

Workable considerations when drafting or updating remote-hearing protocols

A Resource from the
Pandemic Rapid Response Team

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This resource highlights how different state and local jurisdictions have administratively approached common “operational” considerations when developing or updating rules, administrative orders, or guidance for the remote court setting. It is a companion reference to the [National Scan of Remote-First and Remote-Friendly Court Rules](#), the six [Guiding Principles for Post-Pandemic Court Technology](#), the “Digital Divide and Access to Technology” section of NCSC’s 2020 national survey analysis of [Jury Trials in a \(Post\) Pandemic World](#), and [How to Conduct a Fair and Just Remote Hearing Reference Guide](#).

“Itemizing” whether to remote, what, and under what circumstances

State and local jurisdictions use different approaches on what can be conducted remotely, whether certain matters are scheduled by default as remote, and whether remote participation is optional or a matter of judicial discretion. The [National Scan](#) shows how many of the jurisdictions’ written materials often list what types of civil, criminal, and administrative matters can—and cannot—be held remotely (and under what conditions).

Written criteria within the court rules or administrative orders that specifies what matters will be held remotely as a matter of routine, what circumstances a judicial officer may consider in requiring in-person proceedings, and how a judge should weigh any objection and make the record for any future appellate review falls within the first [Guiding Principle for Post-Pandemic Court Technology](#): Ensure principles of due process, procedural fairness, transparency, and equal access are satisfied when adopting new technologies. Specific written criteria are an encouraged best practice.

Requesting or objecting to remote participation and how

In some states, a party can ask to participate remotely. Maryland standardizes that workflow with its court form [Motion for Remote Proceeding or to Appear Remotely](#). The Superior Court of Chatham County (Georgia) adopted a [Form of Election](#) for criminal



defendants to sign after they have reviewed their constitutional rights and decide to go forward with video testimony.

In other jurisdictions, *all* parties must consent before a matter is held remotely. To head off the risk for gamesmanship in its civil cases, [Louisiana’s administrative order](#) admonishes: “*Any consent* required for remote proceedings in civil matters *shall not be unreasonably withheld* by any party” (emphasis added).

In yet other jurisdictions, *no* party consent is required for most proceedings. [Texas’s administrative order](#) allows that “[s]ubject only to constitutional limitations, all courts...may in any case, civil or criminal, *without a participant’s consent*...allow or require anyone 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.” The order extends the lack of consent requirement to jury trials, except for jailable criminal cases. Even so, Texas’s order requires courts to consider—on the record—objections or motions related to proceeding remotely for jury trials at least seven days before the jury trial is scheduled.

Safeguarding the ability to confer with counsel (and language interpreters) privately

Acknowledging for when either counsel or their client will appear in-person but the other will be remote, most court rules (or related orders) require that the remote (or hybrid) setting allow for confidential communication between the party and counsel. [Maryland’s court rule](#) also specifies that the remote format must allow for interpreters to perform their duties.

“Working through” the digital divide

Digital-access observations were included in NCSC’s 2020 published results of its national, [1,000-registered voter survey](#) about jury service and are worth remembering:

- **Vast majority of potential jurors have internet service at home.** Overall, 85 percent report having some form of internet service at their home, and 79 percent say they have highspeed broadband service.
- **Some important differences in access emerge.** As we would expect, while overall access to the internet and internet-enabled devices is very high, age emerges as a critical variable.
- **Ability to participate in remote processes could be impacted by inconsistent cell phone plans.** While overall cell phone access is extremely high, many potential jurors could be constrained by limits on their cell phone plans. As we detail later in this report, nearly half of potential jurors say they would rely on their cell phone if participating in a jury process remotely, and we cannot automatically assume they will use broadband access, even if it is available.

- **Growing comfort with video conferencing services, but large demographic gaps emerge.** Use of video conferencing services has exploded as a result of the coronavirus pandemic, and 70 percent of respondents in this survey say they have used these services at least once in the last three months, including more than half (52 percent) who have used ‘video conferencing services such as Zoom, WebEx, Skype, or Google Hangouts’ regularly over this time period. However, as with any measure of technology usage, significant demographic gaps emerge. Regular usage of these services is highest among college-educated women (73 percent), women under 50 (72 percent), and anyone under age 30 (69 percent); it is lowest among noncollege educated men (31 percent), men over age 50 (38 percent), and of course, seniors (just 30 percent).

We used this survey to measure not just experience with these services, but also how comfortable respondents would feel ‘using video conferencing services for meetings or appointments typically held in person,’ and 2-in-3 (66 percent) reported they would feel very or somewhat comfortable doing so. This number is much larger than the number who regularly use these services because men, across demographic lines, are much more likely to say they would be comfortable using these technologies despite a lack of experience with them.

When reviewing these 2020 insights, it is important to remember that access barriers—such as a lack of transportation, disabilities, conflicting job commitments, and inadequate childcare—existed before the pandemic and affected the litigants’ ability to participate in court matters. In some jurisdictions, access-to-justice champions have creatively managed the challenges when court participants struggle to access physical courtrooms. Alaska’s courts have relied on telephonic participation for decades to overcome its [legendary geography barriers](#): “Many of the approximately 250 small communities that dot Alaska’s landscape are not connected to a road system and are accessible only by plane, or by boat during the summer and snowmachine during the winter. These rural communities range in population between 30 and 5,000 residents.”

While allowing remote participation may have reduced some of those barriers for some litigants, courts need to use that same ingenuity with the increasing need for and use of remote hearings to ensure that there are no new digital barriers to access.



Through 2020 and 2021, jurisdictions have adopted “work-through” solutions to meet court participants where they are even when they lack the resources (computer, tablet, smartphone, or reliable connectivity) or capability to navigate the digital format. Courts have identified and included their “work throughs” in their court rules, administrative orders, and public communications. These digital divide “work throughs” have included court-provided devices, court-purchased data plans, providing Wi-Fi access within or near court facilities, providing on-site remote appearance rooms, arranging access through public library partnerships, allowing telephone-only participation, and staggered scheduling.

Listing the available alternative “work throughs” when adopting court rules, administrative orders, and other public communications is another recommended practice to maintain or increase public confidence in accessibility and procedural fairness.

Maintaining proper decorum (and participant safety)

In his pre-pandemic book [Online Courts and the Future of Justice](#), Richard Susskind acknowledged others who “stressed the importance of incorporating ‘the majesty of the court’ into online courts.”

Various jurisdictions have met this challenge through their administrative orders and guidance by reminding participants that courtroom decorum (including proper dress) is still required in remote proceedings. Many orders prohibit recording or image captures without court permission. [Maine](#) restricts a witness’s virtual background. And [Kansas](#) and others have adopted standards and guidelines that both explain the expected decorum and the precautions for participant safety (which can be of particular concern in, for example, protection order or domestic violence matters). [*Looking ahead*: NCSC will publish safety considerations for virtual protection order hearings in November 2021.]

These approaches complement Susskind’s vision: “[W]e want to have a system that is authoritative, respected, and supportive of the principles of justice.... We also want a system that is considered relevant and not detached from the mainstream social and working lives of citizens. We want a system that celebrates the best of the remarkable online world that we have built and now inhabit.”

This is also borne out in the June 2021 preliminary findings from [Michigan Trial Courts: Lessons learned from the pandemic of 2020-2021](#). Those findings included survey results of nearly 1,500 attorneys: “Clients also expressed they were less intimidated by the process on Zoom without losing respect for the procedure and decorum.”

Ensuring and explaining public access

The public and media’s right to attend public court proceedings is a constitutional guarantee, though the right is not absolute. See [Press-Enter. Co. v. Superior Court of Cal., Cnty. of Riverside](#), 478 U.S. 1 (1986). Understandably, this public-access right continues when court proceedings happen in a partially or fully remote setting. As many have already done, it remains a best practice for a court rule, administrative order, hearing notice, and other

public-facing communications to describe how the public and media can access remote proceedings' live audio (and any video).

At the same time, it may be necessary for courts to consider limiting or closing access to court proceedings much like the need to do so in person. While courts may have declined to use this authority in in-person proceedings because of limited or no public participation in physical courtrooms, a court may wish to consider using its authority when the online public audience may be large. Texas has produced for its judges a [legal backgrounder](#) on public access and a corresponding [bench card](#) guiding judges who wish to limit or close the broadcast of court proceedings.

Staying true to access-to-justice principles when drafting and publishing: Plain language, accurate and contemporaneous non-English translations, and ADA-accessibility

Plain language

Appreciating that the judiciary must communicate clearly with all who use the courts—including the self-represented—the Conference of Chief Justices and the Conference of State Court Administrators adopted a [resolution](#) “in support of implementation of clear communications and streamlined procedures in the courts.” Plain language materials are also easier and more accurate to translate to non-English formats.

With an eye towards being clear, making drafts readable, and including many before-and-after examples, Bryan A. Garner’s 50-page [Guidelines for Drafting and Editing Court Rules](#) remains a helpful go-to resource.

G. *Sentence Length*. Strive for an average sentence length of fewer than 25 words—30 at most.

1. Break long compound sentences into two or more sentences.

Before

Sentence shall be imposed without unnecessary delay, but the court may, when there is a factor important to the sentencing determination that is not then capable of being resolved, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved.

After

Sentence *must* be imposed without unnecessary delay. But if some factor important to sentencing cannot be resolved promptly, the court may postpone sentencing for a reasonable time until that factor becomes resolvable.

Fed. R. Crim. P. 23(a)(1),
before 1994 amendments.

Non-English materials

Of course, English is not the first language for all court users or the public. Ensuring “justice for all” requires accurately and timely sharing the information in other languages.

[Massachusetts](#) courts publish their COVID-19 information, court forms, and other information in Spanish, Arabic, Chinese, Haitian Creole, Khmer, Portuguese, Russian, and Vietnamese.

[Maine](#) includes transcripts translated into Arabic, Chinese, French, Portuguese, Russian, Spanish, Somali, and Vietnamese of its explanatory video for using Zoom to participate in traffic cases.

The [Minnesota](#) judicial branch’s remote hearing information is available in Spanish and Somali.

[New Jersey](#)’s courts include remote hearing instructional videos in English, Spanish, Haitian Creole, Korean, Polish, Portuguese, and Arabic. They also include tips for sign language video remote interpreting.

And the [District of Columbia](#) similarly has a video explaining its ASL remote hearing procedure.

ADA-compatible PDFs

And finally, NCSC has long [discouraged scanned documents](#) (this would include court orders posted online). A scanned document is only “an image” of the text—not the actual text. It is not “searchable” and scanned-only files tend to be larger. This means that they take up more computer space and take longer to download.

[Adobe](#) explains another problem with image-only scans: “[T]he content is not accessible to users who rely on assistive technology [such as a text-to-voice screen reader or Adobe’s Read Out Loud feature]. Additional modifications must be made to make the document accessible.”

The easiest way to sidestep these hassles and create ADA-compatible PDFs—which are also searchable—is to simply print to PDF (rather than print to a physical printer and later scan). Whether using Windows or a Mac, the easy steps are outlined at <https://perma.cc/9F8B-948A>

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“When there is a recognized need in our system and there is a will to meet that need, one of the unique American traits is that we move swiftly from conception to execution.”

Chief Justice Warren E. Burger during the March 19, 1978 dedication of the National Center for State Courts