

Principles for Continued Use of Remote Court Proceedings

By Douglas Keith and Alicia Bannon
September 10th, 2020

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 reliable.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.

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).