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by Michael R. Diliberto

Closing Argument

The coronavirus has led to inconvenience, case backlogs, and court closures across the nation. Yet thanks to Zoom and other videoconferencing platforms, commercial mediators and arbitrators have stepped up to fill the void and remained on the front line to help parties resolve disputes out of court. Virtual bargaining tables and courtrooms have quickly eclipsed in-person models as the preferred dispute resolution choice—a testament to the quality of service and effectiveness neutrals provide with remote access.

It appears that Zoom mediations (and even hearings) are here to stay. What about the court system? Guidelines issued by the Conference of Chief Justices (CCJ) and Conference of State Court Administrators (COSCA) state: “The COVID-19 pandemic is not the disruption courts wanted, but it is the disruption that courts needed: to re-imagine and embrace new ways of operating; and to transform courts into a more accessible, transparent, efficient, and user-friendly branch of government.”¹

A June 2020 National Center for State Courts (NCSC) poll revealed the following:²

- Nearly two out of three people said they were receptive to appearing in courtrooms remotely—a significant increase from the 2014

Pandemic’s Silver Lining for the Courts

survey, when only two out of five were receptive, a finding that reflects the public’s growing comfort level with technology and its discomfort being in close proximity to others during the pandemic.

- Regarding whether respondents would be more comfortable serving on juries in person or remotely, 44 percent stated remotely, 32 percent had no preference, and 23 percent stated in person.

- About two-thirds of respondents stated that courts should require people to wear masks in courthouses, and at least 70 percent stated they would be more comfortable in a courthouse that enforced social distancing, checked temperatures at the door, required court employees and visitors to wear masks, and tested for COVID-19.

The Judicial Council of California’s Ad Hoc Workgroup on Post-Pandemic Initiatives released an August 16, 2021, report recommending courts should “expand and maximize remote access on a permanent basis for most court proceedings and ...not roll back the increased access to the courts made

possible by remote technology to pre-pandemic levels of in-person operations.” Senate Bill No. 241 (Ch. 214), known as the “2021 California Court Efficiency Act,” applies to civil actions and provides in part: “This bill would, until July 1, 2023, authorize a party to appear remotely and the court to conduct conferences, hearings, proceedings, and trials in civil cases, in whole or in part, through the use of remote technology.”³

The NCSC’s latest annual State of the State Courts poll conducted in October 2021⁴ found that a majority of respondents believe courts should continue to hold hearings by video so more cases can be heard and resolved more quickly. They also feel it makes it easier for people to participate without having to travel to a courthouse, take time off work, and find childcare. Large numbers of respondents indicated barriers exist to get to a physical courthouse, and 49 percent said the distance to reach their courthouse would be a problem for them. Regarding remote access, the survey consistently finds a major dif-

ference of opinion based on age, with younger respondents much more likely to embrace technology solutions. Most respondents have the technology tools for remote participation: 88 percent subscribe to Internet at home, and 95 percent own a cell phone.

The silver lining for courts is aptly stated in the CCJ/COSCA guidelines: “Technology is not a panacea. It does not and should not replace the fundamentally human character of justice. However, it provides a unique opportunity for courts to ensure that all parties to a dispute—regardless of race, ethnicity, gender, English proficiency, disability, socioeconomic status or whether they are self-represented—have the opportunity to meaningfully participate in court processes and be heard by a neutral third-party who will render a speedy and fair decision.” Remote access to the court system continues to expand and improve. As the Beatles sang, “It’s getting better all the time.”⁵ ■

¹ Guiding Principles for Post-Pandemic Court Technology 1 (July 16, 2020), available at https://www.ncsc.org/_data/assets/pdf_file/0014/42332/Guiding-Principles-for-Court-Technology.pdf.

² Available at https://www.ncsc.org/_data/assets/pdf_file/0020/62390/20-Annual-Report.pdf.

³ See CODE CIV. PROC. §367.75.

⁴ Available at <https://www.ncsc.org/topics/court-community/public-trust-and-confidence/resource-guide/state-of-the-state-courts>.

⁵ SGT. PEPPERS’ LONELY HEARTS CLUB BAND (Capitol Records 1990) (1967).

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