

Will Massachusetts state courts go remote permanently?

By David H. Rich

The sudden, wide-ranging switch to remote Massachusetts state court proceedings caused by the COVID-19 pandemic has led to a slew of temporary court orders shutting down courthouses except for emergency matters, and mandating that most court hearings and proceedings be conducted telephonically or by videoconference.

Temporary orders now permit service of pleadings under Mass. Rule of Civil Procedure 5(b) by email, as well as filing and serving documents with electronic signatures, including affidavits.

While this dramatic change has not always been smooth for the judiciary or the trial bar, the available technology has nonetheless permitted Massachusetts courts to continue functioning reasonably well remotely.

The pandemic is proving that most litigation does not need everyone present in the same physical space.

Which raises the question, will Massachusetts state courts be willing to adopt these temporary measures long term? And, if so, which ones? It's not a question of if the courts can make this transition, but more a question of policy choice.

A related question is if litigation will move more toward remote mediations and depositions.

How did we get here?

The Supreme Judicial Court led the way with a variety of rapid-fire emergency orders having in common the closure of physical courthouses except for emergency matters (and only those that could not be handled remotely), electronic service of documents, and electronic signatures on documents sufficient for filing and service.

The trial courts issued temporary orders essentially following suit: limited access to courthouses; hearings and some bench trials conducted by audio or videoconferencing; and e-service and e-signatures permitted.

At the appellate level, the SJC is temporarily holding telephonic oral arguments.

And while the Appeals Court canceled oral arguments in all cases scheduled for April and deemed those cases submitted on the briefs (with supplemental memoranda allowed in lieu of oral arguments), the court has adopted a pilot program to hear oral arguments remotely via Zoom videoconference or teleconference for cases scheduled in May.

While the short-term benefit of these orders is to maintain strict social distancing to help mitigate the spread of the coronavirus, the longer-term benefits that could flow from allowing remote court proceedings include: (i) efficiency, (ii) convenience to parties and judges, (iii) cost savings to clients, and (iv) less reliance on paper documents.

Cybersecurity is an overarching concern for remote court proceedings. Moving forward beyond the current ad hoc context, videoconferencing technology used for court proceedings must be secure to protect confidential information and to defend against hacking.

Furthermore, parties would need access to the same or similar hardware and software to



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ensure fair and successful virtual hearings.

Types of proceedings amenable to remote hearings

Routine status and pre-trial conferences seem ripe for a long-term switch to remote court appearances. Courtrooms do not need to be filled with attorneys waiting to provide brief updates on pending matters.

Similarly, some relatively straightforward discovery motions do not need to take place in person, as is demonstrated by appellate arguments being heard by the SJC and the Appeals Court by teleconference or videoconference. Attorneys can readily make their arguments and judges can ask questions remotely. The motion pleadings and supporting documents are already served and on file for judges to review. Even evidentiary hearings, such as for TROs and preliminary injunctions, can be effectively handled remotely. These hearings typically involve documentary evidence and oral argument. Why is a dash to the courthouse needed to resolve these time-sensitive matters?

Jury trials, on the other hand, pose challenges that perhaps necessitate a continued in-person approach. Maintaining juror control and discipline in a videoconference context is problematic.

Another key hurdle is the likely loss of visual, non-verbal cues of witness testimony in a remote setting (not to mention non-verbal cues from the judge and opposing counsel). Another practical concern is how to handle sidebar conferences out of earshot of jurors and witnesses.

Also, it's unlikely trial attorneys can adequately present charts and animations remotely, at least certainly not as effectively as in a courtroom on a large monitor, or with large chalks or other demonstrative aids.

Bench trials involving witnesses pose a similar concern regarding the loss of visual cues as to the credibility of their testimony.

On the criminal side, remote trials raise constitutional concerns such as the right to confront witnesses.

Apart from remote courthouse proceedings, procedural issues such as allowing service of motions by email and permitting the filings of documents with electronic signatures should be addressed long term.

Permitting service by email seems to be a reasonably secure process, particularly as all attorneys licensed to practice in Massachusetts must annually provide to the Board of Bar Overseers a business email address, and attorneys of record must include current email addresses in pleadings.

E-signatures are increasingly common, and it doesn't appear to be an impediment to confirming the authenticity of signatures, particularly since the current court order requires parties to file original signatures as soon as is practicable.

Federal courts have permitted participation in hearings via teleconference, as well as electronic signatures, service and filings for decades. With the proper technology in place, the Massachusetts state courts can certainly follow suit.

E-mediation and e-depositions

Will remote mediation become the norm, or at least more widespread, once the COVID-19 pandemic subsides?

It is technologically feasible, but will parties object because of the loss of non-verbal cues from the mediator or opposing counsel? Another concern is whether decision-makers will lack a true incentive to settle if they are not required to be in the same physical space.

From a cost and convenience standpoint, however, a remote mediation would appear to make considerable sense when litigants, opposing counsel and the mediator are geographically distant.

For remote depositions, attorneys have similar concerns over the loss of visual cues of fact witnesses and opposing counsel. Also, an e-deposition curtails the ability of witnesses to confer with counsel when appropriate.

However, depositions by videoconference make more sense from the standpoint of convenience, cost and necessity for 30(b)(6) depositions, or for witnesses far removed from an attorney's office. Why is it necessary to charge clients for traveling across the country for an hours-long deposition, when it can be done remotely with no travel?

When the COVID-19 pandemic wanes and life returns to some sense of normalcy, court leaders should weigh the costs and benefits of implementing permanent orders and rules allowing, if not requiring, remote proceedings and procedures, balanced against maintaining the integrity and security of judicial proceedings.

Likewise, the trial bar — now that it's been force-fed remote litigation and seen that it's not only feasible but even preferable in many instances — should remain open to moving toward remote mediations and depositions when convenient and cost-effective.

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