

Virtual Proceedings and Access to Justice

BY HON. JAMES "JAY" C. FRANCIS IV (RET.)

Necessity being the mother of invention, courts and alternative dispute resolution (ADR) providers have adapted to the inability to hold in-person proceedings during the pandemic by relying on teleconferencing and videoconferencing to conduct judicial business. As social distancing requirements ease and courthouses and businesses return to normal, there are good reasons to continue using virtual platforms to conduct civil proceedings, the most compelling of which is to ensure that those who are economically disadvantaged have equal access to justice.

When I began my career as a United States magistrate judge in 1985, all proceedings were held in person, including those related to pro se cases brought by prisoners alleging mistreatment by guards, inhumane conditions and religious or racial discrimination, among other things. Judges were understandably reluctant to order corrections authorities to incur the security risk and expense of transporting incarcerated litigants from prison and housing them near the courthouse every time there was a court proceeding. Accordingly, many judges would issue scheduling orders without consulting the plaintiff or

would hold a conference at which only defense counsel was present. A few judges held telephonic scheduling conferences or settlement negotiations.

By the time I left the bench in 2017, technology, and the judges' willingness to use it, had leveled the playing field. Dedicated video connections with correctional facilities permitted prisoner litigants not just to participate in court proceedings in real time, but also literally to see and be seen. This had a significant impact on the quality of the proceedings. The pro se litigants felt that their dignity was being respected, and this, in turn, led them to be more respectful. When a judge looked them directly in the eye and listened to their story, they were less likely to be obstreperous. And a judge who is face-to-face with a litigant in a settlement conference, even virtually, is more persuasive and more likely to achieve a resolution.

Prisoner plaintiffs may be an extreme example, but they are not the only disadvantaged group that can benefit from the ability to access the courts remotely. Individuals and even small businesses are deterred from seeking redress through the courts because of the costs involved in



in-person litigation. The travel time for an attorney, especially those whose offices are in outlying areas, is an expense that will be borne by the client. The attorney who would otherwise take a case pro bono or "low bono"—for a reduced rate—may be unwilling to do so if the case will require multiple physical appearances in court. Furthermore, if the client, or a pro se litigant, needs to appear in person for a proceeding, they may have to miss work. Likewise, anyone who cares for a child or elderly family member must make alternative arrangements before they can attend a hearing.

These costs attendant to requiring in-person appearances have at least two consequences for low-income persons or entities.

First, they may deter a potential litigant from seeking justice through the courts at all if that person either cannot find counsel willing to provide representation at a rate that accounts for the additional attorney time or is unable to afford to miss work as often as may be required. Second, even if that person is able to initiate litigation, their willingness or ability to pursue it to its conclusion will be influenced by the continuing costs that they incur. A party who is conscious of the costs of each appearance may be forced to settle sooner and at a lower price than perhaps is justified by the merit of their case.

Courts and attorneys have navigated virtual proceedings remarkably well since being forced to do so by the pandemic. At JAMS, our mediators and arbitrators have become adept at using a range of virtual platforms, assisted by well-trained moderators who, among other things, offer practice sessions to lawyers and parties who may be less comfortable with the technology. Reports of technical malfunctions are blessedly rare, perhaps because participants have been careful to avoid becoming the attorney in the viral video who appeared in virtual court conference as a cat. Reports of security lapses are virtually nonexistent. Indeed, in the ADR world, parties have become accustomed to conducting an entire matter virtually, from the initial conference through the hearing. So will the courts continue to facilitate virtual proceedings when there is

no emergent need to do so?

The federal courts, at least, face two somewhat competing considerations. On one hand, court proceedings are required to be public. A teleconference or videoconference accessible only to the parties does not meet that obligation. On the other hand, the Judicial Conference of the United States has a long-standing policy prohibiting the use of cameras and recording devices in the courtroom. In federal courts, then, the proceedings must be public, but not “too public.”

One solution is for the judge to conduct a virtual proceeding in open court. The public would be permitted in the courtroom as usual, but instead of seeing parties and lawyers in the flesh, they would see them, as the judge would, on a screen or hear them on speakerphone. This would satisfy the requirement of public access, and at the same time, existing rules against retransmitting the proceedings or recording them could be enforced. This would also be consistent with the Judicial Conference policy that permits broadcasting of proceedings for “purposes of judicial administration.” To be sure, courts will likely resist allowing the main event—the trial—to be conducted virtually, but this should not inhibit them from using virtual proceedings in other phases of the judicial process.

Rule 1 of the Federal Rules of Civil Procedure requires courts and parties to utilize the rules “to secure the just, speedy, and inexpensive

determination of every action and proceeding.” If these principles are applied beyond the confines of the rules themselves, they surely favor the continued use of virtual proceedings by the courts. Virtual platforms make proceedings less expensive by eliminating the cost of travel. They can also make them speedier because it is easier to schedule a virtual proceeding than to attempt to accommodate the schedules of all participants for an in-person conference. And, perhaps most importantly, they can provide greater access to justice.

Virtual proceedings have proven to be not only feasible but also effective in arbitration and mediation. Courts can mirror this success by continuing to utilize virtual platforms, especially when the goal is to ensure justice for all.

Hon. James “Jay” C. Francis IV (Ret.), is an arbitrator, mediator and special master/referee at JAMS handling disputes involving business and commercial matters, civil rights, class actions and mass torts, e-discovery, employment, federal law, financial markets and intellectual property. He can be reached at Jfrancis@jamsadr.com.

