



JTC Quick Response Bulletin

Strategic Issues to Consider when Starting Virtual Hearings

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Abstract

As courts rapidly pivot to provide access to services remotely, there are key decisions, assumptions, and potential challenges as well as opportunities to bear in mind as they go forward. This JTC Quick Response Bulletin provides important reminders designed to help courts succeed with efforts to provide virtual hearings.

Document History and Version Control

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To improve the administration of justice through technology

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Introduction

Courts all over the world are adapting quickly to operational limitations imposed by the coronavirus pandemic. As courts pivot to provide essential services without bringing the public as well as court staff into the courthouse where they could be exposed to, or could expose others to a potentially deadly virus, remote hearings are suddenly essential. In this rapidly evolving situation, courts must still bear in mind key decision points, assumptions, and challenges as well as opportunities as they go forward. This JTC Quick Response Bulletin provides important reminders designed to ensure courts succeed with these efforts while continuing to play the essential role courts play in civil society.

Key Decisions

Which courts?

State and local court leaders should consider whether virtual hearings are appropriate for all the courts in the state. Some states have been successful in initiating virtual hearings in limited jurisdiction courts, general jurisdiction courts, and the appellate courts. However, each of these courts brings different challenges and may need differing levels of support. In addition, state and local court leaders should decide whether to bring every judge or court online at once or on a rolling basis, gathering feedback and observations to improve the process.

Which case types or proceedings?

Court leaders should consider which case types or proceedings are most appropriate for virtual hearings. While all case types or proceedings may be able to be held virtually, there may be particular challenges for each one. For instance, criminal proceedings may present different issues such as the right to confrontation and exchange of signed paperwork during the hearing. Jury trials bring a unique challenge with involvement of jurors. Courts would be wise to evaluate the appropriateness of each case type and proceeding to the chosen virtual hearing tool.

Which technology?

There are multiple technology options that could be used to facilitate virtual hearings. The simplest solution is telephonic hearings; however, that solution may create limitations in the ability to have certain hearings. Videoconferencing provides more robust features that could enable most hearings to occur. Court leaders should consider the particular features of each technology, such as:

- Ease of use by judges, court staff, attorneys, litigants, witnesses, other participants

- Availability/ubiquity of the technology to attorneys, litigants, witnesses, other participants
- Required equipment for all participants
- Ability to access the solution remotely
- Security of the solution
- Ability to schedule hearings and conduct on-demand hearings
- Ability to control access to hearings by participants
- Ability to stream proceedings to third-party solution or otherwise provide the public with access to the court proceedings
- Cost

Equipment needed?

Some solutions require users to have proprietary equipment, which may limit the ability to involve some participants. To ensure the most success, court leaders should prioritize solutions that can be operated with the simplest and broadest array of equipment that is most readily available to all potential participants. Many participants will have smart phones, webcams, and internet access. However, some participants may only have telephone access.

If the court chooses to use videoconferencing technology for the solution, courts should consider the webcam equipment available to judges and court staff. High quality webcams are relatively inexpensive and should be provided to judges to improve the virtual hearing experience. Additional considerations including adequate lighting and appropriate background for participants acting in an official capacity.

State provided solution or local solution?

Court leaders should consider whether the virtual hearing solution should be selected and provided by the state, the local jurisdiction, or the individual judge. A state-provided solution will provide greater uniformity across the state, making it easier for users who will be appearing in multiple courts and may allow for more advantageous bulk pricing; however, a state-provided solution may not be feasible due to structural barriers, lack of support resources, lack of funding, or other barriers. A local solution will still provide uniformity for court users in that local jurisdiction but may not be the same solution being used by other neighboring jurisdictions. Lastly, if a local or state solution is not possible, an individual judge may choose to set up an individual solution for that court. While an individualized solution may not be the preferable route, it may be the only option.

Assumptions

Public Hearings

Courts have traditionally held most proceedings in public forums. When a court is considering transitioning some or all of its hearings to a virtual hearing forum, court leaders should consider how to provide the public with access to that hearing. Court may choose to do this in multiple ways:

- Streaming the proceeding into the courtroom (if the public can gain access to the courtroom – highly unlikely in today’s environment).
- Streaming the proceeding to a publicly available website, e.g., YouTube.
- Providing a listen-only channel for the public to use.

Courts should consider participants in the virtual hearing solution as individuals who would be permitted in the well of the courtroom, while those who would typically sit in the public area should not be permitted in the virtual hearing solution. Permitting the public into the virtual hearing solution will create logistical issues in managing the virtual courtroom and could result in malicious activity. Therefore, it is recommended that court leaders do not permit the public to have access to the chosen platform.

Participation by Both Represented and Self-represented Litigants

With a growing number of self-represented litigants, court leaders should plan for solutions that can serve both represented and self-represented litigants. This assumption will require court leaders to consider tools to assist self-represented litigants in interacting with the court, such as providing how-to guides, choosing a readily available solution that does not require specialized equipment or significant end-user training, and considering how self-represented litigants can exchange documents with the court. Courts should also expect that some self-represented litigants may not have access to the internet or a smartphone, limited cell plan minutes for calling into hearings, and/or frequently changing telephone numbers that may make communication difficult.

Access to Court Files

Despite considerable advances in making the court record electronically available to judges and litigants, some courts still may not have the capability of providing this access during virtual hearing. Special consideration should be given to how to make any electronic court record available remotely. If a court does not have the ability to provide the electronic court record remotely, courts should consider how judges and other participants will review the court files during a virtual hearing. Options may include uploading documents to an online drive, scanning and emailing, etc.

Metrics

As with any implementation, courts should consider in advance what will constitute success, how to measure it, and how data will be collected. Court leaders should regularly monitor data and adjust processes and approaches as necessary.

Technical Infrastructure

Courts should realistically evaluate their current technical infrastructure to determine readiness to support a transition to virtual hearings. In particular, courts may need to consider bandwidth capabilities if multiple virtual hearings will be conducted simultaneously from the courthouse. If hearings are held remotely from home, judges and other court users need to consider their internet home bandwidth capability. In addition, if a court chooses to record virtual proceedings, consideration must be given to where recordings would be captured - locally or in the cloud - and whether the court actually has the capacity for either option. Lastly, courts should consider their ability to support users, including creating accounts, training internal and external users, and providing support functions.

Challenges and Opportunities

Constitutional Rights

There are both United States Constitution and state constitutional provisions that may impact a court's ability to transition to virtual hearings, such as the right to a public trial, right to confront witnesses, freedom of the press, and other due process protections. Court leaders should recognize those rights as any virtual hearing solution is designed and implemented.

Statutes and Rules

Many state court statutes and rules present barriers to virtual hearings. Court leaders wishing to implement virtual hearings should review their statutes and rules to see if those that prohibit or limit virtual hearings can be changed or relaxed. When reviewing statutes and rules, court leaders should consider those that prohibit or limit involvement by all of the participants in the virtual hearing, including witnesses and language interpreters.

Court Processes

While virtual hearings can be used to replace existing physical hearings in many instances, court leaders should consider whether there are ways to simplify court hearing procedures to promote access to justice. Adapting to virtual hearings in response to a crisis presents an unusual opportunity to rapidly and iteratively reengineer court processes. "Pandemic perspective" has changed perceived limitations. Processes

that only a month ago were limited to face-to-face settings are now effectively being handled virtually. When the pandemic is over, newly gained capabilities and expectations will have changed the world. It will not be possible or even desirable to return to pre-pandemic norms.

Signatures and Exhibits

Many court proceedings require real-time signatures on paperwork, such as during a criminal plea proceeding, and exhibits are regularly exchanged and admitted during certain court proceedings. Courts should consider how to obtain signatures remotely and exchange paperwork through technology or develop other options to gather signatures on physical paperwork. Courts may want to develop protocols for how to obtain exhibits in advance of hearings through electronic submission portals, such as OneDrive, Google Drive, or Dropbox.

Contracts

As with any technology solution, court leaders should carefully evaluate the terms of any contract or licensing agreement to ensure that the needs of the court are protected. Courts should look closely at who would own recordings or court-generated data created, communicated, or compiled by a vendor's solution to ensure neither data or metadata is misused.

For more information, contact NCSC at technology@ncsc.org.