

Adapting to Remote Justice

Depositions, mediations, hearings, and trials in the age of COVID-19

BY SHANE CAREW

CCOVID-19 has shocked the legal system in ways that are yet to be completely understood. One area changed almost immediately: adoption of remote technology to conduct the judicial system's business.

King County Superior Court Judge Judith Ramseyer observed: "In four to six weeks, superior courts went from conducting most hearings in person to conducting our essential hearings by telephone and video." Similarly, and just as quickly, depositions and mediations pivoted to remote participation.

Judge Ramseyer is one of three co-chairs of the Court Recovery Task Force of the Board of Judicial Administration (BJA),¹ created to address both the short-term and long-term issues caused by the pandemic. The focus of this article is on remote proceedings, a small subset of all the changes facing our justice system.

THEN: GLACIAL MOVEMENT IN ADAPTING TO TECHNOLOGY

The legal profession and the judicial system normally change at a glacial pace, and their slow slog in adapting to new technology, pre-COVID-19, is illustrated by two examples:

1. Federal courts adopted the civil rule of procedure governing



the taking of remote trial testimony in 1996.² It took the state of Washington 14 more years to adopt the identical rule.³

2. Twenty years after electronic filing started in King County, the Washington Supreme Court held that a county clerk could compel a transition to electronic filing and records, over the objections of the superior court judges of the counties. *Burrowes v. Killian*, 195 Wn.2d 350, 352, 459 P.3d 1082 (2020).

NOW: ADAPTING TO TECHNOLOGY ON THE FLY

Recognizing that they no longer have the luxury of bouncing ideas among committees and constituencies for years to craft the perfect rule, state and federal judiciaries in Washington have been in the vanguard, nationwide, of changes necessitated by the pandemic. The once glacial pace of change has become a flash-flood torrent.

After the first COVID-19 cases in Washington were confirmed, the Washington Supreme Court took about 20 days (not 20 years) to implement vitally necessary changes. In less than a month, the court entered an order suspending civil and criminal jury trials; ordering all emergency matters to be heard remotely; and suspending what many argue are constitutionally protected timelines for criminal arraignments and trials,

among many other matters.⁴ *In re Statewide Response by Washington State Court to the COVID-19 Public Health Emergency*, Case No. 25700-B-607 (March 20, 2020).

Our federal bench was likewise in the vanguard of change for the federal court system. One week after the outbreak, with only 216 confirmed cases in the entire country, the Western District of Washington entered the first of nine "general orders." *In re Court Operation Under the Exigent Circumstances Created by COVID-19 and Related Coronavirus*, General Order No. 01-20 (March 6, 2020). Initially, the court simply continued all civil and criminal matters calling for in-court appearances, continued all grand jury proceedings, and suspended application of the Speedy Trial Act to criminal defendants. *Id.* As facts developed, the Western District has entered amended orders to adapt to circumstances.

The Eastern District followed shortly after with its own general order, vacating all hearings and trials for civil and criminal matters, and temporarily vacating grand juries, pending further orders. *In re Court Operations Under the Exigent Circumstances Created by the (COVID-19)*, General Order No. 20-101-1 (March 18, 2020).

The pandemic has also fast forwarded the implementation of video capabilities in the courtroom in counties that were lagging behind others. This will help make hearings more accessible to those involved, and will result in proceedings being more accessible to the public.

After implementing the necessary changes, courts are now starting to post training videos for civil jury trials. The King County Superior Court website now has a page called "Virtual Civil Jury Trial Preparation" that includes four videos covering pretrial proceedings, jury considerations, and recommendations to attorneys.⁵ The federal court for the Western District sponsored a "Virtual Civil Jury Trial Seminar" on Feb. 5, 2021, for federal judiciary and staff.⁶

COORDINATING SYSTEMWIDE CHANGE

Rapid change requires systemwide coordination. The state and federal court systems are attempting to coordinate and adopt

changes fairly consistently through frequent coordinated meetings—online, of course. These efforts include weekly calls conducted by Hon. Ricardo Martinez, chief judge of the United States District Court for the Western District of Washington, with all the Western District's respective government personnel, including the Marshal's Service, U.S. Attorney, Federal Public Defender's office, and court staff. To facilitate communication among the federal courts, the Administrative Office of the U.S. Courts has created the inter-governmental Federal Judiciary COVID-19 Task Force.

Superior Court Administrators are conducting monthly strategy meetings statewide, and the state's judiciary is coordinating through the previously mentioned Court Recovery Task Force along with its dozen committees and subcommittees.⁷

CHANGING THE NORMS

Depositions

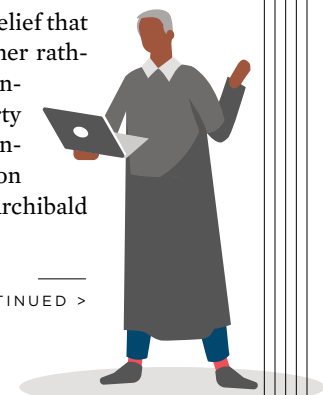
The new norm of remote depositions will take some adjusting to, but Rick Friedman of Friedman Rubin in Seattle was ahead of the game. Friedman practiced for many years in Alaska which, by geographical necessity, is far ahead of other states in conducting remote depositions. Friedman, who has not taken a "live" deposition in several years, believes he has had *better* results using remote depositions. The goal of a deposition is to obtain information, to pin witnesses down to specifics in their testimony. A lawyer asking questions through a window in a computer screen is less intimidating, and that's precisely the point: Friedman firmly believes that when witnesses feel more comfortable, they are actually *more* likely to be more forthcoming.

Mediations

Edward M. Archibald has been a full-time, independent, unaffiliated mediator for 20 years. He hasn't conducted an "in person" mediation since February 2020. "When the pandemic forced us to consider reasonable alternatives, remote mediations immediately became the norm," Archibald said.

Archibald believes that COVID-19 has impacted alternative dispute resolution in some surprising ways. For one thing, he has conducted more "early" mediations—pre-litigation or early in the litigation process. Archibald attributes that to several factors: (1) the uncertainty of case schedules and trial dates; (2) limitations on "in-person" discovery; (3) the apparently shared belief that the opposing side may be incentivized to settle sooner rather than later; and (4) the lower cost and greater convenience of a remote mediation, particularly if a party is located out of state. (In some instances, overseas underwriters have been directly involved in the mediation process, rather than local representatives, which Archibald believes also helps the settlement process.)

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These impacts are not a local anomaly. The cases Archibald has mediated in 2020 were pending in Washington, Alaska, Oregon, and California. “The cases have resolved in a manner similar to what I would have expected if the mediation had been conducted in person, and the same percentage of cases are settling,” Archibald said.

Trials

Civil Trials. There haven’t been many civil trials across the state since March 2020. And lawyers who have developed a comfort level in jury trials may mourn the lost opportunity to employ those skills in a remote trial: Where you position yourself in the “well” of the courtroom while examining witnesses, your posture, your physical gestures to convey a point—all are gone. Eye contact with jurors, assessing interest or understanding based on the jurors’ body language—also gone.

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dialogue with individual jurors.

“I also think something is lost because jurors don’t get to bond with one another. They haven’t gotten to see one another in the jury pool, talk about lunch or the weather during time in the jury room. I feel much better when jurors can connect with one another. Now, everyone refers to the other jurors only by juror number. Something is definitely lost.”

However, there is at least one benefit to remote jury trials. “The chance in a complicated case to put every exhibit on each juror’s screen for close scrutiny undoubtedly helped,” said Keane.

Judge Marsha Pechman of the Federal District Court for the Western District of Washington conducted one of the first federal civil bench trials during the pan-



dem, and now four jury trials. She was on the committee that compiled a “Virtual Trial” handbook for attorneys, and notes, “We have received enthusiastic positive feedback for the handbook. It has really helped attorneys adapt more quickly than you might expect.”⁸

Criminal Trials. Addressing all of the potential consequences of conducting criminal jury trials during the pandemic is beyond the scope of this article, which will focus just on the process of jury selection—an area that has created some new concerns about fundamental fairness. Leslie Brown, communications manager for the King County Department of Public Defense, points out that the pandemic will make it even harder to convene juries that are representative of the community. Even before the pandemic, in those cities with more racial diversity, Black people were underrepresented in jury pools. Furthermore, she says, studies show that Black defendants are convicted at a higher rate than white defendants when there are no Black members of the jury pool.⁹ “In other words, the composition of the jury pool matters to our clients, who are poor and disproportionately people of color,” Brown said.

Criminal defense counsel, on the whole, believe the disproportionality will get worse as jury trials start up again under a “new normal,” because the court’s response so far requires access to technology that many poor people don’t have. And of course, people of color have been harder hit by the pandemic, both economically and physically, thereby making it more likely that they would ask for a hardship exemption from jury service.

Kittitas County was ahead of most Washington counties in reaching Phase 3 of the governor’s Healthy Washington plan and resumed convening juries on July 7, 2020. The jury pool of 68 citizens was directed to appear at the Kittitas Valley Event Center. Chairs were set up at appropriate distances. In an encouraging sign, prospective jurors self-imposed social distancing, and all wore masks.

The trial lasted two days. The

Shane Carew is a 1980 graduate of Tulane School of Law and practices in Seattle in the areas of maritime law and legal malpractice.



courtroom was rearranged to attempt to maintain the appropriate social distancing among all the participants, including the jurors. The jurors deliberated in a jury room with individual desks for each juror, rather than the usual conference table, which was commented upon favorably by almost all the jurors.

“After each case we are tweaking the process to improve it, and the parameters are constantly changing,” said Sarah Keith, the court administrator for Kittitas County.

THE VIEW FROM THE BENCH

The court administrators and judges interviewed for this article welcomed the opportunity to directly address the members of the Bar about our collective future.

Washington Supreme Court Associate Chief Justice Charles W. Johnson noted that something is lost when all court business is conducted on the internet, an opinion shared by almost every judge interviewed for this article. In Justice Johnson’s view: “There is a reason why our body politic had historically invested in courthouses with impressive architecture, beautiful finishing, and furnishings inside courtrooms: it is to imbue in the citizens seeking justice a sense of solemnity and respect for the important matters addressed in the courthouse. Being physically present at the Supreme Court sets the appropriate atmosphere for the advocates and the citizens entering—something that online oral arguments just can’t fully replicate.”

And Judge Ricardo Martinez, Chief Judge of the United States District Court for the Western District of Washington, offers this advice: (1) For those who have civil cases on the docket, please speak to your clients about trying their case to a judge,

not a jury. We have several senior status judges who are ready to conduct trials now, during the pandemic. (2) Engage your opposing counsel to consider creative ways to bring cases to a hearing or conclusion, and we, on the bench, will give your suggestions serious consideration. (3) Petition your Congressional representatives to fill the five active judge positions that are now vacant.

CONCLUSION

We are at a critical inflection point in our justice system. As members of a self-governing bar, if we are true to our oath, we must get involved—now and in the future—to help address extensive case backlogs, access-to-justice barriers, ongoing safety and fairness concerns, new technology needs and training, facilities costs, and ongoing procedural changes.

As a start, check in regularly with the Washington Courts’ dedicated COVID-19 website, www.courts.wa.gov/COVID19. Other opportunities to help exist in your community, or your practice area. Explore the WSBA’s COVID-19 webpage: www.wsba.org/for-legal-professionals/member-support/covid-19. **BN**

NOTES

1. The Board of Judicial Administration is one of those behind-the-scenes entities that’s relatively unknown but is vital to maintaining a viable justice system. Its voting membership comprises 15 judges from around the state from every level of the judiciary. www.courts.wa.gov/programs_orgs/pos_bja/.
2. “For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.” Fed. R. Civ. Pro. 43(a).
3. CR 43(a). In re Marriage of Swaka, 179 Wn. App. 549, 554, 319 P.3d 69 (2014).
4. Find this and all Washington Supreme Court orders relating to the COVID-19 pandemic at <https://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.COVID19>.
5. www.kingcounty.gov/courts/superior-court/get-help/civil-jtrials.aspx.
6. The seminar is posted online at www.youtube.com/playlist?list=PLQQODreSvdKFxJBZBxh2ANIWBKZKpKyZ.
7. The Task Force committees are: Technology Considerations; General Civil Litigation; Lessons Learned; Criminal Matters; Appellate Courts; Family Law; Child Welfare; Facilities and Logistics; and Public Outreach and Communication. The three Task Force subcommittees are: Juvenile Criminal Civil, Therapeutic Courts, and Adult. www.courts.wa.gov/programs_orgs/pos_bja/?fa=pos_bja.TFcommittees.
8. www.wawd.uscourts.gov/sites/wawd/files/VirtualTrialHandbookforAttorneys.pdf.
9. See, Ashish S. Joshi and Christina T. Kline, “Lack of Jury Diversity: A National Problem with Individual Consequences,” Sept. 1, 2015, American Bar Association, available at www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences.



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