

# The Texas Lawbook

Free Speech, Due Process and Trial by Jury

## Remote Hearings: Let's Hope They Become the Rule Rather Than the Exception

April 7, 2020 | VICTOR VITAL AND LIZ DANKERS

One day after the March 23 shelter-in-place order went into effect for Dallas County to prevent the spread of COVID-19, the local ABC affiliate, WFAA, reported that one man was the sole individual to board a Southwest flight leaving Dallas. Who was this man and why was it so essential he make the trip? He was an attorney heading to a court hearing in Houston.

Good attorneys always puts their clients first, and that includes making sure the client is adequately represented at hearings. But is it necessary for attorneys in this day and age of ubiquitous technology to put the health and safety of themselves and others at risk? Further, if the technology is available, why are we still conducting hearings like we were Abraham Lincoln in the 1800s, tethered to live court appearances as the rule?

It makes no sense why in-person hearings are seen as the rule, rather than as the exception. While the current crisis is unfortunate, we are faced with the unique opportunity to bring litigation into the technological age with remote hearing solutions. As we are learning quickly what activities are truly "essential," it's time to reevaluate if in-person attendance at all hearings is essential in most instances.

### Reasons for making the transition

*The technology is widely available, and it is already being used by certain courts.*

An adequate understanding of technology is mandatory to be a modern-day attorney. We utilize teleconferencing, video conferencing and other technological solutions in every other facet of lawyering. Our communications with clients, counsel and the courts are almost exclusively conducted through email or by telephone. Gone are the

days of routinely sending a physical letter to opposing counsel with a settlement offer and waiting for the postman to deliver the counteroffer.

Likewise, e-discovery and e-filing are the norm. Law schools, aware of the dramatic shift in how lawyers practice on a daily basis, are now equipping students with the tools to use technology in practice. For example, the University of Oklahoma College of Law started a Digital Initiative in 2014. Through the Digital Initiative, the law school offers students a digital training curriculum, technology certifications and access to new technologies with a goal of preparing students for the modern practice of law. We've come a long way from the 1800s.

The use of remote hearings is really not that innovative. For example, a 2004 review of technology use in the courtroom in Australia mentions that videoconferencing was widely used for a range of pretrial and administrative hearings. Similarly, Canada, the U.K. and India have all been early adopters of video conferencing for a variety of different hearings.

Proponents have been calling for the expanded use of videoconferencing in the U.S. for over a decade. In a 2006 survey by the Federal Judicial Center, an appellate court judge called videoconferencing the "wave of the future." Fourteen years later, the technology has improved and more practitioners have been exposed to video conferences or calls in some capacity, yet remote hearings have still been the exception rather than the rule.

Enter Covid-19 and suddenly the whole country is adapting how we conduct our daily lives and jobs. Courts across the country are finally utilizing teleconferencing or videoconferencing solutions to conduct

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business on a regular basis. While the practice of remote hearings is being thrust upon us at the moment out of necessity, now that remote hearings are taking place on a large scale, we should reject attempts to return to the status quo once social distancing restrictions are lifted.

## *Remote hearings allow us to balance health and safety while still providing access to courts.*

The primary motivator behind the current shift — health and safety — is a compelling reason to use remote hearings. No attorney, judge, or court employee should be required to put their life at risk by attending a hearing. But health and safety must be balanced with providing access to the courts.

Over the last several weeks, courts around the country have been tested. Hearings are being delayed or cancelled on a large scale, depositions are being postponed and in some states the courts are only addressing emergency matters. Several states, including New York and Virginia, are cancelling all nonessential, nonemergency court proceedings. California has suspended all state court in-person oral arguments. Oklahoma courts have delayed all filing deadlines for 30 days and expanded the statute of limitations for all claims for 30 days. In Texas, the state's Supreme Court has asked courts to either suspend proceedings or minimize attendance at proceedings to avoid large groups gathering. The Texas Supreme Court has also encouraged courts to implement remote proceedings.

Remote hearings and other technological solutions allow us to maintain our current system without compromising access to the courts. Important reasons for delays and rescheduling will still exist, such as if a party, attorney or judge is dealing with health problems. But if all parties are healthy enough to attend a remote hearing and the technology is available, there is likely not a compelling reason to cancel certain hearings, such as dispositive motion hearings, discovery hearings or appellate hearings. With the exception of trials and evidentiary hearings with many exhibits, most hearings are easily convertible to remote hearings.

If we fail to keep the courts functioning throughout the pandemic and wait for restrictions to be lifted, we run the risk that the courts will become severely congested. The combination of needing to reschedule a large amount of current delayed litigation proceedings along with scheduling a slew of new litigation from claims brought about by the crisis will likely result in packed dockets.

## *Remote hearings will increase efficiency and decrease costs.*

Rather than viewing remote hearings as a “forced” change, perhaps we should view their implementation as a move toward common sense. Deploying and leveraging remote hearing technology will allow us to be more cost-efficient and rational. Why does a lawyer need to travel to court for a hearing, when you can deploy phone or video conference technology to effectuate justice? Traveling less will save attorneys and clients two valuable resources — time and money. Remote hearings will reduce the costs associated with travel to and from hearings for attorneys, witnesses and parties. They will allow parties and attorneys to participate in a hearing regardless of where they are located. The solution to so many of our time and money problems seems almost too simple:

- Are you trying to juggle various clients' needs all at once? With remote hearings, a lead counsel who works in Dallas can attend a hearing in Laredo without interrupting their normal workday routine. They can drive to their office, tackle a few client calls, prep for the hearing, attend the hearing remotely and jump right back into helping other clients afterward.
- Do you have a full calendar and you need to schedule a motion to dismiss hearing in El Paso and a motion to compel hearing in Tyler on the same day? It's possible with remote hearings.
- Are you representing a party with only a limited claim or interest in the case? With a remote hearing there's no need to waste a client's money driving to a hearing only to make an appearance.
- Do you have a junior associate who wants to attend a hearing, but you can't justify the cost of flying them to Houston? The associate can sit-in with you in a conference room or your office and gain valuable experience.
- Complacency should not replace common sense. Rather than automatically holding hearings in person, we should instead be asking ourselves is there any good reason we need to hold a hearing in person? The standard should be to schedule most pretrial hearings (particularly nonevidentiary hearings) as remote hearings and seek permission from the court only if an in-person hearing is necessary.

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## Where are we now?

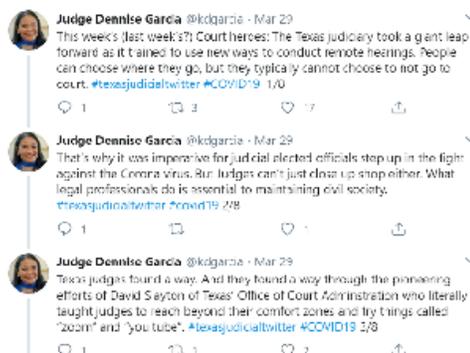
With the widespread arrival of remote hearings, we will experience some growing pains. But some of our most trying times often lead us to some of our most ingenious solutions.

Already, judges and practitioners in several jurisdictions are taking charge of setting the stage for our new normal. In the last few weeks alone, hundreds of Texas judges have signed up for Zoom to conduct more than 1,000 virtual hearings. The judges have also started YouTube channels to post hearings from their courts.

Following its own recommendation to utilize remote hearings, the Texas Supreme Court will hear oral arguments this month via live video conference for the first time in the court's history. In order to make the arguments accessible to the public, the court will livestream the arguments on YouTube.

Judge Dennise Garcia of the 303rd District Court, Judge Emily Miskel of the 470th District Court, Judge Martin Hoffman of 68th District Court, and Judge Roy Ferguson of the 394th District Court are examples of early adopters around the state and thought leaders in the new remote hearing revolution.

Through the use of another tech tool — social media — the judges have taken to Twitter and YouTube to help the legal community. The judges regularly post recommendations, best practices and observations from the bench on how courts and practitioners can most effectively conduct remote hearings. This type of thought leadership — including Zoom tips and procedures — will help litigators make the transition more smoothly. Tips and procedures offered up by Texas jurists include what attorneys should do if they are disconnected from a hearing, the use of visual signals to indicate when a party wishes to address the court, the livestreaming rules for the public and the importance of participants practicing with Zoom prior to the hearing.



Judge Miskel and Judge Ferguson recently hosted a livestream to teach practitioners how to use Zoom. The judges offered advice on a wide range of topics, such as virtual backgrounds, lighting, evidence, witnesses, access to open courts and cross-examination. Judge Ferguson emphasized in the training that it's likely anything that can take place in a court room can also be done in a virtual courtroom.

Judge Ferguson regularly tweets out Zoom tips and tricks as he comes across them:



He has also touted the usefulness of remote hearings after the crisis, especially in remote areas:



And some of the judges are even providing free fashion tips so you can look your best while Zooming:



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In addition, the Office of Court Administration, which has taken the lead in training state court judges on Zoom and YouTube, has published a list of tips for successful Zoom hearings and Frequently Asked Questions. Even those these tips and tricks are directed at judges, the list is equally useful to attorneys.

The tips include:

- Dress in a soft solid color. If a tie is worn, use a solid tie rather than one with a pattern.
- When speaking, remember to look directly at the webcam, not at the screen.
- Position the camera at your eye level or slightly above eye level.
- Be mindful of what is behind you, choose a solid neutral wall if possible.
- Check the lighting. Light from a window behind you might blind the camera, making you look dark. Light above you in the center of a room might also cast shadows. Ideally, position a lamp, or sit facing a window, where light is directly on your face. Also be aware that your monitor casts light that can make you look blue.
- Remind the participants to speak one at a time and to pause prior to speaking in case there is any audio/video lag.
- Encourage the participants to mute themselves or mute them yourself when not speaking in order to avoid any potential background noise.
- Test your connection and setup with Zoom by testing your connection with a test meeting.
- Where do we need to go?

The Texas judiciary's response to the crisis is commendable. Moving forward, we can take the knowledge gained from this shared experience and continue to improve upon remote hearings with a goal of providing a more efficient and effective legal process.

One area we can improve upon is creating a more uniform set of practices for remote hearings. A statewide guideline of the types of hearings that should be conducted remotely could move us closer to a day when remote hearings are customary. Certain areas will still need to be tweaked, such as developing

an efficient process for getting evidence admitted. This will help with making remote hearings the rule for even evidentiary hearings. So far, Texas courts have used a combination of email, Dropbox and screen sharing to get evidence in front of the court. While this solution is admirable, we may be able to come up with an easier solution.

We also need to make sure that the technology for conducting remote hearings is widely available, especially in remote regions. The technological infrastructure must be in place so that every part of the state has equal access to remote hearing capabilities.

Finally, we must continue to train practitioners and judges on the available remote hearing technology and technology etiquette. Just as we had to get used to silencing our cell phones when we enter a courtroom, soon muting our computer when we're not talking at a Zoom hearing will become intuitive.

The health and safety of everyone should be our primary concern. It just so happens that the same solution to keep people healthy and safe also solves several other problems. The time is ripe to change how we conduct hearings. Judge Ferguson said it well:



We should embrace this change.

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