

## FOREWORD

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Justice (Ret.) Gary Hastings\*

In the spring of 2020, courts were blindsided by the COVID-19 pandemic. Court operations were severely curtailed in order to address and implement safe environments for all participants.<sup>1</sup> As a result, large backlogs developed in all types of cases,<sup>2</sup> and many courts began experimenting with remote proceedings conducted over one of the many platforms initially utilized for remote business meetings such as Zoom, Adobe Connect, BlueJeans, Microsoft Teams, etc.<sup>3</sup>

Initially, courts used the remote proceedings to address simple pre-trial matters including trial setting conferences, status conferences, arraignments, and other types of hearings that did not require witnesses to be presented or evidence to be taken. But as the backlog built up, judges and administrators

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\* Justice Hastings graduated Magna Cum Laude from Southwestern University School of Law in June 1972 and spent the next thirteen years as a civil trial attorney. He was appointed to the Los Angeles County Superior Court in 1985 where he spent eight years and in September 1993, he was appointed and then affirmed to the California Court of Appeal, Second District, Division Four, where he spent the next thirteen years until his retirement in 2006. He currently serves on the Southwestern Board of Trustees. He contacted the editorial board of the Southwestern Law Review, of which he was the Editor-in-Chief in 1971-1972, and suggested a law review symposium dedicated to issues involving remote proceedings. Not all issues are addressed, but this Paper Symposium contains a good cross-section of concerns and issues of interest.

1. See Alan Feuer et al., *Coughing Lawyers. Uneasy Jurors. Can Courts Work Under Coronavirus?*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/nyregion/coronavirus-new-york-courts.html>.

2. Michael Finnegan & Maura Dolan, *Coronavirus Shutdown of Jury Trials Upends California's Federal Courts*, L.A. TIMES (Apr. 12, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-04-12/coronavirus-federal-court-jury-trials-shutdown-california>; Alia Nahra, *How Covid-19 Is Still Battering the Criminal Legal System*, BRENNAN CTR. FOR JUST. (Jun. 16, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-covid-19-still-battering-criminal-legal-system>; Sara Jean Green, *King County's Courts Are 'barely keeping up' with a Massive Backlog of Cases Due to the Covid-19 Pandemic*, SEATTLE TIMES (July 11, 2021, 7:46 PM), <https://www.seattletimes.com/seattle-news/crime/King-Countys-Courts-Are-Barely-Keeping-up-With-a-Massive-Backlog-of-Cases-Due-to-the-Covid-19-Pandemic/>.

3. See Eric Scigliano, *Zoom Court Is Changing How Justice Is Served*, THE ATLANTIC (Apr. 13, 2021), <https://www.theatlantic.com/magazine/archive/2021/05/can-justice-be-served-on-zoom/618392/>.

began to investigate conducting more complex hearings and actual trials remotely. For example, in April 2020, Michigan established a Remote Jury Pilot Workgroup,<sup>4</sup> Florida authorized a Remote Civil Jury Trial Pilot Program in May of 2020,<sup>5</sup> and Illinois enacted rules to allow remote bench trials.<sup>6</sup> In July 2020, the King County Superior Court in the state of Washington used YouTube to publish a Civil Bar Remote Bench Trial Training program.<sup>7</sup> Additionally, in June 2020, the Online Courtroom Project (OCP), of which I am on the Advisory Board, held a demonstration remote civil jury trial over two days utilizing jurors from around the United States.<sup>8</sup>

Courts around the country have now conducted numerous remote civil trials. The Superior Court in King County, Washington conducted more than one hundred remote jury trials and hundreds more remote bench trials over the last year.<sup>9</sup> The same is true of courts in California and elsewhere. Hybrid trials, where some of the participants are in person and others appear virtually, are also ongoing. Many courts do jury selection remotely but bring the jurors in for in-person trials with social distancing and masking rules which create their own problems.

Many people believe that remote hearings and trials are here to stay. For example, as two reporters noted:

Virtual court proceedings will probably outlive the Covid-19 pandemic, as even skeptical judges and lawyers say that they've made depositions, oral arguments, and jury selection much more efficient.

Courts forced to accelerate years of innovation into weeks may never go back to how they did business before the pandemic, according to interviews with more than 30 state and federal judges, lawyers and court staff in 16

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4. MICH. SUP. CT. ADMIN. ORD. No. 2020-10, [https://www.courts.michigan.gov/SysGlobalAssets/migrated/news-events-review/archive/2020-08\\_2020-04-23\\_formattedorder\\_ao2020-10.pdf](https://www.courts.michigan.gov/SysGlobalAssets/migrated/news-events-review/archive/2020-08_2020-04-23_formattedorder_ao2020-10.pdf).

5. *Five Trial-Court Circuits Chosen for "Virtual" Civil Jury Trial Pilot Program Due to Pandemic*, FLA. SUP. CT. (June 3, 2020, 12:33 PM), <https://www.floridasupremecourt.org/News-Media/Court-News/Five-Trial-Court-Circuits-Chosen-for-Virtual-Civil-Jury-Trial-Pilot-Program-Due-to-Pandemic>.

6. Sarah Mansur, *Illinois High Court Offers Rules for Remote Criminal Hearings*, CAPITOL NEWS ILL. (Feb. 15, 2021), <https://capitolnewsillinois.com/NEWS/High-Court-Offers-Rules-for-Remote-Criminal-Hearings>.

7. King County Superior Court, *Civil Bar Remote Bench Trial Training*, YOUTUBE (July 6, 2020), <https://www.youtube.com/watch?v=ir5ekhlAOeI>.

8. For further information about OCP including a production of the report prepared about the demonstration trial, see *Online Jury Trials: OCP's Summary and Recommendations Report*, ONLINE COURTROOM PROJECT (July 15, 2020), <https://www.onlinecourtroom.org/demonstration-report>.

9. See Green, *supra* note 2.

U.S. states and the District of Columbia. The embrace of technology is a revolution for many courts that have historically resisted it.

“We’re going to be doing court business remotely forever,” said Nathan Hecht, chief justice of the Texas Supreme Court and co-chair of the National Center for State Court’s pandemic response team. “This has changed the world.”<sup>10</sup>

But not all judges and lawyers are convinced that remote civil trials should remain after the pandemic has run its course. In a Find Law article, Richard Dahl listed a number of limitations attributed to remote trials such as confirming the identity of witnesses, the right to confrontation in a criminal case, problems clients may have in conferring with their attorneys, loss of the “human touch,” and technical issues which may hamper remote litigants and jurors.<sup>11</sup> Furthermore, there are significant constitutional issues which need to be addressed for remote criminal proceedings.<sup>12</sup>

As of this writing, the Delta variant of COVID-19 has continued to hamstring the courts’ ability to address their backlog and provide timely service to the public.<sup>13</sup> Though some businesses and facilities have reopened, it does not appear that the pandemic will be over soon. Several restrictions remain<sup>14</sup> and a new Omicron variant of COVID-19 has been discovered.<sup>15</sup> Even when it is over, the benefits of remote hearings have been established. With my participation in OCP, I have become very interested in remote judicial proceedings and the issues presented. The Southwestern Law Review’s Paper Symposium *Courts in the COVID-19 Era* explores these concerns.

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10. Allie Reed & Madison Alder, *Zoom Courts Will Stick Around as Virus Forces Seismic Change*, BLOOMBERG TAX (July 30, 2020, 1:50 AM), <https://news.bloombergtax.com/payroll/zoom-courts-will-stick-around-as-virus-forces-seismic-change?context=article-related>.

11. See Richard Dahl, *Virtual Court Putting Litigants at a Disadvantage?*, FIND LAW (Aug. 20, 2020, 8:24 AM), <https://blogs.findlaw.com/technologist/2020/08/virtual-court-putting-litigants-at-a-disadvantage.html>.

12. See generally NAT’L CTR. FOR STATE CTS., CONSTITUTIONAL CONCERNS RELATED TO JURY TRIALS DURING THE COVID-19 PANDEMIC (2021) (version no. 3), [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0034/57886/Constitutional-Concerns-Related-to-Jury-Trials-During-the-COVID-19-Pandemic.pdf](https://www.ncsc.org/__data/assets/pdf_file/0034/57886/Constitutional-Concerns-Related-to-Jury-Trials-During-the-COVID-19-Pandemic.pdf).

13. See Finnegan & Dolan, *supra* note 2; Nahra, *supra* note 2; Green, *supra* note 2.

14. See, e.g., *COVID-19 Prevention in Public Settings*, L.A. CNTY. DEP’T OF PUB. HEALTH (Nov. 9, 2021), <http://publichealth.lacounty.gov/acd/ncorona2019/docs/PreventionPublicSettings.pdf>.

15. *Update on Omicron*, WORLD HEALTH ORGANIZATION [WHO] (Nov. 28, 2021), <https://www.who.int/news/item/28-11-2021-update-on-omicron>.

In his essay, *Civil Jury Trials by Zoom: We're All Plugged into One World Now*, Ted A. Donner recognizes the benefits of remote trials and also poses some questions:<sup>16</sup>

- Does an online trial ensure the litigants a jury drawn from a fair cross-section of the community?
- Is the right to confront witnesses unduly compromised, if it applies at all, in a civil setting?
- Does the right to proceed in “open court” require in-person attendance, even when the litigants, counsel, and the jurors will all be wearing masks that obscure the bottom half of their face?

He then addresses the constitutional requirements for civil jury trials in connection with the questions he raises, as well as using supplemental jury questionnaires and issues relating to conducting online voir dire.<sup>17</sup> He concludes by theorizing about the use of online trials after the pandemic has dissipated.<sup>18</sup>

Professor Scott Dodson’s essay, *Videoconferencing and Legal Doctrine*, points out that “[v]ideoconferencing is an effective alternative, even a preferred substitute, for many litigation events. Particularly in multiparty and interstate cases, travel and schedule coordination can impose hurdles and burdens on in-person events.”<sup>19</sup> He discusses how this is so and then turns his focus to how utilizing remote procedures may affect the doctrines of personal jurisdiction, venue transfer, and discovery.<sup>20</sup> He concludes that “[t]he salutary effects of videoconferencing’s ability to lessen burdens are context dependent and must be assessed under all the circumstances.”<sup>21</sup>

Commissioner Douglas G. Carnahan examines what impact COVID-19 has had on low-income populations regarding access to litigation.<sup>22</sup> In his essay, *Access to Justice in a Time of COVID*, he asks, among other questions:<sup>23</sup>

- How can the client gain physical access to courthouses?
- What cultural and technical barriers exist to accessing court files and court hearings remotely?
- How should the courts themselves be guided in assuring that the pandemic does not restrict access to justice?

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16. Ted A. Donner, *Civil Jury Trials by Zoom: We're All Plugged into One World Now*, 51 SW. L. REV. 71 (2021).

17. *Id.* at 75-83.

18. *Id.* at 88-90.

19. Scott Dodson, *Videoconferencing and Legal Doctrine*, 51 SW. L. REV. 9, 13 (2021).

20. *Id.* at 14-18.

21. *Id.* at 18-19.

22. Douglas G. Carnahan, *Access to Justice in a Time of COVID*, 51 SW. L. REV. 91 (2021).

23. *Id.* at 91-92.

- What are the technological challenges—to litigants, lawyers, and court staff—created by the pandemic?
- What is the best way to train lawyers, law firm staff, and court staff in dealing not only with technology but also with the effects of technology on court users?

He first looks to some general statistics and notes: “As we shall see, low-income client populations may have actual, as opposed to theoretical, inabilities to take advantage of protective and online remedies for the pandemic . . . .”<sup>24</sup> He then discusses courthouse access by low-income clients and technology, particularly as it affects access.<sup>25</sup> He finally suggests remedies for some of the problems addressed and concludes:

The pandemic has created chaos in the lives of the less advantaged among us. Lawyers, judges, legislators, and court administrators, will now, and for the foreseeable future, be tasked with ensuring that devices, such as remote court hearings, established and encouraged because of COVID, do not have a deleterious effect on the rights of the least advantaged among us.<sup>26</sup>

Dr. Jeffrey T. Frederick acts as an advisor to OCP and participated in the OCP demonstration remote civil jury trial. His essay, *Online Jury Selection: New Tools for Jury Trials*, reviews his consultations with various jurisdictions and his participation in studies relating to remote jury selection.<sup>27</sup> He discusses all aspects of remote jury selection including use and design of juror questionnaires, conducting voir dire, exercising challenges, the logistics involved, and the benefits to be obtained.<sup>28</sup> He assesses concerns and questions raised by online jury selection such as the degree of formality, attention of the jurors, juror preferences, diversity, and acceptance by the stakeholders.<sup>29</sup>

One of the primary issues raised relating to remote trials is judging credibility. Two of the essays in this Paper Symposium address that issue. Professor Susan A. Bandes and Professor Neal Feigenson authored an essay, *Empathy and Remote Legal Proceedings*, where they discuss the impact of remote proceedings on how empathy of others is perceived.<sup>30</sup> They write:

We ought to be concerned not only with whether remote proceedings interfere with the ability to read facial expressions and body language but

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24. *Id.* at 93.

25. *Id.* at 93-95.

26. *Id.* at 105.

27. Jeffrey T. Frederick, *Online Jury Selection: New Tools for Jury Trials*, 51 SW. L. REV. 40 (2021).

28. *Id.*

29. *Id.* at 57-59.

30. Susan A. Bandes & Neal Feigenson, *Empathy and Remote Legal Proceedings*, 51 SW. L. REV. 20 (2021).

also with whether remote proceedings divert energy from the effort to engage in perspective-taking. When the will and energy to take the other's perspective are in short supply, the temptation to rely on cognitive shortcuts may predominate. The use of these shortcuts too often amounts to a resort to broad-brush generalizations, biases, and prejudices . . . .<sup>31</sup>

They state that empathy is “also subject to a number of biases” and then discuss three concepts: the egocentric bias, affective realism, and the similarity bias.<sup>32</sup> They are clear to point out that further studies need to be done on the subject and conclude: “At bottom, there is no good way to measure empathetic accuracy in legal proceedings. . . . Although pinpointing accuracy is elusive in this context, measures of fairness are within reach.”<sup>33</sup>

Dr. Karen Lisko has worked with witnesses, lawyers, and juries in hundreds of civil cases over her twenty-five years of experience and serves as a member of the OCP Advisory Board. Her essay, *Bearing Witness to, Well, Witnesses: An Examination of Remote Testimony Versus In-Court Testimony*, addresses in-person testimony versus remote testimony.<sup>34</sup> She has interviewed numerous jurors and attorneys on the issue and has also analyzed national survey data on behalf of the Judicial Division of the American Bar Association regarding judges' and attorneys' experiences with and attitudes toward remote proceedings.<sup>35</sup> She provides us with the results of her research including one insight: that jurors who had been involved in actual in-person court trials, as well as remote trials, preferred remote testimony.<sup>36</sup> She tries to reconcile this with findings published by Professor Susan A. Bandes and Professor Neil Feigenson in 2017 that remote trials have possible roadblocks.<sup>37</sup> She asks: “Is this a case where more than one thing can be true?” and answers: “Quite possibly.”<sup>38</sup> She concludes that although there are “obstacles to remote witness testimony, there are [also] remedies . . . .”<sup>39</sup>

As previously noted, criminal trials present significant constitutional issues to be addressed. Professor Norman M. Garland specializes in criminal and evidentiary law and addresses the Sixth Amendment issue of confrontation in connection with remote trials in his essay, *The*

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31. *Id.* at 24.

32. *Id.* at 26-27.

33. *Id.* at 36-37.

34. Karen Lisko, *Bearing Witness to, Well, Witnesses: An Examination of Remote Testimony Versus In-Court Testimony*, 51 SW. L. REV. 63 (2021).

35. *See generally id.*

36. *Id.* at 66.

37. *Id.* at 68.

38. *Id.*

39. *Id.* at 70.

*Constitutionality of Remote Trials*.<sup>40</sup> He reviews confrontation cases over the years and notes that some cases have looked to public policy issues as a possible exception from face-to-face confrontation.<sup>41</sup> He writes: “Courts that have conducted remote trials have reasoned that it is in the states’ public policy interest to protect people from contracting the COVID-19 virus by not appearing in court. But the pervasive question is whether the Confrontation Clause can yield to such a public policy interest.”<sup>42</sup> He answers by providing his reasoned opinion, yet acknowledges that the final answer will not come until the United States Supreme Court intervenes.<sup>43</sup>

Professor Stephen E. Smith also discusses the Sixth Amendment in his essay, *The Online Criminal Trial as a Public Trial*.<sup>44</sup> He posits: “What does it mean to attend an event in 2021 and beyond?” and “Is a trial not public unless you breathe the air of its participants?”<sup>45</sup> He explores the various aspects raised by the Sixth Amendment right to a public trial in an attempt to answer whether a remote trial can be considered a “public trial.”<sup>46</sup> If not, he considers the four-part test set out in *Waller v. Georgia* to determine if the criminal trial can be closed to the public: “(1) the party seeking to close the [proceeding] must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure.”<sup>47</sup> He opines: “Foremost among these would be, again, closure to protect public health in a pandemic. In this unusual and dramatic circumstance, complete closure is likely justified . . . . But the availability of an online trial would nonetheless provide public trial protections.”<sup>48</sup>

Brandon Marc Draper’s essay, *Prosecutorial Dilemmas amid the Pandemic and Online Jury Trials*, addresses issues raised by remote trials that must be considered by prosecutors.<sup>49</sup> He notes that these novel concerns could lead to the risk that a *per se* reversible error may be found.<sup>50</sup> He warns

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40. Norman M. Garland, *The Constitutionality of Remote Trials*, 51 SW. L. REV. 107 (2021).

41. *Id.* at 108-12.

42. *Id.* at 107.

43. *Id.* at 115.

44. Stephen E. Smith, *The Online Criminal Trial as a Public Trial*, 51 SW. L. REV. 116 (2021).

45. *Id.* at 116-17.

46. *Id.*

47. *Id.* at 128-29 (citing *Waller v. Georgia*, 467 U.S. 39, 48 (1984)).

48. *Id.* at 129.

49. Brandon Marc Draper, *Prosecutorial Dilemmas amid the Pandemic and Online Jury Trials*, 51 SW. L. REV. 133 (2021).

50. *Id.* at 134, 139-40.

that “prosecutors should exercise caution when agreeing to conduct a trial by video conference.”<sup>51</sup>

The last essay in this issue is *Mediation in the COVID-19 Era: Is Online Mediation Here to Stay?*, which turns from the subject of trials to mediation.<sup>52</sup> Kristi J. Paulson, who has extensive experience in the courtroom and with ADR processes and is nationally recognized as a leader in online mediation, discusses how online mediations work, the benefits of online mediation, the challenges faced, and the keys to successful mediation.<sup>53</sup> She concludes: “Online mediation is here to stay. Parties will become more creative as we continue to explore the process, and we will see further innovation as virtual online mediation moves forward as the wave of the future.”<sup>54</sup>

COVID-19 arrived fast, hard, and unexpectedly. Under the circumstances, the justice system reacted fairly quickly. Numerous articles and studies have been produced to answer many of the questions raised. Until we begin getting consensus among the courts, not only with regard to remote proceedings but also with precautions taken in connection with in-person proceedings, the debate will continue. We hope that this Paper Symposium will be helpful in that regard.

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51. *Id.* at 133.

52. Kristi J. Paulson, *Mediation in the COVID-19 Era: Is Online Mediation Here to Stay?*, 51 SW. L. REV. 142 (2021).

53. *Id.*

54. *Id.* at 155.