

JUSTICE IN THE NEW DIGITAL ERA: THE PITFALLS AND BENEFITS OF RAPID TECHNOLOGY ADOPTION BY COURTS

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Courts occupy a unique position in the justice system that is steeped in tradition and formality. Likewise, any changes from established procedure are likely to invite challenges to decisions and outcomes based on their legal and constitutional implications. As such, it should be no surprise that courts have been slow to embrace technological advances. The reasons for their hesitancy have included valid worries about keeping procedural safeguards intact and privacy/security concerns, as well as (perhaps less valid) concerns about tradition and the skills required to be a good judge or advocate.¹ Although there is hesitancy, technology can be useful in many ways. Here, we examine three innovations—video conferencing, text messaging, and cloud storage.

VIDEO CONFERENCING

While remote hearings save much time and money, and may be safer because inmates do not need to be transported, they can have adverse effects on defendants.

¹ For a comprehensive review of technological innovations, see Jackson et al., 2016; Hart, 2017.



The pandemic forced courts to quickly adapt and adopt new technologies. Courts and other governmental entities are overcoming hurdles to meet this challenge.

For example:

- Defendants' Sixth Amendment right to confront witnesses may be at stake.²
- Face-to-face, defendants take great pains to manage their image and present themselves in court in the way they choose; remotely from jail, they lose this ability.
- Defendants or other parties with disabilities may find it difficult to understand and participate in remote proceedings.

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However, remote court work, including hearings, has become a way of doing business, particularly during the pandemic. In the early days of cameras in the courts, logistical problems related to bulky video equipment were almost as much of an issue as privacy versus public access. Today's video equipment is as easy to use as a cell phone or a laptop. At the same time, courts have increasingly begun to try to protect defendants' rights while protecting the health of the public.³

As a result, courts have not only risen to the challenge of conducting video hearings during the pandemic, but also improved their processes and services while doing so. Virtual court sessions have allowed more people to attend hearings. For example, rural areas that may have previously had little or no access to justice now need only basic technology to gain such access. Jurors, who have often needed to take time off work, find childcare, commute to the courthouse, find parking, and wait for hours or sometimes days, can now serve from the convenience of their homes.

As the National Association of Criminal Defense Lawyers (NACDL) notes, “[t]he fact that hearings and trials can be conducted via videoconference platforms does not make these proceedings legal” (Ettinger, Gerger, and Pollack, 2020). Defense lawyers have urged the abandonment of video; however, seeing that videoconferencing is perhaps unavoidable, they have at least called for better technology and training (Poulin, 2004).

In a perfect world, “[t]he introduction of videoconferencing should be gradual—allowing time for law enforcement, judges, attorneys, and court administrators to adjust to the new technology and to implement fair and effective procedures” (Bellone, 2015: 45). In a pandemic world, where (to date) over 600,000 deaths in the United States are attributed to COVID-19, time is a luxury. Courts have moved quickly to video. Remote hearings have become a necessity for public health reasons. Bailiffs have become conference hosts, IT departments have become rock stars, and judges have become talking heads. Accordingly, success stories have abounded. Among the positive implications of remote video hearings have been the following:

- better access to screening and services
- fewer failures to appear
- greater efficiency
- easier supervision
- increased participation⁴

Thus, the rapid adoption of technology has been difficult, but exceedingly successful in many ways.

TEXT MESSAGING

Text message reminders have also provided a useful lesson. As with video technology, early on the prevailing view was that cell phones were too new and that texts were unlikely to have much of an effect. However, the prevalence of cell phones, plus the increase in e-filing (by which courts can easily obtain contact information), have made the innovation not only more acceptable, but perhaps even expected by the public. Accustomed to receiving text messages from their pharmacies, doctors, and grocery stores, a text from court or a probation officer is no longer surprising.

² See *Crawford v. Washington*, 541 U.S. 36 (2004).

³ “Absent extraordinary circumstances, criminal defendants must waive their right to face-to-face confrontation before remote testimony may lawfully be introduced against them” (Mance and Rubin, 2020).

⁴ As discussed during the National Center for State Courts' eCourts Webinar in December 2020.



As many are packaged in software-as-a-service (SaaS) form, courts can seamlessly implement text reminders from providers, such as eCourtDate, without installing any equipment or purchasing a new case management system. eCourtDate provides AI-empowered, Web-based messaging and scheduling management services. All demos, training, and support are done remotely.

By using text reminders, courts, prosecutors, and community corrections can enhance the experiences of clients while saving resources. Whether it be jurors receiving better guidance from the jury administrator, or defendants being more likely to remember their case events, simple text reminders will continue to be a key innovation in reducing the failure to appear.

Years ago, jury administration experts feted reminders—texting as we know it had not yet caught on—as a way to reduce costly and time-consuming failures to appear. A report by the National Center for State Courts notes, “as many as one-third of state courts have no mechanism to tell jurors not to report for service in the event that scheduled trials are cancelled before the trial date. Jurors simply arrive at the courthouse only to be sent home” (Hannaford-Agor, 2009: 6). The report suggests “[a] dedicated telephone line and answering machine that permits jurors to call and find out” as a solution. The “dedicated answering machine” was a huge technological advance over the postcard, which is still used widely.⁵ Today, text messaging is an obvious choice over the quaint postcard method. According to one study, over 65 percent of people in the United States check their phones 160 times a day (Abbott, 2020).

The consequences for failing to appear can be catastrophic, involving fines and loss of freedom. However, “failure to appear” is often merely a “failure to remember.” Electronic notifications provide substantial benefits with minimal costs and threats to procedural or legal issues because people are more likely to be aware of and participate in the process. Thus, a tech solution that helps defendants remember court dates represents a positive step (Fishbane, Ouss, and Shah, 2020).

CLOUD STORAGE

Security has become another threat to the adoption of court technology. An important function of courts is creating and maintaining public records. Storing all records in one physical location, however, is not advisable. What if the building catches fire or floods during a storm, and records are damaged or lost?

Cloud or hybrid-cloud architecture has been touted for years as a sensible safeguard in the event of a disaster. In 2017 court technology expert Jim McMillan recommended: “to enable court portability, the e-filing servers, CMS, and electronic document servers shouldn’t be in the courthouse. They should be located either in ‘the cloud’ or in both the court’s local data center and the cloud in a ‘hybrid-cloud’ architecture” (McMillan, 2017). McMillan was writing in the wake of a particularly bad hurricane season that had threatened Gulf Coast courts. Yet the same lesson has applied today during the pandemic.

As with SaaS, the cloud has become invaluable when trying to do court business remotely. Those court systems that already used the cloud have found it far easier to switch to remote work, especially during the pandemic (Stone, 2020).

Cloud storage is being adopted not only by larger areas, but also by many smaller governmental entities (Townes, 2021). The innovation is ranked as a high priority by city, county, and state governments, growing particularly quickly in midsized cities, who may not have been pursuing cloud solutions previously. Moreover, even where cloud solutions are not explicitly sought after, they may be part of an overall trend toward disaster recovery preparation and planning.

CONCLUSION

A worldwide pandemic may not be the ideal time to test new technologies, yet this is what has happened. What we have learned thus far is that courts are not as shackled to tradition as once thought; rather, they are resilient and accommodating. Technologies may have been limited in the past, but they are rapidly improving because of both want and need. Challenges posed by court technology are not insurmountable. Indeed, these technologies can be beneficial for work during the pandemic and into the future.

⁵ As they do in Kentucky; see *AP II, Sec. 15, KY ST ADMIN P AP II, Sec. 15(a)*, Perma link: <https://perma.cc/7FMB-CKB5>.



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