

Conducting Fair and Just Remote Hearings:

A BENCH GUIDE FOR JUDGES

Many courts have embraced innovative communication technologies, especially videoconferencing platforms, to conduct routine hearings during the COVID-19 pandemic. Although these technologies provide an effective solution for managing cases until the pandemic abates, interpersonal communication in a remote platform differs considerably from the in-person experience. These differences can affect whether litigants and other hearing participants believe they have been treated fairly. Courts must make procedural fairness (also called procedural justice) for litigants the highest priority, regardless of where proceedings take place, as litigant perceptions of how they are treated have a greater impact on their acceptance of and compliance with court orders than the actual outcome of hearings. This bench guide offers practical tips for adapting judicial techniques to ensure procedural fairness in remote hearings.

CORE ELEMENTS OF PROCEDURAL FAIRNESS

- **VOICE:** the ability of litigants to participate in the case by expressing their own viewpoints;
- **NEUTRALITY:** the consistent application of legal principles by unbiased decision makers who are transparent about how decisions are made;
- **RESPECT:** individuals are treated with courtesy and respect, including respect for people's rights;
- **TRUST:** decision makers are perceived as sincere and caring, trying to do the right thing;
- **HELPFULNESS:** litigants perceive court actors as interested in their personal situation to the extent that the law allows.

PREHEARING PREPARATION

Adjust calendaring practices to ensure sufficient time to give each case your full attention.

Preliminary reports suggest that remote hearings take longer than in-person hearings. Litigants who are unfamiliar with the technology platform or who have poor internet connectivity may need extra time to logon, present evidence, or make arguments. Litigant appearance rates also tend to be higher for hearings conducted remotely, eliminating the cushion of time that judges have come to expect by entering default judgments or orders to dismiss for failure to prosecute. "Zoom fatigue" is real; do not schedule more cases than you can realistically manage.

Review case files before hearings.

Making direct eye contact shows litigants that you are attentive and engaged, but this is difficult to do this while simultaneously reviewing motions, briefs, and other documents during the hearing. Advance preparation shows respect by demonstrating your familiarity with litigants' individual circumstances.

Ensure that litigants have access to information and resources to participate effectively in the hearing.

Providing a URL to the videoconferencing platform does not necessarily ensure that litigants can participate effectively. Hearing notifications should be written in plain language and include information not only about how to connect and participate on the platform, but also how to access additional information to prepare for the hearing (e.g., gathering documents to present as evidence, potential claims and defenses, etc.). The notification should also communicate the court's expectations about litigant preparation for the hearing (e.g., timeliness, formality of the hearing). Finally, some litigants may require a foreign language interpreter or an accommodation under the Americans with Disabilities Act to participate in a remote hearing. Ensure that the hearing notification includes information on how to request such assistance.

Offer alternatives for litigants who lack devices or internet access to participate remotely.

Courts should suggest community resources (e.g., public schools, libraries, community centers) where litigants can use computers or get access to a stable internet connection, including, if possible, dedicated computer kiosks or Zoom pods at the courthouse.

FAIR AND EFFECTIVE USE OF VIDEOCONFERENCING PLATFORMS

Use a “technical bailiff” to help litigants logon and troubleshoot on technical problems.

The bailiff should rename litigants to indicate their full name, especially litigants using devices with default names (e.g., “Mom’s iPad”) or litigants who have called in on a telephone connection. The bailiff can also move litigants to waiting areas or breakout rooms staffed by ADR professionals, pro bono attorneys, or court staff who can provide legal information or assistance while waiting for hearings to begin.

Pay close attention to videoconference dashboards.

Many default platform settings require participants to raise hands virtually or require the host to permit entrance from a virtual waiting room. Also be alert for hackers (Zoom bombing) disrupting the hearing.

Unmute litigants and check that they can hear and be heard.

Before starting the hearing, identify all participants to ensure that everyone is present on the record. Provide a brief explanation to litigants on how to participate, including raising hands for permission to speak. If litigants are represented by counsel, explain how they can communicate privately using breakout rooms or separate text communications. Before entering a final judgment, check that all participants are still present on the platform, have heard everything that was said, and had an opportunity to express their viewpoint.

Be careful not to overlook litigants who appear on the screen as black boxes due to lack of webcams or unstable connectivity or who have called into the hearing on a telephone line.

It is easier to engage with people whose faces you can see. Similarly, some viewing options on videoconference platforms do not permit users to see all participants simultaneously. Make it practice to call on each person to ensure that they are still present on the platform, have heard everything that was said, and ask them if they have anything else to add before closing the hearing.

Speak to the camera, not to the screen, and wait for litigants to finish speaking before responding.

Looking directly at the webcam makes it appear that you are looking directly at the trial participants, rather than off to the side. In addition, looking through multiple screens or databases during the hearing can make judges look distracted or disengaged. Finally, the delay in audio transmission sometimes causes people to speak over each other. Wait for litigants to finish speaking before responding.

Ensure that litigants participating by telephone are fully informed and have the opportunity to speak during hearings.

Litigants participating by telephone lack the visual cues on which other participants rely to understand what is happening during the hearing. For example, they may not know who is present for the hearing and they will not be able to view documents or other evidence displayed on a shared screen. Litigants participating by telephone also do not have access to platform dashboard tools (e.g., to raise hands to indicate their interest in speaking).

JUDGES’ CONDUCT DURING HEARINGS

Take time to explain the hearing’s purpose and procedures, and the basis for any decisions.

Judges should avoid the urge to rush through cases by cutting off litigants or skipping explanations about the basis for their decisions in an effort to clear calendars. Consider using a form or checklist judgment to explain the legal reasoning for decisions. Use status conferences as an opportunity to advise litigants about upcoming procedures and to connect them to other community resources. Always ask whether litigants have had an opportunity to get legal assistance before entering final judgments.

Ask litigants about the location from which they are participating.

Not all litigants have a private, quiet place in which to participate in the hearing. If they are participating from a public area, they may not have the confidence or ability to provide candid information. In addition, background conversations or activities, including some that should be private, may be audible during the hearing and might even be captured on the videoconference recording. If this occurs, alert the litigant that you can hear the background conversations and ask them to move to a more private location, if possible, or to tell the other group that they can be overheard. Also ask whether litigants have had an opportunity to get legal assistance before entering final judgments.