

It Is Time To Make Virtual Trials A Reality

By **Jeffrey Blumenfeld**

Lawyers assume that electronic communication is always available, fast and reliable, and that it's also often the most efficient and effective way to communicate. Few firms still pay rent for physical law libraries. We have replaced most file cabinets with electronic storage, knowing we can print out anything we need on paper. And we instant message at least as much as we email.

But we can easily forget how recent all those developments are, or how long they took to accomplish. And in one of the most important parts of our profession — court proceedings — we're still stuck in the 1950s. The profession in general, and the courts in particular, have been slow to adopt the technologies that can and someday will transform trials.



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The COVID-19 pandemic is rapidly teaching us that there is surprisingly little legal work or activity that absolutely requires everyone to be in the same room. And that's equally true for trials and other court proceedings.

The issue is not whether it is possible to have virtual trials. We have the technology. We just need the incentive. COVID-19 should give us all the incentive we need.

Electronic Court Records

PACER made its debut in 1988, allowing public access to court filings and proceedings. At first, electronic access was available only at a few pilot courts and provided only basic information, such as docket sheets, to users sophisticated enough to have dial-up modems (for those who remember them). Actual case documents remained unavailable, except at the courthouse.

Electronic Filing

Electronic filing in federal courts did not begin for another decade, when Case Management/Electronic Case Files first enabled the legal community to both file and retrieve court records electronically. Forty-five state courts, plus those in Washington, D.C., allow electronic filing in at least some of their courts.

At least some of us still remember the late-night mad dash to the courthouse (at least for the U.S. district court in D.C.) for the guard to time-stamp the filing with the current date, so that when those papers actually reached the clerk's office the following day — which would have been one day past the filing date — the clerk would stamp the papers with the date they reached the guard's desk.

For many years, the requirement of physical signatures on pleadings and other filings in federal courts prevented electronic filing. While federal courts now accept electronic filing, some require that an electronic filing be followed shortly by physically filing paper copies. There is little reason for this requirement, as the court can simply print out filings for any court personnel who may prefer physical documents.

And not all state courts allow electronic filing. Friends who are judges in Pennsylvania, for

example, report that their courts do not allow electronic signatures, and that in the current lockdown no motions can be docketed because there are no people to process them, and all of their many cases subject to mandated dates must be continued. Both the discovery and rules offices are closed for the same reasons.

Court Proceedings

Courts have been slow to adopt the technologies that would make virtual proceedings possible even though lawyers have been using videoconferencing for years in their professional lives, and for even longer in their personal lives.

Adoption of technology by courts has moved at a stately pace, mainly because it could. Looking back, it's obvious that courts could not have handled today's volumes of filings without electronic filing and retrieval, and that the clerks' offices could not have handled the volume of foot traffic and copying that would be required for getting copies of filings. But at the time each of these was adopted, it was a nice-to-have not a must-have, and that is still the case for technology that would allow virtual court proceedings. For example:

- For any use of videoconferencing in a federal court, the litigants must get permission from the presiding judge, provide one month's advance notice, and use only enterprise-level technology (such as Cisco or Polycom), not consumer-focused applications (such as Skype or FaceTime).
- Courts in 15 states (including Washington, D.C.) allow videoconferencing for at least some proceedings, most often for arraignments, and in some courts for testimony in some kinds of cases.

No one knows how long the current lockdowns will last. Government studies in the U.S., the U.K. and elsewhere, warn that a pandemic will last 18 months or longer and could include multiple waves, if people resume their normal routines prematurely. Working from home is not new to lawyers: We all learned that skill when the same technology that made it possible to "work from anywhere" created the expectation that we would "work from everywhere" and be available 24/7.

Surprisingly little needs to be solved or changed to make it possible to replace physical proceedings with virtual proceedings.

Technology

For any virtual function it will be necessary to ensure that all the participants have access to the hardware and software needed to make it work.

I suspect that the federal court rules mandating that the technology be enterprise-level rather than consumer-level were written at an early stage of development of so-called consumer technologies.

In 2003, Apple introduced the iSight webcam for use with iChat AV, their videoconferencing software, and introduced FaceTime on their mobile devices in 2010. Skype was launched as a Voice over Internet Protocol service in 2003 and as a video-calling service in 2005.

Today, companies conduct business every day on their laptops and desktop — and have done so even before COVID-19 — using Skype and FaceTime even before Zoom, Microsoft

Teams, Webex and other similar products. It has often been the case that what began as consumer technology was so convenient, and sufficiently reliable, that it was imported or even smuggled into the enterprise. IM was the first example, and videoconference is the most recent. The distinction between consumer and enterprise apps for collaboration is less meaningful today than ever.

During the current lockdown, children are attending school, college students are taking classes and exams, businesses and law firms are conducting meetings and conferences — even corporate board meetings — using these same consumer technologies. It may be nice to be looking at a giant monitor on one of the federal court's designated enterprise-level technologies, but it's entirely adequate to be working on a personal computer. And, as with all technologies, the more we use it, the more adequate it becomes.

Even where a virtual proceeding will involve a judge or other presiding official, the only requirement is that all the participants have access to the same or interoperable technology. Because the courts will be budget-constrained, they may continue to dictate the technology.

Some participants may not have, and may not be able to afford, a personal computer and broadband access at home. That is an issue of cost, not of technology, and can be solved in multiple ways.

A participant represented by an attorney could use the technology in the attorney's office. A participant not represented by an attorney could have court-subsidized access to borrowed or rented equipment. It may even be cost-effective for courts to maintain some inventory of equipment that can be loaned to participants who do not have or cannot afford their own. And the same is true for jurors.

Hearings and Pretrial Proceedings

Virtual proceedings are currently permitted only in limited circumstances in both federal and state courts, but where they are available, they have proven to work effectively. Only a change in rules is needed to make possible a wide range of virtual proceedings, including trials.

For example, today nearly all depositions are videotaped. Under current rules, if the deponent testifies live, the video recording can be used to impeach on cross-examination. If the applicable rule is satisfied, the testimony of an out-of-jurisdiction witness, both direct and cross, can be presented on video at a trial.

But with today's technology it is certainly possible to have a virtual deposition, with each participant attending by videoconference. Only minor changes in the rules would be needed to make that possible, specifying that by agreement of the parties, any witness could be presented entirely by video.

As a trial lawyer, I would never say that cross-examining a witness, or even putting on a direct examination, can be just as effective by videoconference. But it can be done, and not only when it is not possible for everyone to be in the same room, but also where it is preferable either for convenience or to avoid the expense and time of bringing everyone together.

Trials

There is little difference between a deposition and a trial in terms of whether it can be done virtually. Not to put too fine a point on it, but a trial is little more than a series of depositions witnessed by a trier of fact. Witnesses are placed under oath, shown exhibits and asked questions on direct and cross. If the judge, the jurors, the court reporter, the lawyers and the witnesses can see and hear everything that happens, we can have a trial. And since we can make that happen over videoconference, we can have virtual trials.

Issues

Of course, there are issues that have to be addressed for virtual trials to become routine, and there is an established process for making such sweeping changes for the federal courts. To begin the process of revising the Federal Rules of Evidence (approved by Congress in 1873), the chief justice appointed a panel — the Advisory Committee on Rules of Evidence — at the direction of the Judicial Conference of the United States, the national policymaking body for the federal courts.

Here, the Judicial Conference could direct the chief justice to convene a similar advisory committee on virtual proceedings made up of judges, lawyers, court reporters, court clerks, marshals and others with relevant expertise. The first job of the advisory committee would be to define the issues that need to be addressed.

Some potential issues may be easier to solve than it might seem. For example:

Q: In a virtual jury trial, how do we ensure that jurors don't see or hear news about the trial?

A: The same way we do now: The judge instructs the jurors to not read or listen to news about the trial.

Q: How do we ensure the safety of the jurors in a virtual trial?

A: Actually, it would be easier to ensure the security of the jurors in a virtual trial than in a real-world trial for the simple reason that instead of all the jurors being gathered in one place, each juror will be attending from a location he or she chooses, and no one else (including the judge, the lawyers and the witnesses) needs to know those locations.

Q: How do we ensure the secrecy of the jury's deliberations?

A: For the most part, the answer is a combination of the same answer as for the jurors' safety and the same answer as for jurors not reading or hearing news about the trial: The court instructs the jurors that they must not allow anyone else to hear their deliberations. A combination of earphones and a closed door will go a long way to solving this issue.

Other issues are more difficult, but no doubt can be solved by the experts on the task force:

- Will jury deliberations be less effective in a virtual jury room? This can likely be assessed in a series of mock trials in courtrooms with two juries: one in attendance and one observing by videoconference.

- Is there a basis to challenge jury verdicts that result from a virtual jury room?
- What would need to be done if a jury needs to be sequestered?

And there are particular issues in criminal trials that may prove more challenging:

- Does video cross-examination satisfy the confrontation clause?
- Need the defendant be in the same room as the witness to satisfy the confrontation clause? There are likely some near-precedents from criminal trials where the defendant has not been in the courtroom throughout the trial.
- Would a defendant have to consent to a video trial?
- If the defendant prefers a video trial, can the government insist on a traditional trial?
- Do we need to make any changes to the rules of evidence?
- In the case of a piece of physical evidence — a gun, a knife, a “model” of a bomb — is it sufficient to display the object without the jurors being able to hold it?

Conclusion

COVID-19 is teaching us that whatever activities cannot be continued virtually will grind to a halt when they cannot be continued in the real world. But it’s also teaching us that there is surprisingly little about legal work and legal proceedings that cannot be accomplished virtually in the online world.

We have the technology to make virtual trials possible. Now we have to do the hard work to make virtual trials a reality.

Jeffrey Blumenfeld is a partner at Lowenstein Sandler LLP and co-chairman of the firm's antitrust and trade regulation practice.

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