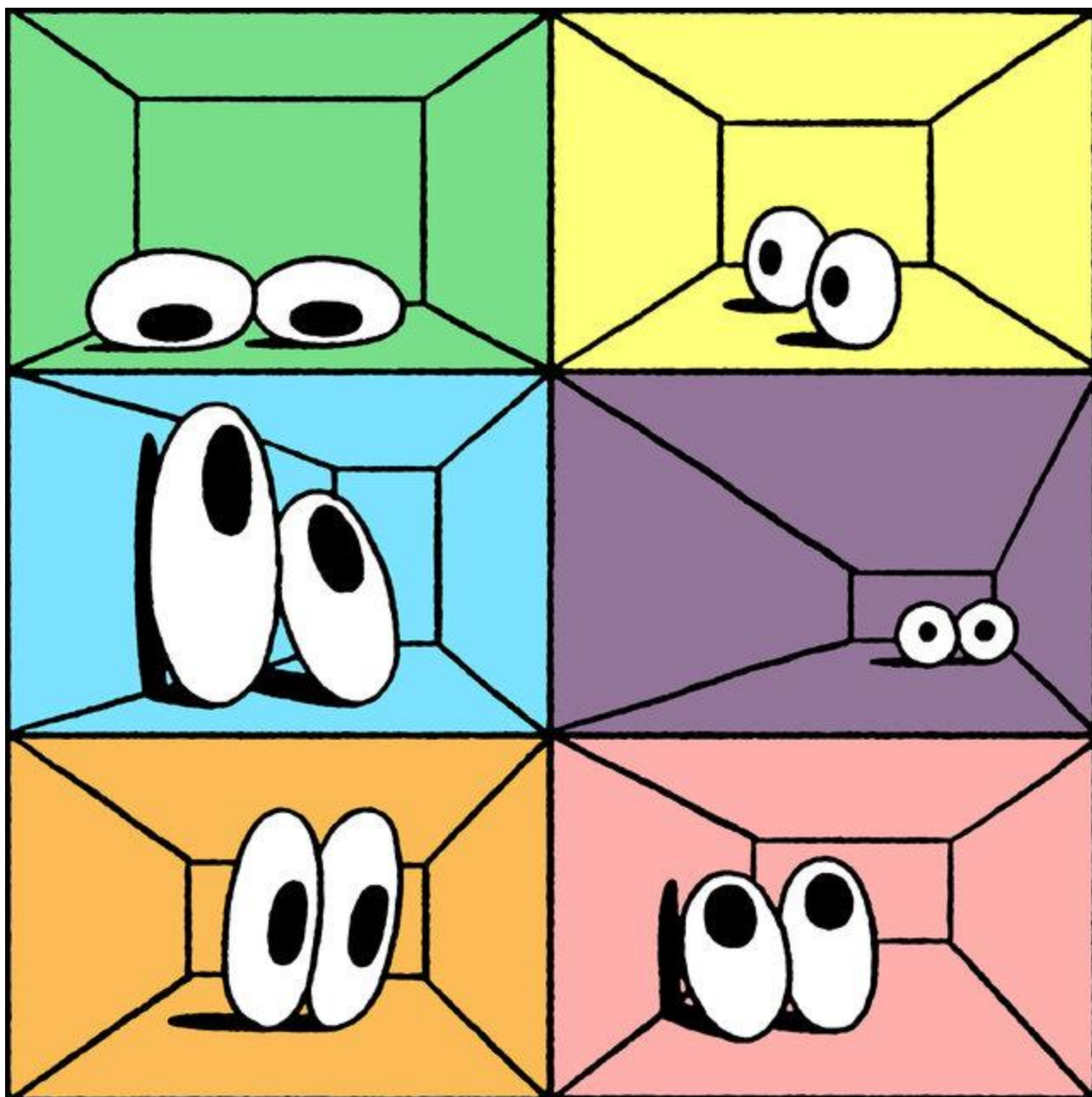
NEWS ANALYSIS

Why Zoom Is Terrible

There's a reason video apps make you feel awkward and unfulfilled.

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Video



CreditCredit...Tim Lahan

By **Kate Murphy**

Ms. Murphy is the author of “You’re Not Listening: What You’re Missing and Why It Matters.”

April 29, 2020

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Last month, global downloads of the apps [Zoom](#), Houseparty and Skype increased [more than 100 percent](#) as video conferencing and chats replaced the face-to-face encounters

we are all so sorely missing. Their faces arranged in a grid reminiscent of the game show “[Hollywood Squares](#),” people are attending virtual happy hours and birthday parties, holding virtual business meetings, learning in virtual classrooms and having virtual psychotherapy.

But there are reasons to be wary of the technology, beyond the widely reported [security and privacy concerns](#). Psychologists, computer scientists and neuroscientists say the distortions and delays inherent in video communication can end up making you feel isolated, anxious and disconnected (or more than you were already). You might be better off just talking on the phone.

The problem is that the way the video images are digitally encoded and decoded, altered and adjusted, patched and synthesized introduces all kinds of artifacts: blocking, freezing, blurring, jerkiness and out-of-sync audio. These disruptions, some below our conscious awareness, confound perception and scramble subtle social cues. Our brains strain to fill in the gaps and make sense of the disorder, which makes us feel vaguely disturbed, uneasy and tired without quite knowing why.

Jeffrey Golde, an adjunct professor at Columbia Business School, has been teaching his previously in-person leadership class via Zoom for about a month now and he has found it strangely wearing. “I’ve noticed, not only in my students, but also in myself, a tendency to flag,” he said. “It gets hard to concentrate on the grid, and it’s hard to think in a robust way.”

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This is consistent with research on [interpreters](#) at the United Nations and at European Union institutions, who reported similar feelings of burnout, fogginess and alienation when translating proceedings via video feed. Studies on video psychotherapy indicate that both [therapists and their patients](#) also often feel fatigued, disaffected and uncomfortable.

Sheryl Brahmam, a professor in the department of information technology and cybersecurity at Missouri State University in Springfield, explains the phenomenon by comparing video conferencing to highly processed foods. “In-person communication resembles video conferencing about as much as a real blueberry muffin resembles a packaged blueberry muffin that contains not a single blueberry but artificial flavors, textures and preservatives,” she said. “You eat too many, and you’re not going to feel very good.”

To be sure, video calls are great for letting toddlers blow kisses to their grandparents, showing people what you’re cooking for dinner or maybe demonstrating how to make a [face mask out of boxer briefs](#). But if you want to really communicate with someone in a meaningful way, video can be vexing.

This is foremost because human beings are exquisitely sensitive to one another’s facial expressions. Authentic expressions of emotion are an intricate array of minute muscle

contractions, particularly around the eyes and mouth, often subconsciously perceived, and essential to our understanding of one another. But those telling twitches all but disappear on pixelated video or, worse, are frozen, smoothed over or delayed to preserve bandwidth.

Not only does this mess with our perception, but it also plays havoc with our ability to mirror. Without realizing it, all of us engage in [facial mimicry](#) whenever we encounter another person. It's a constant, almost synchronous, interplay. To recognize emotion, we have to actually embody it, which makes mirroring essential to [empathy](#) and connection. When we can't do it seamlessly, as happens during a video chat, we feel unsettled because it's hard to read people's reactions and, thus, predict what they will do.

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“Our brains are prediction generators, and when there are delays or the facial expressions are frozen or out of sync, as happens on Zoom and Skype, we perceive it as a prediction error that needs to be fixed,” said Paula Niedenthal, a professor of psychology at the University of Wisconsin-Madison who specializes in affective response. “Whether subconscious or conscious, we’re having to do more work because aspects of our predictions are not being confirmed, and that can get exhausting.”

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- [New York State ends its mask mandate for schools.](#)
- [The ‘off-site’ is still popular, even for workers who are never on site.](#)
- [War strains economies in North Africa already weakened by the pandemic.](#)

Video chats have also been shown to inhibit [trust](#) because we can’t look one another in the eye. Depending on the camera angle, people may appear to be looking up or down or to the side. Viewers may then perceive them as uninterested, shifty, haughty, servile or guilty. For this reason, law scholars and criminal justice activists have questioned the fairness of [remote depositions, hearings and trials](#).

But as anyone who has been on a video call knows, people tend to look more at themselves than at the camera or even at others on the call. “I would be lying if I said I wasn’t super aware of my appearance on video chats,” said Dave Nitkiewicz, a recently furloughed employee of Experience Grand Rapids, the convention and visitors’ bureau in Grand Rapids, Mich. “I have the skin of Casper the Ghost right now — it’s, like, fluorescent — so I’m always concerned with framing and lighting.”

Craving company while confined at home, Mr. Nitkiewicz frequently arranges Zoom meet-ups with family and friends and he even went on a Zoom date. And yet he doesn’t find these interactions terribly satisfying.

The Coronavirus Pandemic: Key Things to Know

Card 1 of 3

The origins of the pandemic. Scientists released two new studies, yet to be published in a scientific journal, [suggesting that the coronavirus originated in a market in Wuhan, China](#). The researchers said they found no support for the hypothesis that the virus escaped from a lab.

New York school mask mandate. New York State will [no longer require students and educators to wear masks in schools](#) starting March 2, Gov. Kathy Hochul announced. The reversal of the state’s mandate for schools comes weeks after a [similar mandate](#) was rolled back for businesses.

A new C.D.C. framework. New guidelines released by the Centers for Disease Control and Prevention to help counties [determine Covid restrictions](#) suggest that [70 percent of Americans can now stop wearing masks](#), and no longer need to social distance or avoid crowded indoor spaces.

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“On video chat there’s literally a glowing box around your face when you’re talking, so you feel like every eyeball is on you, like a very intimidating job interview,” Mr. Nitkiewicz said. “The conversation kind of defaults to trivial drivel because people don’t want to take a risk.” And the delay in people’s feedback makes him feel that it wouldn’t be rewarding to share a good story anyway.

He doesn’t feel the same reserve when he talks on the phone, which he does for two or three hours every other Sunday with his cousin in Los Angeles. “We have for years, and it’s never occurred to us to video chat,” said Mr. Nitkiewicz. “Our comfort place is still on the phone.”

This makes sense given that experts say no facial cues are better than faulty ones. The absence of visual input might even heighten people’s sensitivity to what’s being said. It could be why Verizon and AT&T have reported average daily increases of as much as [78 percent](#) in voice-only calls since the start of the pandemic, as well as an increase in the length of these calls.

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“You can have a sense of hyper-presence on the telephone because of that coiled relationship where it feels like my mouth is right next to your ear, and vice versa,” said Dr. Brahnam during a telephone interview. Provided you have a good connection, she said, you end up hearing more: slight tonal shifts, brief hesitations and the rhythm of someone’s breathing. When it comes to developing intimacy remotely, sometimes it’s better to be heard and not seen.

Are You Vexed by Video Chats?

We are no longer accepting submissions.

Kate Murphy is a journalist in Houston who contributes frequently to The New York Times and the author of “[You’re Not Listening: What You’re Missing and Why It Matters](#).”

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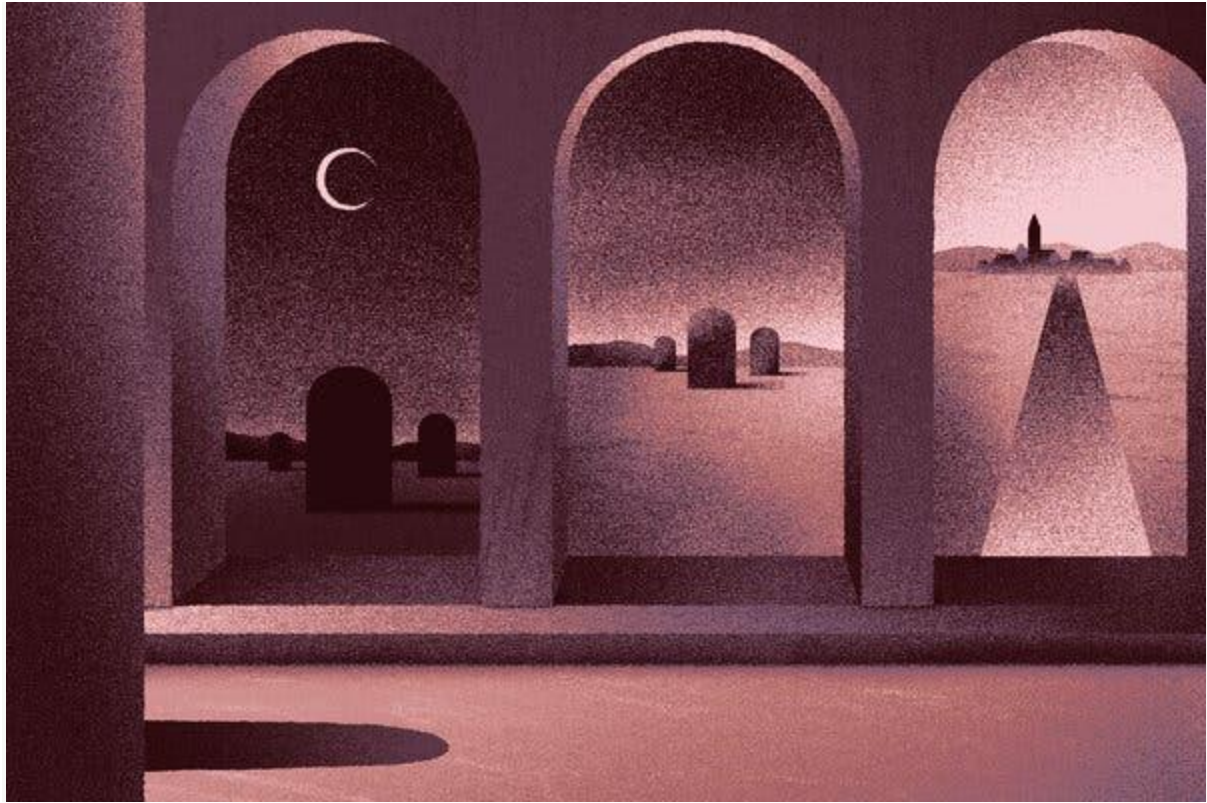


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Remote Hearings and Access to Justice

During Covid-19 and Beyond



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Remote Hearings Guide

INTRODUCTION

Objective of this guide. After the COVID-19 crisis, the use of technology for court appearances will very probably continue. This guide brings together issues and suggestions from the most comprehensive guides we have located on that subject. Court users need equal access to justice in remote proceedings in civil legal matters that touch on critical needs and interests such as evictions, temporary restraining orders, child custody disputes, health care, or debt collection. Judicial officers and court staff need efficient and effective processes for providing such services with the goal of reaching a resolution with minimal access impediments.

How to use this document. Decisions about whether and how to organize and conduct proceedings remotely are for the courts to make. Local needs, conditions, and capabilities must govern. One size does not fit all. Courts are making decisions based on technological considerations, using the expertise of the court's IT staff, working with the Judicial Council Information Technology office. This guide focuses on considerations about access to justice in making arrangements for remotely conducted proceedings — providing a topical discussion of issues, resources, and recommendations from cited sources. We suggest using the topics at least as a checklist in planning for and conducting remote court proceedings.

Additional resources and assistance. While this guide seeks to consolidate a number of helpful resources, others maintain webpages dedicated to the COVID-19 crisis and remote hearings that are regularly updated:

- The American Bar Association's Standing Committee on Legal Aid and Indigent Defense (SCLAID) has compiled materials on *COVID-19 Resources* at https://www.americanbar.org/groups/legal_aid_indigent_defendants/resources/covid-19-resources/?_cpx_camp_rule_id=3565
- National Center for State Courts has a site, *Coronavirus and the courts*, at <https://www.ncsc.org/pandemic>
- The Courts of the State of Michigan, at <https://courts.michigan.gov/News-Events/Pages/VCR.aspx>
- The Texas Judicial Branch maintains a site on *Zoom Information and YouTube Support*, TX JUDICIAL BRANCH, <https://www.txcourts.net/electronic-hearings-zoom>

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TOPICS, RESOURCES, AND RECOMMENDATIONS

I. DECIDING WHICH PROCEEDINGS TO CONDUCT REMOTELY

After the court closures to respond immediately to the COVID-19 crisis, courts in California and some other jurisdictions have been encouraged to engage in remote hearings where possible.¹ The local needs and practices of Superior Courts will suggest priorities for types of proceedings that would be appropriate for early adoption of remote hearing technologies.

It may be helpful to consider different categories of proceedings in deciding which deserve priority.² One category consists of critical court services that need to be provided to self-represented litigants (SRLs) and court users generally, especially and particularly during and after the pandemic. These are matters surrounding essential areas of life, such as personal safety (domestic violence), emergency child custody matters, and proceedings that affect the health of, and access to health care for, people affected by the virus. For example, the Superior Court of Alameda in California is conducting a select number of teleconferenced hearings, primarily focusing on domestic violence and family law.³

A second category could consist of proceedings that are amenable to remote hearing technology and procedures — especially for issues that affect people’s ability to get on with their lives. Examples might be guardianships, uncontested divorces,⁴ and probate proceedings. This category might include defaults, provided that there must be adequate assurance that notice was proper — with attention to whether service may have been made to an address that was not accessible during shelter-in-place periods — and that documentation requirements are satisfied. On the other hand, proceedings involving submission of substantial documentary evidence are more difficult to conduct using remote technology, absent advance staging and/or robust technology available to all participants.

A third category could include procedures capable of reducing or alleviating the backlog of some types of hearings that will take place when the courts fully reopen. For example, evictions and foreclosures are suspended in many jurisdictions. When they resume, courts may face enormous backlogs. Before that happens, courts might use remote hearing technology for mandatory settlement conferences (perhaps conducted by experienced attorneys acting as pro tem settlement judges). Mandatory settlement conferences and/or preliminary pretrial

¹ See NATIONAL CENTER FOR STATE COURTS, *Virtual Hearings: Statewide Orders for Virtual Hearings*, <https://public.tableau.com/profile/ncscviz#!/vizhome/StateCourtResponsestoCOVID-19/CovidTheCourts> (California’s order urges use and suspends conflicting rules).

² NATIONAL CENTER FOR STATE COURTS, CIVIL JUSTICE INITIATIVE, *Findings and Recommendations on Remote Conferencing*, <https://www.ncsc.org/~media/Microsites/Files/Civil-Justice/NCSC-CJI-Appendices-G.ashx> (“The higher the stakes of the hearing or case event, the better technology needs to be (e.g., transition from use of telephonic conferencing to video conferencing as complexity of case event increases).”).

³ SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA, *April 16, 2020 Press Release*, <http://www.alameda.courts.ca.gov/Pages.aspx/COVID-19>.

⁴ See, e.g., *Order Providing Guidance on Videoconference Hearings* for uncontested divorces in Ohio, available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-covid-19-oh-order-providing-guidance-videoconference-hearings.pdf.

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conferences in civil cases could be conducted remotely (and some might be conducted by pro tem judges), which might reduce backlogs or, at least, provide information for use in setting scheduling priorities for later in-person proceedings. Judges handling civil law and motion matters might consider whether there are additional categories of matters that they can restart sooner using remote hearing technology, reducing the backlog when courthouses reopen.

II. SELECTING AND IMPLEMENTING THE TECHNOLOGY⁵

For efficiency, many courts — and some entire states — tend to select a single technology platform for their remote proceedings. Although a single vendor, Zoom, is being widely used, a number of alternative vendors exist. A March 30, 2020 Judicial Council memorandum identifies products available for use by courts for videoconferencing.⁶ Because the sources we are summarizing all refer to Zoom, it will be the focus of many of the points in this guide. However, there could be reasons for making a different selection.⁷ Along with the other points discussed below, a court might already have a relationship with a vendor, such as CourtCall.

Courts' Information Technology staffs, working with the Judicial Council Information Technology office, will, of course, play a key role in the selection of a platform for remote conduct of proceedings. The trial courts of the State of Michigan began using Zoom technology for remote proceedings a year before the current health crisis. They have generated a wealth of guidance on technical and operational matters.⁸

The availability to the courts and individual judicial officers of suitable hardware — such as wide-band connections, computers with cameras, scanners, printers, and suitable audio equipment — may narrow or determine the choice of technology. The Michigan materials cited in footnote 8 offer detailed suggestions about these matters. The focus of this guide, however, is on arrangements that may make remote proceedings less of an impediment to providing equal access to justice to all those who use the courts.

⁵ See generally JOINT TECHNOLOGY COMMITTEE, *JTC Quick Response Bulletin: Strategic Issues to Consider when Starting Virtual Hearings* (Apr. 7, 2020), https://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/2020-04-07%20QR%20Virtual%20hearings_final.ashx.

⁶ <https://www.courts.ca.gov/documents/Memorandum-to-Grant-Recipients-during-COVID-19.pdf> at page 3; see also S. Whaley, *Use of Telephonic and Video Conferencing Technology in Remote Court Appearances* (June 20, 2016) <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/tech/id/850>.

⁷ See generally NATIONAL CENTER FOR STATE COURTS, *Video Conferencing Configurations*, <https://www.ncsc.org/~media/Files/PDF/Newsroom/Coronavirus%20Resources/Video-Conferencing-Configurations.ashx> (“There are many useful virtual conferencing platforms. Most have fairly similar features,” but there are some basics that your platform should have, such as an “auto-generated meeting ID,” the ability to prevent “participants from entering a meeting before the host,” and a “waiting area” function). See also *Key Virtual Hearing Platform Capability Considerations, Version 1*, NATIONAL CENTER FOR STATE COURTS (Apr. 7, 2020), <https://www.ncsc.org/~media/Files/PDF/Newsroom/Coronavirus%20Resources/Key-Virtual-Hearing-Platform-Capability.ashx>.

⁸ See *Michigan Trial Court Standards for Courtroom Technology* (revised April 17, 2020). https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR_stds.pdf; *Michigan Trial Court Standards for Courtroom Technology* (4/20), https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/ct_stds.pdf#search=%22technology%20standard%22.

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Possible technology selection criteria affecting access to justice

1. “Digital Divide” — Accessibility to users without technologically compatible devices.

Almost everyone has, or can use, a telephone. Many people have smartphones (although they can present obstacles, as noted below). But proceedings that require a personal computer may not be accessible to many self-represented litigants.

Consider using a technology that allows the option of voice-only participation and can be accessed via a toll-free telephone number. Where the fairness of a proceeding might be affected by differences in the mode of access, the court might determine through questioning before a hearing whether to conduct the proceeding for all participants via voice only, if that is the only mode of access available to one of the parties.

As distancing rules and circumstances permit, the court’s Self-Help center may offer information and assistance regarding places where self-represented litigants can use computer equipment to participate in remote court proceedings.

2. Is cost to users a barrier?

Consider whether a technology platform imposes charges⁹ that are inconsistent with the intent of the fee waiver in the jurisdiction. Zoom, for example, charges a subscription fee to the host, but not to other users. CourtCall charges users, except that it waives the fee to those who have received a court fee waiver.

3. Is the technology platform compliant with requirements for accessibility to persons with disabilities?

Ensuring accessibility for persons with disabilities is essential for creating an inclusive justice system operating remotely. Apart from being technically inaccessible, remote technology can cause dizziness, nausea, and other feelings of illness. Critical yet fundamental accessibility features are closed captioning, keyboard accessibility, automatic transcripts, and screen reader support, as a minimum.¹⁰ All documents, presentations, and other materials should comply with the Web Content Accessibility Guidelines (WCAG) 2.1.¹¹ The platform should also comply with the 21st Century Communications and Video Accessibility Act (CVAA)¹² — which provides appropriate standards to follow even where it is not legally applicable.

⁹ NATIONAL CENTER FOR STATE COURTS, CIVIL JUSTICE INITIATIVE, *Findings and Recommendations on Remote Conferencing*, *supra*, FN 2 (“Cost and convenience to litigants should be taken into account when implementing videoconferencing.”).

¹⁰ These four accessibility features are included with Zoom and serve as an example. *See Accessibility Features*, Zoom, <https://zoom.us/accessibility>. BlueJeans features similar accessibility features. *See Accessibility Features for Meetings and Events*, <https://www.bluejeans.com/accessibility-video-conferencing-features>.

¹¹ *Web Content Accessibility Guidelines (WCAG) 2.1* (2018), <https://www.w3.org/TR/WCAG21/>.

¹² THE 21ST CENTURY COMMUNICATIONS AND VIDEO ACCESSIBILITY ACT OF 2010, <http://www.gpo.gov/fdsys/pkg/BILLS-111hr3101pcs/pdf/BILLS-111hr3101pcs.pdf>.

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4. Can first-time users navigate the technology without difficulty, without the need for court personnel to give instructions during the proceeding, and without delaying the court proceedings?

Below, we suggest that as part of implementing procedures for remote proceedings, courts should provide users with “how-to” information that is available via the same technologies (phone, smartphone, PC) before the proceeding begins.

The courts of Michigan have been using remote hearings via Zoom for a year. They have developed materials that discuss specific solutions to common problems, which personnel implementing remote proceedings in California courts may find useful.¹³

Judicial officers and court personnel in charge of remote proceedings should note repeated user problems and glitches and report them to a staff member coordinating with the vendor.

5. Can the technology platform accommodate self-represented litigants and witnesses who are not English speakers?

If written instructions are part of the use of the technology, are they available to users in languages other than English?

We understand that Remote translation using video is generally preferred over voice-only because of the additional visual clues to the interpreter.¹⁴ This means that there may be tradeoffs between access for non-English speakers and self-represented litigants who do not have video technology.

6. Does use of the technology unduly disadvantage persons whose literacy is limited?

The fact that a person speaks English does not mean that they are conversant with vocabularies often used in court proceedings. Conducting the proceedings remotely using technology can compound the unfamiliarity of some self-represented people with the words used by a judicial officer or opposing lawyer.

Among other considerations discussed in Section III, this counsels against a technology for which the instructions to users are not conveyed in simple language.

7. How do participants present documentary evidence or use visual aids? Is there a way of doing so that does not exclude those who participate by telephone or Smartphone?

If remote technology is to be used for hearings involving documents, and especially for submission of documentary evidence, the technology must be capable of presenting a usable, clear picture of the documents to all participants. It must also be capable of preserving a record of the documents presented, without uncertainty as to whether the documents in the record are the same as were used in the hearing. If not all participants have access to the same technology, those who do not may be denied an equal opportunity to present their positions. But differences such as in screen size and resolution can impose disadvantages on some parties that may not be apparent to the judicial officer during the hearing.

¹³ *Virtual Courtrooms*, MICH. COURTS, available at web address on Pg. 1.

¹⁴ *Video Remote Interpreting (VRI)*, JUDICIAL COUNCIL, <https://www.courts.ca.gov/VRI.htm>.

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This constraint may not dictate the selection of a technology for remote hearings, but instead it may affect the choice of hearings to be conducted remotely.

In theory, documents can be used by distributing copies to all parties before a hearing and referring to them by identifying names or numbers. However, such practices require much familiarity with the process and are likely to be ineffective with self-represented litigants who are not sophisticated.

8. Does the platform provide tools for the court in exercising control over the proceedings?

- Can the judicial officer or court personnel admit or exclude participants, where appropriate?
- Can the court and other participants identify every speaker?
- Is there a method for persons wishing to speak to make that known to the judicial officer?
- Can the judicial officer or court personnel control which participants are or are not muted?
- Does the technology allow court personnel to move quickly and efficiently from one proceeding (and one set of participants) to another?
- Can the judicial officer or court personnel pass a matter for a period of time, leaving participants online, and return to it after handling another matter?
- Is the proceeding open to public observation, unless good cause for confidentiality exists? Public access can be provided by giving notice of the time and method of observing proceedings as they happen. An alternative, if appropriate, may be to allow public access to recordings after the proceeding has ended.
- Where confidentiality is required, can the judicial officer or court personnel ensure it?
- Can the judicial officer or court personnel disable any facility for recording of the proceeding by other participants (where doing so would violate a statute or rule)?
- Can the judicial officer or court personnel control communications among the parties during the hearing? Using Zoom's Chat feature, participants can communicate with each other in writing. Avoiding improper use of this side-channel, e.g. for witness tampering, may require the court to control it by issuing an order or local rule.
- Is there a method for a subset of the participants to communicate without the presence of other participants (e.g. allowing a confidential consultation between clients and their representatives in different locations)? Zoom's breakout room feature may be used for this purpose.

9. Will the technology, and other arrangements, generate a useable official record?

The court's official reporters may be able to participate, and if that will be done regularly for a type of proceeding, the reporters might be asked to comment on the selection of a technology platform. Emergency Rule 3(a)(3) also permits "the use of remote reporting and electronic recording to make the official record of an action or proceeding."

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- Consider the medium on which the remote proceeding platform generates a recording, and whether that medium can conveniently be stored and maintained as part of the court's electronic file system.
- Consider whether, under what circumstances, and by whom a written transcript may be prepared from the electronic recording; and whether that can be made part of the official record.
- Also consider whether there are reliable, workable, and convenient methods and procedures for the court's permanent record to include documentary evidence (and visual aids where appropriate) used remotely during the proceeding?
- Determine whether reviewing courts will be authorized, able, and willing to accept the electronic recording as the official record. This includes, but is not limited to, applicable court rules and (emergency) orders, as well as the technology available to the reviewing court.

Technology, or court reporters, can convert an electronic recording into a transcript if necessary to facilitate appellate review. If this is done, there should be an opportunity for participants to review both the transcript and the electronic recording, and a procedure for parties to meet and confer about disagreements and present them if unresolved to the trial court for resolution. This is new ground that may be necessary because of the emergency; but may allow development of less costly and more accessible procedures for general use in the future.

III. ADOPTING GENERAL PROCEDURES AND PRACTICES CONSISTENT WITH OPEN AND EQUAL ACCESS

1. "Digital divide"¹⁵ considerations

- Access to technology is inequitable and there is a persistent socioeconomic "digital divide." Many Americans do not have access to the technologies needed to participate in remote hearings conducted using online videoconferencing. This reminder is not to dissuade courts from adopting remote technologies, but to note that access considerations require creative and inclusive practices beyond a blanket requirement for litigants to participate in hearings remotely.
 - Lack of Internet access: Many Americans might not have access to the Internet, or reliable Internet, in their homes. For example, as of 2017, 90 percent of California households used the Internet and 74 percent had broadband subscriptions at

¹⁵ See, e.g., Monica Anderson & Madhumitha Kumar, *Digital divide persists even as lower-income Americans make gains in tech adoption*, PEW RESEARCH (May 7, 2019), <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/>; Andrew Perrin, *Digital gap between rural and nonrural America persists*, PEW RESEARCH (May 31, 2019), <https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/>; *The Digital Divide*, STANFORD CS, <https://cs.stanford.edu/people/eroberts/cs181/projects/digital-divide/start.html>.

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home, overall.¹⁶ But, just 55 percent of low-income Californians had broadband subscriptions at home.¹⁷ If in-home Internet is inaccessible, an individual might access it outside of the home, but there are privacy issues with accessing the Internet in public places like libraries and coffee shops, which are also unlikely to be open under shelter-in-place rules.¹⁸

- Limited access to phone data/call minutes: Because some litigants may only have phones with a limited number of minutes or restricted data plans, they might not be able to use their phone to participate in hearings.¹⁹
- Limited access to email: Some litigants may not have an email account set up or may not be able to access email due to a lack of Internet access, which could disrupt their ability to communicate with the court, such as to receive electronic court documents and other essential information about the hearing. Even if a litigant has an email account, they might not know to check it often to hear about information for their case. The court should offer information about how to use electronic court file systems, instruct the litigant to check their email daily for this information and, if the litigant has a preferable means of contact, arrange for information to be disseminated that way for proper, individualized notice.²⁰
- Private nature of proceeding: As discussed more in Part 4 of Section V, care should be paid to cases with sensitive issues, such as domestic violence, that inherently have privacy concerns as well as those who are unable to “get away” from their household responsibilities (e.g., presence of children) to find a quiet place to participate privately.
- As shelter-at-home restrictions relax,²¹ courts and court Self Help Center staffs could consider working with local legal aid programs, County Law Librarians and public libraries, and other locations to establish and publicize venues where self-represented persons can obtain internet access to participate in remote proceedings.

It may be possible in some areas to establish temporary or mobile internet access facilities for this purpose.

¹⁶ *California's Digital Divide*, PUBLIC POLICY INSTITUTE OF CALIFORNIA, <https://www.ppic.org/publication/californias-digital-divide/>.

¹⁷ *California's Digital Divide*, PUBLIC POLICY INSTITUTE OF CALIFORNIA, *supra*, FN 16.

¹⁸ TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF REPRESENTED LITIGANTS, <https://gato-docs.its.txstate.edu/jcr:27c725a8-4dbc-44f0-a58a-96a8b121e3d0/Best%20Practices%20for%20Courts%20in%20Zoom%20hearings%20Involving%20Self%20Represented%20Litigants.pdf>.

¹⁹ TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF REPRESENTED LITIGANTS, *supra*, FN 18.

²⁰ TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF REPRESENTED LITIGANTS, *supra*, FN 18.

²¹ See NATIONAL CENTER FOR STATE COURTS, *Statewide Plans to Resume Court Operations*, <https://public.tableau.com/profile/ncscviz#!/vizhome/StateCourtResponsestoCOVID-19/CovidTheCourts>.

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The staff of the California Commission on Access to Justice is available to attempt to assist individual courts in exploring options available for such cooperation, if that would be helpful.

2. Consider designating a staff person responsible for coordination of remote proceedings.

A single staff member who deals with the technology provider and is aware of all issues, glitches, and best practices can save judicial officers' and other staff members' time, as well as providing the best services efficiently. Depending on the court's available resources and volume of work, this might be the supervisor of a group of others. The role is not simply, or even primarily, concerned with making the technology work correctly. So, it may not be sufficient to use an IT specialist instead of someone familiar with court procedures and the substance of the proceedings.

3. Provide information to users before the hearing begins about the procedures to follow and how the technology works.

To conduct efficient remote hearings, use the judicial officer's time well, and accommodate the needs and overcome obstacles to equal participation, consider a practice of conducting preliminary calls between a court staff member and parties before their initial remote hearings. The purpose would be to learn about special issues — limited technology, needs for interpretation or technology for persons with disabilities — in advance and to alert the participants to available information about the technology and the procedures that will apply to the proceeding.

Ways of providing information to participants are discussed further in Section IV.

4. Accessibility to non-English speakers

As noted above, the court should have procedures to determine before the hearing begins whether interpretation services for non-English speakers will be needed.²² Conferencing technology may provide for remote interpretation.²³ However, for content such as testimony, the use of an "English only" audio feature that does not allow an adversary to check the accuracy of a translation may be problematic.

The Judicial Council issued guidelines in 2019 on Virtual Remote Interpretation,²⁴ and is seeking funding in the budget to make VRI more broadly available. Remote proceedings involve added challenges for high quality interpretation — especially if the persons needing interpretation are not on video. On the other hand, remote participation may make a larger number of qualified interpreters available.

²² See, e.g., *Remote Interpreting Best Practices during the COVID-19 Emergency*, WASH. COURTS, https://www.courts.wa.gov/programs_orgs/pos_interpret/content/pdf/Remote%20Interpreting%20Best%20Practices.pdf.

²³ Zoom, for example, facilitates simultaneous foreign language interpretation. See <https://www.youtube.com/watch?v=nldGntmE7mQ>.

²⁴ *Recommended Guidelines for Video Remote Interpreting (VRI) for Spoken Language-Interpreted Events*, March 15, 2019, CALIFORNIA JUDICIAL BRANCH, <https://www.courts.ca.gov/documents/vri-guidelines.pdf>.

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The court should explore these possibilities and consult with representative interpreters who will be used in remote hearings, while the court is designing its procedures for remote proceedings. If local interpreters are not available to consult, the staff of the Access Commission would be willing to seek to facilitate discussions with representatives of interpreters' organizations.

5. Accessibility to persons with disabilities

The capability to provide accommodations for persons with disabilities should be established as part of the development of a court's capability for remote proceedings.

To facilitate needs in any given hearing, the appropriate questions should be asked by court personnel long enough before the hearing begins to make the arrangements in time.

6. If remote proceedings continue, judges might consider using "asynchronous" proceedings for some purposes in the future.

Technology for remote participation in hearings makes it possible to change how the proceedings are conducted in substantial ways that may differ, if productive and fair, from customary procedures. In-person hearings are "synchronous." All participants are present at the same time and in the same place. Some proceedings using technology might be organized differently — with different participants making presentations that would be recorded without the judicial officer's presence (but perhaps conducted by a judge pro tem or a member of the court's staff). The presentations, which might involve both sides (to allow, e.g., cross-examination) or one side at a time, could be time-limited and recorded to be assembled into a record available to both sides, and to the public, that the judge could review. A judge could conduct a shorter, synchronous proceeding after reviewing the presentations to ask questions; or the judicial officer could rule based on the submitted presentations. The judicial officer could choose after viewing the presentation.

Such asynchronous proceedings might allow courts to catch up on backlogs of proceedings suited for such presentations, making best use of scarce time on judges' calendars.

It remains to be seen whether this would be more effective and fairer than submitting a matter based on written briefs and documentary submissions alone. For self-represented litigants (and some lawyers), the inability to express themselves clearly and effectively in writing is a limitation that might make recorded, asynchronous voice and video presentations more effective than submission for decisions based on documents alone.

7. Practice reluctance to punish parties for non-appearance.

This is a challenging time for court users and judicial officers alike. Courts are encouraged to practice leniency, at least initially, when litigants do not show up remotely. Additional effective notice before punitive action is taken as a result of non-appearance is highly recommended (e.g., an additional mailed notice of a new hearing date with a description of where to find the information on how to appear remotely for the continued hearing).

Ways of providing notice and information to participants are discussed further in Section IV.

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IV. PROVIDING INFORMATION AND TRAINING TO COURT PERSONNEL AND USERS

1. Scheduling and notice of remote proceedings

- Courts should consider how hearings are scheduled: If a court traditionally docketed multiple hearings at the same time, that court might need to switch to individual scheduling with time-certain proceedings in order to provide more certainty and transparency to litigants.²⁵ This will provide litigants with other responsibilities during shelter-in-place, such as childcare or healthcare support for parents, to have a discrete time to call-in to participate in their hearing.
- Provide extra notice of hearings: Court staff should email all attorneys or self-represented litigants several days in advance to ensure all parties have hearing and login information as well as to offer to assist with troubleshooting issues and answer any questions.²⁶ In case a party does not have access to a computer but does have a telephone, the court's notice should include a call-in number and access code.²⁷ Another option for providing notice is to send out text message reminders as well.²⁸ The purpose of this is to ensure that litigants are well-aware that their hearing is occurring and what is expected of them.
- Clear notices: The notice(s) should clearly state that the hearing will take place via a video-conferencing platform (describing that platform and how to access it) and that the individual should not go to the courthouse.²⁹ For court users with limited English proficiency, the notice should also provide translated versions (or a way for the litigant to request translation), along with an explanation of how to access an interpreter if needed via an online system.³⁰
- Daily dockets should be made available online: The docket should clearly indicate which hearings will be held virtually, along with instructions on how to access those hearings.³¹ Public notice should be consistent with the ways for providing open hearings generally, where applicable; if the way is contemporaneous observation of the video and audio feed, the notice should provide sufficient information for the public to do so (e.g., (YouTube live-streaming described below).)³²

²⁵ CAPACITY BUILDING CENTER FOR COURTS, CONDUCTING EFFECTIVE REMOTE HEARINGS IN CHILD WELFARE CASES, https://www.americanbar.org/content/dam/aba/administrative/child_law/conducting-remote-hearings.pdf.

²⁶ CAPACITY BUILDING CENTER FOR COURTS, CONDUCTING EFFECTIVE REMOTE HEARINGS IN CHILD WELFARE CASES, *supra*, FN 25.

²⁷ NATIONAL CENTER FOR STATE COURTS, REMOTE COURT OPERATIONS INCORPORATING A2J PRINCIPLES (Mar. 27, 2020), <https://www.ncsc.org/~media/Files/PDF/Newsroom/Coronavirus%20Resources/Remote-Court.ashx>.

²⁸ NATIONAL CENTER FOR STATE COURTS, REMOTE COURT OPERATIONS INCORPORATING A2J Principles (Mar. 27, 2020), *supra*, FN 27.

²⁹ TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF REPRESENTED LITIGANTS, *supra*, FN 18.

³⁰ TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF REPRESENTED LITIGANTS, *supra*, FN 18.

³¹ STATE COURT ADMINISTRATIVE OFFICE, MICHIGAN TRIAL COURTS VIRTUAL COURTROOM STANDARDS AND GUIDELINES (Apr. 17, 2020), *supra*, FN 8.

³² STATE COURT ADMINISTRATIVE OFFICE, MICHIGAN TRIAL COURTS VIRTUAL COURTROOM STANDARDS AND GUIDELINES (Apr. 17, 2020), *supra*, FN 8.

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- Comprehension of notices and video-conferencing systems by litigants: Use plain language in notices and instructions, avoiding legalese and technical terms.³³ Ensure that litigants understand what is required of them and understand the consequences of not taking action to meet those requirements.³⁴ Admonish court users that they should do everything in their power to comply and participate, but consider developing a system that is non-punitive for dealing with unintentional misunderstandings by litigants regarding when and how their participation is required.

2. Webpages and instructional materials for users

- Provide clear, simple, and accessible web pages³⁵ that clearly lay out procedures for engaging in remote hearings and proceedings.³⁶ Pages should avoid legal jargon and provide self-represented litigants and others with a direct path to understand whether their hearing is virtual; how and when the virtual proceeding will occur; and a description of how to prepare for and access that virtual proceeding.³⁷
- Pages and resources should be accessible for people with disabilities as well as ensure language access for court users with limited English proficiency.³⁸
- Maximize the number of avenues for litigants to comprehend remote systems. This includes using multiple remote services (e.g., telephone, e-mail, live chat, videoconferencing, and text messaging) to notify, communicate with, and instruct court users on remote processes, which is ultimately beneficial to both the user as well as the efficiency of the court system.³⁹ This starts with a high-quality, thorough webpage.

³³ See, e.g., THE NATIONAL ASSOCIATION FOR COURT MANAGEMENT, 2019 PLAIN LANGUAGE GUIDE, <https://nacmnet.org/wp-content/uploads/NACM-Plain-Language-Guide-20190107.pdf>. See also *Plain Language Resource Guide*, NATIONAL CENTER FOR STATE COURTS, <https://www.ncsc.org/Topics/Access-and-Fairness/Plain-Language/Resource-Guide.aspx>.

³⁴ TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF REPRESENTED LITIGANTS, *supra*, FN 18.

³⁵ NATIONAL CENTER FOR STATE COURTS, REMOTE COURT OPERATIONS INCORPORATING A2J PRINCIPLES (Mar. 27, 2020), *supra*, FN 27 (“Whenever possible, forms and instructions should be written at a 5th grade reading level, and where possible, legal jargon and Latin should be stripped, or at the very least, explained.”).

³⁶ See, e.g., THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER, <http://www.placer.courts.ca.gov/RAS.shtml>. See generally SELF-REPRESENTED LITIGATION NETWORK (SRLN), SERVING SELF-REPRESENTED LITIGANTS REMOTELY: A RESOURCE GUIDE (2016), https://www.srln.org/system/files/attachments/Remote%20Guide%20Final%208-16-16_0.pdf (“Providing services in a way that does not require the public to visit a courthouse or office is advantageous in terms of time and cost savings both for self-represented litigants and for the organizations that serve them.”).

³⁷ See, e.g., *Preparing to Participate in a Zoom Video Conference*, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, <https://www.cand.uscourts.gov/zoom/>.

³⁸ NATIONAL CENTER FOR STATE COURTS, REMOTE COURT OPERATIONS INCORPORATING A2J PRINCIPLES (Mar. 27, 2020), *supra*, FN 27.

³⁹ SELF-REPRESENTED LITIGATION NETWORK (SRLN), SERVING SELF-REPRESENTED LITIGANTS REMOTELY: A RESOURCE GUIDE (2016), *supra*, FN 36.

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3. Provide a means to respond to individual users' questions

- Court staff (or perhaps Self-Help Center staff) can hold “virtual office hours” to train and/or work with self-represented litigants and attorneys to ensure all participants will be able to access the platform.⁴⁰
- Courts can provide step-by-step plain language instructions on how to use the video-conferencing software, assuming the user has never used that platform, along with contact information for a court staff person who can assist them with any issues.⁴¹ The court should further provide step-by-step plain language instructions for any relevant court procedures for virtual hearings, such as e-filing of evidence and other documents.⁴²

V. GUIDELINES FOR CONDUCTING PROCEEDINGS REMOTELY⁴³

1. General accessibility issues

- Before the hearing, if the litigant is unrepresented, the court should provide a list of legal aid organizations in their area relevant to their legal issue.
- Before the hearing, the court should request information from the litigant on their technological capacity. Namely, the court will need to find out if the litigant has access to the Internet and, if so, can download and navigate the preferred video conferencing platform. The court should also find out if the litigant has any ADA accommodations or language access needs.
- During the hearing, the judicial officer may need to make reasonable accommodations to make sure all litigants have what they need to be heard while not infringing upon their duty to remain impartial.⁴⁴ In so doing, “a judge may consider the totality of the circumstances, including the type of case, the nature and stage of the proceeding, and the training, skill, knowledge, and experience of the persons involved when making reasonable accommodations.”⁴⁵

⁴⁰ CAPACITY BUILDING CENTER FOR COURTS, CONDUCTING EFFECTIVE REMOTE HEARINGS IN CHILD WELFARE CASES, *supra*, FN 25.

⁴¹ TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF REPRESENTED LITIGANTS, *supra*, FN 18. See, e.g., THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER, *Video FAQ*, <http://www.placer.courts.ca.gov/RAS-faq-video.shtml>.

⁴² TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF REPRESENTED LITIGANTS, *supra*, FN 18.

⁴³ See Cal. Judicial Council Information Technology, “Technology Advisory and Best Practices for Video Teleconferencing,” April 20, 2020, (copy available on request from jkaddoura@CalATJ.org); see also, e.g., NATIONAL CENTER FOR STATE COURTS, *Checklist for judges in virtual proceedings*, <https://www.ncsc.org/~media/Files/PDF/Newsroom/Coronavirus%20Resources/Checklist-for-judges-virtual-proceedings.ashx>.

⁴⁴ TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF REPRESENTED LITIGANTS, *supra*, FN 18.

⁴⁵ TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF REPRESENTED LITIGANTS, *supra*, FN 18.

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- For example, a judge may: “Construe pleadings and briefs liberally; ask neutral questions to elicit or clarify information; modify the mode and order of evidence as permitted by the rules of procedure and evidence, including allowing narrative testimony; explain the basis for a ruling; and/or inform litigants what will be happening next in the case and what is expected of them.”⁴⁶
- If an SRL is significantly disadvantaged by having a remote hearing, the court and advocates can consider whether there should be a continuance in the case.⁴⁷ Alternatively, if an SRL’s case is continued and he or she is disadvantaged by *not* having a hearing, consider whether the SRL should be requesting a remote hearing or an in-person hearing under appropriate circumstances.⁴⁸

2. General tips to prepare⁴⁹

- Consider visibility when preparing what you will wear: Dress in a solid color (e.g., black robe for judges) and, if a tie is worn, use a solid tie, not one with a pattern.
- Remember your background: Choose a solid colored wall, such as a neutral white wall, or use one of the videoconferencing platforms generated backgrounds.
- Pay attention to lighting: Light from behind you might make you appear dark and hard to see, while light from the center of the room might cast a shadow too.
- Test your connection and setup: Before the hearing, test Zoom and your Internet connection, such as with a test meeting.

3. Public access

- **Court hearings presumptively are public.**⁵⁰ Public access may be provided by giving notice on a court website or otherwise identifying the proceedings, scheduled times, and manner of joining the proceeding (if permitted).
- **Security is paramount.** Whichever method is proposed, the security of the proceedings is absolutely critical. Issues like “Zoombombing” by members of the public can be disruptive and, at times, indecent or explicit.⁵¹ For this reason, courts should avoid making meetings public if allowed (make private and require password) or sharing the Zoom link or password publicly (such as on a publicly accessible webpage).⁵² Also, the court should manage screensharing options so only the “Host” (the court) can

⁴⁶ TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF REPRESENTED LITIGANTS, *supra*, FN 18.

⁴⁷ CAPACITY BUILDING CENTER FOR COURTS, CONDUCTING EFFECTIVE REMOTE HEARINGS IN CHILD WELFARE CASES, *supra*, FN 25.

⁴⁸ CAPACITY BUILDING CENTER FOR COURTS, CONDUCTING EFFECTIVE REMOTE HEARINGS IN CHILD WELFARE CASES, *supra*, FN 25.

⁴⁹ 4. *Tips for Successful Virtual Court Proceedings*, JUDICIAL INFORMATION SERVICES, <https://info.courts.mi.gov/virtual-courtroom-info#ZoomBasics>.

⁵⁰ *Background and Legal Standards — Public Right to Access to Remote Hearings During COVID-19*, TEXAS JUDICIAL BRANCH (link currently unavailable).

⁵¹ AG’s Office Issues Tips for Safe Video Conferencing During COVID-19 Pandemic, MASS.GOV (Apr. 10, 2020), <https://www.mass.gov/news/ags-office-issues-tips-for-safe-video-conferencing-during-covid-19-pandemic>.

⁵² AG’s Office Issues Tips for Safe Video Conferencing During COVID-19 Pandemic, MASS.GOV (Apr. 10, 2020), *supra*, FN 51.

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screenshare and consult the IT department for how to make the meeting as secure as possible (highest Zoom security settings).⁵³

- **Record the proceedings to provide to the public.** The court may also consider providing public access, although not in real time, by posting recordings of the proceedings in the court file for the proceeding, with notice to the public that the recordings are available and how to access them. Non-real time access may be subject to challenge if it is not announced, if content is not complete (absent good cause for confidential proceedings under existing legal standards), or if access is delayed.
- **Allow public access through a YouTube channel.** If real-time public access is allowed, the court should take reasonable steps to restrict full participation to the parties and court staff. For example, the Zoom platform allows the court to email the link to the Zoom meeting only to those participating in the proceeding, and provide simultaneous access to the public by giving notice of the information necessary to view the proceeding on a YouTube channel that the court can establish.⁵⁴
 - **Public Access via Live Streaming.**⁵⁵ “Follow the instructions [here](#) to set up and enable YouTube Live Streaming from your Zoom meetings (initiated/controlled by a Host). Consider adding a “Do Not Record” watermark ([link to example you can use](#)) to your live stream using the instructions [here](#) (use the option "entire video"). YouTube automatically saves and makes available recordings of live streamed video; manage these recordings appropriately after live streaming is completed (these recordings should not be considered an official court record). YouTube automatically enables a Live Chat feature when live streaming; your court should be aware of the settings to control or disable this feature, please see YouTube support on this topic [here](#).”
- To conduct a confidential hearing remotely, the court must make a record of good cause either before or at the outset of the hearing. Texas has prepared a detailed bench card for doing so, which can serve as a model.⁵⁶

4. Arrangements for documentary evidence

The information provided to court users in advance of remote hearings should explain how to submit and use documentary evidence. It will facilitate hearings to require advance submission of exhibits, to the extent possible, and specify any required technology and format for dealing with exhibits.⁵⁷

⁵³ AG's Office Issues Tips for Safe Video Conferencing During COVID-19 Pandemic, MASS.GOV (Apr. 10, 2020), *supra*, FN 51.

⁵⁴ STATE COURT ADMINISTRATIVE OFFICE, MICHIGAN TRIAL COURTS VIRTUAL COURTROOM STANDARDS AND GUIDELINES (Apr. 17, 2020), *supra*, FN 8.

⁵⁵ RECOMMENDATIONS ON USING ZOOM & PUBLIC ACCESS FOR COURT PROCEEDINGS, JUDICIAL INFORMATION SERVICES, <https://info.courts.mi.gov/virtual-courtroom-info#LiveStreamInfo>.

⁵⁶ Bench Card for Closing Courtroom, TEXAS JUDICIAL BRANCH, https://81db691e-8a8c-4e25-add9-60f4845e34f7.filesusr.com/ugd/64fb99_1e6097e7fa4d4e079f58f5a12f3a27ef.pdf.

⁵⁷ A form order entitled *Order Setting Hearing* from Texas for Zoom hearing procedures states: “All exhibits to be considered by the Court must be transmitted to the Court Coordinator and copied to opposing counsel no later

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5. Basic procedures during remote hearings

- Remind participants (and do so yourself) to speak to the computer camera, not the screen, and position the camera to be at eye level or slightly above eye level.
- When participants use Zoom via a phone, their phone number might be displayed. Change this to their name.
- When hosting hearings, the court should enable the “waiting room” function in Zoom. Use Zoom’s “waiting room” function to allow individuals into the “virtual courtroom”; place disruptive participants into the waiting room if necessary.⁵⁸
- The court should address, on the record, that the parties waive any rights they may have to be present in the courtroom for the proceeding and, in criminal proceedings at least, that they consent to the proceeding being conducted via videoconference technology.⁵⁹
- At the outset of the hearing, address any technical difficulties and provide litigants with a clear process to deal with any impediments, such as what to do if their connection drops.⁶⁰ Potentially, a court can build anticipated technical difficulty time into the allotted time for each hearing, to avoid running over into other hearings.
- At the outset of the hearing, the court should again ask if the litigant has any unmet ADA accommodations or if they need an interpreter.⁶¹ The court should also ask if the litigant has caretaker responsibilities or privacy issues (especially for domestic violence matters) at the location where they are participating in the remote hearing.⁶²
- The court should then provide an overview of how the hearing will proceed.⁶³ Instruct participants to be sure their line is muted when they are not speaking. Lay out the rules and procedures clearly so that all participants are on the same page, such as instructions for how the judicial officer prefers the litigant to interact with other participants over the videoconferencing platform (e.g., whether they will be muted and should use the hand-raising function if they wish to speak.)⁶⁴

than 5:00 PM on the business day immediately preceding the date of the hearing. Acceptable formats are PDF, JPG, PNG, and MP4. No other file types will be accepted. Unanticipated rebuttal evidence may be submitted during the hearing through the Chat-Files feature.”

⁵⁸ State Court Administrative Office, Michigan Trial Courts Virtual Courtroom Standards and Guidelines (Apr. 17, 2020), *supra*, FN 8.

⁵⁹ State Court Administrative Office, Michigan Trial Courts Virtual Courtroom Standards and Guidelines (Apr. 17, 2020), *supra*, FN 8.

⁶⁰ State Court Administrative Office, Michigan Trial Courts Virtual Courtroom Standards and Guidelines (Apr. 17, 2020), *supra*, FN 8.

⁶¹ TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF REPRESENTED LITIGANTS, *supra*, FN 18.

⁶² TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF REPRESENTED LITIGANTS, *supra*, FN 18.

⁶³ TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF REPRESENTED LITIGANTS, *supra*, FN 18.

⁶⁴ TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF REPRESENTED LITIGANTS, *supra*, FN 18.

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- If a witness is testifying, ensure you can see the witness clearly. For objections, attorneys can type “objection” in the chat box or raise a hand (if muted), as these will likely be better for the court’s process and the audio recording and transcription than crosstalk on the videoconferencing platform.⁶⁵
- If the platform allows “break-out” rooms (such as on Zoom), these can be utilized for sidebar conversations that others should not hear (such as “bench conferences, attorney-client discussions, or judicial officer interviews of children if traditionally done one-on-one”); the private chat function can also be used for this purpose.⁶⁶ Where applicable, attorney-client discussions in “breakout rooms” should be considered private and not be audio- or video-recorded.⁶⁷
- “Troubleshoot an audio echo in a meeting: There are three causes of an audio echo, or feedback, during a Zoom meeting: 1) The participant called in by phone and is using his or her computer’s audio at the same time; 2) There are participants with computer or telephone speakers that are too close together; or 3) There are multiple computers with active audio in the same conference room.”⁶⁸
- When the hearing concludes, confirm with the litigant that they have an email address. If they do, inform them again that the court will contact them regarding any future hearings or information about their case via that email address.⁶⁹ The court should also review next steps for the litigant, including what is expected of the litigant (including what possible repercussions there are) and when the next hearing date is.⁷⁰

6. Practices to produce a clear record

- The proceedings conducted via videoconference must be recorded by the court.⁷¹ Courts must create a verbatim record of each proceeding with this recording. In order to produce an accurate verbatim record, the recording must be clear. To produce a clear recording, it is important that parties be advised to speak slowly and wait to speak until prompted. To avoid overlap in the recording between speakers, the judicial officer ought to remind parties to talk slowly and avoid interrupting others. Parties should identify themselves each time they speak.

⁶⁵ CAPACITY BUILDING CENTER FOR COURTS, CONDUCTING EFFECTIVE REMOTE HEARINGS IN CHILD WELFARE CASES, *supra*, FN 25.

⁶⁶ CAPACITY BUILDING CENTER FOR COURTS, CONDUCTING EFFECTIVE REMOTE HEARINGS IN CHILD WELFARE CASES, *supra*, FN 25.

⁶⁷ STATE COURT ADMINISTRATIVE OFFICE, MICHIGAN TRIAL COURTS VIRTUAL COURTROOM STANDARDS AND GUIDELINES (Apr. 17, 2020), *supra*, FN 8.

⁶⁸ STATE COURT ADMINISTRATIVE OFFICE, MICHIGAN TRIAL COURTS VIRTUAL COURTROOM STANDARDS AND GUIDELINES (Apr. 17, 2020), *supra*, FN 8.

⁶⁹ TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF REPRESENTED LITIGANTS, *supra*, FN 18.

⁷⁰ TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF REPRESENTED LITIGANTS, *supra*, FN 18.

⁷¹ STATE COURT ADMINISTRATIVE OFFICE, MICHIGAN TRIAL COURTS VIRTUAL COURTROOM STANDARDS AND GUIDELINES (Apr. 17, 2020), *supra*, FN 8.

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- The court should be the Zoom “host” and can thereby control functions of the courtroom, such as muting participants.⁷² Additionally, use “Gallery View” in Zoom to avoid the program function that switches between participants when they speak. Gallery View enables the judicial officer to see all participants and the court reporter/recorder to know who is speaking.⁷³
- If a court is using Polycom as well as Zoom, the videoconferencing technology can feed directly into the court’s recording system, such that when the court calls into the Zoom virtual courtroom, the court’s recording system will record just like any other use of Polycom.⁷⁴ “Where a direct feed into the recording system is not possible due to equipment limitations, a microphone should be placed near the speaker.”⁷⁵ “Alternatively, courts that use Justice AV Solutions (JAVS) may purchase Notewise software to record computer-based conference calls. Notewise is a digital recording application that allows direct recording of any conference calls through Zoom, GoToMeeting, and other software.”⁷⁶

⁷² STATE COURT ADMINISTRATIVE OFFICE, MICHIGAN TRIAL COURTS VIRTUAL COURTROOM STANDARDS AND GUIDELINES (Apr. 17, 2020), *supra*, FN 8.

⁷³ STATE COURT ADMINISTRATIVE OFFICE, MICHIGAN TRIAL COURTS VIRTUAL COURTROOM STANDARDS AND GUIDELINES (Apr. 17, 2020), *supra*, FN 8.

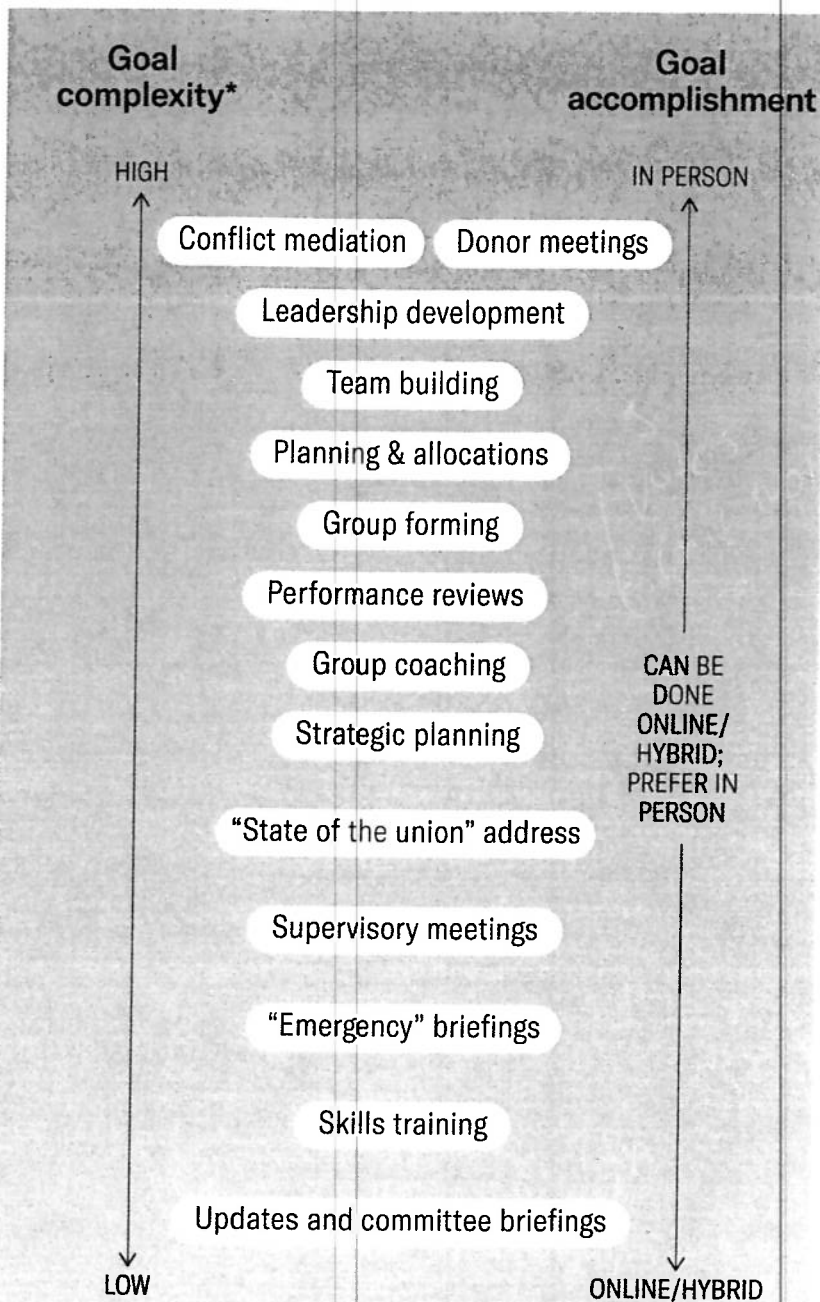
⁷⁴ STATE COURT ADMINISTRATIVE OFFICE, MICHIGAN TRIAL COURTS VIRTUAL COURTROOM STANDARDS AND GUIDELINES (Apr. 17, 2020), *supra*, FN 8.

⁷⁵ STATE COURT ADMINISTRATIVE OFFICE, MICHIGAN TRIAL COURTS VIRTUAL COURTROOM STANDARDS AND GUIDELINES (Apr. 17, 2020), *supra*, FN 8.

⁷⁶ STATE COURT ADMINISTRATIVE OFFICE, MICHIGAN TRIAL COURTS VIRTUAL COURTROOM STANDARDS AND GUIDELINES (Apr. 17, 2020), *supra*, FN 8.

Do You Need to Meet in Person?

Use this tool to gauge a goal's relative complexity.



*In this context, "complexity" includes emotional complexity, the range of interdependence, or the need for intervention.

Juries For Online Trials Are Younger And More Diverse

It makes you wonder if this should become a more permanent development.

COVID is going to be with us for a little while longer, but the show must go on and many jurisdictions have moved trials online. While the most entertaining result of this move into uncharted territory is [an influx of cat attorneys](#), it's also changing the makeup of the juries hearing these cases. And in ways that may have a tangible impact on verdicts.

[Sound Jury Consulting](#) looked at the data from King County, Washington, and compared samples of the remote trial jury pool with the in-person jury pool from pre-pandemic times and [the results are fascinating](#).

The most significant difference we noted was in the age category. In-person trials had an average age of 48.5 and median age of 49. With remote trials, the average age drops to 44.8 and the median age drops even further to 41.5. The median age is the more important point of comparison here. As a reminder, the median is the midpoint for all jurors, meaning 50% of the jury pool in remote trials is under 41.5 and 50% is over 41.5. That is a big difference from in-person trials where the median age is 49, but let's dig a little deeper.

This translates to a jump in millennial participation from 30 to 43 percent. As Sound Jury Consulting's Thomas O'Toole puts it, this "very well may have stopped the heart of insurers and general counsel reading this post since millennials are often cited as one of the reasons for the recent trend towards nuclear verdicts." It's an interesting book-end to [a conversation we had with O'Toole back in June](#) about the fact that in-person jury pools during COVID were likely to get more pro-business because the category of people who would show up for an in-person jury and Republicans were close to a perfect circle. We didn't know what to expect then about juries moving online, but it looks to be the opposite impact.

Turning to the issue of race, we saw other notable differences. In-person jury pools were 81% white, compared to 71% with remote jury pools, which suggests that remote trials could result in greater diversity in our jury pools.

That's a significant bump in diversity. Seattle is about 65 percent white so the move to remote invites a pool that is much closer to an accurate reflection of the city. It's the sort of revelation that makes you wonder if remote jury pools might be worth

keeping around even after everything returns to normal. The impulse is to run back to the old ways as soon as we receive an all-clear, but if the process of dragging people to a dismal central location to sit around for days only to not be picked has a dramatic impact on the demographics of the pool that's a big deal. Could remote trials or at least hybrid trials become a fixture for at least some cases? It's worth thinking about.

At the very least, we could move grand juries online. Having to head to court for a few hours a day over the course of multiple weeks is obnoxious and a drag on people's workday. Let them log on and listen and then go back to work.

We know we have the technology, we just need the will to use it.

[Jury Pool Differences with Remote Jury Trials](#) [Sound Jury Consulting]

Earlier: [Juries Are About To Get A Lot More Corporate-Friendly Thanks To COVID](#)



Joe Patrice is a senior editor at *Above the Law* and co-host of *Thinking Like A Lawyer*. Feel free to [email](#) any tips, questions, or comments. Follow him on [Twitter](#) if you're interested in law, politics, and a healthy dose of college sports news. Joe also serves as a [Managing Director at RPN Executive Search](#).

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📅 February 24, 2021(https://soundjuryconsulting.com/2021/02/24/) 5:59 am

3 Comments(https://soundjuryconsulting.com/jury-pool-differences-with-remote-jury-trials/#comments)

Jury Pool Differences with Remote Jury Trials



I was speaking with a prominent plaintiff personal injury attorney in Seattle recently about the remote jury trials that are taking place in King County. When I asked him his thoughts, he said that he likes remote jury trials because he feels like he is getting better jury pools. This comment intrigued me, so we looked at our own internal data to see if there are any differences in the make-up of remote trial jury pools compared to in-person trials. Does this shift to technology change the make-up of the jury pool and if so, how?

We began by looking at the demographic data we have from remote jury trials in King County, Washington (Seattle). We combined the data from multiple trials to create a sample of roughly 165 jurors. Notably, this includes jury pools from cases where the entire trial was remote as well as cases where jury selection was remote, but the trial occurred in person. We have worked on cases in both scenarios. Since the fundamental question at issue is whether or not the technology requirement as an entry point to the case impacts the make-up of the pool, we thought it was appropriate to include data from these two types of cases.

Once we collected the data, we identified a similar number of jurors (roughly 165) from in-person trials in the year or two before the pandemic in King County.

The comparison between the two types of jury pools was interesting. We have a lot of data we are still working through, but in this blog, I want to highlight some of the immediate, notable differences related to demographics.

The most significant difference we noted was in the age category. In-person trials had an average age of 48.5 and median age of 49. With remote trials, the average age drops to 44.8 and the median age drops even further to 41.5. The median age is the more important point of comparison here. As a reminder, the median is the midpoint for all jurors, meaning 50% of the jury pool in remote trials is under 41.5 and 50% is over 41.5. That is a big difference from in-person trials where the median age is 49, but let's dig a little deeper.

Consistent with the numbers above, the data shows a significant jump in the millennial) population (25-41-year-olds) with remote jury pools. The percentage of millennials that we observed in in-person trials in King County was 30%, which is fairly consistent with the national data we have on this issue. When we looked at remote jury pools, the percentage of millennials jumped to 43%! This jump is astonishing and very well may have stopped the heart of insurers and general counsel reading this post since millennials are often cited as one of the reasons for the recent trend towards nuclear verdicts. The biggest drop we observed was actually in the Gen X crowd (42-56-year-olds), going from 34% with in-person trials to 23% with remote trials, followed by Baby Boomers (57-75-year-olds), which dropped from 30% with in-person trials to 27% with remote trials.

Turning to the issue of race, we saw other notable differences. In-person jury pools were 81% white, compared to 71% with remote jury pools, which suggests that remote trials could result in greater diversity in our jury pools.

We also found some differences in educational background, though it should be noted that King County is unique because it has one of the highest educated jury pools in the United States. For in-person trials, 45% of the jury pool had a college degree. With remote jury pools, we observed a greater distribution in educational background, with the percentage of those with a college degree dropping to 31%. However, that does not necessarily mean remote jury pools are less educated. We saw the percentage of jurors with post-graduate degrees jump from 20% in-person to 27% with remote trials. We also saw increases with those who only have some college or have received an Associate's or Technical degree.

We only observed two notable differences with employment status, both of which are somewhat consistent with the differences we observed with age. The percentage of those who are retired decreased from 11% in-person to 7% with remote trials. The percentage of students increased from 1% with in-person to 5% with remote trials.

Our plan is to dig deeper into the data we have collected, but the early observations paint a picture of a notably different jury pool – at least demographically, which could have significant implications for case strategy development.

More to explorer

What's the Water Cooler Talk for Your Case? (<https://soundjuryconsulting.com/whats-the-water-cooler-talk-for-your-case/>)

March 29, 2022 /// No Comments

This week, Will Smith delivered what the Oscars have desperately needed in recent years: something for people to talk about the next

(<https://soundjuryconsulting.com/whats-the-water-cooler-talk-for-your-case/>)

What to Do When Jurors Forget Your Arguments? (<https://soundjuryconsulting.com/what-to-do-when-jurors-forget-your-arguments/>)

March 23, 2022 /// No Comments

A half-eaten bagel hurls across the room at the large screen of mock jurors deliberating in the next room. "I spent at

(<https://soundjuryconsulting.com/what-to-do-when-jurors-forget-your-arguments/>)

"Post Truth" as a Vivid Reminder of the Role of Narrative Thinking (<https://soundjuryconsulting.com/post-truth-as-a-vivid-reminder-of-the-role-of-narrative-thinking/>)

January 20, 2022 /// No Comments

I have purposely avoided writing about narrative and its importance for years since the industry of jury consulting is oversaturated with folks

(<https://soundjuryconsulting.com/post-truth-as-a-vivid-reminder-of-the-role-of-narrative-thinking/>)



Thomas O'Toole, Ph.D.

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Justice and Nonverbal Communication in a Post-pandemic World: An Evidence-Based Commentary and Cautionary Statement for Lawyers and Judges

Vincent Denault^{1,2}  · Miles L. Patterson³

Published online: 9 August 2020

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Abstract

On 11 March 2020, the World Health Organization officially declared COVID-19 a pandemic. The new physical distancing rules have had many consequences, some of which are felt throughout the justice system. Courts across the world limited their operations. Nonetheless, given that justice delayed is justice denied, many jurisdictions have turned to technologies for urgent matters. This paper offers an evidence-based comment and caution for lawyers and judges who could be inclined, for concerns such as cost and time saving, to permanently step aside from in-person trials. Using nonverbal communication research, in conjunction with American and Canadian legal principles, we argue that such a decision could harm the integrity of the justice system.

Keywords Trials · Witnesses · Nonverbal communication · Facial expressions · Hand gestures · COVID-19

Introduction

On 11 March 2020, the World Health Organization officially declared COVID-19 a pandemic. The resulting new physical distancing rules have had many consequences, some of which are felt throughout the justice system, a pillar of democracy for societies based on the rule of law. Courts across the world limited their operations. Nonetheless, given that justice delayed is justice denied, many jurisdictions have turned to technologies for urgent matters. The use of phone and computer applications such as Skype or Zoom to conduct trials instead of the usual in-person format raises concerns similar to those identified by legal scholars with regards to trials by videoconference, such as dehumanizing defendants (Eagly 2015; Salyzyn 2012). Importantly, the use of such applications also raises a number

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of commonly ignored issues related to the role of nonverbal communication during in-person exchanges. Because legal scholars and practitioners are rarely trained in research-based principles of nonverbal communication (with some even attending pseudoscientific lie detection seminars, Denault et al. 2020), there can be serious threats to the proper course of court proceedings. This paper offers an evidence-based comment and caution for lawyers and judges who could be inclined, for concerns such as cost and time saving, to permanently step aside from in-person trials.

First, we address the faulty historical premise that the role of nonverbal communication during trials is simply to determine who is lying and who is telling the truth. Second, we explain why a fair trial and a meaningful application of the presumption of innocence require, among other things, that lawyers and triers of facts be able to adequately see *patterns* of witnesses' nonverbal communication, not just their facial expressions. Finally, we call upon lawyers and judges to closely work with nonverbal communication scholars and, in turn, nonverbal communication scholars concerned about the actual state of democracy to address more directly the dynamics of courts and courtrooms.

The History and Criticism of Demeanor Evidence

The use of nonverbal communication during trials goes back hundreds, if not thousands of years, whether it was to identify individuals who wanted to poison others by observing, among other things, the color of their face (Troville 1939; Wise 1845), or to ascertain the guilt or innocence of suspects through “Judgments of God” by examining scars resulting from physical procedures (Ford 2006; Kleinmuntz and Szucko 1984). To this day, in American and Canadian justice systems, for example, triers of facts (i.e., judges in bench trials or jurors in jury trials) are legally authorized to consider witness demeanor. According to the United States Supreme Court, triers of facts may judge a witness “by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief” (*Mattox v. United States* 1895, p. 242–243; see also *Coy v. Iowa* 1988). Likewise, the Supreme Court of Canada asserted that triers of facts have “the great advantage of watching the demeanor of all who testify” (*P. (D.) v. S. (C.)*, 1993, p. 192). More recently, the Supreme Court of Canada argued that facial expressions were important to conduct effective cross-examinations by lawyers and witness credibility assessments by triers of facts:

Non-verbal communication can provide the cross-examiner with valuable insights that may uncover uncertainty or deception, and assist in getting at the truth. Covering a witness's face may also impede credibility assessment by the trier of fact, be it judge or jury. (*R. v. N. S.* 2012, p. 743–744)

In keeping with the views of the United States and Canada's highest courts, triers of facts regularly turn to witness demeanor for credibility assessment. This approach, however, has been severely criticized (e.g., Blumenthal 1993; Minzner 2008; Timony 2000; Wellborn 1990). For example, meta-analyses have shown that nonverbal cues to detect lies are largely faint and unreliable and that lie detection accuracy using common visual nonverbal cues rarely exceeds chance (Bond and DePaulo 2006, 2008; DePaulo et al. 2003; Leach et al. 2016; Snook et al. 2017; Vrij and Turgeon 2018). Furthermore, judges in bench trials and jurors in jury trials hold erroneous beliefs about the validity of nonverbal cues to detect lies (e.g., Denault and Dunbar 2019; Heath 2009; Strömwall and Granhag 2003). For example, the popular belief that liars act nervously is not supported by empirical evidence

(The Global Deception Research Team 2006; Vrij 2008). These criticisms might seem consistent with limiting in-person trials and replacing them with phone and computer applications on a regular basis. We contend, however, that such a position would be misguided.

Flawed Arguments Against the Importance of Witness Demeanor

There should be no doubt about the importance, if not the necessity, of recognizing the dangers of systemic biases and stereotypes in courtrooms. Rape myths, for example, distort the outcome of trials and allow perpetrators to escape justice (Dinos et al. 2015; Leverick 2020). The same holds for erroneous beliefs about the validity of nonverbal cues to detect lies. Indeed, as Denault and Dunbar (2019) point out, expectations about how honest and dishonest witnesses are supposed to behave influence witness credibility assessments. And according to the Supreme Court of Canada, “credibility is an issue that pervades most trials, and at its broadest may amount to a decision on guilt or innocence” (R. v. Handy 2002, p. 951).

Arguing against in-person trials, however, because common visual nonverbal cues to detect lies are largely faint and unreliable fails to recognize that many vocal and verbal cues to deception are also largely faint and unreliable (DePaulo et al. 2003). In addition, novel lie detection techniques using verbal cues, and promoted as alternatives to nonverbal cues (Snook et al. 2017; Vrij and Fisher 2016; Vrij and Granhag 2012; Vrij and Turgeon 2018), were developed for investigative interviews, not for real-life court proceedings (Denault and Jupe 2018; Denault et al. 2019a). As Denault and Dunbar (2019) argue, those techniques ignore characteristics of adversarial justice systems, including the more passive roles of judges and jurors. In addition, the nature of questions asked by lawyers during real-life examinations and cross-examinations are often different from those in experimental settings. The same holds for the answers of witnesses in courtrooms. As Scheppele (1989) points out,

Stories may diverge, then, not because one is true and another false, but rather because they are both self-believed descriptions coming from different points of view informed by different background assumptions about how to make sense of events. (p. 2082)

Furthermore, arguing against in-person trials because of erroneous beliefs about the validity of nonverbal cues to detect lies overlooks the fact that triers of facts also hold erroneous beliefs about the validity of vocal and verbal cues to deception, and that “lawyers performing cross-examination can draw witnesses into these cues to make them appear nervous and untruthful” (Denault et al. 2019a, p. 5; see also Denault and Dunbar 2017, 2019; Denault et al. 2019b; Strömwall and Granhag 2003). For better or worse, common sense is an integral part of judicial reasoning (Burns 2016; Cochran 2013; Friedland 1989). Judges in bench trials and jurors in jury trials use it for more than evaluating demeanor and are authorized to do so in making their decisions. As the Supreme Court of Canada notes, “credibility must always be the product of the judge or jury’s view of the diverse ingredients it has perceived at trial, combined with experience, logic and an intuitive sense of the matter” (R. v. Marquard 1993, p. 248). In other words, the belief that ignoring faces and bodies will result in more rational judicial reasoning, without further adverse consequences, is not supported by empirical

evidence. In fact, the importance of nonverbal communication during trials involves much more than simply characterizing witnesses as liars or truth-tellers.

The Role of Nonverbal Communication During Trials

Although crime drama television series, such as *Lie To Me*, have brought the topic of deception detection to the forefront in recent years (Serota 2014), nonverbal communication has been subject to thousands of peer-reviewed publications since the 1960s. Scholars across several academic disciplines have shown that, during in-person exchanges, our face and body serve a variety of functions beyond lie detection (Patterson 1983, 2011). As Hall et al. (2019) emphasize,

The breadth of topics that relate to NVC [nonverbal communication] is quite wide, in accordance with its many functions, which include displaying affect (such as anxiety or happiness), revealing attitudes (such as interest, prejudice, or intimacy), regulating interaction (such as taking turns or directing attention), managing impressions (such as by presenting oneself as competent or brave), revealing physical and mental conditions (such as pain or mental disorders), and exerting interpersonal control (as in displaying dominance). (p. 273)

Nonverbal communication refers to the sending and/or receiving of information through a variety of environmental cues, appearance features, and nonverbal cues and behaviors such as facial expressions, gaze patterns, postures, and body movements (Hall and Knapp 2013; Manusov and Patterson 2006; Matsumoto et al. 2016; Patterson 2011). Thus, the design and arrangement of courts and courtrooms, as well as the appearance features and the nonverbal cues and behaviors of judges, jurors, court clerks, security guards, defendants, witnesses, and lawyers, all affect the course of court proceedings. Their facial expressions, gaze patterns, postures, and body movements convey interpersonal and social information, such as their appraisals, concerns, and dispositions about a situation. In addition, these nonverbal cues and behaviors signal their behavioral intentions, and create impressions among those present in courtrooms and in public observing them, without a single word being uttered (Hall et al. 2019; see also Blanck et al. 1990; Remland 1994; Searcy et al. 2004).

In the case of bench and jury trials, the opportunities to observe nonverbal behaviors include the following: (1) when judges talk to witnesses and lawyers; (2) when witnesses testify; (3) when lawyers examine and cross-examine witnesses; (4) when lawyers make their opening and closing arguments; and (5) when lawyers and clients talk. Moreover, “third-party” expressive reactions by judges, jurors, defendants, witnesses, and lawyers to other interaction participants precipitate evaluations about the course of events. In other words, nonverbal communication, which includes much more than just the speaker’s face, provides participants feedback to coordinate and manage in-person exchanges on a moment-by-moment basis in the service of participants’ goals (Harrigan 1985, 2005; Patterson 2019; Rossano 2012). As Patterson (1995) describes,

... interactants simultaneously act with, and form impressions of, their partners. Thus, individuals are encoding information, feelings, intentions, scripts, or other reactions into behavioral expression while, at the same time, decoding the behavior of the partner and experiencing feedback from their own behavior. (p. 6)

Very few nonverbal cues and behaviors have definite signification. As reiterated by Hall et al. (2019), “contextual factors involving encoders’ intentions, their other verbal and nonverbal behaviors, other people (who they are and their behavior), and the setting will all affect meaning” (p. 272). In addition, how people understand and adapt to facial expressions, gaze patterns, postures, and body movements often happen outside of awareness (Patterson 2019), including through nonconscious mimicry (also known as the “chameleon effect”), that is, the automatic tendency to imitate the behavior of others (Chartrand and Bargh 1999; Hess and Fischer 2014). Nonconscious mimicry also has many other prosocial consequences between interaction participants, including the increase in accuracy of emotion perception, in displays of helpful behaviors, and in feelings of liking, empathy, and trust (Chartrand and Lakin 2013).

Although facial expressions, gaze patterns, postures, and body movements have garnered much attention (Plusquellec and Denault 2018), “a large body of research shows that hand gestures produced during speech are, along with the words, part of an integrated speech production system” (Hall et al. 2019, p. 272). For example, in a variety of contexts, the speaker’s hand gestures can reduce demand on working memory and facilitate speech production (e.g., Cook and Fenn 2017; Cook et al. 2012; Krauss et al. 2000; Ping and Goldin-Meadow 2010), provide information on their own, and improve the listener’s understanding of the speaker’s verbal information (e.g., when the speaker’s verbal information is equivocal) (Goldin-Meadow and Alibali 2013). In addition, listeners producing hand gestures themselves can enhance their understanding of the speaker’s speech (Dargue et al. 2019; Hostetter 2011).

Finally, although the use of phone and computer applications such as Skype or Zoom limit the breadth of view and the ability of lawyers and triers of facts to choose their focus, it could be argued that the behavioral information is simply different. For example, contrary to in-person trials where judges in bench trials and jurors in jury trials may be many feet away, facial characteristics of witnesses could be viewed better on phone and computer screens. This could introduce, however, other concerns about the course of court proceedings. When the focus is primarily on the face, for example, the potential impact of facial characteristics increases. This is not to be taken lightly. Facial characteristics can adversely influence the evaluation of evidence and the sentence of defendants, even when they are subject to the death penalty (Porter and ten Brinke 2009; Porter et al. 2010; Wilson and Rule 2015, 2016).

Our brief overview describes the pervasive and complex role of nonverbal communication during in-person exchanges, including those in courtrooms. Because one of the main functions of judges in bench trials and jurors in jury trials is to understand witnesses, and to ascertain the sometimes complex facts to which the law will apply (Bell 2013; Denault et al. 2019a; Denault and Jupe 2018; Paciocco 2010), the critical role of nonverbal communication in courtrooms should be weighed before limiting in-person trials and replacing them with phone and computer applications on a regular basis. The Supreme Court of Canada emphasized that “credibility is an issue that pervades most trials, and at its broadest may amount to a decision on guilt or innocence” (R. v. Handy 2002, p. 951) and that “effective cross-examination is integral to the conduct of a fair trial and a meaningful application of the presumption of innocence” (R. v. N. S. 2012, p. 743; see also *Mattox v. United States* 1895). Permanently moving away from in-person trials could interfere with the conduct of effective cross-examinations by lawyers and witness credibility assessments by triers of facts, and ultimately, harm the integrity of the justice system.

The Use of Phone and Computer Applications: A Call for Caution

This paper offers an evidence-based comment and caution for lawyers and judges who could be inclined, for concerns such as cost and time saving, to permanently step aside from in-person trials. First, we addressed the faulty historical premise that the role of nonverbal communication during trials is simply to determine who is lying and who is telling the truth. Second, we explained why a fair trial and a meaningful application of the presumption of innocence require, among other things, that lawyers and triers of facts be able to adequately see the *patterns* of witnesses' nonverbal communication, not just their facial expressions. As we have noted, nonverbal cues can also be misleading and result in systematic biases and stereotypes.

There should be no doubt that during the COVID-19 pandemic, technology allows triers of facts to listen to witnesses, albeit imperfectly, and to resolve urgent disputes (e.g., Abruzzese 2020; Boisvert 2020; Burns 2020; Gerstein 2020; Ibrahim 2020; Mathieu 2020; McLachlin 2020; Reynolds 2020; Schmitz 2020). And it is evident that in some delicate situations, technology (e.g., CCTV) can facilitate the testimony of vulnerable individuals, such as rape victims and child witnesses (e.g., Bennett 2003; Hamilton et al. 2017; Kenniston 2015). These accommodations are also recognized by the US Supreme Court and the Supreme Court of Canada (Maryland v. Craig 1990; R. v. J. Z. S. 2010).

Nevertheless, before extolling the merits of phone and computer applications, the multiple functions of nonverbal communication should be carefully considered, as should other concerns raised by experts. Legal scholars have written about various adverse consequences of trials by videoconference (e.g., Cimino et al. 2014; Diamond et al. 2010; Donoghue 2017; Federman 2006; Marr 2013; Poulin 2004; Walsh and Walsh 2008). These consequences not only include dehumanizing defendants (Eagly 2015; Salyzyn 2012), but also compromising their right to effective counsel assistance (Johnson and Wiggins 2006), and hindering the image and the role of judges, the symbolic function of courthouses, and the law's legitimacy and authority (Rowden 2015; Rowden and Wallace 2018; Salyzyn 2012). Concerns raised by practitioners should also not be overlooked. For example, in the absence of in-person trials, it is difficult, if not impossible, to know if someone not visible on the screen is coaching witnesses, or if witnesses are consulting unauthorized documents to assist in their examination and cross-examination (Bermann 2020). In addition, inadequate access to computers and high-speed internet could lead to severe equity problems (Offit 2020).

In light of all of these issues, lawyers and judges can closely work with nonverbal communication scholars in the pursuit of improving the administration of justice in a post-pandemic world. The steadily growing body of research-based principles of nonverbal communication can assist in establishing evidence-based practices for in-person trials. And nonverbal communication scholars concerned about the actual state of democracy might address more directly the dynamics of courts and courtrooms, as well as conducting further collaborative research on these matters. In spite of the challenges of researching justice systems, such efforts provide an opportunity for nonverbal communication scholars to contribute to the betterment of society.

Acknowledgements The authors would like to thank Norah E. Dunbar and Fanny A. Ramirez for their constructive comments on an earlier version of this manuscript.

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The Use of Remote Hearings in Texas State Courts: The Impact on Judicial Workload

FINAL REPORT

December 2021

COURT CONSULTING DIVISION | NATIONAL CENTER FOR STATE COURTS





This document has been prepared under an agreement between the National Center for State Courts and the Texas Office of Court Administration pursuant to grant number **SJI-P-012** from the State Justice Institute. The points of view and opinions offered in this report do not necessarily represent the official policies or position the State Justice Institute.



The Use of Remote Hearings in Texas State Courts: The Impact on Judicial Workload

December 2021

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Acknowledgments

The authors wish to acknowledge the invaluable contributions of the many judicial officers who participated in this project from the counties of Brewster, Collin, Dallas, Lubbock, Tom Green, Travis, Uvalde/Real, and Webb. An undertaking of this nature is not possible without the assistance of the dedicated members of the Texas judiciary who gave their valuable time to this project.

Over the course of this 12-month study, we were fortunate to draw on the support of a distinguished advisory committee. The Texas Judicial Needs Assessment Committee, composed of judges and judicial officers from across the state, informed many of the decisions underlying this study and will guide the upcoming statewide study of judicial workload.

We extend a special note of thanks to David Slayton, Jeffrey Tsunekawa, and Sheri Woodfin from the Office of Court Administration and Michelle White from the State Justice Institute for their guidance, hard work, and dedication in steering this project to a successful completion. We are also extremely grateful to our NCSC colleague Erika Bailey for her careful review of this report.

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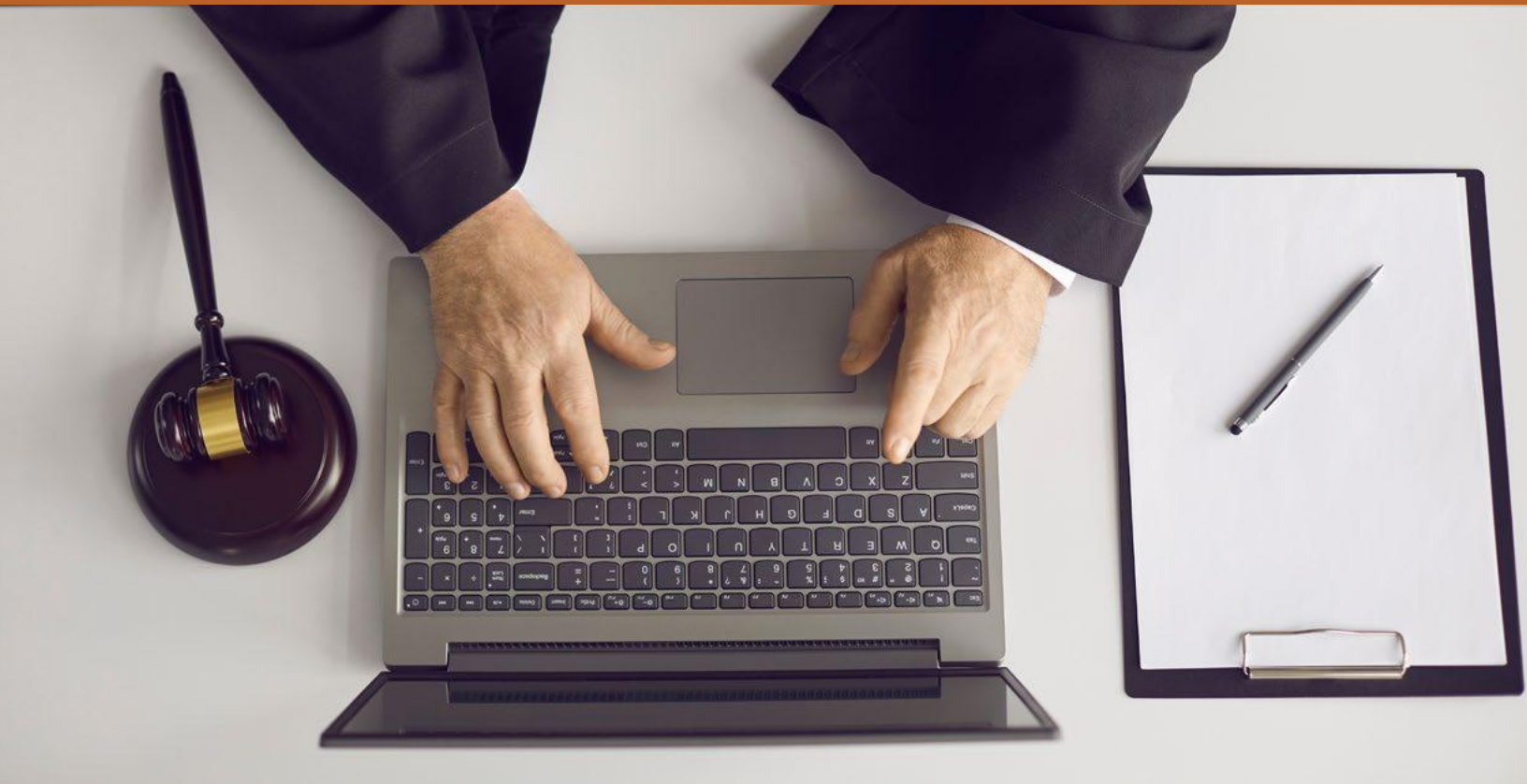
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Executive Summary

During the early months of the COVID-19 pandemic, the Texas state courts moved quickly to implement remote court hearings, in many cases to ensure ongoing access to the courts.

To date, little research has been conducted regarding the impact of implementing remote hearings on courts and court users. Being able to systematically measure differences in hearing length relative to in-person hearings and other consequences of remote hearings is essential for state court decision makers seeking to determine the extent to which remote hearings should be maintained post-pandemic.

The current project involves an analysis of a sample of eight Texas court jurisdictions to empirically investigate the implementation of remote hearings on the efficiency of judicial workload practices and to explore potential benefits, such as improved access to and quality of justice delivered through the courts. The participating judges tracked their work time for a three-week period in April 2021, indicating whether hearings were conducted in-person or remotely. During this time period, approximately 85% of all hearings were conducted remotely, and, as of December 2021, many Texas courts continue to hold most hearings in this manner. NCSC conducted three focus groups with a subset of participating judges to explore the results of the study.

Findings

Overall, this study found remote hearings tend to take about one-third longer (34%) than when hearings are held in-person. That is, on average, a hearing that takes about 30 minutes in-person takes about 40 minutes remotely. To explore the implications of these findings, NCSC staff held a series of three focus groups with 15 judges who fully participated in the time study. The main purpose of the focus groups was to gather judicial perspective on a range of issues related to court workload that involves both remote and in-person hearings. Several themes emerged from this study.

Hearing length. The time study indicated that remote hearings take longer than in-person hearings. Judges generally confirmed that their experience aligned with the study findings that remote hearings take longer and that the increased time is largely the result of technical issues, lack of preparation by parties, fewer default judgments due to the accessibility of attending hearings remotely, and increased numbers of parties in hearings.

Benefits of remote hearings. Texas judges reported that holding remote hearings has definite benefits for expanding access to justice for many litigants, despite taking somewhat longer on average. One major advantage to litigants is the added convenience of not needing to take time off work, locate transportation, or find childcare. In some jurisdictions, remote practice allows litigants, including those who are self-represented, to schedule hearings at specific times (or within short time windows). This practice provides court users greater precision and flexibility in scheduling a court appearance. Remote hearings may also expand access to courts for witnesses, victims, experts, and other court stakeholders who live in remote locations or who fear for their safety in court. Likewise, there is the opportunity for wider participation in many types of family-related cases, especially divorce, child welfare, and child protective services cases.

Challenges of remote hearings. Texas judges identified several technology-related problem areas in line with national patterns. A primary concern is the “digital divide,” the issue that people may have uneven access to the technology needed to participate in remote hearings (e.g., lack of a computer or internet access). Relatedly, litigants may have limited experience using online videoconferencing, causing delays in court proceedings. Trouble navigating the technology can deepen when inexperienced court users need to submit documents or use visual aids. Texas judges also reported having mixed success with the remote-hearing platform when cases involved interpreters. Because the Texas judges believe the use of remote hearings will remain a part of court practice going forward, they clearly recognize the need for ongoing attention to creative and inclusive solutions to access issues.

Proceedings that lend themselves to remote hearings. Judges were asked whether certain types of cases or types of hearings are more or less suited for remote hearings. Texas judges agreed that the type of case is less relevant than the type of hearing—in most instances. Generally speaking, remote hearings function most effectively with hearings that are short in nature and limited in scope, such as setting trial dates, status hearings, permanency hearings, discovery hearings, motions hearings of various types, self-represented divorce dockets (especially when parties have completed agreements), and non-evidentiary or non-witness cases. Additionally, in terms of case types that work well for remote dockets, judges indicated the type of matters that affect people's ability to get on with their lives, such as many probate proceedings, child protective services, and other family law cases, work well.

Impact of remote hearings on judges. Across the three focus groups, as well as during introductory discussions with judges conducted before the time study, the consensus is that remote proceedings will continue for the foreseeable future. Judges reported that, while remote hearings can be exhausting, they are beneficial to litigants in many ways and allow for broader inclusion of interested parties than in-person hearings. However, courts should also focus on ways to reduce judicial stress and "Zoom fatigue" when handling remote proceedings.

Implications of Findings and Recommendations

This exploratory study has revealed there are both benefits and challenges associated with the current case-processing practices used in handling hearings remotely. The need for ongoing attention to reducing technology problems was a recurrent theme during the Texas focus groups, one corroborated by other recent studies conducted elsewhere around the country.

A primary benefit of remote hearings is the opportunity to significantly improve the court experience for court users in select types of hearings and cases. Remote hearings are often more convenient because they allow for more precise scheduling and reduce obstacles to attending related to such issues as transportation, childcare, and work schedules. According to most judges and attorneys interviewed and surveyed across a variety of studies conducted since the pandemic began, remote hearings will be an ongoing reality in courts across the country.

Aside from technological concerns, courts will need to address other challenges with pre-hearing preparation associated with the swift move to remote practices. Texas judges noted a major focus in court administration involves improving the efficiency of remote hearings, including better use of judicial officer time, improved scheduling and notice of remote proceedings, and workable methods to respond to individual users' questions.

Recommendations

1. Judicial leadership should generate guidelines regarding how best to determine when a court proceeding should be conducted in-person or remotely.
2. Judges and court administration should determine the most effective way to schedule hearings that provide for the greatest efficiency in the court, while also being mindful of litigants' time.
3. Remote court participants will benefit from clearly delineated instructions and expectations for hearings.
4. Court systems should develop clearly written (and other formats) instructions for remote proceedings on courtroom decorum and expectations of litigants, including timeliness, dress code, and appropriate places from which to log into a hearing.
5. Before any hearing, the court should ensure that all required paperwork and agreements between parties have been appropriately completed.
6. Courts should not assume that all parties have access to the proper equipment (e.g., computers, tablets, smart phones) necessary to participate in remote court proceedings. If individuals do not have access to the appropriate technology, courts should make such equipment available to court users in a safe and easily accessible location.
7. When interpreters are used, the court should ensure that the non-English-speaking litigant's attorney has briefed the interpreter on the case and how to use the communication system.
8. Court systems should find ways to preempt judicial burnout from holding lengthy sets of back-to-back remote hearings. Judges should be encouraged to take regular breaks during and between hearings.
9. Since remote hearings appear to be permanent, court systems should consider hiring "technical bailiffs" or additional court staff responsible for setting hearing links, scheduling parties, contacting parties before the hearings, and addressing technical issues that arise during remote hearings.

I. Introduction

During the early months of the COVID-19 pandemic, the Texas state courts moved quickly to implement remote court hearings, in many cases to ensure ongoing access to the courts. On March 19, 2020, the Supreme Court of Texas and Texas Court of Criminal Appeals jointly issued Emergency Order 3 (20-944; 20-008) relating to court closures due to the pandemic.¹ The orders stated that “courts must not conduct non-essential proceedings in person contrary to local, state, or national directives, whichever is most restrictive, regarding maximum group size.”

There are currently approximately 1,500 Texas trial courts actively using Zoom to conduct remote hearings.² While state court leadership anticipates that the virtual delivery of court services will remain an integral part of court business practices in the years to come, many important yet unanswered questions remain about the impact on judicial workload.

Understanding the impact of remote hearings on judicial time and case management practices relative to in-person hearings is essential for state court decision makers to determine the extent to which remote hearings will be maintained post-pandemic. The current analysis is intended to assist in the design and conduct of the statewide workload assessment study that will be conducted in Texas in the fall of 2022. It is also hoped that the findings from the current study will aid other states as they weigh the value of the use of virtual versus in-person delivery of court services.

The current project involves an analysis of a sample of Texas courts to empirically investigate the implementation of remote hearings on judicial workload, as well as to explore potential benefits and challenges to this evolving style of work. This is not a traditional weighted caseload study in which the amount of time judges spend on different types of cases is measured and a judicial needs model is developed; rather, it is an exploratory effort to determine the differences between remote versus in-person hearings, in terms of both elapsed time for each and the judicially perceived strengths and weaknesses of these two modalities of court hearings.

¹ <https://www.txcourts.gov/media/1449339/209044.pdf>

² The Texas Judicial Branch purchased Zoom licenses for each judge early in the pandemic.

II. Time Study Participants

This limited-scope study was initially intended to include judicial officers from six jurisdictions of varying sizes (e.g., two large, two midrange, and two smaller). In the end, eight jurisdictions, including 52 judges, took part in the time study. Participating judges tracked and entered the time they spent on their judicial officer duties during the three-week period spanning April 12 through April 30, 2021. The participating jurisdictions and the number of judges from each county who participated are shown in Figure 1.

FIGURE 1:
Texas Jurisdictions and
Number of Judges
Included in the Limited-Scope
Study on Hearing Types

Jurisdiction	Number of Judges Who Participated
Brewster County (Small)	1
Collin County (Large)	8
Dallas (Large)	1
Lubbock County (Midrange)	2
Tom Green County (Midrange)	6
Travis County (Large)	21
Uvalde/Real County (Small)	3
Webb County (Midrange)	10
Total: 8 counties	52



III. Developing the Study's Parameters

Before commencing the current study comparing remote to in-person court hearings, the National Center for State Courts (NCSC) began planning a statewide weighted caseload study for trial court judges in Texas. The statewide study was suspended due to the COVID-19 pandemic. During the first meeting of the statewide study's advisory committee, a set of 31 separate case types were selected, for which case weights are to be developed. The committee also identified four case-related event categories to distinguish judicial work at different points in the life of a case (e.g., pretrial, jury trial).

Given the more tightly focused nature of the current project, the NCSC team worked with the Texas Office of Court Administration (OCA) staff to collapse the case types into fewer categories for ease of data tracking and to expand the case event categories to differentiate whether hearings were conducted in-person or remotely.

Case Type Categories

The case type categories for the current study consisted of 12 categories shown in Figure 2; each case type was defined in the glossary provided to the study's participants. Appendix A provides a description of each of the 12 case types.

FIGURE 2:
Texas Case Types by Category

Case Type
Felony A
Felony B
Misdemeanor
Injury/Damage with Motor Vehicle
Injury/Damage no Motor Vehicle
Contract
Other Civil
Divorce
Other Family Law
Modifications/Enforcements
Delinquency
Child Protective Services

Case-Related and Non-Case-Related Judicial Events

Disaggregating case-related work into meaningful events allowed NCSC staff to measure the amount of time spent by judges on hearings conducted at each stage of the court process. For the statewide study, the advisory committee identified four main event categories, shown in Figure 3 (Appendix B provides the definition of events). To determine the differences between in-person hearings and remote hearings, events were further broken down by the hearing modality (in-person vs. remote), for a total of eight distinct events.

FIGURE 3:
Texas Case-Related Events

Pretrial activities: IN-PERSON
Pretrial activities: REMOTE
Bench trial activities: IN-PERSON
Bench trial activities: REMOTE
Jury trial activities: IN-PERSON
Jury trial activities: REMOTE
Posttrial activities: IN-PERSON
Posttrial activities: REMOTE

NCSC also collected information on non-case-specific activities, such as continuing education and judges' meetings, that are not directly related to a particular case, but are nonetheless essential to a judge's work. These activities, defined as non-case-related activities, are presented in Figure 4; Appendix C provides the definitions. For the current project, NCSC compared the average amount of time associated with this work in early 2021 to the amount of time spent on non-case-specific work measured in the last statewide workload assessment study conducted by NCSC in 2007. In the previous time study, the data showed between 2 and 2.5 hours per day were dedicated to non-case-related work. In the current study, this time was reduced to 1.75 hours per day, presumably due to judges' attending fewer meetings and engaging in less community outreach during the pandemic.

FIGURE 4:
Texas Non-Case-Related Events

Non-case-related administration
General legal research
Judicial education and training
Committees, meetings, and related time
Community activities and public outreach
Work-related travel
Vacation, sick leave
Lunch and breaks
Technology-related work or issues
Time study data tracking and reporting
Non-case-related specialty court activities

IV. Average Hearing Times: In-Person versus Remote

At the heart of this inquiry is whether there are differences in the average time spent by judges in handling in-person and remote hearings. To answer this question, a three-week time study was conducted in which judges from the participating jurisdictions, including district court judges and judges from the county courts at law, tracked their time by case type and event. Data were collected using an online data collection instrument where judges entered discrete blocks of time spent on a particular type of case, event, and hearing modality. NCSC computed the average amount of time associated with remote and in-person hearings, by hearing event category and case type.

During the time study period, most proceedings in the participating courts were conducted remotely. In aggregate, 86% of the total time reported was identified as remote work, compared to 14% in-person. Another way to look at the data is by individual time entry to estimate the amount of time a judge spent on a remote or in-person hearing, with each entry representing a single block of work.³ When calculated, a similar pattern emerged, with 85% of individual time entries being conducted remotely compared to 15% in-person.⁴

Recall, judges were asked to record their time by case type and event category. They indicated whether they were working on pretrial events (e.g., arraignment, pretrial motions, scheduling conference); bench trial activities (i.e., all activity related to a trial where the judge is finder of fact); jury trial activities (i.e., all activity related to a trial where a jury is the finder of fact); or post-disposition events (e.g., sentencing revocation, guardianship review). This data collection strategy allowed NCSC staff to examine a wide range of case types and distinguish at what point in the life of a case the work was being done.

Using the time study data, NCSC staff computed the average times for in-person and remote pretrial events for each case type. This approach was adopted because while the participating jurisdictions' case management systems were able to provide an accurate count of the number

³ Participants were not instructed to enter each hearing as an individual event; however, participants did enter time in discrete event categories. For example, a judge might enter 20 minutes for a single arraignment or 60 minutes for three arraignments. Internal consistency by each judge in recording practice is assumed in this analysis. Focus group responses by participating judges provided strong support for this assumption.

⁴ In total, 1.25 million minutes of judicial time was collected during the time study.

of cases filed during the time study period, the systems did not track the number or type of hearings held. In addition, the case management data did not include information on manner of disposition (e.g., bench trial, jury trial) or whether an event occurred post-disposition. That is, counts do not exist of the number of bench or jury trials held during the study or the number of post-disposition events. These limitations restricted NCSC analysis to pretrial activity, as that occurs in all cases filed. Consequently, NCSC focused on the amount of time judges spent on pretrial matters in both remote and in-person environments.

In addition, it is likely that the measure of “pretrial event” time is aligned with individual “pretrial hearing” time for the case types examined. This assumption was tested and generally verified in two ways. First, the length of the time entries recorded by active judicial participants were calculated. Of the approximately 1,700 individual pretrial event times entered during the time study, about two-thirds were 30 minutes or less, in line with expected individual pretrial hearing length.

Second, focus groups were conducted in October with a sample of the participating judges. When judges were asked about their method for entering data, they tended to corroborate that in many cases hearing times were entered for each hearing, so that one time entry represents a single hearing. Of equal importance, all judges confirmed that they used a consistent method in entering time during the study. That is, they either entered time by individual hearing or they grouped similar hearings together as a single block of time (e.g., three hearings of the same type took a total of 60 minutes). This suggests time data were collected in individually consistent fashion among participating judges, thereby allowing for direct comparison between remote and in-person proceedings. In the remainder of this document, we will refer to remote and in-person pretrial “hearings,” although we recognize that the time estimates will somewhat overstate the actual length of an individual hearing.

Figure 5 provides the average pretrial hearing times and the number of hearings examined for remote and in-person hearings by case type. In addition, the figure shows the percentage difference in time between remote and in-person hearings. For example, for Felony A (Person) cases, in-person hearings take an average of 40 minutes and remote hearings average 53 minutes, a difference of 34%.

FIGURE 5:
Pretrial Hearing Times and Number of
Hearings by Case Type

Pre-trial Hearing	ESTIMATED HEARING TIMES			NUMBER OF HEARINGS	
	In-Person	Remote	Percentage Difference	In-Person	Remote
Felony A (Person)	40	53	1.34	42	124
Felony B (Property)	31	40	1.27	51	138
Injury Damage w/ Vehicle	26	45	1.73	16	104
Injury Damage - No Vehicle	68	73	1.07	12	52
Contract	13	58	4.43	5	117
Other Civil	48	80	1.69	36	226
Divorce	30	65	2.16	28	195
Other Family Law	59	72	1.22	26	224
Modifications/Enforcements	64	47	0.73	17	107
Delinquency	94	104	1.11	4	71
Child Protective Services	102	132	1.29	9	82
Overall Average	52	70	1.34	246	1,440

Discussion

The analysis shows that remote hearings take longer than in-person hearings for 10 of the 11 case types examined. As can be seen, the difference in time between the two hearing modalities varies by case type. Overall, remote hearings tend to take about one-third longer (34%) than when hearings are held in-person.

Figure 5 also shows the number of hearings upon which the time estimates are based. While the study was limited in scope, the results do draw on a sizable overall number of hearings. Of course, given the time period in which the study was conducted, the majority of hearings were held remotely (85%). This means that for some case types, such as Contract, the sample of in-person hearings is small and suggests caution in extrapolating the results to all Contract cases. However, for most of the other case types the sample sizes are sufficient for placing reasonable confidence in the results.

To explore the implications of these findings, NCSC staff held a series of three focus groups with 15 judges who fully participated in the time study. The main purpose of the focus groups was to gather judicial perspectives on a range of issues related to court workload that involve both remote and in-person hearings. A unanimous belief was that the use of remote court proceedings will continue. The focus groups also agreed that all judges and court staff need efficient and effective processes to ensure court users receive equal access to justice regardless of how proceedings are held.

Specific topics included:

1. Hearing length.
2. Benefits of remote hearings for court users.
3. Challenges of remote hearings for court users.
4. Hearing types best suited for remote hearings.
5. The impact of remote hearings on judicial stress.

These topic areas are discussed below.

1. Hearing length.

Texas judges generally were not surprised with the findings showing that remote hearings take longer than those conducted in-person. This result fits with their perceptions from handling both types of hearings. When asked why, judges were quick to say the increased time is largely the result of technical issues from hearing participants, such as difficulty logging onto the Zoom platform, connectivity problems related to limited bandwidth, or difficulty sharing screens or uploading documents and exhibits. In many instances, resolution of technological issues fell to judges or court staff, who are not trained to address them. Regardless, judges and court staff have undertaken these additional tasks as part of their regular duties, even though it adds stress and reduces the time available for handling their remaining caseload.

This finding aligns with results from a recent study of Child Abuse and Neglect cases conducted in September 2020 by the Nevada Court Improvement Program (CIP).⁵ The study found that four of the five types of hearings examined took longer when conducted remotely. On average, remote hearings took about 39% longer. This finding is similar to what was found in the current study

⁵ A. Summers and S. Gatowski, *Nevada Court Improvement Program Remote Hearings Study* (2020). The study collected data on 123 hearings from five judicial districts and included 58 remote hearings and 65 in-person hearings.

for Texas judges handling Child Protective Services cases (Child Abuse and Neglect cases): remote hearings were 29% longer. As in Texas, the additional time in Nevada (relative to in-person hearings) was found to be largely due to technology-related issues.⁶

A comparable study of Abuse and Neglect cases conducted by the Utah Court Improvement Program in October 2021 also found that remote hearings take longer than in-person hearings.⁷ In this case, remote hearings were about 80% longer, with the primary reason for lengthier proceedings being technology related.

2. Benefits of remote hearings for court users.

Texas judges reported that holding remote hearings has definite benefits for many litigants, despite taking somewhat longer on average. One major advantage is the added convenience of not needing to take time off work, locate transportation, or find childcare. In some jurisdictions, remote practice allows litigants, including those who are self-represented, to schedule hearings at specific times (or within short time windows). This practice provides court users greater precision and flexibility in scheduling a court appearance. Remote hearings may also expand access to courts for witnesses, victims, experts, and other court stakeholders who live in remote locations or who fear for their safety in court. Likewise, there is the opportunity for wider participation in many types of family-related cases, especially Divorce, Child Welfare, and Child Protective Services cases.

For example, one judge stated that “many pro se cases lend themselves to Zoom dockets. A lot of times we have issues like non-service or other issues that take a small amount of time to figure out and do not require everyone to come to court.” Another judge stated, “It is emotionally easier for the parties to get through a divorce if they are not in the same room. Divorces are still a drain, and participants even break down remotely, but it is easier to get through.” This same judge indicated that, before the pandemic, only 25% of self-represented Divorce cases had all the documents necessary to proceed on their case at the originally scheduled hearing. During the pandemic, the judge began providing forms for the litigants to complete before their remote court hearing, so on the day of the hearing the parties have a completed agreement before the hearing begins. Since this change was made, nearly 90% of the self-represented divorce litigants appear prepared and ready to resolve their cases.

⁶ Technology delays occurred in 21% of remote hearings, compared to 3% of in-person hearings; delay time ranged from one to five minutes, with an average of two minutes (p. 5).

⁷ A. Summers and S. Gatowski, *Virtual Hearing Study—Utah* (2021). The study collected data on 158 hearings from four judges and included 80 remote hearings and 78 in-person hearings.

Judges across the board indicated that attendance at remote hearings for Civil and Family cases tends to be higher, reducing the number of default judgments that occur when one party does not appear for a hearing. A similar pattern of higher appearance rates was also noted for Criminal cases, with a consequent reduction in failures to appear (FTAs).

Relatedly, especially in family-related cases, more parties (e.g., immediate and extended family members) often appear for remote hearings. Texas judges stated that a benefit of broader attendance is the opportunity to explain the hearing process and provide opportunities for all interested parties to be heard more fully. There is some anticipation that the increased participation will reduce post-judgment disputes. Of course, as more people participate in hearings, the length of the hearings will also increase, but the quality of those hearings is also likely improved.

The Nevada CIP focus groups also found that the depth and breadth of discussion occurring in remote hearings was greater than that during in-person hearings, thus increasing the hearing length. The Nevada study noted that people who are less likely to attend an in-person court hearing, such as foster parents and kinship caregivers, are more likely to appear at remote proceedings because having a guaranteed login time is less disruptive to their schedules.

These findings echo a recently published report in which NCSC interviewed family court judges across the country.⁸ The judges indicated that parents attended remote hearings more frequently than in-person hearings, with the increase in participation attributed to “the convenience of not having to travel or find parking, not having to take time off from work, and the less intimidating atmosphere of the virtual courtroom.” Additionally, the report noted that incarcerated parents can participate in hearings more often due to the increased number of remote connections offered by jails and prisons and the elimination of transportation barriers.

Of particular importance, the increased involvement of parties likely improves their perceptions of procedural fairness, as research has demonstrated that simply having a voice in a proceeding improves one’s experience of fairness.⁹ As noted by the UK Judicial College, “the process, rather than merely the result (of remote hearings) is a significant consideration in terms of the delivery of real justice. An individual is more likely to accept an adverse conclusion where it has been arrived at after a process which has been transparently just, where the needs of all have been considered, and where they have felt engaged in the process and the outcome is explained.”¹⁰ Such attention to enhanced procedural fairness has the benefit of better acceptance of court decisions, a more positive view of the courts, and greater compliance with court orders.

⁸ National Center for State Courts, *Study of Virtual Child Welfare Hearings Impressions from Judicial Interviews*, (June 2021), p. 2.

⁹ J. Bowers and P. H. Robinson, “Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility,” *Wake Forest Law Review* 47 (2012): 47.

¹⁰ UK Judicial College, *Good Practice for Remote Hearings*, p. 1.

Judges also reported that remote hearings are generally viewed positively by attorneys. These views are confirmed by a June 2020 survey of Texas attorneys conducted by the Texas Office of Court Administration that found over 73% of respondents indicated remote hearings are effective, with only 12% indicating they are ineffective. The focus group participants said attorney support is particularly strong for out-of-town counsel, or in larger counties where attorneys often must travel long distances to get to court. In addition, remote proceedings have made scheduling easier and avoided unnecessary delays, especially in uncontested matters, like case status updates.

This perspective is confirmed in a study conducted by the Berkeley Research Group (BRG) in the summer of 2021 on the psychological impacts of remote hearings on legal professionals. During interviews, the authors found that the experience of remote hearings on attorneys, arbitrators, and expert witnesses has been largely positive for all parties involved. Further, those interviewed indicated that there are many efficiencies (for legal professionals) to be gained by holding court hearings remotely, especially where it concerns the time and cost of travel associated with expert witnesses. This study also found that “the relaxed setting of familiar surroundings such as the home office has had a noticeable psychological impact on expert witnesses and placed them at ease, which in turn allows for more considerate answers to the benefit of the court.”¹¹

Texas judges noted three additional benefits of remote hearings related to more efficient use of resources, including better managing limited courtroom space, reducing the need to travel to different courthouses, and improving utilization of scarce court reporters, interpreters, and pro bono legal representatives. As to the first two issues, when judges share courtrooms or must travel between court locations, their ability to schedule hearings is obviously limited to the days that judge is assigned to a specific courtroom. In many rural parts of Texas, judges travel between multiple courthouse locations to hold in-person proceedings. This style of riding circuit can mean a judge may only visit some locations every other week or even once a month, thereby reducing access. Since holding hearings remotely does not require the use of a physical courtroom, there is more flexibility in scheduling hearings, and proceedings can be held in a more timely fashion regardless of location.

As to the third issue, judges reported the ability to use court reporters, interpreters, and pro bono lawyers who are not physically located in the courtroom because they can participate in the hearing via Zoom. This ability makes efficient use of scarce resources and further expands the ability to hold more hearings than if the participants were required to be in the same physical location as the judge.

¹¹ C. Bao, A. Masser, and S. Puchkov, *The Psychological Impact of Remote Hearings* (2021), p. 6.

3. Challenges of remote hearings for court users.

As noted above, judges stated that technology-related issues are the primary source of longer hearing times for remote proceedings. Texas judges identified several technology problem areas in line with national patterns.¹² A primary concern is the “digital divide,” or the issue that people may have uneven access to the technology needed to participate in remote hearings (e.g., lack of a computer or internet access). While judges reported that most litigants are able to participate in hearings via video and audio and in greater numbers than during in-person hearings due to other barriers, there remain litigants who experience access issues related to technology. Relatedly, litigants may have limited experience using online videoconferencing, causing delays in court proceedings. Trouble navigating the technology can deepen when inexperienced court users need to submit documents or use visual aids. Because the Texas judges believe remote hearings will remain a part of court practice going forward, they clearly recognize the need for ongoing attention to creative and inclusive solutions to access issues.

Another concern voiced by some Texas judges is that remote hearings as currently operating may not make the best use of judicial time. One example is that the structure of remote hearings reduces some of the more informal discussions among opposing counsel that can occur with in-person hearings. Negotiations that occur before a hearing can clarify and sometimes resolve issues without direct judicial involvement. However, this opportunity is often lost with remote hearings, and some judges find they must expend time discussing these issues with the parties during the hearing itself. One judge relayed that she was holding a hearing on a divorce case, and that the parties agreed on all but one issue, which could have been resolved without judicial involvement before the hearing. Instead, she needed to negotiate the issue during the hearing, which unnecessarily increased the hearing time. Some judges indicated that they had remedied this issue by admitting lawyers and litigants to the virtual courtroom and placing them in “breakout rooms” that function similarly to in-person meeting space.

Accessibility for non-English speakers during remote proceedings was another challenge, with several judges stating they had mixed levels of success with cases involving the need for interpreters. Some judges indicated that the interpreter function in Zoom is not ideal for courts and is difficult to use. One issue is that some parties in need of interpreter services lack access to the technology required to participate both visually and with audio. Another issue is that to use the interpreter function, all parties must be logged into the hearing through the Zoom app, as opposed to following a link to the hearing. If parties have not properly logged in to their remote hearing, the interpreter function is not available for parties who attend by phone only.

¹² See <https://www.ncsc.org/newsroom/public-health-emergency/pandemic-and-the-courts-resources> for a variety of resources created by NCSC and the CCJ-COSCA Rapid Response Team (RRT) to help state courts deal with challenges presented by the pandemic.

Further concerns expressed by Texas judges on this topic revolve around accommodating interpreter breaks during remote hearings. To preserve quality, interpreters need substantial breaks every 30-40 minutes. When problems occur, interpreters must spend part of their limited time helping their client resolve technology issues, reducing the time available for the hearing itself.

As the above examples illustrate, whether the specific issue is litigant access to technology, interaction between attorneys, or coordination with interpreters, the larger challenge of “pre-hearing preparation” remains a primary concern for remote hearings. Not surprisingly, a central theme among Texas judges is the need for greater attention to improving the efficiency of remote hearings, with the goals of better using judicial officer time, preserving access to justice, accommodating the needs of litigants, and overcoming obstacles to equal participation. One suggestion is using some form of preliminary contact (e.g., phone call, text message) between court staff and parties to learn about special needs in advance of the remote hearing, explain the process to be used, and point to existing resources developed by the court to facilitate meaningful participation. This approach has been used effectively in the United Kingdom, where court staff schedule pre-hearing conferences with the litigants or counsel in the days before the hearing.

4. Hearing types best suited for remote hearings.

Judges were asked whether there are certain types of cases or types of hearings that are more or less suited to the use of remote hearings. One theme was the essential need for judges to be able to conduct certain types of cases remotely if courts are closed or severely limited in their in-person proceedings. These are cases related to personal liberty or personal safety, such as bail hearings, domestic violence cases, or emergency child custody matters.

As courts move beyond mandatory COVID closures, the focus groups identified proceedings that remain amenable to remote hearing technology and procedures. Texas judges agreed that the type of case is less relevant than the type of hearing—in most instances. Generally speaking, remote hearings function most effectively with short hearings that are limited in scope, such as setting of trial dates, status hearings, permanency hearings, discovery hearings, motions hearings of various types, summary judgments, self-represented divorce dockets (especially when parties have completed agreements), and non-evidentiary or non-witness cases.

Additionally, in terms of case types that work well for remote dockets, judges indicated the type of matters that affect people’s ability to get on with their lives, such as many Probate proceedings, Child Protective Services, and other Family law cases.

Though jury trials have successfully been conducted remotely in Texas, and it is reported that jurors especially like this format, the collective view among focus group participants is that jury trials are more effectively held in-person. Similarly, problem-solving courts, such as drug courts, are better suited to in-person hearings, though some have been handled remotely during the past 18 months.

Several judges indicated that it is not necessarily the type of hearing or the type of case that matters when determining whether to hold a hearing in-person or remotely; sometimes, the nature of the case or the makeup of the parties determines the most appropriate platform. For example, one judge who hears Child Protective Service cases argued that she often triages families' needs by having service providers available in the courtroom to address the needs of family members, such as substance abuse or mental health needs. While these professionals can be scheduled to attend a remote hearing, not having them physically present limits their ability to provide immediate assistance. Another judge relayed an incident in which a family member was yelling profanities during a remote hearing, and it was easier to mute that person remotely than to physically remove them from the courtroom.

Overall, the focus groups were supportive of Texas judicial leadership developing guidelines clarifying the types of hearings that would presumptively be held remotely. This approach would encourage general uniformity in practice throughout the state. However, as noted in the examples above, the judges would also like to preserve some discretion in selecting the type of venue to best address the needs and circumstances of particular litigants.

5. Impact of remote hearings on judicial stress.

Across the three focus groups, the consensus is that remote proceedings will continue for the foreseeable future. Currently, most Texas judges are responsible for all or most aspects of remote hearings, including setting up links, addressing technical issues, teaching parties how to use the hearing platform, and ensuring control of the hearings. Judges reported feeling more exhausted when conducting remote hearings. As one judge indicated, "I definitely get more exhausted by doing virtual hearings. As a judge, I am constantly *on*; but my performance and focus is just different. Holding remote hearings all day is very exhausting physically. But there is a perception that people need to see and feel they have had their day in court and that they are getting what they paid for."

A related factor is the ease of more tightly scheduling remote hearings. The move to remote hearings has changed court-scheduling practices in important ways. In the past, many courts would schedule a morning and afternoon in-person docket for a set number of hours. The judge would handle all matters scheduled for each block of time. Typically, gaps would appear during the session (e.g., party non-appearance), and the judge would get a series of short breaks during the day. With remote proceedings, many courts have moved to tighter scheduling of individual matters in 15- or 30-minute time-certain "appointments" (similar to a doctor's office). Many Texas judges report they now have a more individualized and tightly structured daily calendar than in the past, with the associated cost of fewer breaks throughout the day. They also note that the ease of virtual appearance in remote hearings makes it easier to quickly fill gaps in a daily docket that might emerge if a previously scheduled matter is postponed.

Of course, the converse to more individualized scheduling is greater convenience for litigants and attorneys. Rather than sitting through a three-hour morning docket waiting for their case to be called, a specific time slot means court users can more easily plan their day. For this reason, there will be interest in maintaining these new scheduling practices, making it incumbent on judges to adjust mentally and physically to new ways of doing business. A recent AJA white paper discusses the importance of mindfulness in judicial decision making and how that can affect procedural justice.¹³ While this paper focused on in-person proceedings, the same concepts apply to dealing with “Zoom fatigue.” The stressors noted by Texas judges make the practice of mindfulness and self-care especially important during remote hearings. The use of decision aids or checklists is presented as a simple, yet effective, tool that can be used to be more mindful.

Implications of Findings and Recommendations

This exploratory study has revealed there are both benefits and challenges associated with the current case-processing practices used in handling hearings remotely. Driven largely by technology-related issues, the time study data collected from participating Texas judges show that remote pretrial hearings take an average of about 34% longer than similar in-person hearings. The need for ongoing attention to reducing technology problems was a recurrent theme during the Texas focus groups, one corroborated by other recent studies conducted in Nevada and Utah.

A primary benefit of remote hearings is the opportunity to significantly improve the court experience for court users in select types of hearings and cases. As noted, remote hearings are often more convenient because they allow for more time-certain scheduling and reduce obstacles to attending, such as transportation, childcare, and work schedules. By improving the court experience, the perception and reality is that the quality of justice is improved.

According to most judges and attorneys interviewed and surveyed across a variety of studies conducted since the pandemic began, remote hearings will be an ongoing reality in courts across the country. Aside from technological concerns, courts will need to continue to address other challenges with pre-hearing preparation associated with the swift move to remote practices. Texas judges noted a major focus in court administration is continuing attention to improving the efficiency of remote hearings, including better using judicial officer time, improved scheduling and notice of remote proceedings, and workable methods to respond to individual users’ questions.

¹³ P. Casey, K. Burke, and S. Leben, “Minding the Court: Enhancing the Decision-Making Process,” *International Journal for Court Administration* 5, no. 1 (2013): 45–54. DOI: <http://doi.org/10.18352/ijca.8>.

If the reliance on remote hearings is expected to be a reality for courts going forward, there is an unquestioned need for additional research to provide guidance to courts regarding how to make the process more efficient and effective for all participants, including judges. While some court administrators and individual judges have found ways to improve the process of conducting remote hearings, many of the topics covered in this exploratory analysis deserve further investigation, including:

- Which hearing types best lend themselves to being conducted remotely?
- Are there specific case types that are more efficiently and effectively conducted remotely?
- Are there best practices that contribute to more effective remote hearings?
- What can be done to decrease judicial burnout resulting from conducting virtual hearings?
- What are the experiences of court users, such as litigants, families, attorneys, and expert witnesses, participating in remote hearings?
- What technological assistance should be available to judges and court staff to ensure seamless remote hearings?





Recommendations

1. State and local judicial leadership should generate guidelines for determining when a court proceeding should be conducted in-person or remotely. These guidelines should include the type of docket, the subject matter of the hearing, the parties who will appear at the proceeding, and the potential legal consequences of the final adjudicative decision. For example, traffic dockets, in which a large volume of cases are likely to be heard, may lend themselves well to remote hearings; conversely, cases involvingailable offenses, evidentiary material, or criminal jury trials might be better heard in trial court. Judges also indicated that the personalities involved, or specific litigant situations, might also affect the decision regarding in-person versus remote hearings. For example, in a divorce case in which the parties are not amicable, it might be more effective to hold the hearing remotely.
2. Court systems and judges should determine the most effective way to schedule hearings that provide for the greatest efficiency in the court, while also being mindful of litigants' time. Court users should be able to expect similar experiences across courtrooms, so scheduling considerations should be determined consistently.

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3. Remote court participants will benefit from clearly delineated instructions and expectations for their hearings. Not all court participants may have the necessary reading skills to comprehend the information, so this information should be provided through multiple media, including in writing and through video, such as YouTube. A survey conducted in Australia indicated that there were several aspects of the court experience that could be improved. More than a quarter of court users wanted to be better informed about when their matter would start and how long it would take. They wanted to understand what was expected of them and what the next steps would be.¹⁴ In the UK, some courts are also contacting the parties before their court hearing to ensure that they understand how to log into the hearing, how to navigate the platform in which the hearing is being conducted, what the hearing will entail, what is expected of them, what documents they will need to have and in what format, and any additional information they need for the hearing, so that they have an opportunity to have any questions answered.¹⁵ The documentation should include basic steps of how to connect to the platform, individual identifiers that are required, and the mechanics of using the platform's software.
 4. Court systems should develop clear instructions for remote proceedings on courtroom decorum and expectations of litigants, including timeliness, dress code, and appropriate places from which to log into a hearing. The instructions should be made available in both written and video format, and they could even include a checklist of items to address. Courts should also develop workable methods to respond to individual users' questions.
 5. Before any hearing, the court should ensure that all required paperwork and agreements between parties have been appropriately completed. For example, if couples seeking a divorce are expected to attend the hearing with completed agreement documents, this should be clearly communicated before the hearing; if completed documents are not provided to the court by a date certain, the hearing should not be held. Courts should explore technology platforms that simplify this experience.
 6. Courts should not assume that all parties have access to the proper equipment (computers, tablets, smart phones) allowing them to participate in remotely held court proceedings. Similarly, courts should consider the technical expertise of parties before scheduling remote hearings. All courts should provide safe and easily accessible computer systems for court users to attend remote hearings.

¹⁴ From Court User Satisfaction Survey, Family Court of Australia, Federal Circuit Court of Australia, Richard Foster, Chief Executive Officer, 2014, https://www.courtexcellence.com/_data/assets/pdf_file/0018/6093/user-satisfaction-survey.pdf

¹⁵ Personal experience by David Slayton, Vice President of the NCSC Court Consulting Division, based on consulting experience in the UK.

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7. When interpreters are used, the court should ensure that the non-English-speaking litigant's attorney has briefed the interpreter on the case and how to use the communication system. The court should ensure that all parties know how to log in to the system (for example, in Zoom, they need to be on a certain channel).
 8. Court systems should find ways to preempt judicial burnout arising from holding consecutive remote hearings. Judges should be encouraged to take regular breaks during and between hearings.
 9. Since remote hearings appear to be a permanent part of the justice system, court systems should consider hiring "technical bailiffs" or other court staff. These positions would be responsible for setting hearing links, scheduling parties, and addressing technical issues that arise during remote hearings. These positions could also be responsible for communicating with parties before the hearings to ensure that everyone knows what to expect during their hearings, has all the proper documentation available for the hearings, and has an opportunity to have any questions answered.



Appendix A: Texas Remote Hearing Study Case Type Categories

1. **Felony Group A** – Murder, homicide, attempted murder, assaultive offenses (Ch. 22, Penal Code), aggravated robbery/robbery, indecency with or sexual assault of a child, family violence assault.
2. **Felony Group B** – Automobile theft, burglary, drug sale or manufacture, drug possession, felony DWI, theft, all other felonies.
3. **Misdemeanor** – All misdemeanors, including DWI first or second offense, theft, theft by check or similar sight order, possession of marijuana or other drugs, family violence assault, other assault, traffic offenses, SWLS/DWLI, other misdemeanors.
4. **Injury or Damage Involving Vehicle** – Injury or damage involving a motor vehicle.
5. **Injury or Damage – Other than Vehicle** – Injury or damage other than from a vehicle, malpractice, and product liability.
6. **Contract – Other** – Accounts, consumer/commercial debt, contracts, and notes.
7. **Other Civil** – Tax cases, condemnation, civil cases relating to criminal matters, other civil cases, real property, administrative law, and government cases.
8. **Divorce** – Divorce with children, divorce without children.
9. **Other Family Law Matters** – IV-D Paternity, IV-D support order established, parent-child – no divorce, protective orders, non-divorce family cases, other family matters.
10. **Modifications and Enforcements** – Modifications and enforcements related to custody or other matters.
11. **Delinquency** – Juvenile delinquency cases.
12. **Child Protective Services** – Child protective services cases.

Appendix B: Texas Remote Hearing Study Case-Related Activity Categories and Definitions

1. **Pre-Disposition/Non-Trial Disposition: In Court** – Includes all IN COURT on-bench and off-bench activity related to pretrial proceedings and non-trial dispositions. In probate cases, includes uncontested proceedings to appoint a fiduciary or to order supervision of a trust. Includes all off-bench research and preparation related to pre-disposition and non-trial disposition activities.
2. **Pre-Disposition/Non-Trial Disposition: Remote** – Includes all REMOTE on-bench and off-bench activity related to pretrial proceedings and non-trial dispositions. In probate cases, includes uncontested proceedings to appoint a fiduciary or to order supervision of a trust. Includes all off-bench research and preparation related to pre-disposition and non-trial disposition activities. This also includes time required to set up links, establish communication, etc.
3. **Bench Trial: In Person** – includes all IN-PERSON bench trial activity, including:
 - Bench trial: counted as a trial when the case is called (includes all time related to in-trial activities). Includes criminal trials, civil trials, contested divorces, contested adjudicatory or disposition hearings in juvenile cases, contested probate matters, etc.;
 - Any work by the judicial officer related to research, case review, writing findings of fact and conclusions of law on specific cases that have gone to trial is counted; and
 - Sentencing hearing following trial.
4. **Bench Trial: Remote** – includes all REMOTELY CONDUCTED bench trial activity, including:
 - Bench trial: counted as a trial when the case is called (includes all time related to in-trial activities). Includes criminal trials, civil trials, contested divorces, contested adjudicatory and/or disposition hearings in juvenile cases, contested probate matters, etc.;
 - Any work by the judicial officer related to research, case review, writing findings of fact and conclusions of law on specific cases that have gone to trial is counted;
 - Sentencing hearing following trial; and
 - Time required to set up for trial.

-
5. **Jury Trial: In Person** – Includes all IN-PERSON on-bench and off-bench activity related to a bench or jury trial or another contested proceeding that disposes of the original petition in the case. In probate cases, includes contested proceedings to appoint a fiduciary or to order supervision of a trust. Includes all off-bench research and preparation related to trials. Includes sentencing following a bench or jury trial. Some examples of trial activities include:
- Jury trial: counted as a trial when a jury is empaneled. Includes jury selection, arguments and evidence, jury deliberation, jury polling, announcement of verdict;
 - Any work by the judicial officer related to research, case review, writing findings of fact and conclusions of law on specific cases that have gone to trial is counted; and
 - Sentencing hearing following trial.
6. **Jury Trial: Remote** – Includes all REMOTELY CONDUCTED on-bench and off-bench activity related to a bench or jury trial or another contested proceeding that disposes of the original petition in the case. In probate cases, includes contested proceedings to appoint a fiduciary or to order supervision of a trust. Includes all off-bench research and preparation related to trials. Includes sentencing following a bench or jury trial. Some examples of trial activities include:
- Jury trial: counted as a trial when a jury is empaneled. Includes jury selection, arguments and evidence, jury deliberation, jury polling, announcement of verdict;
 - Any work by the judicial officer related to research, case review, writing findings of fact and conclusions of law on specific cases that have gone to trial is counted; Sentencing hearing following trial; and
 - Scheduling and technical set-up.
7. **Post-Disposition Activities: In Person** – Includes all IN-PERSON on-bench and off-bench activity that occurs after the entry of judgment on the original petition in the case. In probate cases, includes all activity after a fiduciary is appointed or trust supervision is ordered. Includes all off-bench research and preparation related to post-disposition activity. Does not include trials de novo.
8. **Post-Disposition Activities: Remote** – Includes all REMOTELY CONDUCTED activity that occurs after the entry of judgment on the original petition in the case. In probate cases, includes all activity after a fiduciary is appointed or trust supervision is ordered. Includes all off-bench research and preparation related to post-disposition activity. Does not include trials de novo.

Appendix C: Texas Remote Hearing Study Non-Case-Related Activity Categories and Definitions

a. Non-Case-Related Administration

Includes all non-case-related administrative work such as:

- Staff meetings
- Judges' meetings
- Personnel matters
- Staff supervision and mentoring
- Court management

b. General Legal Research

Includes all reading and research that is **not** related to a particular case before the court.

Examples include:

- Reading journals
- Reading professional newsletters
- Reviewing appellate court decisions

c. Judicial Education and Training

Includes all educational and training activities such as:

- Judicial education
- Conferences

Includes travel related to judicial education and training.

d. Committee Meetings, Other Meetings, and Related Work

Includes **all work related to and preparation for** meetings of state and local committees, boards, and task forces, such as:

- Community criminal justice board meetings
- Bench book committee meetings
- Other court-related committee meetings

Includes travel related to meetings.

e. Community Activities and Public Outreach

Includes all public outreach and community service that is performed in your official capacity as a judge. This category does not include work for which you are compensated through an outside source, such as teaching law school courses, or personal community service work that is not performed in your official capacity as a judge.

Examples of work-related community activities and public outreach include:

- Speaking at schools about legal careers
- Judging moot court competitions

Includes travel related to community activities and public outreach.

f. Work-Related Travel

Includes only travel between courts during the business day. Time is calculated from the primary office location as determined by the Texas Supreme Court to the visited court.

Do not include commuting time from your home to your primary office location. Record travel time from your primary office location to judicial education and training, committee meetings, or community activities and public outreach in the applicable category. This is an account of minutes spent on travel only.

g. Vacation, Sick Leave, and Holidays

Includes all time away from work due to vacation, personal leave, illness or medical leave, and court holidays.

h. Lunch and Breaks

Includes all routine breaks during the working day.

i. Non-Case-Related Specialty Court Activity

Includes all work related to specialty courts that does not include meeting in-person or remotely with specialty court participants.

j. Technology-Related Work/Issues

Includes all time spent addressing technology-related issues that do not involve litigants.

k. NCSC Time Study

Includes all time spent filling out time study forms and entering time study data using the Web-based form.



RESOURCE

Principles for Continued Use of Remote Court Proceedings

Policymakers should consider these guidelines when assessing when to use remote technology in lieu of in-person judicial proceedings.



Douglas Keith



Alicia Bannon

PUBLISHED: September 10, 2020

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The Brennan Center has also released an analysis of the existing scholarship on how remote court proceedings may impact fairness and access to justice, [available here](#).

Since the beginning of the coronavirus pandemic, courts have turned to remote proceedings to continue essential operations, using video platforms to hear cases while adhering to public health guidance. As the pandemic has continued, many courts have expanded the use of these technologies to more types of cases, even holding remote

jury trials. In some jurisdictions, courts are considering expanding the use of remote technologies in the long term.

But existing research about remote court proceedings gives reason for caution. A [Brennan Center review](#) of the existing scholarship around the use of remote video proceedings found that, at least in some circumstances, remote proceedings can undermine the attorney-client relationship, alter the perceived credibility of witnesses, lead participants to disengage with the judicial process, and ultimately result in changed outcomes in cases. At the same time, remote proceedings implemented well may have substantial benefits, including expanding access to legal services.

Based on this research — and drawing on conversations with legal services providers, judges, scholars, and advocates for expanding access to justice — the Brennan Center has identified the following principles to help inform future policymaking about the use of remote court proceedings:

1. Engage a diverse array of justice system stakeholders

In developing policies for remote proceedings, courts have to balance public health guidance with the need to continue serving their communities, and efficiency with the obligation to ensure fairness. Courts are ill-equipped to balance these considerations on their own. To do so, it is critical that courts engage and listen to stakeholders both inside and outside the judicial system. Among others, courts should involve members of the communities most likely to suffer if remote proceedings go poorly, including communities of color, immigrant communities, and communities of people with disabilities. Courts should incorporate the insights of community advocates, public defenders and prosecutors, civil legal service providers, tenant representatives, survivors of domestic violence, public health experts, disability rights advocates, court employees, and more.

2. Tailor plans to the type of proceeding

There is no one-size-fits-all approach to remote proceedings. Courts hear a broad range of cases, both civil and criminal, for which remote proceedings are likely to pose very different challenges, benefits, and trade-offs. Relevant factors include a case's complexity and time-sensitivity, the stakes of a win or loss, the kind of factfinding that the case requires, and whether detained individuals or self-represented litigants are involved. For example, using a remote proceeding to resolve an uncontested divorce raises different fairness considerations than using one to evict someone from their home. Courts should evaluate categories of cases separately, and listen to attorneys and community representatives, in order to strike the right balance.

Similarly, courts should consider how tradeoffs may vary depending on the proceeding. For example, holding a status conference by video or phone raises different considerations than using the same technology for an evidentiary hearing. By being context-specific, courts may be able to advance a large portion of their docket remotely while being cautious around the types of hearings stakeholders know are most impacted by the use of remote technology.

3. Bolster the attorney-client relationship

Remote proceedings can dramatically alter the attorney-client relationship. Most fundamentally, they reduce the opportunity for communication between attorneys and clients prior to, during, and after court proceedings. This can hinder attorneys' ability to get the information they need to make the strongest case possible for their clients, and it can make it hard for clients to ask questions. It is critical that courts adopt technology that allows for confidential attorney-client communication during court proceedings, and that they create procedures to facilitate such communication. Judges may also need to go to greater lengths during remote proceedings to ensure that parties appreciate the significance of the proceedings they are involved in and that they are made aware of their options for relief.

4. Provide extra support for self-represented litigants

A large portion of parties in civil cases are unrepresented — as high as 90 percent in some categories of cases. In addition to being unfamiliar with the court system, self-represented litigants are also disproportionately likely to have limited computer literacy. As courts expand remote proceedings, they must take extra steps to ensure that self-represented litigants can navigate the new system, whether by providing additional supports or prioritizing opportunities for in-person services.

In particular, courts should prioritize continued access to in-court legal support programs. Many people who enter a courthouse to address a civil matter without a lawyer still get legal assistance along the way. Courts across the country have narrowed the justice gap through innovations like legal help desks, which give advice to unrepresented parties, and programs that station pro bono counsel in courthouses to provide on-the-spot limited representation. Through these resources and other courthouse interactions, some unrepresented individuals are also able to obtain long-term representation. Courts should prioritize offering remote versions of these programs, and take extra steps to publicize these resources and identify parties in court who might benefit from them.

5. Provide technical support and adopt technology standards to ensure quality

Seemingly mundane technological glitches can have a substantial impact on the fairness of court proceedings. For example, a [2017 report](#) commissioned by the Department of Justice recognized that “issues associated with poor video and sound quality... can disrupt [immigration court] cases to the point that due process issues may arise.” Courts must have a plan in place to respond when a party cannot be heard, or cannot hear, at a critical juncture in their case. Likely, this will mean that courts need new technical support on call for court staff and for members of the public, some of whom may be using the court's chosen remote platform for the first time. Courts should prioritize the parties' interests above efficiency and the drive to conclude cases, being sure not to penalize parties for technological difficulties. To that end, courts may need to adopt guidelines for determining when a proceeding has failed to meet the minimum-required level of technical quality to be considered fair.

Beyond disruption, the technological aspects of remote proceedings — how defendants, witnesses, and parties appear on screen, including their backdrop, lighting, and sound — may affect credibility determinations and other factfinding. Courts should consider setting standards to ensure new technologies do not unfairly disadvantage litigants. They also may need to establish safe access points within the community for people without quality technology at home.

6. Appreciate the persistent digital divide and ensure meaningful participation by marginalized populations

In adopting remote policies, courts must appreciate the persistent digital divide — large disparities in access to technology by income, race, and geography. Some persons with disabilities also face obstacles to using certain technologies. These disparities have been borne out in the use of remote education platforms during the Covid-19 crisis, where Black and Latino students, English language learners, and students facing housing instability have accessed remote technology at **reduced rates** in some districts. It is important that court policies be flexible, understanding that substantial portions of the populations courts serve, and in particular historically marginalized communities, may not easily transition to remote proceedings or may have more difficulty using resource-intensive technologies like video.

Courts also need to ensure that supports, such as remote interpreter services, are of sufficient quality. For example, **court administrators** have reported that non-English speakers have a more difficult time understanding and communicating with remote interpreters. Courts will need to go to greater lengths to ensure that all parties understand what is happening and believe the interpretation fairly represents their statements. Courts should be prepared to adjourn proceedings when the quality of interpretation is too poor.

7. Seek the consent of parties before proceeding remotely

The parties and attorneys involved in a case will often best understand the balance between the costs and benefits of advancing a case remotely. There may be individuals who will only feel fully heard if they appear physically, and others who would be relieved by not having to go to the courthouse. Attorneys may recognize that certain aspects of a case are too crucial or sensitive to conduct remotely. Courts can most easily resolve the challenge of balancing competing pressures by simply giving participants a choice, as some **court systems** have already done for certain cases, and prohibiting judges from moving a case forward remotely without consent from all parties. Any consent requirement must be meaningful, however, with an option for timely in-person proceedings not so far in the future as to harm the interests of the parties.

8. Meet all legal and constitutional requirements when using remote proceedings

As courts hone their virtual operations, this new normal must also fit within existing legal guardrails. In criminal cases, for example, the U.S. Constitution demands that defendants be able to confront witnesses against them. Under Supreme Court precedent, that means courts can only dispense with face-to-face confrontation, which is necessary to “ensure the integrity of the factfinding process,” if the court makes a case-specific determination of necessity and assures the testimony is nevertheless. ¹ As Justice Scalia wrote upon rejecting a proposed amendment to the Federal Rules of Criminal Procedure which would have made video testimony more common, while “virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.”

Limits on a defendant's ability to communicate and strategize with their attorney could also implicate their right to effective representation by counsel. This protection applies not only to ineffective representation resulting from an attorney's decisions, but also when circumstances make it impossible for even the most qualified counsel to

provide effective representation.² In civil matters as well, remote proceedings may interfere with parties' constitutional right to a meaningful hearing by making it more difficult for them to present or examine evidence or by diminishing the reliability of witness testimony.³

The Constitution also guarantees a public right to access court proceedings, which belongs to both the public and to defendants in criminal cases.⁴ The Covid-19 crisis presents challenging questions for courts as to how to best balance public health guidelines with broad access, and balance broad access with the potential that streamed court proceedings may be recorded in ways that are undesirable or prohibited. Many criminal proceedings, for example, are eligible to be sealed from public view, particularly when youth are involved. Court plans for public access must recognize that it will be practically difficult to "seal" a proceeding that has been previously streamed to the public. Whatever means of access courts adopt, they will need technology and security mechanisms to keep them open when they are supposed to be open and closed when they are supposed to be closed.

9. Embrace the benefits of remote proceedings when they are clear

Even understanding their shortcomings, remote proceedings also have substantial benefits. Foremost, they have allowed courts to continue operating in this crisis without risking the health of their communities. Even in more normal times, however, courts have used remote tools to strengthen the justice system by enabling legal providers to reach difficult-to-serve communities, expand language access, and allow attorneys to spend more time serving clients and less time in transit to the courthouse. Most of all, the availability of remote proceedings may be the difference between someone remaining in custody or returning home to their family and community. While courts must recognize the documented shortcomings of remote proceedings, they should embrace the benefits when justice system stakeholders agree on those. Courts and legislatures should also take this opportunity to invest in technologies that expand access to justice.

10. Study remote proceedings to better understand their impact

While there is significant research highlighting the shortcomings of remote proceedings, as well as their benefits, these studies are limited and come from specific contexts, such as immigration courts, that may be distinct from other court proceedings. If court systems are going to rely on remote proceedings more broadly, it is essential that they study this transition for its impacts on both fairness and access to justice.

Endnotes

¹ *Coy v. Iowa*, 487 U.S. 1012 (1988).

² *Strickland v. Washington*, 466 U.S. 668 (1984); *Perry v. Leeke*, 488 U.S. 272 (1989).

³ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

⁴ *Waller v. Georgia*, 467 U.S. 39 (1984); *Press Enterprise Co. v. Superior Ct.*, 464 U.S. 501 (1984).

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Essay

REMOTE COURT: PRINCIPLES FOR VIRTUAL PROCEEDINGS DURING THE COVID-19 PANDEMIC AND BEYOND

Alicia L. Bannon & Douglas Keith

ABSTRACT—Across the country, courts at every level have relied on remote technology to adapt the justice system to a once-a-century global pandemic. This Essay describes and assesses this unprecedented journey into virtual justice, paying particular attention to eviction proceedings. While many judges have touted remote court as a revolutionary innovation, the reality is more complex. Remote court has brought substantial time savings and convenience to those who are able to access and use the required technology, but it has also posed hurdles to individuals on the other side of the digital divide, particularly self-represented litigants. The remote court experience has varied substantially depending on the nature of the proceedings, the rules and procedures courts put in place, and the relevant court users’ resources and tech savvy. Critically, the challenges posed by remote court have often been less visible to judges than the efficiency benefits. Drawing on these lessons, this Essay identifies a series of principles that should inform future uses of remote technology. Ultimately, new technology should be embraced when—and only when—it is consistent with fair proceedings and access to justice for all.

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Chanski for their excellent editing and cite checking. We owe special thanks to the legal-services providers and advocates who took time away from representing low-income tenants to speak with us about their experiences.

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INTRODUCTION

Shortly before Justice of the Peace Nicholas Chu was set to hear opening arguments in the first fully virtual criminal trial in the United States, Judge Chu had to excuse Juror #5 for a reason familiar to anyone grappling with remote life during the COVID-19 pandemic—spotty Wi-Fi.¹ After

¹ Travis County, *JP5 Jury Trial Justice of the Peace, Pct. 5*, YOUTUBE, at 11:50:00–13:10:00 (Aug. 11, 2020), <https://www.youtube.com/watch?v=FEwnM615Xh8> (last visited Mar. 7, 2021).

seating an alternate juror for this misdemeanor trial in Travis County, Texas, which was conducted over the Zoom videoconference system, Judge Chu reminded the jurors to give their full attention and not be “on Facebook or checking email.”² The jurors heard from witnesses, viewed documents and videos (also made available to jurors in an e-folder),³ and deliberated in a Zoom breakout room for approximately twenty minutes, after which the foreperson delivered the jury’s verdict: the defendant was guilty of speeding. Each juror gave a muted thumbs-up to indicate the verdict was unanimous.⁴

Across the country, courts at every level have relied on remote technology to adapt the justice system to a once-a-century global pandemic, which shuttered courthouse doors beginning in March 2020 and has required limits on in-person proceedings for over a year. In June 2020, Bridget Mary McCormack, chief justice of the Michigan Supreme Court, told a congressional subcommittee that “in three months, [the courts] have changed more than in the past three decades.”⁵ Nathan Hecht, chief justice of the Supreme Court of Texas, has suggested that with the expansion of remote court proceedings, “the American justice system will never be the same.”⁶

In this Essay, we seek to describe and assess courts’ unprecedented journey into virtual justice, with a focus on trial-level courts. What has worked well, and what have been the challenges? What shortcomings must be resolved if, as seems likely, courts are going to continue using remote proceedings more frequently than they had prior to the pandemic? What institutional blind spots might be holding courts back from fully addressing those challenges? To answer these questions, this Essay builds on two reports we published at the Brennan Center for Justice in 2020 and incorporates new insights gleaned from interviews with legal-services attorneys grappling with these issues on a daily basis.⁷

² David Lee, *Texas Judge Holds First Virtual Jury Trial in Criminal Case*, COURTHOUSE NEWS SERV. (Aug. 11, 2020), <https://www.courthousenews.com/texas-judge-holds-first-virtual-jury-trial-in-criminal-case/> [https://perma.cc/XJ9R-H3KG].

³ Travis County, *supra* note 1, at 1:55:00.

⁴ *Id.* at 3:16:00–3:16:15.

⁵ *Federal Courts During the Covid-19 Pandemic: Best Practices, Opportunities for Innovation, and Lessons for the Future: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 116th Cong. 1 (2020) (testimony of Bridget M. McCormack, chief justice, Michigan Supreme Court) [hereinafter *McCormack Testimony*].

⁶ Meera Gajjar, “*The American Justice System Will Never Be the Same,” Says Texas Supreme Court Chief Justice Nathan Hecht*, THOMSON REUTERS (Apr. 24, 2020), <https://www.thomsonreuters.com/en-us/posts/government/texas-supreme-court-chief-justice-nathan-hecht/> [https://perma.cc/69JS-AG79] (interviewing Nathan Hecht, chief justice, Supreme Court of Texas).

⁷ See ALICIA BANNON & JANNA ADELSTEIN, BRENNAN CTR. FOR JUST., *THE IMPACT OF VIDEO PROCEEDINGS ON FAIRNESS AND ACCESS TO JUSTICE IN COURT* (2020), <https://www.brennancenter.org>.

In Part I, we describe how courts have expanded the use of remote proceedings during the COVID-19 pandemic. In Part II, we draw on diverse sources—including interviews with civil legal-aid providers, media reports, surveys conducted during the pandemic, accounts from judges and others within the judicial system, and pre-pandemic scholarship—to detail some of the benefits and shortcomings of remote proceedings that have become apparent. In Part III, we look at some of the constitutional questions raised by remote court. In Part IV, we discuss potential institutional blind spots in courts’ responses to the pandemic that may have colored their view of remote proceedings. Finally, in Part V, we lay out a series of principles that we suggest should guide future policymaking.

At several points throughout this Essay we highlight eviction proceedings, which sit at the nexus of the public-health and economic crises flowing from the pandemic. Eviction proceedings are a useful lens for understanding the practical implications of remote proceedings on access to justice: they are high stakes, yet tenants enjoy fewer constitutional protections than do criminal defendants and are frequently unrepresented by counsel. Insights from the civil justice system are also important because much of the conversation about remote technology to date has focused on the criminal courts.

Despite a patchwork of state and federal eviction moratoria, courts have authorized hundreds of thousands of evictions during the pandemic.⁸ A

org/sites/default/files/2020-09/The%20Impact%20of%20Video%20Proceedings%20on%20Fairness%20and%20Access%20to%20Justice%20in%20Court.pdf [https://perma.cc/C4TH-S72N]; DOUGLAS KEITH & ALICIA BANNON, BRENNAN CTR. FOR JUST., PRINCIPLES FOR CONTINUED USE OF REMOTE COURT PROCEEDINGS (2020), https://www.brennancenter.org/sites/default/files/2020-09/Principles%20for%20Continued%20Use%20of%20Remote%20Court%20Proceedings%20final_0.pdf [https://perma.cc/69WY-6XHD].

⁸ As of April 11, 2021, <http://www.evictionlab.org/eviction-tracking/> reported 291,368 evictions in just the five states and twenty-seven cities it tracks. *The Eviction Tracking System*, EVICTION LAB, <http://www.evictionlab.org/eviction-tracking/> [https://perma.cc/S8GS-K4MN]. For state policies, see *COVID-19 Housing Policy Scorecard*, EVICTION LAB, <https://evictionlab.org/covid-policy-scorecard/> [https://perma.cc/GGZ6-J56T]. At the federal level, in addition to a short-lived moratorium in the CARES Act, in September, the Centers for Disease Control and Prevention (CDC) ordered a halt on evictions and foreclosures due to nonpayment through January 31, 2021, which has since been extended to June 30, 2021. CARES Act, Pub. L. No. 116-136, § 4024, 134 Stat. 281, 492 (2020); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292 (Sept. 4, 2020); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16731 (Mar. 31, 2021). To take advantage, tenants and residents only have to submit a two-page declaration confirming that they met the CDC’s requirements, such as qualifying annual income and substantial loss of income or increased medical expenses. See *Declaration Under Penalty of Perjury for the Centers for Disease Control and Prevention’s Temporary Halt in Evictions to Prevent Further Spread of COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019->

recent study found that lifting eviction moratoria contributed to increased COVID-19 incidence and mortality rates, likely due to transience, increased crowding in homes and shelters, and reduced access to health care.⁹ As the pandemic drags on and moratoria expire, an estimated 8.8 million renters are behind on their rental payments, placing them at risk of eviction.¹⁰ Among renters with annual incomes below \$25,000, more than one in four reported that they were behind on their rent.¹¹ Throughout this Essay, we include examples of how remote proceedings have been used in the eviction context, drawing on surveys, court cases, and interviews with legal-services providers and tenant advocates in five states: Florida, Michigan, Missouri, Ohio, and Texas.¹²

Remote court has brought benefits to many court users, most notably in time savings and convenience for those who are able to access and use the required technology. Yet remote court has also posed real challenges, including to the attorney–client relationship and to the ability of self-represented litigants to access resources and fully participate in court proceedings. It has worked better in some kinds of proceedings than others. And it has raised difficult questions about whether key functions—such as credibility assessments—can be fulfilled virtually.

Importantly, many of the disadvantages of remote proceedings are likely to be less visible to judges and other court officials than the efficiency benefits many have described as revelatory. And remote court’s long-term desirability is likely highly dependent on the nature of the proceedings at

ncov/downloads/declaration-form.pdf [https://perma.cc/A4DR-9ZZT]. But some states have not interpreted the CDC’s moratorium strictly. *See, e.g.*, Email from Nicole N. Brinkley, Assistant Couns., N.C. Admin. Off. of the Cts. Off. of Gen. Couns., to Clerks, Assistant Clerks, & Deputy Clerks of Superior Ct., N.C. Jud. Branch, & Other Ct. Offs. (Sept. 9, 2020, 5:12 PM) (on file with journal) (instructing clerks throughout North Carolina that the CDC order changed nothing about the clerks’ process for filing and scheduling eviction proceedings and issuing writs of possession, the final eviction order in the state); Annie Nova, *The CDC Banned Evictions. Tens of Thousands Have Still Occurred*, CNBC (Dec. 5, 2020), <https://www.cnbc.com/2020/12/05/why-home-evictions-are-still-happening-despite-cdc-ban.html> [https://perma.cc/N4AN-8KWJ] (reporting that seven states never stopped evictions despite the CDC moratorium).

⁹ Emily A. Benfer, David Vlahov, Marissa Y. Long, Evan Walker-Wells, J. L. Pottenger Jr., Gregg Gonsalves & Danya E. Keene, *Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, 98 J. URB. PUB. HEALTH 1, 7 (2021) (finding that lifting eviction moratoria was associated with 2.1 times higher incidence and 5.4 times higher mortality after sixteen weeks, leading to more than 10,000 excess deaths).

¹⁰ CONSUMER FIN. PROT. BUREAU, HOUSING INSECURITY AND THE COVID-19 PANDEMIC 6 (2021), https://files.consumerfinance.gov/f/documents/cfpb_Housing_insecurity_and_the_COVID-19_pandemic.pdf [https://perma.cc/PA6E-JYE2] (providing estimates as of December 2020).

¹¹ *Id.*

¹² To protect confidentiality and encourage frank feedback about the judiciary’s performance, all interviews cited in this Essay are referenced by state and organization type.

issue. All of these considerations underscore the importance of broad consultation with stakeholders both inside and outside the judicial system in setting court policies. Yet on this measure, there are concerning indications that courts in many jurisdictions have been falling short.

The COVID-19 pandemic has forced innovation, but the next step is to make sure we take the right lessons from the experience, so that technology is embraced when—and only when—it is consistent with fair proceedings and access to justice for all.

I. COURTS' ADOPTION OF REMOTE PROCEEDINGS IN RESPONSE TO THE COVID-19 PANDEMIC

When state and federal officials began responding to the COVID-19 crisis in March 2020 by mandating social-distancing measures, court systems acted swiftly.¹³ In many state and federal jurisdictions, early court orders expressed at least a preference for using remote technology when possible. For example, on March 13, the Florida Supreme Court suspended all court rules limiting or prohibiting the use of remote proceedings, while noting that defendants' confrontation clause rights must still be met in criminal cases.¹⁴ On the same day, the Supreme Court of Texas authorized the state's courts to "[a]llow or require anyone involved in any hearing . . . to participate remotely, such as by teleconferencing, videoconferencing, or other means."¹⁵

By April 2020, every state judicial branch, and many local court systems, had issued an order or guidance seeking to reduce the number of people entering courthouses.¹⁶ While some jurisdictions were more aggressive than others in their initial responses, in a matter of weeks court systems had largely coalesced around a similar set of measures for trial courts: suspension of jury trials and in-person proceedings save for categories of cases the jurisdiction deemed essential.

¹³ Janna Adelstein & Douglas Keith, *Initial Court Responses to Covid-19 Leave a Patchwork of Policies*, BRENNAN CTR. FOR JUST. (Apr. 14, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/initial-court-responses-covid-19-leave-patchwork-policies> [<https://perma.cc/FMV9-A7PG>].

¹⁴ Administrative Order at 3–4, *In re* COVID-19 Emergency Procs. in the Fla. State Cts., No. AOSC20-13 (Fla. Mar. 13, 2020), <https://www.floridasupremecourt.org/content/download/631744/file/AOSC20-13.pdf> [<https://perma.cc/AY6P-JP23>] (discussing COVID-19 emergency procedures in the Florida state courts).

¹⁵ First Emergency Order Regarding the COVID-19 State of Disaster at 1, Misc. Docket No. 20-9042 (Tex. Mar. 13, 2020), <https://www.txcourts.gov/media/1446056/209042.pdf> [<https://perma.cc/C475-NE3V>].

¹⁶ Adelstein & Keith, *supra* note 13.

At the same time, as weeks passed and court leaders recognized the enduring nature of the crisis, court systems increasingly turned to remote technologies to reopen and expand their dockets. Since March 2020, at least thirty-eight states have issued statewide orders during the pandemic either mandating or urging the use of remote proceedings, and in the remaining states many local jurisdictions have adopted similar orders.¹⁷ In May 2020, for example, Connecticut’s judicial branch announced that it would resume its suspended civil docket by video and telephone.¹⁸ The CARES Act federal stimulus package likewise authorized the use of video and phone for key aspects of federal criminal proceedings, including arraignments, preliminary hearings, initial appearances, detention hearings, probation hearings, and more.¹⁹ Congress allocated \$6 million to the federal judiciary to adapt to the new environment.²⁰ While many jurisdictions subsequently took steps to reopen or expand in-person operations in a limited capacity during the pandemic,²¹ reopening plans have waxed and waned with the prevalence of the virus. In November 2020, for example, approximately one-quarter of

¹⁷ *Courts’ Responses to the Covid-19 Crisis*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), <https://www.brennancenter.org/our-work/research-reports/courts-responses-covid-19-crisis> [<https://perma.cc/CHS4-ZNFM>].

¹⁸ *See Judicial Branch Continues to Expand Types of Cases Handled Remotely*, STATE OF CONN. JUD. BRANCH (May 7, 2020), <https://jud.ct.gov/HomePDFs/RemotelyHandledCases.pdf> [<https://perma.cc/3UD6-BH25>].

¹⁹ CARES Act, Pub. L. No. 116-136, § 15002(b), 134 Stat. 281, 528 (2020).

²⁰ *Id.* § 15001. Some states also allocated funds to support technology updates—the Supreme Court of Ohio gave \$6 million to local courts for this purpose. *See* Anne Yeager, *Chief Justice’s Program Funds \$6 Million in Technology Grants for Local Courts*, CT. NEWS OHIO (May 1, 2020), http://www.courtnewsoriohio.gov/happening/2020/remoteTechGrants_050120.asp#.YAdgDuhKg2w [<https://perma.cc/74S2-HKCN>].

²¹ For example, as COVID-19 rates decreased in many places over the summer and early fall in 2020, judicial systems in many states reopened some physical aspects of courthouses, albeit with measures in place to meet public-health guidance. *See, e.g.*, Administrative Order Related to Appellate & District Courts Operations at 3, No. 2020-PR-054 (Kan. May 27, 2020), <https://www.kscourts.org/KSCourts/media/KsCourts/Orders/2020-PR-054.pdf> [<https://perma.cc/W4KJ-9ACV>] (requiring, among other measures, remote hearings when possible and social distancing). Courts that resumed in-person trials employed a range of techniques, from scattering jurors around the courtroom, to requiring witnesses wear masks while testifying, to providing attorneys with walkie-talkies so that they could sidebar with the judge without having to physically approach the bench. Michael Gordon, *Place Your Hand on the Bible: Federal Jury Trials Resume After Weeks of COVID Planning*, CHARLOTTE OBSERVER (June 13, 2020), <https://www.charlotteobserver.com/news/coronavirus/article243514632.html> [<https://perma.cc/4XF3-VW7B>]; Nicole Hong & Jan Ransom, *Only 9 Trials in 9 Months: Virus Wreaks Havoc on N.Y.C. Courts*, N.Y. TIMES (Dec. 2, 2020), <https://www.nytimes.com/2020/12/02/nyregion/courts-covid.html> [<https://perma.cc/3NER-CKNE>].

federal district courts ordered reduced operations in response to worsening health indicators.²²

Courts' pivot to remote court was unprecedented in its scope and scale, but the use of video and phone to hold remote proceedings has been part of the legal landscape for decades, most often in cases involving incarcerated or detained individuals.²³ In criminal cases, for example, most jurisdictions have permitted the use of remote videoconferencing for initial appearances and felony arraignments, with some jurisdictions requiring the defendant's consent.²⁴ Some jurisdictions have further permitted the use of video for other criminal proceedings, such as pretrial release hearings (typically requiring consent).²⁵ In immigration court, videoconferencing (without consent) is authorized by statute for removal proceedings²⁶ and has been used regularly since the 1990s.²⁷ During the last quarter of 2019, one out of every six final hearings that concluded an immigrant's case was held by video.²⁸ In state court, videoconferences were widely used for certain criminal and civil proceedings prior to the pandemic, including criminal arraignments and first appearances, as well as child-support enforcement.²⁹

²² *Courts Suspending Jury Trials as COVID-19 Cases Surge*, U.S. CTS. (Nov. 20, 2020), <https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge> [https://perma.cc/4R4L-K4HP].

²³ See, e.g., MIKE L. BRIDENBACK, STATE JUST. INST., STUDY OF STATE TRIAL COURTS USE OF REMOTE TECHNOLOGY 12–15 (2016), <http://napco4courtleaders.org/wp-content/uploads/2016/08/Emerging-Court-Technologies-9-27-Bridenback.pdf> [https://perma.cc/9A8V-8ZH5]; Shari Seidman Diamond, Locke E. Bowman, Manyee Wong & Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 877–78 (2010); Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 934 (2015).

²⁴ See Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH. L. REV. (forthcoming 2021) (manuscript at 6), <https://papers.ssrn.com/a=3699045> [https://perma.cc/TP3Z-FWRC]. Videoconferencing had been widely used for these proceedings. See BRIDENBACK, *supra* note 23, at 13–14. With respect to consent, Arizona, for example, does not require consent for videoconferencing for a defendant's initial appearances, misdemeanor arraignments, and not-guilty felony arraignments. ARIZ. R. CRIM. P. 1.5(c)(1). By contrast, the Federal Rules of Criminal Procedure permit video teleconferencing for a defendant's initial appearance or arraignment only with consent. FED. R. CRIM. P. 5(f), 10(c).

²⁵ Turner, *supra* note 24, at 6.

²⁶ See 8 U.S.C. § 1229a(b)(2)(A)(iii); see also 8 C.F.R. § 1003.25(c) (“An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person.”).

²⁷ *Video Hearings in Immigration Court FOIA*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/content/video-hearings-immigration-court-foia> [https://perma.cc/3H9Q-MNFD].

²⁸ *Use of Video in Place of In-Person Immigration Court Hearings*, TRAC IMMIGR. (Jan. 28, 2020), <https://trac.syr.edu/immigration/reports/593/> [https://perma.cc/9B7L-MKN7].

²⁹ BRIDENBACK, *supra* note 23, at 12–15.

But the COVID-19 pandemic prompted courts to turn to remote proceedings to an unprecedented degree³⁰; expanding the use of video and phone in proceedings for which they were already authorized;³¹ allowing remote proceedings in matters that previously had been required to be in person;³² and, in some jurisdictions, removing requirements that parties consent prior to the use of remote proceedings.³³ Similarly unprecedented was that courtrooms themselves were often entirely empty, particularly in the early months of the pandemic, with judges, staff, lawyers, litigants, witnesses, and the public all appearing via video or phone.

During the pandemic, many jurisdictions have used remote proceedings extensively for bail, plea, and sentencing hearings,³⁴ as well as for eviction proceedings³⁵ and family court.³⁶ Though virtual criminal jury trials have been unusual, Texas saw its first online misdemeanor jury trial in August 2020,³⁷ and one Texas city began holding regular virtual trials in its

³⁰ See the “Virtual Hearings” map at *Coronavirus and the Courts*, NAT’L CTR. FOR STATE CTS., <https://www.ncsc.org/newsroom/public-health-emergency> [<https://perma.cc/4KUR-N89Z>] (click the “NEW — Virtual Hearing Resources and Guides” tab on the interactive map).

³¹ *Gould Elecs. Inc. v. Livingston Cnty. Rd. Comm’n*, 470 F. Supp. 3d 735, 738 (E.D. Mich. 2020) (authorizing remote bench trial pursuant to Federal Rules of Civil Procedure 77(b) and 43(a)).

³² See, e.g., CARES Act, Pub. L. No. 116-136, § 15002, 134 Stat. 281, 527–29 (2020) (authorizing courts to conduct remote hearings in a variety of criminal proceedings).

³³ See, e.g., Eighteenth Emergency Order Regarding the COVID-19 State of Disaster at 1–2, No. 20-9080 (Tex. June 29, 2020), <https://www.txcourts.gov/media/1448109/209080.pdf> [<https://perma.cc/JTB9-V4SL>] (authorizing, “[s]ubject only to constitutional limitations” and without consent, all Texas courts to “allow or require anyone involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a party, attorney, witness, court reporter, grand juror, or petit juror—to participate remotely, such as by teleconferencing, videoconferencing, or other means”).

³⁴ Turner, *supra* note 24, at 36; see also OHIO CRIM. SENT’G COMM’N, COVID-19 AND THE COURTS 2020: A SURVEY OF OHIO JUDGES, COURT ADMINISTRATORS AND ATTORNEYS 46–48 (2020), <http://www.sc.ohio.gov/coronavirus/resources/CSC-COVIDReport.pdf> [<https://perma.cc/QBQ3-RZ8R>] (surveying courts about the pandemic’s impact on plea, bond, and sentencing hearings in criminal cases).

³⁵ See, e.g., Admin. Order 2020-1, *In re Procs. for Landlord/Tenant Matters* (Del. J.P. Ct. Sept. 11, 2020), <https://courts.delaware.gov/rules/pdf/Justice-of-the-Peace-Court-Administrative-Order-2020-1.pdf> [<https://perma.cc/SK6R-JF9R>] (instructing that all landlord–tenant matters “will be set for a virtual pretrial conference and then a subsequent virtual trial,” and noting that “[w]hile in-person hearings are available where there are technological barriers or complications determined on a case-by-case basis, the default position will be for a virtual hearing”); see also Chris Arnold, *Zoom Call Eviction Hearings: ‘They’ll Throw Everything I Have out on the Street,’* NPR (June 19, 2020), <https://www.npr.org/2020/06/19/880859109/zoom-call-eviction-hearings-they-ll-throw-everything-i-have-out-on-the-street> [<https://perma.cc/L4LP-JMXP>] (reporting on virtual eviction proceedings, including one in which a judge “granted landlords the right to evict five people who didn’t or couldn’t dial into the hearing”).

³⁶ See Allie Reed & Madison Alder, *Virtual Hearings Put Children, Abuse Victims at Ease in Court*, BLOOMBERG L. (June 23, 2020) [hereinafter Reed & Adler, *Virtual Hearings*], <https://news.bloomberglaw.com/us-law-week/virtual-hearings-put-children-abuse-victims-at-ease-in-court> [<https://perma.cc/2ZUY-LHP2>].

³⁷ Turner, *supra* note 24, at 29.

misdemeanor court in November 2020,³⁸ which are livestreamed from its YouTube page (and subsequently deleted).³⁹ In February 2021, the Florida Supreme Court authorized remote criminal jury trials for felonies and misdemeanors with the defendant's consent.⁴⁰ Remote criminal bench trials have been more widely used, as have remote civil trials.⁴¹ Some jurisdictions have convened remote grand juries.⁴² Courts have also turned to hybrid proceedings, for example, providing for public access via video feed or phone,⁴³ relaxing requirements so as to allow witnesses to appear via videoconference,⁴⁴ and allowing remote jury selection.⁴⁵

For an institution where change is often incremental and technology use has often lagged behind other industries, courts' embrace of technology during the pandemic has been remarkable. In Michigan, for example, courts conducted more than 50,000 hearings on Zoom over the course of nearly 350,000 hours between April and the end of June in 2020.⁴⁶ Texas held

³⁸ Anna Caplan, *McKinney Is First City in Texas to Hold Virtual Jury Trials During COVID-19*, DALL. MORNING NEWS (Nov. 24, 2020), <https://www.dallasnews.com/news/2020/11/24/mckinney-is-first-city-in-texas-to-hold-virtual-jury-trials-during-covid-19/> [<https://perma.cc/4Z73-FGNB>].

³⁹ *Id.*; see City of McKinney Municipal Court, YOUTUBE, <https://www.youtube.com/channel/UCHaA5x5U5jhMNRU5bqHOjsg> [<https://perma.cc/F5UQ-Z4YF>].

⁴⁰ Administrative Order at 3, *In re Comprehensive COVID-19 Emergency Measures for Fla. Trial Cts.*, No. AOSC20-23 (Fla. Feb. 17, 2021), <https://www.floridasupremecourt.org/content/download/719444/file/AOSC20-23-Amendment-9.pdf> [<https://perma.cc/H7PA-8SNF>].

⁴¹ See Zack Needles, *Trendspotter: Virtual Civil Jury Trials Are Definitely Divisive—And Likely Inevitable*, LAW.COM (Sept. 13, 2020), <https://www.law.com/2020/09/13/law-com-trendspotter-virtual-jury-trials-remain-divisive-but-are-they-inevitable/> [<https://perma.cc/BHK6-7MLS>]; *Five Trial-Court Circuits Chosen for “Virtual” Civil Jury Trial Pilot Program Due to Pandemic*, FLA. SUP. CT. (June 3, 2020, 12:33 PM), <https://www.floridasupremecourt.org/News-Media/Court-News/Five-trial-court-circuits-chosen-for-virtual-civil-jury-trial-pilot-program-due-to-pandemic> [<https://perma.cc/5MCR-PERA>].

⁴² Marcus W. Reinkensmeyer, *Virtual Grand Jury Hearings: Response to the COVID-19 Emergency in Mohave County, Arizona*, AM. BAR ASS'N (June 29, 2020), https://www.americanbar.org/groups/judicial/publications/judicial_division_record_home/2020/vol23-4/technology/ [<https://perma.cc/4P9M-FSSJ>] (Arizona); Charles Toutant, *Is the Virtual Grand Jury Process Unconstitutional? Judge Weighs Challenge*, LAW.COM (Dec. 23, 2020), <https://www.law.com/njljournal/2020/12/23/is-the-virtual-grand-jury-process-unconstitutional-judge-weighs-challenge/> [<https://perma.cc/6AFE-L7TK>] (New Jersey).

⁴³ *United States v. Richards*, No. 2:19-cr-353-RAH, 2020 WL 5219537, at *1 (M.D. Ala. Sept. 1, 2020).

⁴⁴ *Sunoco Partners Mktg. & Terminals L.P. v. Powder Springs Logistics, LLC*, No. CV 17-1390-LPS-CJB, 2020 WL 3605623, at *2 (D. Del. July 2, 2020); OHIO CRIM. SENT'G COMM'N, *supra* note 34, at 51 (nearly half of surveyed judges had allowed witnesses to testify by video in criminal proceedings even though the trials were not fully remote).

⁴⁵ Order, *In re Ill. Cts. Response to COVID-19 Emergency/ Remote Jury Section in Civil Cases*, No. M.R. 30370 (Ill. Oct. 27, 2020), <https://courts.illinois.gov/SupremeCourt/Announce/2020/102720-1.pdf> [<https://perma.cc/ME3R-CAQA>].

⁴⁶ *McCormack Testimony*, *supra* note 5, at 2.

approximately 122,000 remote hearings between March 24 and June 1, 2020.⁴⁷ In 2020, Professor Jenia Iontcheva Turner surveyed state and federal judges, prosecutors, and defense attorneys in Texas as to their experience with remote court proceedings.⁴⁸ Professor Turner found that while just over one-quarter of respondents had participated in remote criminal proceedings before the pandemic, more than 92% had done so during the pandemic.⁴⁹ Likewise, 93% of Ohio judges surveyed by the state's criminal sentencing commission reported using some sort of remote technology to reduce face-to-face interactions during the pandemic.⁵⁰

To be clear, remote court has not exempted the justice system from the impact of COVID-19. In particular, more limited use of trials, both remote and in person, has led to overwhelming backlogs in many jurisdictions. In New York City, for example, state and federal courts conducted a combined 9 criminal trials between March and November 2020, compared to 800 criminal trials in 2019, leaving hundreds of people in limbo in pretrial detention.⁵¹ These delays have contributed to a humanitarian crisis in which the virus has worked its way through prisons and jails while many people await progress in their cases, disproportionately affecting minority defendants, who are both more likely to be subject to pretrial detention and more vulnerable to the virus.⁵²

Yet despite its limits, the expansion of remote proceedings has allowed courts to maintain many basic functions during the pandemic, and there are strong indications from many court leaders that expanded remote proceedings will continue even when the pandemic subsides. Texas's Chief

⁴⁷ Erika Rickard & Qudsiya Naqui, *Coronavirus Accelerates State Court Modernization Efforts*, PEW CHARITABLE TRS. (June 18, 2020), <https://www.pewtrusts.org/en/research-and-analysis/articles/2020/06/18/coronavirus-accelerates-state-court-modernization-efforts> [https://perma.cc/789G-9ZE4].

⁴⁸ See Turner, *supra* note 24, at 35.

⁴⁹ See *id.* at 38–39.

⁵⁰ OHIO CRIM. SENT'G COMM'N, *supra* note 34, at 45.

⁵¹ Hong & Ransom, *supra* note 21. Maine and Texas experienced similar backlogs. See *Pandemic Causes 'Staggering' Court Backlog in Maine*, ASSOCIATED PRESS (Nov. 8, 2020), <https://apnews.com/article/virus-outbreak-pandemics-maine-5e056e9c004152929d614dd3f6c5ff82> [https://perma.cc/3GAH-AVN4] (reporting state court officials in Maine warning of a “staggering” backlog); Jenni Bergal, *Some States Halt Jury Trials Again, Leaving Staggering Backlogs and 'a Lot of People Sitting in Jail,'* USA TODAY (Dec. 8, 2020), <https://www.usatoday.com/story/news/nation/2020/12/08/jury-trials-stopped-some-states-backlogs-build-amid-covid-19/6491162002/> [https://perma.cc/3ZZS-NBSG] (reporting Texas's court administrator warned it may be “years” before the state gets through its trial backlog).

⁵² See Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U. L. REV. ONLINE 60, 70, 72–77 (2020); *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 12, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> [https://perma.cc/XY5F-BR6F].

Justice Nathan Hecht told a reporter in July 2020, “We’re going to be doing court business remotely forever This has changed the world.”⁵³ Ohio’s Chief Justice Maureen O’Connor similarly argued that “[w]e’ve got to embrace the changes and move[] this institution in that direction,”⁵⁴ a sentiment echoed by many of the state’s judges in a survey, where 82% said they are considering continuing some of their pandemic-era changes into “non-emergency” times, including virtual preliminary hearings.⁵⁵ In July 2020, Michigan Chief Justice McCormack put it simply: “Oh, you never go back. There’s no way we’re going back.”⁵⁶

II. THE PANDEMIC EXPERIENCE SHOWS REMOTE COURT’S SHORTCOMINGS AND POTENTIAL

Remote proceedings unquestionably served their primary purpose: courts have been able to continue operating while still heeding public-health guidance to limit the number of people physically present in courthouses.

⁵³ Allie Reed & Madison Alder, *Zoom Courts Will Stick Around as Virus Forces Seismic Change*, BLOOMBERG L. (July 30, 2020, 3:50 AM) [hereinafter Reed & Adler, *Zoom Courts*], <https://news.bloomberglaw.com/us-law-week/zoom-courts-will-stick-around-as-virus-forces-seismic-change> [https://perma.cc/3Q65-RQ9Y].

⁵⁴ Marc Kovac, *COVID, Sentencing Reform Among Focuses for Final Years of Chief Justice Maureen O’Connor’s Term*, COLUMBUS DISPATCH (Dec. 29, 2020), <https://www.dispatch.com/story/news/politics/state/2020/12/29/oconnor-heading-into-final-2-years-supreme-court-chief-justice/4006669001/> [https://perma.cc/3484-5P79]; see also Nathan B. Coats, *Chief Justice Introduction to COLO. CTS., COLORADO JUDICIAL BRANCH ANNUAL STATISTICAL REPORT: FISCAL YEAR 2020 (2020)*, https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2020/FY2020%20Annual%20Statistical%20Report-FINAL.pdf [https://perma.cc/NZ4E-VP3S] (“We will no doubt continue the use of virtual proceedings to the extent that it is consistent with our constitutional obligations.”); Turner, *supra* note 24, at 64 (noting that 66% of surveyed state judges and 48% percent of surveyed federal judges said they wanted to see remote videoconference proceedings used more frequently after the pandemic is over).

⁵⁵ OHIO CRIM. SENT’G COMM’N, *supra* note 34, at 53; see also OHIO CRIM. SENT’G COMM’N, *COVID-19 AND THE COURTS 2020: FOLLOW-UP INTERVIEWS ADDENDUM TO THE FULL REPORT 4-5 (2020)* [hereinafter OHIO CRIM. SENT’G COMM’N FOLLOW-UP], <http://www.sc.ohio.gov/coronavirus/resources/CSC-COVIDReportAddendum.pdf> [https://perma.cc/Y9FF-YXQE] (recounting respondents’ opinions that pandemic-era changes will continue).

⁵⁶ Karen J. Bannan, *The Wheels of Justice Supercharged — And on Zoom*, COMMONS (July 30, 2020), <https://wearecommons.us/2020/07/30/the-wheels-of-justice> [https://perma.cc/2ZPF-TWPM]; see also Brandon Birmingham, *Three Ways COVID-19 Makes the Criminal Courts Better*, DALL. EXAMINER (May 8, 2020), <https://dallasexaminer.com/editorial/local-commentaries/three-ways-covid-19-makes-the-criminal-courts-better> [https://perma.cc/6YCD-H23U] (noting a Texas criminal court judge expressed hope that remote proceedings become permanent); Lyle Moran, *How Hosting a National Pandemic Summit Aided the Nebraska Courts System with Its COVID-19 Response*, AM. BAR ASS’N LEGAL REBELS PODCAST (May 13, 2020, 6:00 AM), https://www.abajournal.com/legalrebels/article/rebels_podcast_episode_052 [https://perma.cc/MG9G-QW5W] (reporting that the Nebraska Supreme Court chief justice expects “courts will continue to use video technology for many hearings” after the pandemic).

But has the forced innovation posed by the pandemic served, in the words of Michigan Chief Justice McCormack, as “the disruption our industry[, the courts,] needed”?⁵⁷

The answer to this question is emphatically, “It depends.” This Part looks at how the use of remote technology has affected the experience of “going to” court, with a particular (but not exclusive) focus on tenants facing eviction. We suggest that remote court has been at times a boon to access to justice, at others an instrument of unfairness, and sometimes a bit of both—often depending on the nature of the proceedings, the rules and procedures courts put in place, and the resources and tech savvy of the relevant court users. These equivocal experiences should inform future policymaking and encourage caution as many judges look to expand and make permanent remote innovations.

A. Convenience for Many, Exclusion for Some

Going to court frequently requires a substantial time commitment from both lawyers and litigants. Lawyers can sit in court for hours to appear before a judge for a few minutes—often charging fees to their clients the whole time. Litigants and witnesses themselves often must take off work or line up childcare in order to wait for their cases to be called. All participants must travel to and from the courthouse.

On the basic measures of time saving and convenience, remote court has been a sea change for many court users. At the same time, the expansion of remote court during the pandemic has also laid bare the so-called digital divide. For individuals without access to or comfort with technology, remote court can functionally close the courthouse door to meaningful participation.

1. Time Savings

The time-saving dimension of remote court has been widely observed across many sources and many kinds of proceedings. Professor Turner’s survey of Texas judges, prosecutors, and defense lawyers found that large majorities across all three groups thought the online proceedings used during the pandemic saved time or resources for prosecutors, the court, defense attorneys, and defendants.⁵⁸ An organization representing domestic violence survivors in New York recounted to a reporter that prior to the pandemic, her clients “would often wait around the courthouse for hours,” or even all day,

⁵⁷ *Expanding Court Operations II: Outside the Box Strategies: Administering the Courts While the COVID-19 Curve Is Flattened*, NAT’L CTR. FOR STATE CTS. (May 19, 2020), <https://cdm16501.contentdm.oclc.org/digital/collection/facilities/id/242> (last visited Apr. 2, 2021).

⁵⁸ Turner, *supra* note 24, at 35, 41–43.

waiting for their cases to be called.⁵⁹ With remote court, the organization “files the petition electronically, the litigant appears before a judge by phone within roughly an hour, and the order of protection is emailed to them in 30 minutes to an hour.”⁶⁰ Similarly, a corporate lawyer emphasized the benefits to lawyers, clients, and witnesses: “[It] is ‘beneficial for everyone’s schedules, efficiency and cost. You don’t have to have an expert sit for weeks in a courtroom and wait to be called.’”⁶¹ A defense attorney surveyed by Professor Turner suggested that the convenience associated with allowing defendants not in custody to appear in court over video reduced prosecutors’ leverage in plea negotiations.⁶²

These benefits were echoed in several of our interviews about eviction proceedings as well. One housing and consumer legal-aid attorney in Florida noted that the jurisdiction’s remote hearings were “on-time,” “quick,” and “efficient,” in a way that the courthouse had never been previously. “[You] don’t have to wait forty-five minutes in a hallway to be called into a hearing room,” the attorney added.⁶³ A legal-services lawyer in Missouri and a court observer in Texas both noted that remote hearings had made it possible for many tenants to appear in court despite childcare and work obligations that otherwise would have prevented them from making a physical appearance.⁶⁴ The court watcher in Texas recounted a tenant who had three children and a job and who said she would not have been able to make it to court if the proceedings had been in person. “For tenants who are tech savvy,” the court watcher added, “remote proceedings are great.”⁶⁵ A pre-pandemic report by the Self-Represented Litigation Network similarly observed that videoconferencing technology can reduce the time and expenses associated with going to court, including travel time, transportation costs, childcare, lost wages, and other day-to-day costs.⁶⁶

⁵⁹ Reed & Alder, *Virtual Hearings*, *supra* note 36.

⁶⁰ *Id.*

⁶¹ Reed & Alder, *Zoom Courts*, *supra* note 53.

⁶² Turner, *supra* note 24, at 45.

⁶³ Telephone Interview with legal-services provider in Florida (Dec. 16, 2020) (on file with journal).

⁶⁴ See Telephone Interview with court watcher in Texas (Nov. 12, 2020) (on file with journal); Telephone Interview with legal-services provider in Missouri (Nov. 11, 2020) (on file with journal) [hereinafter Nov. 11 Telephone Interview with legal-services provider in Missouri].

⁶⁵ Telephone Interview with court watcher in Texas, *supra* note 64.

⁶⁶ See JOHN GREACEN, SELF-REPRESENTED LITIG. NETWORK, REMOTE APPEARANCES OF PARTIES, ATTORNEYS AND WITNESSES 2–3 (2017); see also CAMILLE GOURDET, AMANDA R. WITWER, LYNN LANGTON, DUREN BANKS, MICHAEL G. PLANTY, DULANI WOODS & BRIAN A. JACKSON, RAND CORP., COURT APPEARANCES IN CRIMINAL PROCEEDINGS THROUGH TELEPRESENCE 4–6 (2020), https://www.rand.org/pubs/research_reports/RR3222.html [<https://perma.cc/Y7D8-E6BJ>] (discussing advantages and disadvantages of remote proceedings in criminal cases).

In some instances, time savings have also meant expanded access to legal services for low-income tenants. For example, in one jurisdiction, a housing attorney noted that the added convenience of remote proceedings resulted in the legal-aid office being able to serve many more clients than it had prior to the pandemic.⁶⁷ Pre-pandemic research on remote proceedings in Montana similarly found that video court appearances in both civil and criminal hearings enabled legal-aid organizations to serve previously underserved parts of the state.⁶⁸

Early data indicate that remote court has also corresponded with increased appearance rates in some categories of cases, suggesting that added convenience has a concrete impact.⁶⁹ For example, in a survey conducted by the Ohio Criminal Sentencing Commission, juvenile judges reported that appearance rates slightly increased because parents no longer needed to miss work and defendants no longer struggled to secure transportation to the courthouse.⁷⁰

2. *The Digital Divide*

While these benefits are meaningful and important, they are only available to parties with access to and comfort with the required remote technologies. The other side of the remote court experience is that it has generated substantial hurdles for individuals on the wrong side of the digital divide.

While computers and broadband internet have extensive coverage in the United States,⁷¹ these technologies are not equally accessible to all communities. In 2019, 29% of adults with household incomes below \$30,000 did not own a smartphone, 44% did not have home broadband services, and

⁶⁷ Telephone Interview with legal-services provider in Florida, *supra* note 63.

⁶⁸ Turner, *supra* note 24, at 45.

⁶⁹ *Will Remote Hearings Improve Appearance Rates?*, NAT'L CTR. FOR STATE CTS. (May 13, 2020), <https://www.ncsc.org/newsroom/at-the-center/2020/may-13> [<https://perma.cc/3TVM-VJVT>] (noting that some reports suggest more litigants were showing up for remote hearings than had for in-person hearings pre-pandemic); *see also* Elizabeth Thornburg, *Observing Online Courts: Lessons from the Pandemic* (Sept. 21, 2020) (unpublished manuscript), <https://ssrn.com/a=3696594> [<https://perma.cc/QJC3-UHX8>] (reporting that family court judges and child-advocate staff saw a higher level of parent participation in remote proceedings as compared to in-person proceedings).

⁷⁰ *See* OHIO CRIM. SENT'G COMM'N FOLLOW-UP, *supra* note 55, at 2–3 (finding, however, that outside of juvenile proceedings, virtual hearings had no impact on appearance rates).

⁷¹ In 2016, for instance, 81% of households had a broadband connection and 89% had a computer. CAMILLE RYAN, U.S. CENSUS BUREAU, *COMPUTER AND INTERNET USE IN THE UNITED STATES: 2016*, at 1 (2018), <https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-39.pdf> [<https://perma.cc/2GJW-XM37>].

46% did not own a traditional computer.⁷² There are substantial disparities in access to broadband internet and computers according to income and race.⁷³ Americans who live in rural areas are also less likely to have access to broadband internet,⁷⁴ as are people with disabilities, who may also require special technology in order to engage in online activities such as remote court proceedings.⁷⁵ Access issues have been exacerbated during the pandemic as libraries and other public access points for computer and internet use have frequently closed their doors.⁷⁶

In the eviction context, the housing attorneys and court watchers we interviewed reported that many tenants lack the stable high-speed internet access that most video platforms require and are generally new to navigating such platforms, as are many of the witnesses that tenants may seek to call.⁷⁷ For these individuals, remote proceedings create obstacles, not convenience. As a housing attorney in Florida observed, many low-income individuals who might have been able to get a ride to the courthouse are struggling to

⁷² See Monica Anderson & Madhumitha Kumar, *Digital Divide Persists Even as Lower-Income Americans Make Gains in Tech Adoption*, PEW RSCH. CTR. (May 7, 2019), <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption> [https://perma.cc/K8L2-UNCN].

⁷³ Households with incomes of \$100,000 almost universally had access to these technologies. *Id.* Only 66% and 61% of Black and Latino Americans, respectively, had access to broadband internet at home, compared to 79% of white Americans. Andrew Perrin & Erica Turner, *Smartphones Help Blacks, Hispanics Bridge Some – But Not All – Digital Gaps with Whites*, PEW RSCH. CTR. (Aug. 20, 2019), <https://www.pewresearch.org/fact-tank/2019/08/20/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/> [https://perma.cc/4ZEZ-T5VC].

⁷⁴ Andrew Perrin, *Digital Gap Between Rural and Nonrural America Persists*, PEW RSCH. CTR. (May 31, 2019), <https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/> [https://perma.cc/J4PH-NXPY].

⁷⁵ Monica Anderson & Andrew Perrin, *Disabled Americans are Less Likely to Use Technology*, PEW RSCH. CTR. (April 7, 2017), <https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/> [https://perma.cc/6ABT-9PKT]. Disabled Americans are about twenty percentage points less likely than those without a disability to say that they have access to home broadband internet or own a computer, smartphone, or tablet. *Id.* With respect to special technology, the American Bar Association (ABA) has noted that hearing-impaired litigants may require real-time court transcription or captioning, which certain online platforms may not be able to provide. AM. BAR ASS'N, REPORT IN SUPPORT OF ABA RESOLUTION 117, at 6 (2020), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/117-annual-2020.pdf> [https://perma.cc/8F5V-WKUC].

⁷⁶ See, e.g., Elizabeth Owens-Schiele, *COVID-19 Restrictions Force Area Public Libraries to Revert to Reduced Offerings and Curbside Service*, CHI. TRIB. (Dec. 1, 2020, 9:57 AM), <https://www.chicagotribune.com/suburbs/barrington/ct-aph-library-services-covid-tl-1203-20201202-4pvxnsqzffqzffezqxhtc4dmi-story.html> [https://perma.cc/GX44-4JYU] (documenting library closures due to the pandemic).

⁷⁷ See Telephone Interview with legal-services provider in Michigan (Oct. 22, 2020) (on file with journal); Telephone Interview with legal-services provider in Ohio (Nov. 20, 2020) (on file with journal); Telephone Interview with legal-services provider in Florida, *supra* note 63.

access technology.⁷⁸ Among other challenges, tenants who are facing eviction may stop paying phone bills in an effort to keep up with rental payments, leaving them without an active device to use for an eviction hearing.⁷⁹

One way the digital divide has manifested is through technological challenges during the proceedings. Poor audio or video quality and poorly positioned cameras have often made it difficult for participants to follow proceedings.⁸⁰ In Missouri, a self-represented tenant sought to access a video hearing on both his phone and his wife's phone but was unable to do so, and he was therefore forced to appear over audio while the judge, the plaintiff's lawyer, and the plaintiff's witness all appeared via video.⁸¹ Among other disadvantages, the tenant was unable to share documents over video with the court.⁸² In Massachusetts, a tenant won a new trial after the court concluded she had been prejudiced by her inability to present evidence due to technological issues at her trial over the Zoom video platform.⁸³ The tenant, who was self-represented during the trial but represented by legal services on appeal, had been unable to send in documents electronically to the court or to share her screen over Zoom during the trial.⁸⁴ Additionally, while courts frequently assume tenants are accessing remote platforms on a computer, our interviews suggest they are often doing so on a phone for which the remote platform may not be optimized, making it unlikely the tenant can see everything happening in the proceeding.⁸⁵ This has been a particular challenge for reviewing evidence.⁸⁶

Technology issues have also meant that some litigants have been unable to access proceedings altogether. Several legal-services attorneys reported to us that judges across jurisdictions have been willing to issue default

⁷⁸ Telephone Interview with legal-services provider in Florida, *supra* note 63.

⁷⁹ We are grateful to John Pollock, Coordinator of the National Coalition for a Civil Right to Counsel, for raising this point based on his conversations with tenant lawyers and advocates.

⁸⁰ An observation of fifty-nine online plea hearings in Texas found audio or connection problems in approximately 20% of cases. Turner, *supra* note 24, at 60; *see also* Telephone Interview with court watcher in Texas, *supra* note 64 (noting that judges are impatient with tenants experiencing technology issues).

⁸¹ Petition for Writ of Prohibition at 4–5, Missouri *ex rel.* Logan v. Neill, No. 2022-AC05861 (Mo. Aug. 25, 2020).

⁸² *Id.* at 6.

⁸³ Decision on Defendant's Motion for a New Trial at 6–7, Jamar Acquisitions LLC v. Avila, No. 20SP582 (Mass. Hous. Ct. Jan. 14, 2021).

⁸⁴ *Id.* at 6.

⁸⁵ *See, e.g.*, Telephone Interview with legal-services provider in Texas (Oct. 30, 2020) (on file with journal) (explaining that tenants frequently use their phones for proceedings on Zoom).

⁸⁶ *See id.*

judgments against tenants who fail to appear for remote hearings without inquiring into whether they had difficulty accessing the remote system.⁸⁷ This corresponds with concerns raised in a June 2020 survey of legal-aid attorneys by the National Housing Law Project. Eighty-eight percent of respondents raised due process concerns about remote eviction proceedings, including the impact of the digital divide, racial disparities in access to technology, and the use of default judgments against tenants who face technology challenges.⁸⁸ Remote court can pose additional hurdles for non-English speakers. Court administrators have reported that non-English speakers have a more difficult time understanding and communicating with remote interpreters.⁸⁹

Courts and legal-aid offices have gone to varying lengths to bridge this digital divide. Some courts have spent considerable resources to expand access by creating computer kiosks in the courthouse where parties can access their remote hearings.⁹⁰ Others have simply provided a phone-in option for remote hearings without appreciating that tenants may also lack access to phones or the necessary phone-plan minutes to wait on the line for hours until the court calls their case.⁹¹ Legal-aid providers have purchased routers to turn their parking lots into digital hot spots⁹² and microphones to turn conference rooms into remote-hearing access points.⁹³ In Texas, one judge insisted on moving a case forward remotely, which required the legal-services attorney to drive a tablet to the client's house so the client could

⁸⁷ See Telephone Interview with legal-services provider in Michigan, *supra* note 77; Telephone Interview with legal-services provider in Missouri (Nov. 13, 2020) [hereinafter Nov. 13 Telephone Interview with legal-services provider in Missouri] (on file with journal); see also Telephone Interview with Tanaya Srin, Nat'l Hous. L. Project (Mar. 23, 2021) (recounting anecdotes from legal-services attorneys that tenants had default judgments entered against them after being unable to access remote eviction proceeding due to technology issues).

⁸⁸ NAT'L HOUS. L. PROJECT, STOPPING COVID-19 EVICTIONS: SURVEY RESULTS 2 (2020), <https://www.nhlp.org/wp-content/uploads/Evictions-Survey-Results-2020.pdf> [https://perma.cc/MB9H-Q5XZ].

⁸⁹ ROBIN DAVIS, BILLIE JO MATELEVICH-HOANG, ALEXANDRA BARTON, SARA DEBUS-SHERRILL & EMILY NIEDZWIECKI, RESEARCH ON VIDEOCONFERENCING AT POST-ARRAIGNMENT RELEASE HEARINGS 20 (2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248902.pdf> [https://perma.cc/Q58A-T2WS].

⁹⁰ See Telephone Interview with legal-services provider in Florida, *supra* note 77.

⁹¹ See Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87; see also Tony Romm, *Lacking a Lifeline: How a Federal Effort to Help Low-Income Americans Pay Their Phone Bills Failed Amid the Pandemic*, WASH. POST (Feb. 9, 2021, 6:00 AM), <https://www.washingtonpost.com/technology/2021/02/09/lifeline-broadband-internet-fcc-coronavirus/> [https://perma.cc/Z8ZR-KB CY] (discussing shortcomings in the federal Lifeline program to provide low-income families with access to mobile phones).

⁹² Telephone Interview with legal-services provider in Michigan, *supra* note 77.

⁹³ Telephone Interview with legal-services provider in Ohio, *supra* note 77.

participate.⁹⁴ However, even when courts have taken affirmative steps to expand access, implementation has had mixed success. In one jurisdiction in Florida, for example, the court created access points within the courthouse but failed to include notice of the option in its summonses.⁹⁵

B. A Day in Court Without a Courtroom

In-person court proceedings involve countless interactions between judges, litigants, attorneys, jurors, and witnesses. Replacing these in-person interactions with ones undertaken via technology has had decidedly mixed results. This Section details the areas that have raised the most challenges.

1. Attorney–Client Communication

One of the most commonly cited concerns with remote court is its impact on attorney–client communications. In our interviews about eviction proceedings, for example, attorneys reported that they have had very limited ability to speak with their clients during remote proceedings. Without being able to whisper or pass notes easily, it can be difficult to adjust strategy based on what the opposing parties have said.⁹⁶ For example, a legal-services attorney in Florida recounted one case in which his client wished to speak in response to a contested issue in an eviction proceeding. In normal circumstances, the attorney would have whispered with his client to get more information and assisted her in responding in a way that served her interests. In this remote hearing, however, when the judge asked the attorney if he wanted the client to speak, the attorney declined, as he could not be certain that the opportunity would benefit the client.⁹⁷ Similar concerns have been raised in the context of criminal cases.⁹⁸

Differences in court resources and individual judges' comfort with technology have also affected the degree to which remote technologies undermine attorney–client communication.⁹⁹ Some courts are making virtual

⁹⁴ Telephone Interview with legal-services provider in Texas, *supra* note 86.

⁹⁵ Telephone Interview with legal-services provider in Florida, *supra* note 77.

⁹⁶ For example, a 2010 survey by the National Center for State Courts found that 37% of courts using videoconferencing had no provisions to enable private communications between attorneys and their clients when they were in separate locations. Eric T. Bellone, *Private Attorney- Client Communications and the Effect of Videoconferencing in the Courtroom*, 8 J. INT'L COM. L. & TECH. 24, 44–45 (2013).

⁹⁷ Telephone Interview with legal-services provider in Florida, *supra* note 77.

⁹⁸ Turner, *supra* note 24, at 21, 57–58 (discussing the disadvantages of remote proceedings for defense attorneys to communicate with clients before, during, and after court appearances due to limitations on videoconferencing in some jails).

⁹⁹ One legal-services attorney recounted that a judge told them they were holding in-person hearings because they did not have the IT staff necessary to operate breakout rooms. Telephone Interview with legal-services provider in Michigan, *supra* note 77. In Ohio, one judge reported that he managed without

breakout rooms available for attorneys and clients to access in the middle of proceedings,¹⁰⁰ while other courts are instructing attorneys to simply send text messages to their clients if they need to communicate.¹⁰¹ While one eviction attorney we interviewed said text messages are often sufficient,¹⁰² another explained that she would never willingly conduct a full trial without being next to the client.¹⁰³ Where courts do provide breakout rooms, some attorneys report being reluctant to interrupt the court proceeding to access them.¹⁰⁴

There is also an indication that judges may not be fully aware of the extent to which videoconferencing is impacting attorney–client interactions. In Professor Turner’s Texas survey, for example, 63% of defense attorneys said that remote court interfered with attorney–client confidentiality, but only 21% of judges agreed.¹⁰⁵

2. *Assessing Documentary Evidence and Witnesses*

Many judicial proceedings involve evidence—documents as well as witness testimony. Remote court has changed how courts engage with evidence, posing logistical challenges and, in the case of testimony, raising deeper questions about whether video is an adequate substitute for in-person interactions.

With respect to documentary evidence, our interviews with legal-services providers representing tenants suggest that courts have struggled with the transition to remote proceedings.¹⁰⁶ In some jurisdictions, courts have allowed parties to submit documentary evidence in a video hearing by holding papers up to the camera, making it difficult for other participants to review the documents.¹⁰⁷ Elsewhere, courts have required parties to share evidence electronically with all other participants, a process that has been confusing to many self-represented tenants.¹⁰⁸ In Missouri, a self-represented

dedicated IT staff because his court reporter happened to be proficient with technology. OHIO CRIM. SENT’G COMM’N FOLLOW-UP, *supra* note 55, at 9.

¹⁰⁰ Telephone Interview with legal-services provider in Michigan, *supra* note 77.

¹⁰¹ Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87.

¹⁰² Telephone Interview with legal-services provider in Texas, *supra* note 64.

¹⁰³ See Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87.

¹⁰⁴ See Telephone Interview with legal-services provider in Michigan, *supra* note 77 (describing some judges’ frustration when asked to pause a proceeding to allow attorneys and clients to speak in breakout rooms).

¹⁰⁵ Turner, *supra* note 24, at 51.

¹⁰⁶ See Telephone Interview with legal-services provider in Ohio, *supra* note 77 (discussing a court missing exhibits after implementing new email requirements).

¹⁰⁷ Telephone Interview with court watcher in Texas, *supra* note 64.

¹⁰⁸ Telephone Interview with legal-services provider in Ohio, *supra* note 77.

tenant won a new trial after he had been unable to physically deliver exhibits to the court (he mailed exhibits to the court that arrived after his trial date) and lacked video capability to share evidence during the remote trial.¹⁰⁹ Further complicating matters, in many cases evidence—such as text communication between tenants and landlords—is generated just before a hearing, making it difficult for parties to share exhibits in advance.¹¹⁰

Remote court has posed even greater challenges with respect to witness testimony, where both civil and criminal attorneys report that interactions with witnesses—assessing credibility, cross-examining, impeaching—are made more difficult by remote court.¹¹¹ Indeed, a substantial body of pre-pandemic research suggests that the use of remote court can have subtle effects on credibility assessments.¹¹² For example, in a 2017 U.S. Government Accountability Office report on immigration courts, judges in three of the six surveyed courts identified instances where they had changed credibility assessments made during a video hearing after holding a subsequent in-person hearing.¹¹³ In one instance, an “immigration judge reported being unable to identify a respondent’s cognitive disability over [video teleconference], but that the disability was clearly evident when the respondent appeared in person at a subsequent hearing, which affected the judge’s interpretation of the respondent’s credibility.”¹¹⁴ Several psychology studies have specifically looked at the impact of video testimony by children in the context of sexual-abuse cases and found that video testimony had an impact on jurors’ perceptions of the child’s believability.¹¹⁵

¹⁰⁹ See Order Granting Motion for a New Trial, *E. Wright Inv. Strategies LLC v. Logan*, No. 2022-AC05861 (Mo. Sept. 28, 2020); Petition for Writ of Prohibition, *supra* note 81, at 4–6; Rebecca Rivas, *Many Missouri Tenants Lack Legal Counsel During Eviction Proceedings*, MO. INDEP. (Nov. 23, 2020), <https://missouriindependent.com/2020/11/23/many-missouri-tenants-lack-legal-counsel-during-eviction-proceedings/> [<https://perma.cc/HK59-MQRR>].

¹¹⁰ Telephone Interview with legal-services provider in Florida, *supra* note 77.

¹¹¹ Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87 (discussing testimony difficulties in the context of tenant cases); see also Turner, *supra* note 24, at 55 (discussing a 2020 survey of judges, prosecutors, and defense attorneys that found wide agreement that “the online setting makes it difficult for the parties to assess” and, where necessary, “challenge witness accounts or credibility”).

¹¹² For a discussion how social psychology and communications research should inform the use of videoconferencing in court, see Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1114 (2004).

¹¹³ U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 55 (2017), <https://www.gao.gov/assets/690/685022.pdf> [<https://perma.cc/ESA8-GSZ7>].

¹¹⁴ *Id.*

¹¹⁵ Holly K. Orcutt, Gail S. Goodman, Ann E. Tobey, Jennifer M. Batterman-Faunce & Sherry Thomas, *Detecting Deception in Children’s Testimony: Factfinders’ Abilities to Reach the Truth in Open*

In some jurisdictions, concerns about assessing witness credibility have led judges to delay trials during the pandemic. A federal district court judge in Connecticut, for example, continued a civil bench trial in June 2020 because “[t]he very purpose of trials as distinguished from pre-trial motions is to assess the credibility of witnesses, especially the credibility of fact witnesses” and “[t]he credibility of a witness is best assessed when the witness’s face is fully visible and the witness appears in person or is recorded being examined in person.”¹¹⁶ On the other hand, some judges have suggested that it is actually easier for them to assess credibility over a videoconference because they can see the witnesses’ full faces rather than “someone’s left ear” peering from the bench.¹¹⁷ Others have argued that while in-person testimony is generally preferable, masking and other safety requirements during the pandemic undercut the benefits, such as the ability to evaluate “the testimony of a witness’ facial expression and diction.”¹¹⁸

3. Courtroom Management

Remote court has also posed challenges for judges’ ability to manage their courtrooms and ensure fair proceedings. Remote technology offers new opportunities for distraction and inappropriate conduct during court proceedings, and it can be difficult for judges to identify such conduct and intervene. For example, a legal-services attorney in Ohio reported that he observed housing managers being coached off camera when they testified remotely.¹¹⁹ Professor Elizabeth Thornburg echoed a similar concern in her

Court and Closed-Circuit Trials, 25 LAW & HUM. BEHAV. 339, 357, 358, 363 (2001) (using a simulated crime and trial to assess the impact of remote testimony by children in sexual-abuse cases, and finding mock jurors rated children who testified via closed-circuit television as less honest, intelligent, and attractive as compared to children who testified in person, and concluded that their testimony was less accurate); see also Sara Landström, Pär Anders Granhag & Maria Hartwig, *Children’s Live and Videotaped Testimonies: How Presentation Mode Affects Observers’ Perception, Assessment and Memory*, 12 LEGAL & CRIMINOLOGICAL PSYCH. 333, 344 (2007) (finding mock jurors perceived children’s live testimony in more positive terms and rated the children’s statements as more convincing than video testimony). However, not every study has found harmful effects from video proceedings. A series of studies from the 1970s and 1980s based on reenacted trials, for example, generally found that videotaped trials had no impact on outcomes. See, e.g., Gerald Miller, *Televised Trials: How Do Juries React?*, 58 JUDICATURE 242, 246 (1974) (describing study that found no impact); Gerald R. Miller, Norma E. Fontes & Gordon L. Dahnke, *Using Videotape in the Courtroom: A Four-Year Test Pattern*, 55 U. DET. J. URB. L. 655, 668–69 (1978) (making a similar observation as Miller’s *Televised Trials*).

¹¹⁶ Order, *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, No. 3:18-cv-00705-VLB (D. Conn. June 26, 2020) (No. 190).

¹¹⁷ Video: Connecticut Judicial Branch Virtual Courts CLE, at 01:08:00–01:09:40 [hereinafter *Virtual Courts Video*] (statement of Judge James Abrams) (on file with journal).

¹¹⁸ *Lynch v. State*, No. HHDCV166067438, 2020 WL 5984790, at *3 (Conn. Super. Ct. Sept. 11, 2020).

¹¹⁹ Telephone Interview with legal-services provider in Ohio, *supra* note 77.

study of Texas family court proceedings.¹²⁰ And after a remote voir dire in a civil trial in California, a defendant sought a mistrial due to prospective jurors being distracted by children or electronics, using home exercise equipment, and even lying in bed, “possibly asleep.”¹²¹ In a traffic court hearing, a plastic surgeon logged in while in the middle of surgery, prompting the judge to reschedule.¹²²

At the same time, remote technology has also given judges new tools to control their courtrooms. During a webinar, for example, a family court judge in Connecticut suggested that when “emotional scenes” occur during remote court, “the mute button is a great tool.”¹²³ While muting disruptive individuals may be appropriate under some circumstances, it is also a shift in courtroom dynamics that could open the door to abuses of power. Given the speed with which courts have had to adopt remote technology, many questions about how courtroom norms should evolve have been left unanswered.

C. Special Challenges for Self-Represented Litigants

Remote court raises unique concerns for self-represented litigants, who have had to navigate new and changing remote systems without the resources often available inside physical courthouses. This is no footnote: States report that in some categories of cases, 70% to 98% of all cases involve at least one litigant appearing without a lawyer.¹²⁴ Even under normal circumstances, self-represented litigants face substantial obstacles in navigating the court system, from parsing “legalese” on forms to following often-cumbersome procedural steps.¹²⁵ And there is also vast unmet need for legal assistance; the State Bar of California reports, for example, that there are more than

¹²⁰ Thornburg, *supra* note 69, at 25.

¹²¹ Debra Cassens Weiss, *Potential Jurors Exercised, Curled Up on Bed During Virtual Voir Dire, Motion Says in Asbestos Case*, ABA J. (July 22, 2020, 2:41 PM), <https://www.abajournal.com/news/article/potential-jurors-exercised-curled-up-on-bed-during-virtual-voir-dire-motion-says> [https://perma.cc/6GWY-FAUN]. The defendant settled the case before the court ruled on the mistrial motion. *Id.*

¹²² Salvador Hernandez, *So, Uh, a Plastic Surgeon Logged into Traffic Court via Zoom While Operating on a Patient*, BUZZFEED NEWS (Feb. 26, 2021, 7:23 PM), <https://www.buzzfeednews.com/article/salvadorhernandez/surgeon-operating-table-zoom-court-hearing> [https://perma.cc/D699-C4GA].

¹²³ Virtual Courts Video, *supra* note 117, at 01:13:38–01:14:10 (statement of Judge Michael A. Albis).

¹²⁴ Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 743 (2015).

¹²⁵ JUD. COUNCIL OF CAL., HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS 1-4–1-10 (2019), https://www.courts.ca.gov/documents/benchguide_self_rep_litigants.pdf [https://perma.cc/CDM6-WQ3Q].

7,500 potential low-income clients for every legal-aid attorney in the state.¹²⁶ Remote court has exacerbated many of these challenges.

First, some jurisdictions have confusing instructions for participating in remote proceedings or lack clear guidance for individuals who do not have the required technology.¹²⁷ These can be traps for the unwary. In Washington State, for example, the Northwest Justice Project sued and ultimately settled with a court that was requiring tenants facing eviction to call the day before a hearing to schedule their remote appearance without providing clear notice of the requirements.¹²⁸ In Ohio, a legal-services lawyer reported that many self-represented litigants found the log-in process for remote court confusing and missed hearings as a result.¹²⁹

A second challenge stems from the loss of access to the physical courthouse, which is often a site where self-represented litigants are connected with resources or legal services. For example, the director of a legal-services organization in Missouri observed that prior to the pandemic, legal-services attorneys “roamed the halls, offered informal advice, provided helpful forms, built relationships. Some of these tenants would become clients, others just got on-the-spot help with their cases.”¹³⁰ By contrast, during the pandemic, the only outreach they were able to do was to give out their phone numbers at the beginning of the day’s docket.¹³¹ Troublingly, in one Ohio jurisdiction, the court refused to distribute fliers from legal services during remote eviction cases out of concern that the court would appear to be picking a side.¹³²

Pre-pandemic research from the immigration court context suggests that litigants’ disconnect from the physical courthouse can have broad implications for case outcomes. A study by Professor Ingrid Eagly, which looked at the use of video technology to adjudicate immigration proceedings remotely, found that detained respondents were more likely to be deported

¹²⁶ *Id.* at 1-2-1-3.

¹²⁷ Eileen Guo, *Logging In to Get Kicked Out: Inside America’s Virtual Eviction Crisis*, MIT TECH. REV. (Dec. 2, 2020), <https://www.technologyreview.com/2020/12/02/1012810/video-evictions-zoom-webex/> [<https://perma.cc/UL3Z-HL4X>].

¹²⁸ Zoe Tillman, *Landlords Are Illegally Evicting Tenants During the Coronavirus Pandemic. Lawyers Fear a “Tsunami” of Evictions When State Moratoriums End*, BUZZFEED NEWS (Apr. 22, 2020, 5:26 PM), <https://www.buzzfeednews.com/article/zoetillman/coronavirus-illegal-evictions-moratorium-rent-lawyer-aid> [<https://perma.cc/T5HC-7VPM>].

¹²⁹ Telephone Interview with legal-services provider in Ohio, *supra* note 77.

¹³⁰ Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87.

¹³¹ *Id.*; see also Telephone Interview with court watcher in Texas, *supra* note 64 (highlighting difficulties of making people aware of legal services remotely).

¹³² Telephone Interview with legal-services provider in Ohio, *supra* note 77.

when their proceedings occurred over videoconference as compared to in person.¹³³ She found what she described as a “paradoxical result”: detained immigrants whose proceedings occurred over video were more likely to be deported, but *not* because judges denied their claims at higher rates.¹³⁴ Rather, they were less likely to take advantage of procedures that might help them.¹³⁵ Detained individuals who appeared in person were 90% more likely to apply for relief, 35% more likely to obtain counsel, and 6% more likely to apply for voluntary departure, as compared to similarly situated individuals who appeared by video.¹³⁶ These results were statistically significant, even when controlling for other factors that could have influenced case outcomes.¹³⁷

Notably, among those individuals who actually applied for various forms of relief, there was no statistically significant difference in outcome after controlling for other factors.¹³⁸ However, because video participants were *less likely* to seek relief or retain counsel, video cases were still significantly more likely to end in removal.¹³⁹ Relying on interviews and court observations, Professor Eagly suggested several potential reasons for this dynamic, including logistical hurdles, challenges in communicating with counsel, and difficulties in following what was happening over video.¹⁴⁰

D. Differing Forms of Public Access

Remote court has also changed what it means to attend court as a member of the public, although states’ approaches to public access have varied widely. Some jurisdictions have provided for broad public access to remote court, providing livestreams on their websites or YouTube; others

¹³³ Professor Eagly used a nationwide sample of nearly 154,000 cases in which immigration judges reached a decision on the merits during fiscal years 2011 and 2012. Eagly, *supra* note 23, at 966.

¹³⁴ *Id.* at 937.

¹³⁵ *Id.* at 937–38.

¹³⁶ *Id.* at 938.

¹³⁷ Among other things, Professor Eagly controlled for the type of proceeding and charge, the respondent’s nationality, whether the respondent is represented by counsel, the judge, and the year the proceedings took place. *Id.*

¹³⁸ *Id.*

¹³⁹ Professor Eagly looked at two samples, a national sample and a subset of locations that she called the Active Base City Sample. She found that “[i]n the National Sample, 80% of in-person respondents were ordered removed, compared to 83% of televideo respondents. In the Active Base City Sample, 83% of in-person respondents were ordered removed, compared to 88% of televideo respondents.” The disparities in outcomes were statistically significant. *Id.* at 960, 964, 966.

¹⁴⁰ *Id.* at 978, 984, 989–90.

have permitted public access by phone or video by request; and some have not provided for any form of public access.¹⁴¹

Remote court offers at least the potential for greater transparency in court proceedings. In jurisdictions that livestream court proceedings, court-watching programs have reported being able to recruit and deploy many more volunteers now that they can observe from home.¹⁴² Such livestreams can also make it easier for family and friends to observe. One family court judge in Texas tweeted that she had granted an adoption that “was witnessed by a community of over 75 people from all over the world. There was much joy and many tears.”¹⁴³

Yet this greater transparency also comes with a privacy cost. While in-person proceedings are open to the public, broadcasting court hearings over the internet introduces “a loss of practical obscurity.”¹⁴⁴ For example, for some individuals an eviction is a source of embarrassment or even shame.¹⁴⁵ It could be painful to know that anyone could view and potentially disseminate images from such proceedings. Further, if public access to proceedings is too unrestrained, courts also risk undermining laws that allow for certain criminal cases to be sealed and records to be expunged—after all, it is difficult to prohibit recording a court proceeding from the comfort of one’s home.¹⁴⁶

This is challenging terrain to navigate. In her article describing family court observations, Professor Thornburg detailed measures some judges took to preserve privacy, including removing broadcasts from YouTube when the hearing ended, using breakout rooms to have sensitive conversations with

¹⁴¹ See, e.g., Turner, *supra* note 24, at 39–40 (noting that Texas makes live broadcasts available to the public); ALBERT FOX CAHN & MELISSA GIDDINGS, VIRTUAL JUSTICE: ONLINE COURTS DURING COVID-19, at 4 (2020) <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f1b23e97ab8874a35236b67/1595614187464/Final+white+paper+pdf.pdf> [<https://perma.cc/R9KY-F4R5>] (explaining that New York has no provisions for public or press access to remote proceedings).

¹⁴² Telephone Interview with court watcher in Texas, *supra* note 64. Public access within courthouses varies as well, with some judges streaming while others do not. *Id.*

¹⁴³ Justice Dennise Garcia (@kdgarcia), TWITTER (May 14, 2020, 9:38 PM), <https://twitter.com/kdgarcia/status/1261123727410020355> [<https://perma.cc/LQQ4-NWQ4>].

¹⁴⁴ CAHN & GIDDINGS, *supra* note 141, at 3–4.

¹⁴⁵ See, e.g., Casey Morris, *Eviction in North Carolina as Pandemic Wears On*, CAROLINA PUB. PRES (Jan. 14, 2021), <https://carolinapublicpress.org/41424/eviction-in-north-carolina-as-pandemic-wears-on/> [<https://perma.cc/JE6R-ZUKJ>] (discussing embarrassment associated with being evicted).

¹⁴⁶ For example, New York prohibits televising court proceedings and permits sealing criminal records for some types of offenses. See N.Y. CIV. RIGHTS LAW § 52 (McKinney 2021); N.Y. CRIM. PROC. LAW § 160.59 (McKinney 2021). Note that there is no First Amendment right to a televised trial. *Courtroom Television Network LLC v. New York*, 833 N.E.2d 1197, 1200–01 (N.Y. 2005) (citing *Estes v. Texas*, 381 U.S. 532, 549 (1965)).

minors, and going offline for some sensitive testimony.¹⁴⁷ But there is little guidance yet for exactly how judges should draw these lines.

E. Inconsistent Implementation

Finally, another striking aspect of our interviews was that system-wide directives obscured substantial variation in court operations that arose as courts within jurisdictions interpreted and used their authority differently, reflecting at least in part an institutional culture in many court systems resistant to centralized oversight.¹⁴⁸

For example, legal-aid providers confirmed there is substantial inconsistency regarding remote eviction proceedings, even within courthouses, often as a result of a judge's individual preference for video or phone.¹⁴⁹ In one large Texas county, nearly one-third of justices of the peace were declining to use video despite having been provided with Zoom licenses, according to one service provider.¹⁵⁰ In one Michigan jurisdiction, the vast majority of courts were operating remotely, but two courts were requiring physical presence in the courtroom, or in a tent constructed in the court's parking lot.¹⁵¹ In Kansas City, one judge who was previously conducting remote hearings transitioned to in-person to avoid anti-eviction protests that had become common on the remote platform.¹⁵² Meanwhile, some judges, so dissatisfied with the choice between remote and socially distanced in-person proceedings, opted to simply delay trials for as long as possible.¹⁵³ In some courts, eviction dockets effectively shut down as judges

¹⁴⁷ Thornburg, *supra* note 69, at 26–27.

¹⁴⁸ Gordon M. Griller, *Governing Loosely Coupled Courts in Times of Economic Stress*, in *FUTURE TRENDS IN STATE COURTS* 48, 48 (2010) (“It is no secret that some judges believe the traditional definitions of judicial independence—freedom from control by other branches of government and freedom from interference in case-related decisions—should include freedom from control by leadership judges and managers responsible for the day-to-day operations of the court system.”). Such “independence” is encouraged by a selection system where judges are generally selected by third parties, either through elections or appointments, rather than by institutional actors within the judiciary itself, giving them an independent source of legitimacy that can be in tension with court-administration hierarchy. CHRISTINE M. DURHAM & DANIEL J. BECKER, *A CASE FOR COURT GOVERNANCE PRINCIPLES* 2–3 (2011), <https://www.sji.gov/wp/wp-content/uploads/Becker-Durham-A-Case-for-Court-Governance-Principles.pdf> [<https://perma.cc/6XPL-8A39>].

¹⁴⁹ Telephone Interview with legal-services provider in Florida, *supra* note 77; Telephone Interview with court watcher in Texas, *supra* note 64.

¹⁵⁰ Telephone Interview with court watcher in Texas, *supra* note 64.

¹⁵¹ Telephone Interview with legal-services provider in Michigan, *supra* note 77.

¹⁵² Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87.

¹⁵³ Nov. 11 Telephone Interview with legal-services provider in Missouri, *supra* note 64.

attempted to wait out the storm, while in others, judges have been moving along as normal.¹⁵⁴

Importantly, while the legal-services providers we interviewed had many critiques of remote court, they all wanted and appreciated the ability to participate remotely during the pandemic.¹⁵⁵

III. CONSTITUTIONAL ISSUES RAISED BY REMOTE COURT

At their most extreme, the shortcomings of remote court also raise a host of constitutional questions that are only beginning to wind their way through the legal system—questions that will take on added salience as courts emerge from crisis and develop long-term plans for remote proceedings. We detail here both how courts have begun to address these questions as well as constitutional values that should inform future policymaking around the use of remote court. This discussion focuses on federal constitutional rights, but it is worth noting that remote court proceedings may raise additional questions under state constitutions.¹⁵⁶

The most acute constitutional questions arise in the criminal context—and, for this very reason, courts have shown a greater reluctance to advance criminal trials remotely as compared to their civil counterparts.¹⁵⁷ Take, for example, the Sixth Amendment’s Confrontation Clause, which functions “to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing.”¹⁵⁸ Proper testing requires that witnesses appreciate the gravity of the proceedings, defendants have an opportunity to cross-examine witnesses, and jurors have an opportunity to evaluate witness credibility.¹⁵⁹ Still, the Supreme Court has said the Confrontation Clause’s preference for face-to-face confrontation “must occasionally give way to considerations of public policy and the necessities of the case.”¹⁶⁰

Confrontation rights are waivable, and a court may further dispense with face-to-face confrontation over a defendant’s objections but only based

¹⁵⁴ Telephone Interview with court watcher in Texas, *supra* note 64.

¹⁵⁵ *E.g.*, Telephone Interview with legal-services provider in Ohio, *supra* note 77 (expressing gratitude for the ability to participate remotely rather than in person); Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87 (discussing health and safety benefits of remote hearings).

¹⁵⁶ For example, thirty-nine states have “open courts” or “right-to-remedy” clauses in their constitutions. Robert F. Williams, *State Constitutional Protection of Civil Litigation*, 70 RUTGERS U. L. REV. 905, 911 (2018).

¹⁵⁷ See *supra* Part I.

¹⁵⁸ *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

¹⁵⁹ See *Mattox v. United States*, 156 U.S. 237, 259 (1895).

¹⁶⁰ *Craig*, 497 U.S. at 849 (quoting *Mattox*, 156 U.S. at 243).

upon a case-specific determination that doing so is necessary and that there are other guarantees that the testimony is reliable. Reviewing courts have set high bars for these determinations.¹⁶¹

Indeed, because of “serious concerns under the Confrontation Clause,” a divided Supreme Court rejected a proposed 2002 change to the Federal Rules of Criminal Procedure that would have allowed video testimony when a witness is unavailable to appear in person, when “appropriate safeguards” ensure the reliability and technical quality of the testimony, and when “exceptional circumstances” are present that necessitate remote testimony.¹⁶² “Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones,” wrote Justice Antonin Scalia in opposition to the proposed rule amendment.¹⁶³ In 2020, a unanimous Michigan Supreme Court ruled that two-way, interactive video testimony (provided at trial prior to the pandemic) violated a defendant’s right to confront witnesses under both the state and federal constitutions.¹⁶⁴ Some courts have also applied confrontation rights to limit the use of video in parole-revocation hearings.¹⁶⁵

Recognizing the limits of video testimony, courts have struggled to apply the Confrontation Clause amid a global pandemic.¹⁶⁶ Courts that have allowed remote testimony over a defendant’s objections have relied on the unique necessity of the pandemic and the protections provided by modern video platforms, including two-way communication.¹⁶⁷ But other courts have

¹⁶¹ *Id.* at 850. Indicia of reliability included the physical presence of the witness, whether the testimony was under oath, the opportunity for cross-examination, and the jury’s ability to observe the witness’s reactions and demeanor. *Id.* at 846.

¹⁶² SUP. CT. OF THE U.S., AMENDMENTS TO RULE 26(B) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 4 (Apr. 29, 2002) (dissenting statement of Breyer, J.), <https://web.archive.org/web/20100409232731/http://www.uscourts.gov/rules/CR-26b.pdf>.

¹⁶³ *Id.* at 2 (statement of Scalia, J.).

¹⁶⁴ *People v. Jemison*, 952 N.W.2d 394, 396 (Mich. 2020).

¹⁶⁵ *See, e.g., Wilkins v. Wilkinson*, No. 01AP-468, 2002 WL 47051, at *3 (Ohio Ct. App. Jan. 15, 2002). Courts have generally found no confrontation rights in pretrial proceedings but have not completely foreclosed that such rights could apply in some circumstances. *See, e.g., United States v. Karmue*, 841 F.3d 24, 26–27 (1st Cir. 2016).

¹⁶⁶ In addition to considering how video hearings interact with the Confrontation Clause, courts have considered whether masked witnesses violate the Clause. *See, e.g., United States v. Crittenden*, No. 4:20-CR-7 (CDL), 2020 WL 4917733, at *7 (M.D. Ga. Aug. 21, 2020) (“The Confrontation Clause does not guarantee the right to see the witness’s lips move or nose sniff, any more than it requires the jurors to subject the back of a witness’s neck to a magnifying glass to see if the hair raised during particularly probative questioning.”).

¹⁶⁷ *Commonwealth v. Masa*, No. 1981CR0307, 2020 WL 4743019, at *5 (Mass. Super. Ct. Aug. 10, 2020); *United States v. Dozinger*, No. 19-CR-561 (LAP), 2020 WL 5152162, at *3 (S.D.N.Y. Aug. 31, 2020).

determined that the Confrontation Clause poses a high bar to video testimony even in a global health crisis, going so far as to examine the comorbidities of individual witnesses before determining whether it is reasonable to make them travel to the court.¹⁶⁸ In denying the government's request for a witness to provide video testimony, one court cited an earlier hearing which had taken place by video where participants did not know who was speaking at any given moment.¹⁶⁹ When the urgency of the pandemic fades, confrontation rights will be an even greater bar to remote testimony, absent consent.

Other Sixth Amendment guarantees have not yet been thoroughly examined by courts in the context of the pandemic. For example, remote court can implicate the right to a fair jury, most notably with respect to the difficulty in ensuring jurors are free of improper influence during trials.¹⁷⁰ Remote proceedings make it harder to monitor jurors and make measures like sequester impossible, posing further hurdles to the due process dictate that a trial judge is "ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."¹⁷¹

Likewise, while the Sixth Amendment does not guarantee defendants a petit jury that is perfectly representative of the community, it requires at least a representative pool of jurors that presents a "fair possibility for obtaining a representative cross-section of the community" on the petit jury.¹⁷² If a court conducts voir dire remotely, as some jurisdictions have done, the digital divide—which disproportionately leaves some communities without access to high-speed internet—may distort the jury pool.¹⁷³

Further, if remote systems impair attorney–client communications,¹⁷⁴ courts risk systematically violating the guarantee of effective assistance of counsel in criminal cases. While the most common claims of ineffective assistance arise based on alleged poor decision-making by defense counsel, the guarantee is also violated when a court creates circumstances that make it impossible for even the deftest attorney to provide effective

¹⁶⁸ *United States v. Casher*, No. CR 19-65-BLG-SPW, 2020 WL 3270541 (D. Mont. June 17, 2020); *United States v. Pangelinan*, No. 19-10077-JWB, 2020 WL 5118550 (D. Kan. Aug. 31, 2020).

¹⁶⁹ *Pangelinan*, 2020 WL 5118550, at *4.

¹⁷⁰ *See supra* Section II.B.3.

¹⁷¹ *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

¹⁷² *Williams v. Florida*, 399 U.S. 78, 100 (1970). To identify violations of the fair-cross-section doctrine, courts look to whether the group excluded is distinctive, the group is underrepresented in the pool of prospective jurors, and whether that underrepresentation is "inherent in the particular jury-selection process." *Duren v. Missouri*, 439 U.S. 357, 364–66 (1979).

¹⁷³ *See supra* Section II.A.2.

¹⁷⁴ *See supra* Section II.B.1.

representation.¹⁷⁵ When such constructive denial of assistance of counsel exists—because, for example, the trial court prohibited a defendant from speaking with his lawyer during an extended recess—a defendant need not even prove the circumstances prejudiced his case.¹⁷⁶

If a court’s chosen remote system makes it difficult for attorneys and clients to strategize or exchange information immediately prior to or in the middle of a remote hearing, that court may violate defendants’ constitutional rights by constructively denying them access to their attorneys. However, early cases suggest courts will likely be skeptical of such arguments, at least barring unusual circumstances. For example, in rejecting a criminal defendant’s objections to conducting a suppression hearing remotely over videoconference, including a claim that it would violate the right to effective assistance of counsel, a federal district court judge noted, “[The court] has conducted many hearings and even a bench trial via videoconference, and it is confident in defense counsel’s ability to see, hear, assess, and cross examine witnesses in an effective manner in that format.”¹⁷⁷

Courts have been less cautious in proceeding with civil matters remotely. In many instances, existing rules already provided courts with greater flexibility to use remote technology. For example, Federal Rule of Civil Procedure 43(a) provides that “[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.”¹⁷⁸ Applying this rule, numerous courts found that the COVID-19

¹⁷⁵ *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Perry v. Leeke*, 488 U.S. 272, 279–80 (1989).

¹⁷⁶ *Perry*, 488 U.S. at 278–80 (holding that no showing of prejudice is necessary); *Geders v. United States*, 425 U.S. 80, 92 (1976) (holding that no showing is necessary in an overnight-recess context).

¹⁷⁷ *United States v. Rosenschein*, 474 F. Supp. 3d 1203, 1209 (D.N.M. 2020); *see also* *United States v. Willis*, No. 1:19-cr-102, 2020 WL 3866853, at *3–5 (S.D. Ohio July 9, 2020) (concluding in the context of a detention hearing that a temperamental video link that served as the only means for a detained defendant to communicate with his attorney during the pandemic did not violate the Sixth Amendment or otherwise justify the defendant’s temporary release (citing *Benjamin v. Fraser*, 264 F.3d 175, 187 (2d Cir. 2001))).

¹⁷⁸ FED. R. CIV. P. 43(a); *see also* *Parkhurst v. Belt*, 567 F.3d 995, 1002 (8th Cir. 2009) (“[A] district court is afforded wide latitude in determining the manner in which evidence is to be presented.”).

pandemic was a compelling circumstance to authorize remote bench trials,¹⁷⁹ and even jury trials,¹⁸⁰ via videoconference over parties' objections.

But in civil cases as well, judges must ensure that remote proceedings do not interfere with the right to a fair jury under the Seventh Amendment¹⁸¹ or constitutional guarantees of due process.¹⁸² In part, procedural due process requires notice and a meaningful opportunity to be heard, and courts identify constitutional infringements by balancing the importance of the interests at stake in the proceeding, the risk that the procedures at issue will result in erroneous harm to those interests, the value of additional safeguards, and the government's interests in the current procedures.¹⁸³

Notice of a proceeding, for instance, must be more than a "mere gesture" and should be "reasonably calculated, under all the circumstances, to apprise interested parties . . . and afford them an opportunity to present their objections."¹⁸⁴ But what if a summons provides little guidance on how to use the court's chosen platform, be it Zoom, GoToMeeting, or another tool, or fails to give clear guidance on alternatives for litigants who lack access to the necessary technology?¹⁸⁵

With respect to what constitutes a sufficient hearing, due process requirements can vary widely depending on the interests at stake and may be a very low bar.¹⁸⁶ Numerous courts have rejected due process objections to remote civil trials during the pandemic, including ruling that remote cross-

¹⁷⁹ Gould Elecs. Inc. v. Livingston Cnty. Rd. Comm'n, 470 F. Supp. 3d 735, 741 (E.D. Mich. 2020); Argonaut Ins. Co. v. Manetta Enters., Inc., No. 19-CV-00482 (PKC) (RLM), 2020 WL 3104033, at *2–3 (E.D.N.Y. June 11, 2020); Aoki v. Gilbert, No. 2:11-cv-0297-TLN-CKD, 2019 WL 1243719, at *2 (E.D. Cal. Mar. 18, 2019); see also *In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d 967, 971 (D. Minn. 2020) (allowing two witnesses to testify remotely when COVID-19 interrupted an ongoing bench trial).

¹⁸⁰ Liu v. State Farm Mut. Auto. Ins. Co., No. 2:18-1862-BJR, 2020 WL 8465987, at *3 (W.D. Wash. Dec. 17, 2020).

¹⁸¹ Skaggs v. Otis Elevator Co., 164 F.3d 511, 514 (10th Cir. 1998) (citing U.S. CONST. amend. VII).

¹⁸² See, e.g., Lindsey v. Normet, 405 U.S. 56, 64–69 (1972) (applying procedural due process protections to state eviction proceedings). For a review of potential procedural due process challenges to summary eviction proceedings during the pandemic, see *Procedural Due Process Challenges to Evictions During the Covid-19 Pandemic*, NAT'L HOUS. L. PROJECT (May 22, 2020), <https://www.nhlp.org/wp-content/uploads/procedural-due-process-covid-evictions.pdf> [<https://perma.cc/A9KW-P5DS>].

¹⁸³ Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

¹⁸⁴ Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314–15 (1950).

¹⁸⁵ See Tillman, *supra* note 128.

¹⁸⁶ See, e.g., Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 18 (1978) (holding that when a public utility seeks to discontinue service to a customer due to overdue payments, the utility must provide merely "some administrative procedure for entertaining customer complaints").

examinations meet the requirements of due process.¹⁸⁷ In Iowa, for example, a court ruled that a termination-of-parental-rights hearing could take place over the telephone.¹⁸⁸

Yet, for at least a decade, courts have recognized that faulty technology can trigger a due process violation in immigration proceedings if “the outcome of [a] hearing ‘may have been affected’ by the fact that [the] hearing was conducted by video conference.”¹⁸⁹ Particularly in the civil context, where many litigants are pro se, a remote hearing may not provide a meaningful opportunity to be heard for any number of reasons: poor access to or discomfort with technology, insufficient accommodations on the remote system for persons with disabilities, or a system for submitting evidence that affords little opportunity for review by either opposing parties or the court. As a New York court noted in an eviction matter, “[T]he presumption that the modern practice of law should readily include a computer and internet access does not hold for litigants, especially those of limited financial means.”¹⁹⁰ Thus, while due process objections are unlikely to be a general bar to remote proceedings, they may have teeth for certain categories of issues or litigants.

Finally, remote court raises challenging questions about what kind of public access is required by the First and Sixth Amendments.¹⁹¹ The guarantee of public access is supposed to result in a two-way exchange of information. On one side, the right exists to ensure the public can see what is happening in their courtrooms.¹⁹² But the guarantee of a public trial also benefits the accused: “[T]he presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of

¹⁸⁷ *Lynch v. State*, No. HHDCV166067438, 2020 WL 5984790, at *1 (Conn. Super. Ct. Sept. 11, 2020); *see also Ciccone v. One W. 64th St., Inc.*, 132 N.Y.S.3d 261, 261 (Sup. Ct. 2020) (rejecting objection to holding attorney-fee hearing via videoconference).

¹⁸⁸ *In re A.H.*, 950 N.W.2d 27, 39–40 (Iowa Ct. App. 2020); *see also A.S. v. N.S.*, 128 N.Y.S.3d 435, 435 (Sup. Ct. 2020) (authorizing virtual child-custody trial over objections).

¹⁸⁹ *See Vilchez v. Holder*, 682 F.3d 1195, 1200 (9th Cir. 2012) (quoting *Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009)).

¹⁹⁰ *Wyona Apartments LLC v. Ramirez*, 137 N.Y.S.3d 653, 657 (Civ. Ct. 2020).

¹⁹¹ *See Waller v. Georgia*, 467 U.S. 39, 40–41 (1984) (considering whether the Sixth Amendment requires a public hearing on a motion to suppress evidence); *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 503, 509 n.8 (1984) (determining how much publicity the First Amendment requires in voir dire proceedings). Several federal courts have found a right to public access to civil proceedings, but the Supreme Court has not spoken on this question. *See Courthouse News Serv. v. Planet*, 947 F.3d 581, 590 (9th Cir. 2020).

¹⁹² “The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Press-Enter.*, 464 U.S. at 508.

their functions . . . ’ [i]n addition to ensuring that judge and prosecutor carry out their duties responsibly.”¹⁹³ A one-way streaming link may serve the goal of getting information out but fail to serve the interest in enabling family members, neighbors, and the general public to keep courtroom participants in check in the way the Constitution intends.

Nevertheless, courts may close court proceedings to the public so long as doing so is narrowly tailored to forward an overriding interest.¹⁹⁴ Courts have recognized that public safety, juror and witness privacy, and national security all may support court closure at times.¹⁹⁵ Amid the 1918–1919 flu pandemic, an Ohio appellate court ruled that a trial court properly exercised its authority when, “acting for the general public welfare,” it excluded the public from a trial at a time when “schools and churches were closed, the right of public assemblage was prohibited[,] . . . and these were all necessary police regulations designed to stamp out the further extension of the then existing epidemic.”¹⁹⁶

During the COVID-19 pandemic, several courts have determined that partial courtroom closures undertaken to protect the “health and safety of trial participants and the public” did not violate public-access rights because the public was able to view the proceedings by streaming video in another location.¹⁹⁷ But at least one court determined that the Constitution requires more than just public viewing and ordered that a corresponding video display of the public and press watching in another room be installed in the courtroom itself.¹⁹⁸ In its ruling, the court stated that this two-way video feature serves a vital purpose: it reminds “those in the courtroom that the

¹⁹³ *Waller*, 467 U.S. at 46 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979)).

¹⁹⁴ *Id.* at 48.

¹⁹⁵ See *Presley v. Georgia*, 558 U.S. 209, 213, 215 (2010) (per curiam) (holding that while there are some circumstances which merit closure of voir dire to the public in order to inhibit improper communications with jurors and ensure juror safety, the threat must be specifically articulated to overcome the presumption that voir dire should otherwise be open to the public per the Sixth Amendment); *Sixth Amendment at Trial*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 653, 657 (2010) (collecting cases); JOSEPH G. COOK, 3 CONSTITUTIONAL RIGHTS OF THE ACCUSED § 18:1 (3d ed. 2020) (collecting cases).

¹⁹⁶ *Colletti v. State*, 12 Ohio App. 104, 122 (1919).

¹⁹⁷ *United States v. Richards*, No. 2:19-cr-353-RAH, 2020 WL 5219537, at *2–3 (M.D. Ala. Sept. 1, 2020); see also *Strommen v. Mont. Seventh Jud. Dist. Ct.*, No. OP 20-0327, 2020 WL 3791665, at *1, 3 (Mont. July 7, 2020) (finding that the petitioner’s Sixth Amendment rights were not violated when the court limited the number of persons who could attend his trial in person due to the COVID-19 pandemic but allowed the public to view the remote proceedings live); *Gomes v. U.S. Dep’t of Homeland Sec., Acting Sec’y*, 460 F. Supp. 3d 129, 130–31 (D.N.H. 2020) (holding that the “goals of public access will be achieved” through the use of video recordings of hearings that may be viewed live).

¹⁹⁸ *United States v. Babichenko*, No. 18-cr-00258-BLW, 2020 WL 7502456, at *1 (D. Idaho Dec. 21, 2020).

proceedings are indeed public and that members of the public are watching the proceedings.”¹⁹⁹

IV. INSTITUTIONAL BLIND SPOTS AND LESSONS FOR THE COURTS

Remote court has undoubtedly brought tangible benefits to many court users as well as to judges and lawyers. Yet one striking element of the move to remote court is that the benefits are often more visible than the costs, particularly for judges, who are trained lawyers firmly on one side of the digital divide. For example, Professor Turner’s survey of judges, prosecutors, and defense attorneys in Texas found that 72% of defense attorneys believed that online proceedings tended to lead to less favorable outcomes for the defense, whereas only about 5% of prosecutors and judges agreed.²⁰⁰

There is thus strong reason to bring a critical eye to the embrace of remote court by many judges. Judges and other court leaders are frequently in the position of setting court policy while also being participants in the institution they are regulating. This gives them a valuable perspective, but it also creates the risk of blind spots and warped incentives. For example, courts, as well as individual judges, can face pressure to overemphasize values such as speed, cost savings, and reduced workloads at the cost of fair proceedings.²⁰¹ Indeed, courts’ pandemic response occurred under the backdrop of an institutional culture where critics have suggested that “the focus on efficiency has tended to overshadow other important values, undercutting judicial oversight over, and commitment to, the realization of other competing values, notably, the fair, equitable, and just conclusion of disputes.”²⁰²

In addition to courts’ own incentives at times being at odds with the pursuit of justice, court leaders may also overestimate their understanding of the interests of other stakeholders. For example, by early summer, several judicial branches and state bar associations had set up committees to make

¹⁹⁹ *Id.*

²⁰⁰ Turner, *supra* note 24, at 62; *see also id.* at 57 (“With respect to all but one of the statements about the disadvantages of video proceedings, there were statistically significant differences between the responses of defense attorneys and the responses of judges and prosecutors.”).

²⁰¹ Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 615 (1985) (criticizing an overemphasis on efficiency and arguing that “[e]conomy is not the sole purpose of a court system, nor is it the hallmark of court systems as contrasted with other forms of decisionmaking,” that “[c]oin flipping (or lotteries) would, after all, provide final and inexpensive solutions, but would also be an offensive mechanism by which to make many decisions in this society”).

²⁰² Orna Rabinovich-Einy & Yair Sagy, *Courts as Organizations: The Drive for Efficiency and the Regulation of Class Action Settlements*, 4 STAN. J. COMPLEX LITIG. 1, 11 (2016).

recommendations about reopening generally or, more specifically, about their civil dockets or criminal trials. In August, the American Bar Association (ABA) urged states that had not already done so to form “committees to conduct evidence-based reviews of the use of virtual or remote court proceedings . . . to ensure that they are guaranteeing all applicable constitutional rights and ensure that attorneys can comply with their professional ethical obligations.”²⁰³ The ABA further urged that “[s]uch committees should include representatives of all constituencies involved in or affected by the type of court or proceeding under consideration.”²⁰⁴

A review of these reopening committees, however, makes evident that they did not include representatives from all affected constituencies. At least sixteen state courts have convened committees to guide court policy on addressing the COVID-19 crisis or the reopening process, of which fourteen have publicly available membership lists.²⁰⁵ Several other state bar associations have also convened task forces.²⁰⁶ Most committees have consisted exclusively of judges, attorneys, and court staff; the few nonattorney members have been either public-health experts or law enforcement.²⁰⁷ No nonattorney representatives of affected communities have been included,²⁰⁸ and most attorney commissioners have been sitting or retired judges or attorneys in private practice.²⁰⁹

Of the fourteen committees established by a judicial branch that we reviewed, only two had a civil legal-aid representative.²¹⁰ Three commissions also lacked any public-defender representation.²¹¹ This experience gap is particularly significant because judges themselves rarely come from legal-services or defender backgrounds, making representation of these

²⁰³ AM. BAR ASS'N, RESOLUTION 117 (Aug. 3–4, 2020), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/117-annual-2020.pdf> [<https://perma.cc/N6VM-TEV4>].

²⁰⁴ *Id.*

²⁰⁵ Task forces were created by the courts in Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, New Hampshire, North Carolina, Ohio, Vermont, Virginia, Washington, and Wisconsin. Membership lists were not available for New Hampshire or Indiana. Alicia Bannon & Douglas Keith, Analysis of COVID-19 Commission Membership (unpublished data) (on file with journal).

²⁰⁶ State bar task forces were created in Alabama, Connecticut, Florida, Maryland, Missouri, New Jersey, New York, Pennsylvania, Vermont, and Washington. *Id.*

²⁰⁷ Out of twenty-six committees, five included public-health representatives and five included representatives from law enforcement (excluding prosecutors). *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

perspectives even more important during policy making.²¹² To be sure, many courts likely have sought the counsel of other bodies in the course of their deliberations, such as state access-to-justice commissions, which include public defenders and civil legal-aid representatives.²¹³ But it is nevertheless troubling that the committees driving the development of court policy included few of the perspectives of the people most likely to suffer if remote proceedings result in unfairness.

Similarly, the National Center for State Courts, which works collaboratively with court associations like the Conference of Chief Justices and the Conference of State Court Administrators, created a panoply of resources for courts during the pandemic, including producing thirty-four webinars between March and November 2020. The webinars covered everything from managing jury trials during COVID-19, to the use of remote interpretation services, to administering criminal court dockets.²¹⁴ Strikingly, only four of these webinars included any representatives from civil legal-services or public-defender offices.²¹⁵ In half of them, the only participants were judges, court administrators, or a combination of the two.²¹⁶

Our interviews further suggested that even when stakeholder consultation was valued at the top of the court hierarchy, it did not always trickle down to the local level, where ordinary people are most likely to interact with courts. In Missouri, for example, the state supreme court directed local court leaders to consult with “members of the local bar, prosecutors and public defenders, law enforcement and probation and parole.”²¹⁷ Yet when advocates in Kansas City wrote to court leadership to express concerns that tenants would be unable to access the court’s remote platform,²¹⁸ advocates reported that local leadership did not engage with

²¹² ALICIA BANNON & JANNA ADELSTEIN, STATE SUPREME COURT DIVERSITY UPDATE (forthcoming 2021).

²¹³ For example, the Massachusetts Access to Justice Commission created a COVID-19 Task Force, with an Access to Courts Committee that provided recommendations to the courts. Mass. Access to Just. Comm’n, *Update*, MASS. A2J (Apr. 9, 2020), <https://massa2j.org/?p=1170> [<https://perma.cc/XX62-E5UW>].

²¹⁴ *Webinars*, NAT’L CTR. FOR STATE CTS., <https://www.ncsc.org/newsroom/public-health-emergency/webinars> [<https://perma.cc/E3N6-FMGU>].

²¹⁵ *See id.*

²¹⁶ *See id.*

²¹⁷ SUP. CT. OF MO., OPERATIONAL DIRECTIVES 3 (May 4, 2020), <https://www.courts.mo.gov/file.jsp?id=156093> [<https://perma.cc/MN5A-XVT3>].

²¹⁸ *See e.g.*, Letter from Gina Chiala, Exec. Dir., Heartland Ctr. for Jobs & Freedom et al., to Hon. David M. Byrn & Hon. Janette K. Rodecap 2–4 (Apr. 23, 2020), <https://fox4kc.com/wp-content/uploads/sites/16/2020/04/20200423-Ltr-to-J-Bryn-and-Rodecap-re-Remote-Hearings-copy->

legal aid or address their concerns.²¹⁹ In Ohio, the managing director of a legal-services organization described legal aid as having good communication with the state supreme court but said that at the local level it was “hit or miss and mostly miss.”²²⁰ That said, some courts have taken the time to engage with their communities, including in Michigan, where a leader of a legal-services group reported that legal aid developed a constructive relationship with its district court during the pandemic. This occurred after the Michigan Supreme Court issued a directive that each chief district court judge should hold a meeting to evaluate remote proceedings and include legal aid in that meeting.²²¹

If courts did engage more with lawyers representing low-income community members, they might find substantial agreement about the need for remote proceedings and ideas for maximizing their utility and minimizing their shortcomings. For example, the legal-services attorneys we interviewed generally supported holding many preliminary hearings remotely and focused their concerns on evidentiary hearings and trials.²²² Among the recommendations we heard from attorneys were expanding access kiosks and doing more to let tenants know about their existence,²²³ more formal efforts to connect pro se parties to legal services,²²⁴ and prioritizing technological solutions to overcome the problems involving documentary evidence and attorney–client communication.²²⁵

V. PRINCIPLES FOR MOVING FORWARD

States’ experiences with remote court suggest several principles that should inform future policymaking, both in responding to COVID-19 and other emergencies and in developing long-term policies regarding remote

1.pdf[<https://perma.cc/NS38-VQST>] (expressing concerns regarding due process and other constitutional issues with respect to remote court proceedings).

²¹⁹ Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87.

²²⁰ Telephone Interview with legal-services provider in Ohio, *supra* note 77; *see also* Telephone Interview with legal-services provider in Florida, *supra* note 77 (noting there is a lack of collaboration between the court system and the public with respect to legal aid).

²²¹ Priority Treatment and New Procedure for Landlord/Tenant Cases, Admin. Order No. 2020-17, (Mich. Jan. 30, 2021), https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/Documents/HTML/AOs/AOsResponsive%20HTML5/AOs/Group1/Administrative_Orders/AO_No_2020-17_%E2%80%9494_Priority_Treatment_and_New_Procedure_for.htm [<https://perma.cc/SQ33-Y6VZ>].

²²² Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87.

²²³ Telephone Interview with legal-services provider in Florida, *supra* note 77; Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87.

²²⁴ Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87.

²²⁵ Telephone Interview with legal-services provider in Florida, *supra* note 77; Telephone Interview with legal-services provider in Michigan, *supra* note 77.

court. This list of principles adapts and builds on our earlier work,²²⁶ supplemented with the lessons laid out in this Essay.

A. Engage a Diverse Array of Justice-System Stakeholders

Courts must engage and listen to stakeholders both inside and outside the judicial system in developing remote court policies, including integrating diverse perspectives into committees and other policymaking bodies. As this Essay discusses, remote court has transformed the experience of going to court. But it can pose widely disparate challenges and benefits for different kinds of litigants in different types of cases, which span from evictions to multimillion-dollar commercial disputes, from traffic violations to felony criminal cases. At the same time, judges and court administrators have their own institutional incentives and blind spots that can obscure some of the challenges posed by remote court policies.

For all these reasons, court leaders must engage broadly with affected constituencies, including members of the communities most likely to suffer if remote proceedings go poorly, such as communities of color, immigrant communities, and communities of people with disabilities. As discussed in Part IV, there are worrying indications that many states' consultations to date have largely been limited to the perspectives of court staff and lawyers and that civil legal services in particular have not consistently had a seat at the table. Courts should prioritize incorporating the insights of community advocates, public defenders and prosecutors, civil legal-services providers, tenant representatives, survivors of domestic violence, public-health experts, disability-rights advocates, court employees, and more.

B. Tailor Plans to the Type of Proceeding

There is no one-size-fits-all approach to remote proceedings. Courts hear a broad range of cases, both civil and criminal, for which remote proceedings are likely to pose very different challenges, benefits, and trade-offs. Among other things, cases vary in complexity and time sensitivity, the stakes of a win or loss, the kind of fact-finding that is required, and whether they involve detained individuals or self-represented litigants. Courts should target their policies accordingly. For example, the Michigan Supreme Court issued an order pertaining exclusively to procedures for landlord–tenant cases during the pandemic, including the use of remote proceedings.²²⁷

Similarly, courts should consider how trade-offs may vary depending on the nature of the proceeding. For example, holding a status conference by

²²⁶ See KEITH & BANNON, *supra* note 7.

²²⁷ Priority Treatment and New Procedure for Landlord/Tenant Cases, *supra* note 221.

video or phone, or a hearing where purely legal questions are at issue, raises different considerations than using the same technology for an evidentiary hearing. Existing research suggests reason for caution in using videoconferencing in instances where a fact finder must make credibility assessments.²²⁸ The Florida Supreme Court's COVID-19 workgroup, for example, determined that the state's mandate for remote hearings should only apply to status and pretrial conferences, nonevidentiary hearings, and other categories of proceedings the workgroup deemed "amenable" to being conducted remotely.²²⁹

Going forward, the contours of future policies should also be informed by experience. In Texas, for example, surveyed judges, prosecutors, and defense attorneys "identified initial appearances, bond hearings, status hearings, and certain other uncontested pretrial hearings as suitable for videoconference" in the future.²³⁰ In the eviction context, experience shows that the digital divide is a salient issue, underscoring the need for procedures to ensure access for individuals who lack the required technology.²³¹ By crafting policies that respond to the nature of the proceeding at issue, courts may be able to advance a large portion of their docket remotely while being cautious around the types of hearings stakeholders know are most impacted by the use of remote technology.

C. Bolster the Attorney–Client Relationship

Remote proceedings also pose challenges to the attorney–client relationship. Most fundamentally, remote court reduces the opportunity for communication between attorneys and clients prior to, during, and after court proceedings. This can manifest in small ways. For example, an attorney may be unable to whisper a reminder to a client to maintain courtroom decorum. It can also manifest in large ways. For instance, a client might be precluded from asking a question or sharing information in a way that prejudices her case.

Courts have varied widely in the kinds of technological solutions they have developed to bolster attorney–client communication, from Zoom breakout rooms to instructions that attorneys send text messages to their clients. Reports by practitioners suggest communication has posed numerous

²²⁸ See *supra* Section II.B.2.

²²⁹ Administrative Order at 8–9, *In re Comprehensive COVID-19 Emergency Measures for the Fla. State Cts.*, No. AOSC20-23 (May 21, 2020), <https://www.floridasupremecourt.org/content/download/633282/file/AOSC20-23.pdf> [<https://perma.cc/8X79-KWPC>].

²³⁰ Turner, *supra* note 24, at 67.

²³¹ See *supra* Section II.A.2.

practical and logistical problems, even when the court has provided a formal communication mechanism.²³²

Courts should prioritize adopting technology that allows for confidential attorney–client communication during court proceedings. Just as important, they should create procedures to facilitate such communication so that it is easy to pause proceedings for a client consult.

Even with these safeguards, courts should also recognize that clients separated from their attorneys are at a disadvantage. A failed experiment with remote juvenile detention hearings in Florida from 1999–2001 is a cautionary tale. In repealing the interim rule authorizing these remote proceedings, the Florida Supreme Court observed that “[a]t the conclusion of far too many hearings, the child had no comprehension as to what had occurred and was forced to ask the public defender whether he or she was being released or detained.”²³³ Judges may need to take extra steps during remote proceedings to ensure that the parties appreciate the significance of the proceedings they are involved in and that they are made aware of their options for relief. This is particularly important when cases involve individuals who are likely to be unfamiliar with the legal system. And in some kinds of proceedings, the risk of prejudice from being remote may simply be too high.

D. Provide Extra Support for Self-Represented Litigants

Remote court offers both challenges and opportunities for serving self-represented litigants. The physical courthouse often plays a central role in connecting self-represented litigants with resources, including representation. Courts across the country have narrowed the justice gap through innovations like legal help desks, which give advice to unrepresented parties, and programs that station pro bono counsel in courthouses to provide on-the-spot limited representation.

Remote court interrupts these connections and makes it harder to connect unrepresented individuals with resources.²³⁴ At the same time, expanded remote proceedings also have the potential to extend representation to underserved and hard-to-reach communities by extending the capacity of legal-services providers.²³⁵

²³² See *supra* Section II.B.1.

²³³ Amend. to Fla. Rule of Juvenile Proc. 8.100(A), 796 So. 2d 470, 473 (Fla. 2001).

²³⁴ See *supra* Section II.C.

²³⁵ See *supra* Section II.A.1.

Courts must take extra steps to ensure that self-represented litigants can navigate the system during remote court, whether by providing additional supports, appointing counsel, publicizing resources, or prioritizing opportunities for in-person services.²³⁶ And it is crucial that courts provide clear notice in advance of remote court. For example, guidance from the National Consumer Law Center urges courts to provide clear information, in multiple languages, about a consumer's options to participate remotely or appear in person in debt-collection hearings, including detailed instructions about how the hearing will proceed, and to have a process to reach out to consumers who fail to appear and make it easy for them to vacate defaults and reschedule.²³⁷ Courts should also consider special rules for self-represented litigants, particularly during the pandemic.²³⁸

E. Provide Technical Support and Adopt Technology Standards to Ensure Quality

Seemingly mundane technological glitches can have a substantial impact on litigants' rights and the fairness of court proceedings. Courts should develop policies to protect litigants when they cannot be heard, or cannot hear, at a critical juncture in their case, ensuring that they are not penalized for technological difficulties. Courts also need technical support on call for court staff and for members of the public, some of whom may be using the court's chosen remote platform for the first time.

And as our interviews highlighted, courts need clear policies for how to submit evidence remotely, recognizing that litigants may face hurdles submitting or reviewing documents or other materials on a screen. For example, the Joint Technology Committee of the Conference of State Court Administrators, National Association for Court Management, and National

²³⁶ *Reaching SRLs During COVID: Outreach Campaigns Leverage Social Media, Ad Spots, and Traditional Print to Ensure SRLs Know Self-Help Support Is Still Available (News 2021)*, SELF-REPRESENTED LITIG. NETWORK (Apr. 2, 2021), <https://www.srln.org/node/1433> [<https://perma.cc/FR27-TRTK>] (providing some examples of outreach).

²³⁷ NAT'L CONSUMER L. CTR., REMOTE COURT APPEARANCES IN THE COVID-19 ERA: PROTECTING CONSUMERS IN COLLECTION LAWSUITS (2020), https://www.nclc.org/images/pdf/special_projects/covid-19/IB_Remote_Court_Appearances.pdf [<https://perma.cc/P57V-6364>].

²³⁸ For example, an April 2020 letter from a coalition of New York-based legal-services organizations called on the Office of Court Administration to exclude cases involving pro se litigants from virtual appearances for nonessential matters, unless the parties specifically requested otherwise. For time-sensitive matters, the letter recommended that pro se litigants be given the option to participate by telephone conference call rather than video. Email from New Yorkers for Responsible Lending to The Hon. Lawrence K. Marks, Chief Admin. Judge, N.Y. State Unified Ct. Sys. (Apr. 15, 2020) [hereinafter Email from New Yorkers for Responsible Lending], <http://www.nyrl.org/wp-content/uploads/2019/01/2020.4.15-NYRL-Ltr-re-virtual-appearances.pdf> [<https://perma.cc/75CT-FZ7D>].

Center for State Courts has developed recommendations for courts' use of evidence during remote hearings, including special support for self-represented litigants.²³⁹

Beyond disruption, the technological aspects of remote proceedings—how defendants, witnesses, and parties appear on screen, including their backdrop, lighting, and sound—may affect credibility determinations and other fact-finding. As Professor Anne Bowen Poulin has noted in the context of criminal proceedings, “[E]very technological choice will influence the way the defendant is perceived, often in ways that cannot be precisely predicted or reliably controlled.”²⁴⁰ Professor Poulin highlights, among other things, screen size, the use of close-up shots, and camera angle as all potentially affecting the ability to assess credibility as well as other relevant information such as a defendant's age and size.²⁴¹ Courts should develop evidence-based metrics to standardize the use of technology, while also recognizing that technological hurdles may make remote court inappropriate for certain kinds of proceedings or litigants.

F. Appreciate the Persistent Digital Divide and Ensure Meaningful Participation by Marginalized Populations

In adopting remote policies, courts must also address the persistence of a digital divide with respect to technology access.

Court policies should reflect the fact that substantial portions of the populations courts serve, and in particular historically marginalized communities, may not easily transition to remote proceedings or may have more difficulty using resource-intensive technologies like video.²⁴²

Our interviews suggest that in many instances, legal aid has stepped in to help bridge the digital divide by creating internet hot spots for clients or making conference rooms available to use during remote court. To the extent legal-services providers are filling the justice gap, they should be fully funded to do so. But legal services should not be a substitute for courts establishing other safe access points within the community for people without quality technology at home.

²³⁹ JOINT TECH. COMM., MANAGING EVIDENCE FOR VIRTUAL HEARINGS 1 (2020), https://www.ncsc.org/_data/assets/pdf_file/0019/42814/2020-07-27-Managing-Evidence-for-Virtual-Hearings-002.pdf [<https://perma.cc/MC69-CSSK>].

²⁴⁰ Poulin, *supra* note 112, at 1120.

²⁴¹ *Id.* at 1120–22, 1120 n.120, 1121 n.123.

²⁴² Email from New Yorkers for Responsible Lending, *supra* note 238.

G. Seek the Consent of Parties Before Proceeding Remotely

Remote proceedings involve sometimes-complex costs and benefits, and the parties and attorneys involved in a case will often be best situated to understand these tradeoffs, which are rooted both in the nature of the proceedings as well as individual-level factors. For example, individuals with substantial childcare commitments may prefer proceeding with remote court rather than traveling to a courthouse. Others may have privacy concerns about appearing via video, recognizing that their images could be easily recorded. Attorneys may recognize that certain aspects of a case are too crucial or sensitive to conduct remotely.

As a general matter, courts should address these competing pressures by giving participants a choice and prohibiting judges from moving a case forward remotely without consent from all parties, as some court systems have already done for certain cases. New Jersey, for example, requires consent for criminal sentencing hearings as well as hearings related to juvenile delinquency, termination of parental rights, and other proceedings for which the court system has determined greater care is necessary.²⁴³ Any consent requirement must be meaningful, however, with an option for timely in-person proceedings not so far in the future as to harm the interests of the parties.

At the same time, our interviews also highlighted numerous examples of local courts and individual judges who have insisted on in-person proceedings, even in the face of guidance encouraging the use of remote court. Just as individuals should have a choice in whether to proceed remotely, they should not be forced to appear in person in nonessential cases when public-health guidance suggests such proceedings could be unsafe. As the ABA has noted, “[B]ecause virtual or remote court proceedings have the potential to ease and expand access to the courts, and indeed may be the only access available during this pandemic, optional use of these procedures, governed by consent, should be as widely available as possible.”²⁴⁴

H. Study Remote Proceedings to Better Understand Their Impact

Courts expanded the use of remote court with unprecedented speed and scope, and there is much that we simply do not know about its impact on

²⁴³ Notice from Glenn A. Grant, Acting Admin. Dir. of the N.J. Cts., to the N.J. Bar, COVID-19 – Updated Guidance on Remote Proceedings in the Trial Courts; Options for Observing Court Events and Obtaining Video and Audio Recordings; Court Authority to Suspend the Commencement of Certain Custodial Terms (Apr. 20, 2020), <https://njcourts.gov/notices/2020/n200420a.pdf?c=nHy> [https://perma.cc/FRR4-P33H].

²⁴⁴ AM. BAR ASS’N, *supra* note 75, at 11.

fairness and access to justice, as well as on the “user experience” of litigants, lawyers, and other stakeholders. Pre-pandemic research has generally focused on specific contexts, such as immigration court²⁴⁵ or bond hearings,²⁴⁶ leaving many unanswered questions about the implications of remote court for different litigants or proceedings.

If court systems are going to continue to rely on expanded remote proceedings, they need data on what works, with particular attention paid to the impact on marginalized communities. The pandemic experiment with remote court is an opportunity for data collection, surveys, and empirical research on impact and is a call to action for court systems and scholars alike.

I. Embrace the Benefits of Remote Proceedings

Even recognizing their shortcomings and with the caveat that there is much that we still do not know about their impact, it is clear that remote proceedings can bring substantial benefits in some circumstances. Foremost, they have allowed courts to continue operating during the COVID-19 pandemic, reducing risks to court staff and court users alike, while providing essential services.

But in more normal times as well, courts can use remote tools to strengthen the justice system. Remote court can make it easier for litigants to access the courthouse, enable legal providers to reach difficult-to-serve communities, allow attorneys to spend more time serving clients and less time in transit to the courthouse, and provide services to self-represented litigants, among other benefits.²⁴⁷

While courts must recognize the documented shortcomings of remote proceedings, they should also embrace using remote proceedings when the benefits are clear. Many courts have invested substantially to develop remote court infrastructure. These investments should be built upon, and courts and legislatures should take this opportunity to further invest in expanding remote services and resource hubs that promote access to justice.

²⁴⁵ *E.g.*, Eagly, *supra* note 23, at 934.

²⁴⁶ *E.g.*, Diamond et al., *supra* note 23, at 897 (noting that after proceedings via closed-circuit television were introduced for most bail hearings in Cook County, the average bond amount for impacted cases rose by 51% and increased by as much as 90% for some offenses, and noting that for those cases that continued to have live bail hearings, there were no statistically significant changes in bond amounts).

²⁴⁷ SELF-REPRESENTED LITIG. NETWORK, SERVING SELF-REPRESENTED LITIGANTS REMOTELY: A RESOURCE GUIDE 11–13 (2016), https://www.srln.org/system/files/attachments/Remote%20Guide%20Final%208-16-16_0.pdf [<https://perma.cc/LM7N-BGD6>].

CONCLUSION

Courts are often slow to innovate. The COVID-19 pandemic has forced unprecedented agility and creativity, including the embrace of remote court in many contexts. Courts should not go backwards. But just as courts should resist the temptation to return to a broken status quo, they should also avoid embracing change without fully reckoning with the costs. This Essay is part of an initial effort to detail some of the factors that should guide this longer-term policymaking.



PRESERVING FAIR-TRIAL RIGHTS IN THE TIME OF COVID AND BEYOND

by Wendy Lumish, Amanda Heitz, and Daniel A. Rock

As courts around the country begin to open back up, judges are facing increasing pressure to get through the backlog of cases caused by pandemic-related shutdowns. To do so, many courts are relying on reforms that were hastily adopted in the name of efficiency and public health, most often without the opportunity for significant debate, discussion, or meaningful study from bar associations or other groups. These unstudied remedies pose threats to the trial rights of civil litigants.

This LEGAL BACKGROUNDER will identify pandemic-induced changes that imperil fair-trial rights and provide guidance on where to focus when challenging their use in litigation now and in the future. In particular, the limited availability of jurors and efforts to reduce the amount of time the venire spends in a courtroom have motivated courts to reduce panel sizes and limit peremptory challenges in civil cases. Likewise, social distancing and efforts to limit the number of participants in the courtroom will potentially result in proceedings without live witnesses, parties, and counsel. In some cases, courts have found that the only viable solution is a virtual trial. Civil litigants must take steps to ensure that these short-term solutions do not deprive litigants of their right to a fair jury trial and that these changes do not become permanent.

Preserving the Right to a Full Jury

It is no secret that defendants—particularly corporate defendants—prefer to have a larger number of jurors. The research bears out longstanding defense preferences for large juries. In their essay in the summer 2020 issue of *Judicature*, “Better by the Dozen: Bringing Back the Twelve-Person Civil Jury,” authors Patrick Higginbotham, Lee Rosenthal, and Steven Gensler dispel the social science rationale that has historically supported efforts to shrink civil jury sizes over the last fifty years. They note that six-person juries disproportionately render outlier verdicts—extremely small and large verdicts. And as early as 2004, Nicole L. Waters, Ph.D., the Director of Research Services for the National Center for State Courts (NCSC), prepared a literature review report for the NCSC outlining many problems that other researchers had found with small juries—including wide variability in verdicts, reduced evidentiary recall, and psychological research showing the tendency of people in smaller groups to cede even obviously incorrect factual points to conform with a small number of other people. Larger jury sizes tend to ameliorate these problems.

But as courts try to resume trials, they are grappling with how to empanel enough jurors to accommodate caseloads. Health and safety concerns are front-of-mind for traditionally reliable jurors, such as retired persons. Abrupt interruptions to reliable childcare thwart working parents’ availability. And guidance from organizations such as the NCSC, implicitly recognizing the likely absenteeism, have encouraged courts to adopt lenient policies for excusing individuals from jury service. Further, with priority placed on criminal, juvenile, and probate matters, court systems have an incentive to try to preserve the scarce resource of jurors for high priority proceedings. Adding strain to the system, courthouses present logistical challenges for safely amassing enough potential jurors to conduct voir dire and trial. The result is pressure on civil litigants to cede their rights to a trial before a full jury in favor of smaller panels.

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Courts' efforts to shrink the jury panel can occur through overt orders—emergency or otherwise—simply declaring that civil proceedings will occur before the smallest size jury permitted by the laws of the jurisdiction. Or jury-panel reduction can happen in a more roundabout way. For example, trial judges may urge parties to stipulate to a reduced jury size. Depending on the jurisdiction, there may not be much choice, but if there is, defending the right to the largest jury possible is a fight worth having. When reduced-sized juries are permissible only upon stipulation, pressure to acquiesce is likely to be great. The stakes are too high to just go along on this issue.

If rules and orders force a party to accept a small jury, civil litigants must raise formal objections at every opportunity in order to preserve these issues for appellate review. Object in open court. Raise it in a trial brief. Make the point during voir dire with specific arguments about the venire. Object to the panel before they are sworn and in post-trial motions.

Preserving the Right to Peremptory Strikes

In addition to attempts to limit the number of jurors seated in civil cases, some courts have also limited parties' peremptory strikes to preserve the jury pools. As part of their COVID-19-related orders, courts in Massachusetts, Idaho, and Arizona each reduced the number of permissible peremptory strikes from four to two per side or party. Other jurisdictions have altered their peremptory strike systems. For example, Washington's rules grant judges the discretion to allow parties an additional peremptory strike when alternate juries are empaneled; pandemic-related orders eliminated this discretion.

Because the importance of picking a fair jury is paramount, limitations on lawyers' ability to strike jurors obviously deserve attention. Perfunctory objections to temporary restrictions on the ability to exercise the full number of peremptory strikes are unlikely to yield results.

Rather, to protect these critical rights, counsel should tailor careful objections to limitations on the number of peremptory strikes to the context of the voir dire. If, for public health reasons, the court has limited the time for individual voir dire, conducted remote hardship screenings, or relied on jury questionnaires in lieu of voir dire questioning, the number of peremptory strikes may be of more pressing concern as the attorneys have been permitted little opportunity to evaluate potential jurors.

In addition to raising proper, case-specific objections and arguments, one of the best defenses against reduced peremptory strikes is strong voir dire strategy. Now more than ever, jury research is critical. If peremptory strikes are limited, counsel must rely more on strikes for cause to empanel a strong jury.

Preserving the Right to Have the Parties and their Attorneys Present at Trial

Before the pandemic, a court would rarely compel a civil litigant to go to trial without its choice of attorneys and corporate representatives present in the courtroom. Now, the risk that a party representative or attorney will be unable to attend trial is commonplace. There is a patchwork of COVID-19 travel restrictions imposed on the national, state, and local level, which complicates attendance for corporate representatives at trial. The issue is exacerbated for foreign witnesses. Persons who are at an increased risk of severe illness from COVID-19 will likewise be unable to travel—if not legally, as a matter of common sense.

The right of a party to be present at trial derives from the Fifth Amendment Due Process Clause, which protects the parties' rights both to be present in the courtroom and to meaningfully participate in the trial process. *Lane v. Tennessee*, 315 F.3d 680, 682 (6th Cir. 2003). This right is not absolute, but there is support for the proposition that if a court arbitrarily excludes a party who desires to be present, merely because counsel's presence is enough, such an exclusion would violate the Due Process Clause. *Helminski v. Ayerst Labs.*, 766 F.2d 208, 213 (6th Cir. 1985); *Preferred Props., Inc. v. Indian River Estates, Inc.*, 276 F.3d 790, 797-98 (6th Cir. 2002).

The right to be present is not a right that can be summarily cast aside for expediency because it protects the essential role that a party plays at trial. For a corporate defendant, the party representative often helps at trial by communicating with counsel and developing strategy in real time as testimony unfolds, rulings come from the bench, and the jurors react. This role can be particularly involved in complex cases in which the party

representative has relevant expertise and a unique perspective.

The right to have counsel of choice is also critical. Courts have long noted that our adversarial legal system depends on parties being represented by able and well-informed counsel. In light of this, a court's failure to grant a continuance in a trial when counsel of choice is absent due to sickness may be grounds for reversal on appeal. *Smith-Weik Mach. Corp. v. Murdock Mach. & Eng'g Co.*, 423 F.2d 842, 844 (5th Cir. 1970).

In sum, parties have the right to present a meaningful case; both the parties and the court should ensure that the critical team members on both sides are present.

Preserving the Right to Present Live Witnesses

Most trial lawyers believe that having their witnesses live in the courtroom is critical. And before the pandemic, most attorneys believed they had a right to present live witnesses and that the inability to do so would have warranted a continuance. That has changed since the pandemic began, as the right to appear for trial in person has been a frequent subject of dispute.

Under Federal Rule of Civil Procedure 43(a), witnesses must testify in open court, but there is an exception that permits contemporaneous transmission of testimony from a remote location "for good cause in compelling circumstances." Relatedly, Federal Rule of Civil Procedure 77(b) states that every trial must be conducted in open court "so far as convenient." Thus, the Rules appear to prefer in-person testimony in a normal courtroom, but also permit remote testimony in exceptional circumstances. Before the pandemic, cases were scarce where the "exceptional circumstance" requirement was met. Since the pandemic began, however, several courts have held that remote testimony is permissible, citing the "compelling circumstances" exception to Rule 43. *See, e.g., In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d 967, 971 (D. Minn. 2020); *Vitamins Online, Inc. v. HeartWise, Inc.*, No. 2:13-CV-00982-DAK, 2020 WL 3452872, at *9 (D. Utah June 24, 2020).

This is a troublesome trend. Despite the growing body of authority that permits remote testimony of witnesses during the pandemic, significant scientific evidence suggests that witness testimony is less clearly communicated through remote transmission. As one recent evidence-based study reveals, significant nonverbal communication may be lost on jurors during video transmission. Vincent Denault & Miles L. Patterson, *Justice and Nonverbal Communication in a Post-pandemic World: An Evidence-Based Commentary and Cautionary Statement for Lawyers and Judges*, J. OF NONVERBAL BEHAVIOR (Aug. 9, 2020). Nonverbal communication includes much more than just whether the witness has a "tell" or is lying. It includes (1) displaying affect, such as anxiety or happiness; (2) revealing attitudes, such as interest, prejudice, or intimacy; (3) managing impressions, such as by acting competent or brave; (4) revealing physical or mental conditions, such as pain or mental disorder; and (5) exerting interpersonal control by, for example, displaying dominance. *Id.* Nonverbal communication also helps directly with communication of ideas, such as by way of gesturing. *Id.*

Unfortunately, some courts have brushed aside concerns about the limitations on communication of ideas by remote testimony. *Gould Elecs. Inc. v. Livingston Cty. Rd. Comm'n*, 470 F. Supp. 3d 735, 743 (E.D. Mich. 2020). But it is reasonable to question whether judicial intuition about the effectiveness of remote communication should be preferred over the scientific evidence provided by experts.

So once again, while many courts seem intent on moving forward with remote testimony, it is important to object to proceeding forward without having critical witnesses present to testify.

Troubles with Virtual Trials

In some jurisdictions, courts have decided that it is impossible to proceed with an in-person trial, and they have concluded that a virtual trial is appropriate. Although there have been few virtual jury trials since the pandemic, the number is growing, and some courts are enthusiastic about pushing for more. *See As Pandemic Lingers, Courts Lean Into Virtual Technology | United States Courts (uscourts.gov)*. But virtual trials have led to many concerns. These concerns are not limited to one aspect of trial—they permeate the proceedings from voir dire to jury deliberations. In addition to state-specific grounds to object to a virtual trial, (*see, e.g.,* N.Y. C.P.L.R. 4013 (requiring stipulation of the parties to hold a civil trial somewhere other than at the courthouse)), there are

a few big-picture observations worth keeping in mind.

In virtual proceedings, prospective jurors have been famously inattentive. During virtual voir dire, prospective jurors have often been seen working at their offices, talking with others in the room, exercising, doing other things on their smartphones, or even laying down. See *Honeywell Int'l Inc.'s Notice of Irregularities at Remote Jury Trial from July 27-29, 2020*, Case No. RG19041182, at p. 2 (Sup. Ct. Cal., July 29, 2020); Miami-Dade Virtual Voir Dire, [Jury Duty Panel 1 - YouTube](#) (jurors are seen distracted, talking to others off-screen, and working in the office). Notably absent is the sense of formality and decorum that would be required in a courtroom. But the parties are constitutionally entitled to a jury that carefully and thoughtfully considers the merits of the case; the duty to listen to the evidence and pay attention is foundational. See, e.g., *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 411, 650 P.2d 1171 (1982). Juror misconduct deserves serious consideration.

Technical issues have also been significant. While some virtual snafus can be comical, often the technical problems are quite significant. In one of the first virtual trials in California, the attorneys were muted and unable to object for a significant portion of voir dire. *Defendant Fryer-Knowles, Inc., A Washington Corporation's Motion for Mistrial*, Case No. RG19029791 (Sup. Ct. Cal., July 16, 2020). In another example from California, the court's livestream during trial proceedings was plagued with audio problems. *Honeywell Int'l Inc.'s Notice of Irregularities at Remote Jury Trial from July 27-29, 2020*, Case No. RG19041182, at p. 2 (Sup. Ct. Cal., July 29, 2020). In one asbestos trial, the presiding judge accidentally broadcasted about his own exposures to asbestos when he had changed the brakes in his cars. See [Judge To Zoom Trial Asbestos Jury: 'Pay Attention, Please' - Law360](#). And as noted above, even if the technology does not fail, there are significant substantive difficulties with nonverbal communication when people speak from a virtual platform. As one federal court persuasively noted:

Jury trials are innately human experiences. More is often communicated in a courtroom non-verbally than verbally. Such a human experience must allow for the look and feel of direct human interaction. Such factors as cadence, tone, inflection, delivery, and facial expression are as vital to due process as is the applicable statute or case law.

Infernal Tech., LLC, v. Sony Interactive Entertainment LLC, Order at D.E. 261, n.4, No. 2:19-CV-00248-JRG (E.D. Tex. Nov. 20, 2020) (finding that “the remote, sterile, and disjointed reality of virtual proceedings cannot at present replicate the totality of human experience embodied in and required by our Sixth and Seventh Amendments”). The technology used in virtual trials is still gestational, and there will no doubt be additional yet unforeseeable technical difficulties in the future.

Another significant concern is the potential that the sanctity of the jury-deliberation process will be disrupted. For an in-person trial, the jurors are sent to a room where they are isolated from the outside world so they can debate among themselves and consider the evidence. But in a virtual trial, the jurors are disaggregated. They are each at home or an office, and there is no reliable way to tell who is with them. Consider the unseen prejudice if a juror's family member is secretly watching the trial and offering opinions just off screen.

Additionally, the dynamics of the jury are significantly altered when the members of jury do not have the opportunity to interact as they do during an in-person trial. Those interactions are important as the jury decides, for example, who to select as a foreperson and how to go through the deliberative process. These essential interactions are missing in a virtual trial.

In short, virtual trials pose a significant threat to the litigants' right to a fair trial that is likely to erode faith in the justice system.

Conclusion

History will tell whether the changes triggered by COVID-19 will systemically benefit or harm the justice system. Over the next few years, public policy research—and more importantly, appellate courts—may find that some emergency rules that seemed necessary or appropriate during the pandemic and its immediate aftermath resulted in the deprivation of fundamental rights and were the source of mischief in jury verdicts. For that reason, it is especially important to be vigilant to protect these fundamental rights.