

TECHNOLOGY AND THE COURTS: TIME TO MOVE INTO THE TWENTY-FIRST CENTURY

BY RICHARD GABRIEL & TED A. DONNER

ON JANUARY 6, 2022, FORMER HEALTH ADVISORS for President Biden published three pieces in the Journal of the American Medical Association that described a need for the United States to devise a strategy to anticipate future coronavirus variants and to create an infrastructure to deal with the inevitability of future pandemics.¹ This poses an interesting question for a justice system that tends to operate on a highly individualized basis, district by district, jurisdiction by jurisdiction, and court by court. Given that the courts serve a constitutionally mandated function, should our justice system be required to develop a centralized strategy and infrastructure to maintain operations, even during a national health crisis or other emergency that would halt or delay those court functions?

As a result of the pandemic, court delays and closures have added to a significant backlog of cases for thousands of criminal and civil litigants.² And while most public agencies, organizations, and businesses have used technology to maintain and even improve their operations, most courts have opted to wait until they can resume the same in-person practices they used before the pandemic. Depending on how long the pandemic lasts, or if there are future interruptions, there is no unified plan to ensure that a party's right to a jury trial as well as their access to the courts to resolve other disputes is consistently maintained.

Interestingly, the legal profession and most courts have made significant strides in transitioning their law practices and their own court procedures to remote technology. Those that have utilized these newer systems have seen many notable and surprising benefits that could provide a template for a more unified approach to maintaining and even improving court operations.

Over 1.1 million unprecedented remote proceedings were conducted in Texas between 2020 and 2021 and Michigan held 35,000 video hearings in a two-month period in 2020,

despite never previously conducting remote hearings.³ In Arizona, Texas, New Jersey, and Michigan, remote courts saw a decrease in default judgements and a decline in failure-to-show rates for criminal, family law, debt collection, eviction, and child welfare cases.⁴

In the National Center for State Courts (NCSC) country-wide survey in 2021 of one thousand registered voters, the researchers note a marked increase in the use of remote technology for traffic tickets, consumer debt, small claims, landlord/tenant disputes, divorce, and child custody hearings.⁵ The NCSC survey also indicated a willingness among members of the public to appear remotely for mediations, arbitrations, or trial, and to report and serve on a jury. Most of the respondents believed the courts should continue remote proceedings to improve the courts' ability to hear more cases, resolve cases more quickly, and make it easier

for people to participate in court proceedings. With remote access, all these proceedings became more available to parties who could not take time off work, had difficulty with childcare, had no transportation, were disabled, or who are intimidated or disenchanted by the court system.

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Western Washington State has proven that conducting remote bench and jury trials are not only possible, but there have even been improvements in some of their operations. Since the beginning of the pandemic, King County has conducted over a thousand remote bench trials and over eighty fully remote civil trials, with many more courts conducting jury selections online.⁶ Judges in King County and elsewhere have noted that they have seen greater diversity in the jury pools, improved efficiency in seating a jury, and a greater willingness for citizens to serve on remote trials.⁷ To date, Texas, Florida, New Jersey, and Northern California as well as other states have had similar experiences with dozens of partially or fully remote jury trials.

In July of 2021, the California Judicial Council identified

remote proceedings and services as an “equal access to justice issue.” Justice Marsha Slough, who was chair of the Chief Justice’s Ad-Hoc Workgroup on Post-Pandemic Initiatives, stated, “We simply would be wrongheaded after all we’ve heard so far to unplug remote proceedings as a tool to be used in accessing justice in American courts.” California Chief Justice Cantil-Sakauye added, “What it has come down to in your moving remarks to me is that remote access to justice, hands down, serves our most vulnerable.”⁸

When remote jury trials were first introduced, there was significant resistance to these types of proceedings. As these types of trials had never been previously conducted, the expressed concerns were that jurors would not pay attention, that they would do their own research, that they would not be able to judge witness credibility, that they would not have access to appropriate computer equipment or internet access to participate, and jurors would not take the case as seriously as if they were in court. Additionally, attorneys were also concerned they would not be able to effectively select juries, present witnesses and demonstrative exhibits, or persuasively argue their cases in an online forum. While there have undoubtedly been trials with individual difficulties in each of these areas, none of these concerns have proven to be significant or pervasive problems. Many of the judges, attorneys, and jurors that have participated in remote trials have noted their surprise in being able to select juries, present and judge evidence and witness testimony, argue their cases, give instructions and make rulings, and effectively deliberate to a verdict in an online forum. Jurors also report being more easily able to judge witness credibility, and attorneys have reported being able to readily monitor juror body language.⁹ There has been an inevitably steep learning curve for judges,¹⁰ courtroom staff, and attorneys to adjust to the medium, but jurors in particular have noted the convenience and ease of their remote service.¹¹ Even attorneys who were initially resistant, but then participated in virtual bench or jury trials, reported that many of their initial concerns were not realized when they prepared for an online proceeding.

The main difficulty has been the inevitable technology delays where the court, the attorneys, or jurors have difficulty with computer equipment, the internet, or picture or sound quality. Some courts have opted to provide equipment and even internet access for jurors while other courts have allowed jurors to use their own equipment with instructions on closing browsers, apps, turning off other devices, and creating a private, uninterrupted space in their home or work in order to avoid distractions during the trial. And while the 11th U.S. Court of Appeals has thus far remanded one trial because

of technical problems which disrupted the appearance of an attorney repeatedly during the trial,¹² this issue could have been resolved during the trial by delaying the proceedings until the technical problems were fixed.

A more complicated issue arises in criminal cases involving the confrontation clause in the 6th Amendment. The Missouri Supreme Court has remanded three criminal cases for the use of remote witness testimony,¹³ citing different precedential criteria. However, a Minnesota court of appeals also recently ruled that a witness’ remote testimony did not violate a defendant’s right to confront his or her accuser.¹⁴ Ultimately, this issue may have to be resolved in the United States Supreme Court.

Because of research they have done to implement remote proceedings or actual success in conducting partial or fully online jury trials, Washington and Arizona will continue to develop their use of technology for remote court proceedings after the pandemic. Washington is proposing to allow courts to conduct remote jury selection as an option, even after the pandemic.¹⁵ Arizona is recommending the expansion of online dispute resolution, e-filing, exhibit exchanges, AI systems, and virtual platforms for other services.¹⁶ California is also recommending that courts continue to develop the use of technology for online proceedings and have included jury trials as an option.¹⁷ Other states are developing working groups to study and adopt similar services.

And yet, despite these accomplishments, many courts and attorneys have refused or been reluctant to consider the use of remote proceedings. After all, precedent and not innovation tends to guide law practices and court procedures. However, given the significant backlog of cases accruing in our system and the uncertainty of the future, the courts and counsel need to consider studying and adopting reforms or emergent best practices to not only provide continued access to the justice system, but to actually improve representation and court efficiency.

To be sure, remote proceedings are not a perfect solution for every case. And there will be difficult issues to be worked out, such as budgets for equipment and broadband, court reporters, interpreters, and training of courtroom staff, judges, and attorneys. Tens of millions of people have become familiar with and use video conferencing platforms on a daily basis¹⁸ to communicate in business, school, medical settings, and numerous other industries, and there is every indication that this trend will continue in the future. Implementing effective solutions to overcome systemic problems or national crises

should take precedent over our adherence to tradition – especially as the solutions become clearer and more accessible with the advance of technology.

Access to the courts and juries is one of the cornerstones of our republic – the unique right of citizens to have their disputes decided by other citizens. To protect the rights of litigants and to bring the justice system into the twenty-first century, we need to be ready and willing to use modern tools.

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¹ <https://jamanetwork.com/journals/jama/fullarticle/2787944>

² https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/white-papers/covid-court-report_final.pdf?form=thankyou&gatedContent=%252Fcontent%252Fewp-marketin-g-websites%252Flegal%252Fgl%252Fen%252Finsights%252Freports%252Fimpacts-of-the-pandemic-on-state-local-courts

³ <https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations>

⁴ <https://www.americanbar.org/content/dam/aba/administrative/judicial/2021-az-post-pandemic-rec.pdf>; https://www.americanbar.org/groups/family_law/publications/family-law-quarterly/volume-54/issue-3/observing-online-courts-lessons-the-pandemic/; <https://www.ncsc.org/newsroom/at-the-center/2020/may-13>

⁵ https://ncsc.org/___data/assets/pdf_file/0021/70581/SoSC-Analysis-2021.pdf

⁶ <https://kingcounty.gov/~media/courts/superior-court/docs/COVID-19/FILED-Emergency-Order35-KCSC-200120501.ashx?la=en>

⁷ <https://southseattleemerald.com/2021/10/03/king-county-superior-court-wants-to-make-virtual-jury-selection-and-trials-permanent/?amp>

⁸ <https://newsroom.courts.ca.gov/news/council-approves-funding-allocation-trial-courts>

⁹ <https://www.law360.com/articles/1445285>

¹⁰ <https://www.americanbar.org/groups/gpsolo/publications/>

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¹¹ <https://www.law360.com/articles/1353728/clear-exhibits-abrupt-goodbyes-life-as-a-zoom-juror>

¹² <https://cases.justia.com/texas/eleveth-court-of-appeals/2021-11-20-00258-cv.pdf?ts=1640870563>

¹³ https://www.washingtonpost.com/national/missouri-supreme-court-remands-3-cases-using-video-testimony/2022/01/11/a2da7df4-733b-11ec-a26d-1c21c16b1c93_story.html

¹⁴ <https://www.startribune.com/court-of-appeals-decision-clarifies-zoom-testimony-at-trial/600132366/>

¹⁵ https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=5838

¹⁶ <https://www.americanbar.org/content/dam/aba/administrative/judicial/2021-az-post-pandemic-rec.pdf>

¹⁷ <https://newsroom.courts.ca.gov/news/report-remote-proceedings-increased-access-court-users-during-pandemic>

¹⁸ <https://www.businessofapps.com/data/zoom-statistics/>