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PERSPECTIVE

History's greatest shift in access to American justice in jeopardy

By Mary Ellen Waller

Policymakers are preparing to make decisions before the California constitutional deadline of June 15 to pass the 2021-22 California Budget. The state budget contains trailer bill legislation authorizing trial courts to use virtual access technology measures implemented in response to COVID-19. The trailer bill will implement language enacting corresponding changes in state law to accomplish the budget's fiscal policies and will allow California courts to conduct all proceedings in civil cases remotely on a broader basis beyond the current emergency.

This legislation presents an opportunity to modernize antiquated statutes that are no longer suitable for today's conditions and do not account for recent technological advancements. The governor and leaders of the California Senate and Assembly need to agree that the trailer bill is necessary for implementing a system of virtual access technology measures that have a remarkable capacity to allow future access to justice.

The proposed trailer legislation would authorize the Judicial Council — the policymaking body of California courts — to adopt statewide Rules of Court. Under the California Constitution, the Judicial Council is responsible for ensuring the consistent, independent, impartial and accessible administration of justice. To sustain essential court services in California during the pandemic, on April 6, 2020, emergency rules adopted by the Judicial Council and issued by Chief Justice Tani Cantil-Sakauye — who chairs the council — were enacted into the California Rules of Court.

The judicial branch gave the California courts tools to confront

the impact of COVID-19 through Civil Justice Actions, including Emergency Rule 3, regarding remote hearings. It allowed courts to require hearings and

the emergency Rules of Court will automatically sunset and disappear 90 days after the state of emergency is lifted, unless the rules are amended or repealed by

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court operations to be conducted remotely via technology, with the defendant's consent in criminal cases. Telephonic appearances had previously been permitted in most courts. However, the implementation of this order ushered in a sea change for the legal system. Proceedings were allowed to use video, audio and telephonic means for remote appearances; the electronic exchange and authentication of documentary evidence; e-filing and e-service; the use of remote interpreting; and the use of remote reporting and electronic recording to make the official record of an action or proceeding.

Unfortunately, California courts and attorneys are currently in the dark about whether remote technology will be permanently left in place or discontinued.

Under the Emergency Services Act, Gov. Gavin Newsom has the power to decide when the current COVID-19 state of emergency will be lifted. The governor is obligated to end the emergency as soon as possible; however, the Assembly and the Senate acting together can also declare an end to the emergency, terminating the emergency powers granted to the governor. Gains in access to remote technology achieved during the global crisis through

the Judicial Council.

While the Judicial Council may amend emergency rules procedures, it is limited in changing regulations set forth by statutes. Absent the trailer bill language once the emergency is lifted, various existing statutory impediments to the use of remote technology presently being held in abeyance will be triggered once again. These impediments consist of dozens of outdated laws written before the advent of remote technology that prohibit the use of certain technologies. The legislature must implement the trailer bill language to enact these changes in state statutory law.

The Legislature and the Legislative Analyst's Office, a non-partisan government agency that provides fiscal and policy advice to the California Legislature, have voiced hesitancy in allowing the California courts to continue prioritizing the use of remote technology on a widespread basis. In addition, numerous court interpreters and court reporters have objected to the trailer bill based on audio issues while interpreting via remote video appearances and out of concern that limited English language speakers would be denied meaningful access to the courts and its services.

The LAO has acknowledged the benefits of remote proceedings. However, the reluctance to recommend authorization to the Legislature is based on assessing that important key implementation details will be left to the judicial branch. The LAO cautions that a more measured approach to informing legislative decisions could be achieved through a pilot program allowing for "the minimization of unintended consequences and costs." The Senate Budget and Fiscal Review Subcommittee No. 5, Public Safety, the Judiciary, Labor and Transportation committee chair, has indicated an opinion that the Legislature is being asked to revamp the judicial system without extensive conversations and studies.

LAO recommendations appear to result from bureaucratic thinking that ignores the fact that the courts have already been engaged in a 14-month "pilot program" of experimentation and testing since the beginning of COVID-19. If the LAO aims to make government programs more effective and less costly, consideration should be given that the courts have already seen the solutions take effect with direct feedback, historical metric data, tested logistics, and troubleshooting of deficiencies.

COVID-19 has accelerated innovation and transformed the legal field. This generation has experienced upending circumstances; now is not the time for standard rigid operating procedures with recommendations of duplicative pilot programs and extensive studies. The main issue must be grasped rather than getting caught up in the minutiae; the Legislature should address the larger picture as a whole.

According to a Judicial Council presentation before Senate Budget and Fiscal Review Subcommittee No.5, 54 of the 58 California trial

courts already have the remote ability for one case type, and 38 have the remote ability for all case types. This is undoubtedly a high adoption rate. Pausing or reverting this now commonplace situation to how it formerly existed by limiting advancements fails to recognize the technological achievements of the California State Bar members and its courts.

The 54 California courts currently participating is a large enough group to give instructive feedback to address what worked and what didn't work. Under the guidance of the Judicial Council, informed decisions can be made — perhaps by creatively using project management software tools to retroactively set objectives using the data and experience from what they have already been doing and what they will continue to do under the ongoing emergency rules.

Court interpreters and reporters have called for a blanket “no” on the trailer bill language. This is short-sighted opposition; there should be multiple ways to access the courts. Ironically, due to the pandemic, none of the interpreters who protested remote access appeared in person. Instead, they took advantage of telephonic appearances, indicating the benefits of remote technology. In addition, the interpreters' comments were broadcast via Senate Media on Demand, with closed-caption processes that provided interpretive information demonstrating the benefits of technological tools.

The concerns regarding limited language speakers suggest a challenge. However, the Judicial Council can make rules based on the feedback from the interpreters that protect this group of the public. The Judicial Council can study information obtained, perform further studies, have conversations, and are astute in ironing out the various implementation issues. The Judicial Council has a track record of experience promulgating Rules of Court dealing with equity, fairness, standards, procedures, costs and facilitating

the process. It should be given broad authority to decide how the court's process will proceed with technology. There is no evidence to suggest that the Judicial Council cannot promulgate rules that address considerations, including acknowledged differences in existing local court infrastructures. This is the very function of the judicial branch.

The COVID-19 pandemic has brought historical transformation to the legal profession, facilitating the ability for litigants, including self-represented litigants, to have remote access to courtrooms. There should be multiple ways to access the courts. Tara Desautels, presiding judge for the Alameda County Superior Court, advocated before the legislative committee to support the governor's trailer bill on remote hearings. The judge noted that the trailer language is permissive and flexible, allowing individual courts to proceed based on needs. She expressed an opinion that a pause would negatively impact the courts, also saying that the Alameda County Superior Court had also administered a survey that supported the continuation of remote appearances.

Sherri R. Carter — executive officer and clerk of court for the Los Angeles County Superior Court, a distinguished advocate for advancing greater access, efficiency and accountability to courts worldwide — participated in a recent Los Angeles County Bar Association webinar panel that advocated for the use of the technology in the courts. According to the webinar, the reduction in costs and increased efficiency associated with litigation must be reaffirmed. The remarkable remote technology opportunity for accessible access to advocacy offers clients and self-represented litigants the most significant cost savings yet seen in legal expenses. Clients are saving money as attorneys no longer have to bill them for driving to court to make various appearances or sitting around a courthouse waiting to

be called. The panel recognized that courts could be anxiety-inducing venues that remote appearances would help to alleviate. Litigants no longer have to take as much time off from work for appearances. Remote technology would also reduce childcare costs as individuals would be able to appear from their homes remotely.

LACBA President Tamila C. Jensen introduced a month-long rollout of the new platform for LASC virtual appearances. When the emergency rule first went into effect, some courts, including Los Angeles Superior Court, used various platforms for remote technologies. The court is now transitioning entirely to Microsoft Teams due to its application programming interface functionality and ability to interact with the existing backend resources of LACourtConnect programmatically (a permanent part of the LASC Here for You/Safe for You initiative). A virtual “Attorney Sandbox” has been set up for Los Angeles attorneys to “play in the Sandbox” to help train lawyers to interact on the platform in this rapidly evolving legal world. As remote advocacy has expanded, attorneys are ethically required to stay up to date on advancing technology. The LACBA panel of experts stressed that litigators must continue courtroom decorum and understand how they look and sound on electronic platforms — emphasizing that “lawyers have to be adaptable to change if we are going to serve clients well.” The LACBA encourages attorneys to join a non-intimidating learning atmosphere to experiment with the latest enhancements and learn tips for an improved experience. LASC also has an extensive courtroom deployment plan.

It appears the door has opened to a fundamental reframing of the future of the American justice system by broadening access to all. Numerous courts throughout California are taking a reform-minded approach to the enhancement of the legal system. These

courts have embraced the universal positives of technological tools adopted during the pandemic to advance the docket, making innovative improvements that work for litigants, witnesses, court personnel, and judicial officers. Remote technology can overcome barriers and inefficiencies by expanding access and improving delivery. Time will tell if the emergency measures implemented by the Judicial Council and the vision of the legal system charted by the LACBA and other California courts will continue as policy. Indeed, these solutions look beyond today's concern regarding the pandemic, advance real access, and prepare the legal field for future needs in delivering justice and excellence in the American legal system. ■

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<https://www.feinbergwaller.com/blog/2021/may/lasc-update-new-platform-for-virtual-appearances/>

