

2023 Questionnaire of the 1st Study Commission IAJ-UIM
“The Effects of Remote Work on the Judicial Workplace and the
Administration of Justice”

United States Federal Judges Association

Hon. Marilyn L. Huff, Past President

Questions:

1) Remote work of judges in your country

Were judges permitted to work remotely in your country prior to and/or during the COVID-19 pandemic? Was technical equipment made available to the judges to enable them to work remotely?

Prior to the COVID-19 pandemic, United States federal judges were permitted to conduct certain work remotely, but the vast majority of proceedings were held in person in a courthouse. The limited remote work included accessing electronic case files, preparing orders, limited telephonic pretrial hearings in civil cases, and special circumstances video appellate hearings. During the pandemic, both United States federal and state courts rapidly adapted to adopt video conferencing or teleconferencing applications. The United States federal court policy prohibits the broadcasting of federal trial court proceedings.¹ In March 2020, shortly after the start of the COVID-19 pandemic, the courts authorized a temporary exception to permit the use of video and teleconference technology to provide public access to court proceedings.²

On March 27, 2020, Congress passed and the President signed into law the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”).³ The CARES Act gave judges the authority to use video and teleconferencing technologies in certain criminal proceedings with the consent of defendants.⁴ Under the CARES Act, certain federal criminal proceedings could proceed via video or teleconferencing when: 1) the Judicial Conference of the United States finds that emergency conditions due to the pandemic have and will materially affect the functioning of federal courts; and 2) the chief judge of the relevant federal district court authorizes the use of video or teleconferencing.⁵ Under the CARES Act, a number of pretrial and post-conviction criminal proceedings were permitted to take place via videoconference, including detention hearings, initial appearances, preliminary hearings, waivers of indictment, arraignments,

¹ U.S. COURTS, Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic (Mar. 31, 2020), <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic>.

² *Id.*

³ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–136 (2020).

⁴ U.S. COURTS, Judiciary Provides Public, Media Access to Electronic Court Proceedings (Apr. 3, 2020), <https://www.uscourts.gov/news/2020/04/03/judiciary-provides-public-media-access-electronic-court-proceedings>.

⁵ Steven Gordon, *CARES Act And The Future Of Remote Criminal Proceedings*, LAW360 (Apr. 7, 2020), <https://www.law360.com/articles/1259596/cares-act-and-the-future-of-remote-criminal-proceedings>.

probation, supervised release revocation proceedings, pretrial release revocation proceedings, and appearances based on failure to appear.⁶

Prior to the enactment of the CARES Act, the Federal Rules of Criminal Procedure permitted federal courts to use video or teleconferencing technologies for only a limited number of criminal proceedings and generally only with the defendant's consent.⁷ Under Rule 5(g) of the Federal Rules of Criminal Procedure, video teleconferencing can be used to conduct an initial appearance if the defendant consents.⁸ Under Rule 10(c), video teleconferencing can be used to arraign a defendant if the defendant consents.⁹ Under Rule 40(d), video teleconferencing can be used to conduct an appearance for arrest for failing to appear in another district or for violating conditions of release set in another district if the defendant consents.¹⁰ The Federal Rules of Criminal Procedure generally provide that a defendant must be present at the initial appearance, the initial arraignment, the plea, every stage of trial, and sentencing.¹¹ Federal Rule of Criminal Procedure 43(b) states that a defendant need not be present when the offense is a misdemeanor offense and, with the defendant's written consent, the court can permit arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.¹² Accordingly, the most significant impact of the CARES Act on the use of remote videoconferencing technology in criminal cases was the ability to use video teleconferencing for guilty pleas and sentencings in both misdemeanor and felony cases.¹³ The authorization to conduct remote videoconferencing proceedings in criminal cases ended on May 10, 2023.¹⁴ There is currently a 120-day grace period in place allowing federal courts to continue to provide the same remote access to civil and bankruptcy proceedings as they did during the pandemic.¹⁵ In addition, federal judges may still continue to conduct other work remotely. Court administrators provided technical equipment to judges to enable them to work remotely. The technology made available varied based on the particular court and the particular judge's needs.

Generally, use of video technology in state courts was limited prior to the pandemic, but quickly became prevalent in response to the pandemic. Research conducted by the Pew Research Center found, for instance, that prior to the COVID-19 pandemic, state courts in Michigan and Texas did not conduct a single video hearing in a civil case.¹⁶ Between April 1 and June 1, 2020, state courts in Michigan conducted over 35,000 video hearings and state courts in Texas conducted

⁶ *Id.*

⁷ *See generally* FED. R. CRIM. P.

⁸ FED. R. CRIM. P. 5(g).

⁹ FED. R. CRIM. P. 10(c).

¹⁰ FED. R. CRIM. P. 40(d).

¹¹ FED. R. CRIM. P. 43(a).

¹² FED. R. CRIM. P. 43(b).

¹³ Steven Gordon, *CARES Act And The Future Of Remote Criminal Proceedings*, LAW360 (Apr. 7, 2020), <https://www.law360.com/articles/1259596/cares-act-and-the-future-of-remote-criminal-proceedings>.

¹⁴ U.S. COURTS, *Judiciary Ends COVID Emergency; Study of Broadcast Policy Continues* (May 11, 2023), <https://www.uscourts.gov/news/2023/05/11/judiciary-ends-covid-emergency-study-broadcast-policy-continues>.

¹⁵ *Id.*

¹⁶ *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, THE PEW CHARITABLE TRUSTS (Dec. 1, 2021), <https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations>.

over 122,000 video hearings.¹⁷ The policies and procedures of state court systems vary state by state, but each state attempted to adapt to the necessity of remote work during the pandemic.

What is the status of remote work by judges in your country now?

Many judges continue to electronically review case files remotely and some continue to conduct civil proceedings via videoconferencing or teleconferencing. The authorization provided by the CARES Act permitting the use of videoconferencing technologies ended on May 10, 2023, but there is a 120-day grace period, through September 21, 2023, that permits remote hearings in civil and bankruptcy proceedings.¹⁸ The Judicial Conference of the United States is currently evaluating whether to extend authorization for videoconferencing and teleconferencing in non-trial civil and bankruptcy proceedings within the federal system.¹⁹

Many federal judges continue to utilize remote hearings in civil proceedings. But, in state courts, some states are beginning to phase out the use of remote work by judges. For example, no remote work is permitted in state court in Cook County, Illinois as of June 4, 2023.²⁰ The Cook County chief judge ordered approximately 400 judges to return to work in person.²¹ However, the chief judge launched a committee to study the possibility of returning to part-time remote work at some point in the future, indicating that at least some courts may not be opposed to some degree of remote work by judges going forward.²²

2) Effect on Judicial Work

Did remote work change judicial work in general for better or worse – or both – in your country?

The federal courts will continue to study the effects of remote work on the judicial system. Some of the benefits of remote work include greater flexibility in the work, reduced commute time, improved work life balance, reduced space, increased efficiency of meetings, less cost, and increased ease of scheduling.²³ On the other side, some are concerned about a decrease in productivity, the lack of supervision, and a loss of collegiality and collaboration in the workforce. The federal system will evaluate the pros and cons of remote work on judicial work as it considers whether to permit remote work to continue in the judicial workplace.

¹⁷ *Id.*

¹⁸ U.S. COURTS, Judiciary Ends COVID Emergency; Study of Broadcast Policy Continues (May 11, 2023), <https://www.uscourts.gov/news/2023/05/11/judiciary-ends-covid-emergency-study-broadcast-policy-continues>.

¹⁹ *Id.*

²⁰ Sophie Sherry, *Cook County Judges, Court Employees Ordered to Phase Out Remote Work*, CHICAGO SUN TIMES (Apr. 25, 2023), <https://chicago.suntimes.com/2023/4/25/23697928/cook-county-judges-and-court-employees-told-to-start-returning-to-work-in-person>.

²¹ *Id.*

²² *Id.*

²³ Lee Rosenthal et al., *The Zooming of Federal Civil Litigation*, 104 JUDICATURE 13 (2020).

Does the remote work of judges have an impact on the judicial workplace in your country? Negative, positive, or both?

Research on the benefits and limitations of remote work is ongoing. Some noted benefits of remote work include a lack of commute time, increased work flexibility, improvements in employees' work-life balance, and an increase in creativity and motivation.²⁴ Studies have also found that remote work has contributed to increased productivity.²⁵ Studies also note challenges caused by remote work including the interference of home-life in the work day, ineffective communication or communication challenges, procrastination, and loneliness.²⁶ The federal judiciary continues to study the benefits and limitations of remote work on the judicial workplace.

What future effects of remote work on the judicial workplace – negative, positive, or both – can be expected?

Following the COVID-19 pandemic, remote work will continue to be more prevalent in some workplaces across the country, including the judicial workplace. Remote work has made certain proceedings – such as internal meetings, status conferences, and settlement conferences – easier to schedule, more focused and efficient, and less costly than in person meetings.²⁷ Some argue that videoconferencing and teleconferencing technologies should continue to be used for these types of proceedings.²⁸ On the other hand, remote work has made some proceedings – such as cross-examination of certain witnesses, jury selection, and jury trials – more challenging.²⁹ For example, videoconferencing and teleconferencing technologies make it difficult for judges, lawyers, and jurors to conduct credibility assessments of witnesses.³⁰ Some maintain that complicated motion hearings and trials should remain in person. These are some of the many considerations that the federal system is taking into account in evaluating the future of remote work on the judicial workplace.

Judges also have different preferences on the remote work policies of their chambers' staff. Some judges prefer to have all law clerks and employees in the office to increase collaboration and collegiality within chambers. Other judges have adopted a more hybrid remote work policy following the pandemic. Some court administrators require an employee to sign a telework agreement and limit an employee's use of telework. These policies currently vary based on the particular court and the particular judge.

²⁴ *Id.*; Grzegorz Kowalski et al., *Remote Working and Work Effectiveness: A Leader Perspective*, 19 INT. J. ENV. RES. & PUBLIC HEALTH 15326 (2022).

²⁵ Grzegorz Kowalski et al., *Remote Working and Work Effectiveness: A Leader Perspective*, 19 INT. J. ENV. RES. & PUBLIC HEALTH 15326 (2022).

²⁶ *Id.*

²⁷ Lee Rosenthal et al., *The Zooming of Federal Civil Litigation*, 104 JUDICATURE 13 (2020).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

3) Effects on the Administration of Justice

What are the pros and cons of remote work on the administration of justice?

There are numerous pros and cons of remote work on the administration of justice. Supporters of remote work argue that remote work increases efficiency and comes with significant cost savings. The efficiency gains and cost savings of video teleconferencing is especially substantial for certain proceedings, such as internal meetings, court conferences, some oral arguments, and settlement conferences.³¹ This is particularly true when travel would otherwise be required if the conference were to take place in person. Remote work provides substantial cost savings in air and hotel travel for all parties. Another benefit to remote work is the ease of scheduling.³² Parties are able to have greater availability for hearings, discovery conferences, status conferences, and settlement conferences when the proceedings are conducted remotely. This increased flexibility may permit those attorneys who are the ultimate decision-makers to be active participants in settlement conferences and other judicial proceedings. For certain proceedings, however, the cost savings and efficiency gains may be outweighed by other factors. Complex motion hearings and trials are arguably best conducted in person, where lawyers can utilize a variety of litigation tactics that might be restricted or limited by remote proceedings and judges can better assess credibility of witnesses.³³

Videoconferencing and teleconferencing technology may also help improve transparency in courtroom proceedings by allowing for increased public and media access.³⁴ For instance, approximately 500,000 individuals listened to the live oral arguments heard by the Supreme Court during the pandemic, and approximately 2 million individuals listened to the recordings of the oral arguments online.³⁵ The increased access to courtroom proceedings is especially beneficial when cases deal with issues that are of national significance. Certain courts employ a listen-in line so that non-parties can hear court proceedings but are not able to speak or be heard by parties and the court.³⁶

Although remote work provides many benefits to the administration of justice, there are notable challenges and concerns regarding the effect of remote work on the administration of justice worth considering. Certain litigants, such as unrepresented litigants and prisoners, may face challenges accessing the required technology for videoconference proceedings, such as having access to a computer with a video camera and a microphone.³⁷ Access to videoconferencing or teleconferencing applications in larger cities is greater than that in rural parts of the country, where individuals may not have broadband or adequate internet access, if access at

³¹ Lee Rosenthal et al., *The Zooming of Federal Civil Litigation*, 104 JUDICATURE 13 (2020).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ See e.g., U.S. COURTS, CourtCall Public “Listen Only” Phone Line, <http://www.caeb.uscourts.gov/documents/Forms/Misc/CourtCallPublicPhoneLine.pdf>; U.S. DISTRICT COURT DISTRICT OF COLUMBIA, Public and Media Access to Court Proceedings During COVID-19 Emergency, <https://www.dcd.uscourts.gov/public-and-media-access-to-court-proceedings-during-covid-19-emergency>.

³⁷ Lee Rosenthal et al., *The Zooming of Federal Civil Litigation*, 104 JUDICATURE 13 (2020).

all.³⁸ Additionally, some litigants – as well as attorneys and Court personnel – may face technological challenges in using the particular technology.

In addition to concerns regarding access to technology, some researchers have also raised concerns regarding the disparate outcomes for litigants whose hearings were conducted remotely as opposed to those in person.³⁹ For example, one study found that defendants who had remote bail hearings had substantially higher bond amounts than defendants who had in person bail hearings.⁴⁰ Another study that focused on immigration courts found that detained individuals who had remote hearings were more likely to be deported than detained individuals who had their hearings in person.⁴¹

Does remote work have a positive or negative impact on the administration of justice in general in your country?

The courts will continue to study the positive and negative impacts of remote work. On the criminal side, a defendant has a right to face the accuser, so use of remote technology restricts a criminal defendant's constitutional rights. On the civil side, certain pretrial hearings are more conducive to videoconference technology as it saves time and expense for the lawyers and increases the ease at which litigants, attorneys, and court personnel can access the court system and schedule proceedings. However, remote technology may pose additional challenges to certain civil proceedings such as cross-examination of witnesses and jury trials. Although many of the positive aspects of remote work on the administration of justice apply to all court proceedings, generally remote work has a more substantial positive impact on the administration of justice in the civil setting than it does in the criminal setting.

Are you aware of the public's perceptions of remote work by judges?

Traditionally, proceedings in a courtroom are conducted with a dignity and solemnity to convey the importance of equal justice under the law. Certain members of the public may conclude that remote work by judges lacks this solemnity, and proceedings may appear more informal when conducted via videoconferencing or teleconferencing technologies. For example, the Texas state Supreme Court Chief Justice noted that in Texas there has been "some public pushback against judges not being in the courtroom or their office when they're conducting these proceedings."⁴² Although the Texas Supreme Court Chief Justice noted that these public perceptions will likely change over time, he reported that some members of the public complained that "the judge is not

³⁸ Huo Jingnan, *To Try or Not To Try – Remotely. As Jury Trials Move Online, Courts See Pros and Cons*, NPR (Mar. 18, 2022); King County, *Broadband Access Study* (2020), kingcounty.gov/~media/depts/it/services/cable/202002-Broadband-Access-Study.ashx?la=en.

³⁹ Janna Adelstein and Alicia Bannon, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, BRENNAN CENTER FOR JUSTICE (Sept. 10, 2020), <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Allie Reed, *Virtual Court Hearings Earn Permanent Spot After Pandemic's End*, BLOOMBERG LAW (May 18, 2023), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XB4E6MAG000000?bna_news_filter=us-law-week.

doing her or her job if they're not on the premises.”⁴³ However, there are also likely many members of the public whose perceptions of remote work on judicial work and the administration of justice more broadly are neutral or positive.

What are the positive and/or negative effects of holding remote hearings/conferences?

Remote hearings or conferences permit substantial cost savings, greater efficiency in proceedings and ease of scheduling, and potentially increased participation in court proceedings. The negative effects are access to technology for remote proceedings and disadvantages judges and lawyers may face when holding certain proceedings remotely. For example, with a telephonic hearing, lawyers and judges are not able to discern the reactions and subtle cues of the entire courtroom.

4) Remote Work and Judicial Independence

Do you see any positive or negative effects of remote work on judicial independence?

In general, there have not been any noticeable positive or negative effects of remote work on judicial independence.

5) Limits on Remote Work for Judges

Does your country place any limits on the remote work of judges?

There are limits placed on the remote work of judges in criminal and civil cases. The Confrontation Clause of the United States Constitution grants a criminal defendant a right to be present at a criminal proceeding when there are witnesses.⁴⁴ The Federal Rules of Criminal Procedure restrict the remote work of judges by placing limits on remote hearings in criminal cases with some exceptions. Rule 43 of the Federal Rules of Criminal Procedure permits videoconference pleas for misdemeanor offenses, and Rules 5(g) and 10(c) permit the use of video teleconferencing for initial appearances or arraignments where a defendant consents. Rule 43 does not make any provision for video teleconferencing of pleas for felony offenses or of sentencing proceedings.⁴⁵ The United States Court of Appeals for the Seventh Circuit recently held that “the plain language of Rule 43 requires all parties to be present for a defendant’s [felony] plea and that a defendant cannot consent to a plea via videoconference.”⁴⁶

⁴³ *Id.*

⁴⁴ See *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987); *Delaware v. Van Arsdaal*, 475 U.S. 673, 679–80 (1986)

⁴⁵ See Fed. R. Crim. P. 43.

⁴⁶ *U.S. v. Bethea*, 888 F.3d 864, 867 (7th Cir. 2018).

In civil cases, Judicial Conference policy prohibits federal trial court proceedings from being broadcasted.⁴⁷ Additionally, the Federal Rules of Civil Procedure do not make any provisions for the videoconferencing or teleconferencing of civil proceedings in federal court, except for the use of depositions in court proceedings in limited circumstances.⁴⁸ A party's testimony taken under oath in a deposition may be used at a hearing or trial if the party was present or represented at the taking of the deposition or had reasonable notice of it, and the deposition of a witness can be used at a hearing or trial when the witness is unavailable.⁴⁹

Are there any proposals to change rules or statutes in your country either to permit more, or to limit, remote work by judges?

The relevant Judicial Conference committees are considering recommending an amendment to the current broadcasting policy to give federal judges discretion to permit remote public audio access to certain non-trial civil and bankruptcy proceedings.⁵⁰ If adopted by the Judicial Conference, judges could conduct certain civil and bankruptcy proceedings remotely.

Across the United States, states have various proposals to change rules or statutes to permit more remote work by judges. For example, a proposed new rule in Washington would permit jury selection to be conducted by videoconference in all cases in which all participants could simultaneously see, hear, and speak with one another.⁵¹ The judges in support of this proposed change noted that jurors preferred remote jury selection finding that their time is "better used."⁵² Further, remote jury selection "promises to improve the process and provide a more accessible, affordable, and efficient means for citizens from all walks of life to perform their civic duty and add their voices to this crucial process."⁵³ In California, the Criminal Law Advisory Committee put forth a proposal during the pandemic to permit remote appearances in criminal proceedings.⁵⁴ There are numerous proposals to permit more, or to limit, remote work for judges. In general, more states are considering expanding remote work of judges rather than limiting it.

Should there be any changes of rules or statutes in your country either to permit more, or to limit, remote work for judges?

Federal courts are conducting additional research on the benefits and limitations of videoconferencing and teleconferencing technologies in certain non-trial civil and bankruptcy proceedings. Federal courts will continue to evaluate whether any rule changes are needed to adapt

⁴⁷ U.S. COURTS, Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic (Mar. 31, 2020), <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic>.

⁴⁸ See generally Fed. R. Civ. P.; Fed. R. Civ. P. 32.

⁴⁹ Fed. R. Civ. P. 32.

⁵⁰ U.S. COURTS, Judiciary Ends COVID Emergency; Study of Broadcast Policy Continues (May 11, 2023), <https://www.uscourts.gov/news/2023/05/11/judiciary-ends-covid-emergency-study-broadcast-policy-continues>.

⁵¹ Washington Courts, Proposed New General Rule ("GR") 41 (Wa. 2021), https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=5838.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Judicial Council of California, Invitation to Comment LEG21-01, Proposal for Judicial Council—Sponsored Legislation: Authorization for Remote Appearances and Expansion of Defendant Personal Presence Provisions in Criminal Proceedings (2021), <https://www.courts.ca.gov/documents/leg21-01.pdf>.

to an increased use in technology that permits more remote work while also considering whether use of available technology is outweighed by other factors. Federal courts will continue to evaluate the lessons learned from the use of videoconferencing and teleconferencing technologies during the COVID-19 pandemic and will review the costs and benefits associated with their continued use.