

FOREWORD

Justice (Ret.) Gary Hastings

In the spring of 2020, courts were blindsided by the COVID pandemic. Court operations were severely curtailed in order to address and implement safe environments for all participants. As a result, large backlogs developed in all types of cases, 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.

Initially, courts used the remote proceedings to address simple procedural 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 attorneys

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. Paper Symposium contains a good cross-section of concerns concerning California. J ET Q 0.00000912 0 612 792 re W* n

began to investigate conducting more complex hearings and actual trials remotely. For example, in April 2020, Michigan established a Remote Jury Pilot Workgroup⁴; Florida authorized a Remote Civil Jury Trial Pilot Program in May of 2020⁵; and Illinois enacted rules to allow remote bench trials.⁶ In July 2020, the King County Superior Court in the state of Washington used YouTube to publish a Civil Bar Remote Bench Trial Training program⁷. 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 States⁸.

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 year⁹. 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 survive the COVID-19 pandemic, as

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:¹⁶

Does an online trial ensure the litigants a jury drawn from a fair crosssection of the community?

Is the right to confront witnesses unduly compromised, if it applies at all, in a civil setting?

require inperson 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 voir¹⁷dire. He concludes by theorizing about the use of online trials after the pandemic has dissipated.¹⁸

Videoconferencing and Legal Doctrine,

preferred substitute, for many litigation events. Particularly in multiparty and interstate cases, travel and schedule coordination can impose and burdens on inperson events.¹⁹ 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.²⁰ He concludes that the salutary effects of videoconferencing in this

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also with whether remote proceedings divert energy from the effort to engage in perspective taking. When the will and perspective are in short supply, the temptation to rely on cognitive shortcuts

Constitutionality of Remote Trials.⁴⁰ 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!

have conducted remote trials have reasoned that it is in the public policy interest to protect people from contracting the COVID virus by not appearing in court. But the pervasive question is whether the Confrontation Clause can yield to such a public ⁴² He answers by providing his reasoned opinion, yet acknowledges that the final answer will not come until the United States Supreme Court intervenes.⁴³

Professor Stephen A. Smith also discusses the Sixth Amendment in his essay *The Online Criminal Trial as a Public Trial*.⁴⁴ it mean to attend an event in 2021 and beyond

⁴⁵ He explores the various aspects raised by the Sixth Amendment right to a public trial in an attempt to ⁴⁶ If not, he considers the four-part test set out in *Waller v. Georgia* to determine if 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

⁴⁷ protect public health in a pandemic. this unusual and dramatic circumstance, complete closure is likely justified. But the availability of ⁴⁸

*Prosecutorial Dilemmas amid the
Pandemic and Online Jury Trials*

exercise caution when agreeing to conduct a trial by

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The last essay in this issue, *Mediation in the COVID-19 Era: Is Online Mediation Here to Stay?*, which turns from the subject of trials to mediation.⁵² 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.⁵³

become more creative as we continue to explore the process we will see further innovation as virtual online mediation moves forward as the wave of the

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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 procp98(f8cy7>-4<004C>-4<00520051>11<0003>-32<004C>6<00560003>-34<0040 G