

# Pandemic Potpourri: The Legal Profession's Rediscovery of Teleconferencing

By Judge Herbert B. Dixon Jr. (Ret.)



When I first started writing this technology column in 2007, I encouraged technology's use for technology's sake. Along the way, I also sought to highlight and create awareness of some technology pitfalls. I mostly wanted the profession to adopt technology for the benefits it could bring to court operations and the practice of law, but it seemed I was fighting an uphill battle.

In 2013, I predicted that judges and lawyers would initially resist the idea of remote video hearings but would nevertheless relent because of the impressive nature of high-definition video displays.<sup>1</sup> I also predicted that the Supreme Court would find the Constitution's Sixth Amendment Confrontation Clause satisfied by remote witness appearances, but maybe not within my lifetime. In 2014, I asked what would be the next major technological advancement in the law and expressed my desire that our profession would embrace it.<sup>2</sup> Suffice it to say, the technology opportunities I wrote about years ago were not embraced by my profession with as much enthusiasm as I promoted.

But enough crying over spilled milk! The COVID-19 pandemic and quarantine have forced us to take a second look at available technology solutions for practicing our profession. This time, lawyers and judges are adopting technology more than ever to maintain some semblance of our previous lives. We are keeping in touch with friends, relatives, and business associates more than ever using Skype, FaceTime, Google Duo, Zoom, Webex, BlueJeans, Teams, Google Hangouts, GoToMeeting—well, you get the point.

Here are some of our profession's technology experiments undertaken during the 2020 pandemic quarantine. Some were successful; others need work and will be revisited as we learn their impact on court operations and the practice of law.

## Supreme Court Oral Argument by Telephone

For the first time ever, the Supreme Court resorted to remote telephone audio appearances for the justices and lawyers to conduct oral arguments—a change

due solely to the 2020 coronavirus pandemic.<sup>3</sup> Over 102 years ago, during another worldwide pandemic, the Supreme Court canceled oral arguments. The idea of conducting remote arguments over the telephone was likely not considered. Most telephone calls during that time were placed manually through a switchboard telephone operator.

In addition to this new plan for remote audio appearances by the justices and lawyers, the court provided a live audio feed for the listening public. Some of the memorable events during the first set of those oral arguments are:

1. Justices were called in sequence to ask questions instead of the traditional free-for-all format;
2. Justice Sotomayor twice forgot to unmute her device before she started speaking;
3. Justice Breyer was briefly kicked off the line when he received another telephone call; and
4. Listeners around the world were amused to hear the obvious sound of a toilet flushing while one counsel was responding to a question.<sup>4</sup>



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The Supreme Court's experimental use of telephone conferencing technology reminds us of a best practice we have all learned during this pandemic: Mute your device when it is not your turn to speak and unmute it before you start talking. I predict oral argument by videoconference is in the Supreme Court's future. State and federal appellate courts have proven that the virtual process works for appellate hearings.<sup>5</sup>

### **In-Person Depositions Will No Longer Be the Rule**

Before the pandemic, many lawyers generally believed that for depositions to be effective, they must be in person. These lawyers prefer in-person depositions because of (1) a better opportunity to assess the deponent's credibility and (2) a belief that the deponent is less likely to lie face-to-face. Lawyers are also concerned about remote deponents cheating by reading notes during the deposition or being coached by an unseen person. Perhaps the profession's future experiences with remote proceedings may address the issue of our ability to judge credibility remotely. However, there are available precautions and technologies to address the latter concern, such as a neutral proctor physically present with the witness or artificial intelligence software, as is being used during some virtual bar admission and law school entrance exams to flag illicit activity.<sup>6</sup>

Regardless of these concerns, lawyers are nevertheless being forced to proceed with remote depositions at an increasing rate. Numerous judges have concluded that the pandemic's existence is not "good cause" to delay discovery. These judges have ruled that parties must explore alternative means to complete discovery. Because court rules provide that a deposition may be taken by telephone or other remote means, numerous judges have denied requests to extend stays of discovery and ordered the litigation to move forward.<sup>7</sup> Waiting until some unknown date for the pandemic to end is becoming less of an option and being seen as a waste of time. There is a bright side to this new normal—fewer scheduling difficulties and lower travel and lodging costs for witnesses and counsel.

### **The Move to Virtual Court Proceedings**

The pandemic has caused federal and state courts to make much more extensive use of videoconferencing technology for trials and other hearings.

On March 31, 2020, the Judicial Conference of the United States temporarily approved the use of video and teleconferencing for certain criminal and civil proceedings. This approval also allowed a judge to authorize the use of teleconferencing to provide the public and media audio access to court proceedings. The Judicial Conference's action followed President Trump's March 27, 2020, signing of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which temporarily authorized and expanded videoconferencing and telephone conferencing for certain court proceedings. State courts also increased their use of videoconferencing technology for court proceedings.

Texas is an excellent example of the judiciary's increased use of videoconferencing technology. During the first four months following the pandemic shutdown, Texas courts logged over 700,000 hours of virtual court hearings.<sup>8</sup> Also, there were reports of (1) increased efficiencies because of reduced judicial travel between court locations and (2) more defendants in criminal cases showing up for hearings because of the ease of logging on from home.

In federal court, a notable example demonstrating the extent to which one judge adopted the virtual alternative to get the job done involves an eight-week bench trial, which ended with a judgment against Cisco Systems, Inc. of \$1.9 billion plus a percentage of future sales.<sup>9</sup> An interesting side note of the trial involved the judge's decision to use the Zoom platform. Cisco argued that the Cisco Webex videoconferencing platform was more secure.<sup>10</sup>

### **Virtual Juries**

Texas seems to have initiated the process of experimenting with virtual juries. In May 2020, a Collin County district judge conducted a virtual summary jury trial, an alternative dispute resolution technique of presenting a condensed case to a jury to receive a nonbinding verdict.

Two six-member juries were selected, deliberated in separate virtual breakout rooms, and viewed evidence submissions in Dropbox folders. The jury selection was live-streamed on YouTube, but the arguments and evidentiary presentations were not because a summary jury trial is a confidential alternative dispute resolution proceeding.<sup>11</sup> Ultimately, the juries rendered separate verdicts, which hopefully the parties used to assist in their settlement discussions.

Two virtual jury trial experiments brought about by the pandemic will be studied and likely attempted by other courts. One was an August 2020 full-fledged state criminal jury trial in Travis County, Texas. The other occurred in October 2020 and involved a federal civil jury trial in Seattle, Washington.

### ***The Texas Criminal Jury Trial***

The Texas case involved misdemeanor charges alleging excessive speed in a construction zone. Prosecutors and defense attorneys posted exhibits using the file-sharing service Box.<sup>12</sup> The defendant's counsel used a virtual breakout room to confer with their client. The jury was put in a private virtual room to review the evidence and deliberate, returning a verdict of guilty on the speeding charge and not guilty on the work-zone enhancement. The trial was livestreamed and had over 1,000 viewers.

### ***The Seattle, Washington, Federal Jury Trial***

A federal court in Seattle, Washington, undertook a virtual civil jury trial in which the plaintiff alleged injuries incurred on a cruise ship. The trial resulted in a verdict of \$1.35 million.<sup>13</sup>

The virtual summary jury trial and both virtual jury trials described above all encountered typical videoconferencing issues and glitches (e.g., frozen video, dropped Internet service, etc.). However, everyone should marvel that real judges, lawyers, parties, and jurors undertook and completed these experiments with a real case. I have no doubt that other courts and parties will undertake more experiments with virtual jury trials.

## Final Thoughts Regarding Cybersecurity

There is one more issue I need to address concerning the elephant in the room, sometimes called an 800-pound gorilla—cybersecurity! I have two examples that demonstrate the concern of persons who oppose virtual hearings because of cybersecurity and hacking vulnerabilities.

### Disruption of a Federal Court Proceeding

On Friday, September 11, 2020, in a Georgia federal court, an ongoing virtual hearing involving nearly 100 participants was interrupted when the screen of all video participants received a message that Osama was sharing his screen and displayed images of a swastika, a man and woman engaging in a sex act, and airplanes striking New York's World Trade Center on September 11, 2001.<sup>14</sup> The court staff successfully shut down the hearing and resumed later that day. Coincidentally, the hearing concerned whether hand-marked paper ballots are more reliable and secure than Georgia's electronic voting machines.

### Disruption of a State Court Proceeding

In my second example, a Florida circuit judge encountered numerous issues at a virtual hearing that concerned the state's unemployment assistance system. The plaintiffs alleged that the system was plagued by website crashes and occurrences of wrongly denied claims. Florida was experiencing record unemployment due to the pandemic. Emotions were running high.

One party in the case was removed from the virtual hearing for shouting at the judge. That same party was shouted down by other attendees when she returned to the virtual courtroom. At another point, hackers broke into the virtual proceedings and levied insults at the judge.<sup>15</sup> Eventually, the judge dismissed the case for lack of subject matter jurisdiction.

## My Conclusion

Our profession is rediscovering teleconferencing, and we, along with the videoconferencing providers, are suffering growing pains. During this process, the videoconference service providers have added new cybersecurity protections and other

features to improve service. So, in part, it is up to us lawyers and judges to use available security features and follow best practices to help minimize embarrassing incidents. Examples of these security practices include but are not limited to:

1. Enabling password protection for the proceedings, using complex passwords;
2. Using waiting room features, putting participants in a separate virtual room before the court proceeding, and verifying the attendees;
3. Establishing a separate channel for members of the public to view and hear only, without the ability to participate or disrupt the proceeding;
4. Not sharing links on public forums or social media and advising participants not to share the links;
5. Not allowing other participants to share their screens until authorized by the host; and
6. Locking the proceedings once all participants have joined.

Notwithstanding the above common-sense security protections for virtual hearings, we must remember that in-court disruptions also occur. Unlike in-person disruptions where judges can both call on court security to quell a disturbance and take action to punish the willful disrupter, virtual disruptions may require the assistance of IT personnel. We can pull the plug on a disrupted virtual proceeding or disrupting individual whose identity is known. However, where the disrupter is initially unknown, our forensic technologists are constantly improving their ability to discover and identify the troublemaking person with as much certainty as using eyes and ears when a disrupting event occurs in our presence.

Yes, the legal profession has rediscovered teleconferencing technology. It will be a part of our new normal. Embrace it. ■

*Judge Dixon wishes to thank Lisa Jiron, a third-year student at The George Washington University Law School, for her assistance researching and preparing this article.*

## Endnotes

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