Vol. 74 - Why Court Appearances Should Be Remote By Default

A Legal Note From Marshal Willick

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WHY COURT APPEARANCES SHOULD BE REMOTE BY DEFAULT

A legal note from Marshal Willick about the pending decisions about how court proceedings should normally be handled – in person, or by remote electronic appearances.

For lots of reasons, remote appearances should be the default going forward for all court proceedings for the indefinite future; if and when that ever changes, the change should be restricted to those proceedings actually requiring in-person participation.

I. WHAT BROUGHT US TO THIS POINT

By fits and starts, the Nevada Supreme Court has been encouraging "appearance by audiovisual transmission equipment" for some years, starting in 2009. There were many reasons for the rules, including making

it easier for people throughout Nevada to more affordably hire counsel of their choice, even if that lawyer lived in a different city.

The rules included a policy statement that their purpose was to "improve access to the courts and reduce litigation costs." Courts were directed to "permit parties, to the extent feasible, to appear by audiovisual transmission equipment at appropriate conferences, hearing[s], and proceedings in civil cases."

The problem is that those rules were largely ignored, especially in the rural districts where permitting telephonic or audio/visual appearances would have made the most dramatic improvement in the economy of parties and ensuring access to counsel of choice. See Legal Note Vol. 23 — What's Up With Hooterville? (Aug. 18, 2010).

I and others have been trying to get the courts to accommodate remote appearances for many years, only to run into bureaucratic interference and often judicial indifference. About a decade ago, I lamented that although the equipment had been provided to courts throughout the state, there just was no "percentage" in it for the administrative personnel "to make it any easier for the public or the attorneys to actually use the equipment in the day to day representation of actual clients in actual cases." See Legal Note Vol. 58 — Video Conference Rule (Nov. 19, 2013).

Pleas for the Nevada judiciary to more forcefully require the rules to be followed and the equipment to "actually be made available in some practical way to the great unwashed outside the judicial edifice" went entirely unheeded for many years.

All that changed overnight in March 2020, when the COVID-19 pandemic led to a series of lock-downs, administrative orders, court closures, and a dramatic pivot everywhere for virtual appearances in place of live appearances. Having been ordered to do so, the administrators for courts at every level made virtual appearances possible, and courts began facilitating the scheduling of hearings, conferences, and trials by way of audio-visual technology. Reports continued to surface, however, of some rural judges simply refusing to follow mandates or permit remote appearances because

"that's not the way we do it here."

Two years on, how long extraordinary measures will continue to be necessary remains uncertain; there is a huge backlog of civil cases due to the impracticality of convening juries. In the meantime, courts, lawyers, and the public have all adapted to virtual appearances in almost all legal matters, and some of those in positions of authority have been giving thought to which virtual processes should remain in place after the pandemic is past.

II. THE COMMISSION NOW STUDYING THE ISSUE

In August 2021, the Nevada Supreme Court (through ADKT 582) appointed a commission to report on "best practices" for "virtual advocacy" in Nevada courts to "evaluate applicable rules to govern the unified use of remote technology" and consider applicable rule changes.

The commission includes two Supreme Court justices, six district court judges, four municipal and justice court judges, and representatives from the Attorney General, Public Defender and District Attorney representatives, a law professor from UNLV's law school, a couple of court administration staff and clerks, and court I.T. employees. Notably absent are representatives of the Bar knowledgeable about what is actually being done by lawyers representing clients in a world of virtual appearances or anyone else reflecting the interests of the general public.

III. THE EXISTING RULES

The current version of the "Rules Governing Appearances by Simultaneous Audiovisual Transmission Equipment for Civil and Family Court Proceedings" (Supreme Court Rules Part IX-B) includes a policy statement favoring the use of such equipment for pretty much everything except some *ex parte* motions or defendants in contempt proceedings. Separate rules govern "Appearances by Telephonic Transmission Equipment."

Judges retain the ability to decide that personal appearances are necessary, and presume that: anyone intending to appear virtually gives notice of that intention in advance; a record be preserved of any such proceedings as if it had been live; and public access to proceedings be maintained.

IV. THE INTERESTS OF THE PUBLIC OVERWHELMINGLY FAVOR VIRTUAL APPEARANCES

The pandemic forced circumstances allowing a reconsideration of the economics of every court participant in the "normal" court operations, making evident what those who have been urging use of modern electronics have been saying for years.

Family court is used as the example here, but the experience has been mirrored by civil and criminal division district courts, and other courts at various levels, each with some individual challenges and solutions. In my personal experience, attending a simple motion calendar in any civil department at the Regional Justice Center consumed a minimum of half a day.

Traditionally, on a typical motion day in Clark County family court in "the before times," each department would have some 5-8 hearings, each hour, on the law and motion calendar, usually for four to six settings per day.

Each case would have at minimum two parties, and at least half the time, two attorneys. Settings were in one-hour increments. That means that at least 20 departments would have between two and four people sitting in the hallway waiting for at *least* most of an hour for each hearing, all day. It is extremely common for things to run long, so the realistic wait times in the hallway were 2-4 hours (with or without travel time), from arrival to departure, for *every* litigant and attorney, for *each* case.

Economically, that means some 20 x 4 x 6 (480) hours of "waiting" time" were incurred – *every hearing day*, and on *top* of the time spent actually attending to those cases. Attorneys typically bill from $200-$750 per hour. Assuming half of the cases had counsel on at least one side, that

means that some $114,000 to $228,000 ***per day*** of billable time was consumed each and every day just *waiting* for ten to fifteen-minute hearings by requiring people to attend in-person hearings at family court.

And even for the cases *without* counsel, that two to four hour travel/wait/appear/depart reality meant that every in-person hearing for each litigant normally required taking a day off of work, at the loss of an entire day's wages. The effects of having to take a day off work every time a hearing is scheduled is felt most severely in the lowest economic strata. In other words, traditional in-person court calendars hurt poor people most; that reality is critical to any access to justice analysis.

Virtual appearances often permit litigants to work on the day set for court hearings and take a break to attend them while at work – as opposed to taking a day off – and permit counsel to be at their desks attending to other matters until called. If counsel only bill when the matter in question is called, that is a reduction in incurred fees per case of some 75% to 80% per hearing as opposed to the cost of traveling to, waiting for, and then returning from attending an in-person hearing.

The total savings to litigants – i.e., "the public" – is in the many millions of dollars per year. Even if any of the specifics above were quibbled over, the numbers involved are so large that a variance of 50% on any of the variables discussed above would not change the bottom line of a massive reduction in cost for the public in having virtual as opposed to in-person hearings.

One question to be asked is whether there are any countervailing interests for the general public of in-person hearings that weigh against that huge economic interest in having virtual hearings. Over the past two years, none of significance have become evident.

V. THE FAMILY COURT EXPERIENCE AND PROPOSED RULE CHANGE

I served as Reporter to the 2016 and 2020 Committees proposing revisions to the Eighth Judicial District Court Rules governing family court ("EDCR 5

Revisions Committees").

The 2020 EDCR 5 Committee Summary recites:

Having noted the enormous savings in time and money for litigants and counsel alike, the default was altered so that motion practice would continue to default to "virtual" even after the pandemic restrictions are lifted, with a provision to have an in-person hearing if desired; the court is sensitive to the public-access issue (for non-sealed, non-closed hearings) and working to provide a mechanism to provide it virtually as if it was in person.

The 2020 Committee drafted proposed EDCR 5.609 and its ancillary procedural provisions relating to virtual appearances after lengthy discussion, significant public input, and inquiries to all known stakeholders:

Rule 5.609. In-person and virtual hearings.

(a) Unless otherwise directed by the court, all hearings except for evidentiary hearings, trials, and proceedings to show cause why sanctions should not be imposed shall be conducted utilizing simultaneous audiovisual or telephonic transmission equipment.

(b) A party filing a motion, opposition, or reply requesting an in-person hearing shall set forth the reasons for the request.

(c) Upon a minimum of seven days notice, the court may schedule or reschedule any hearing as an in-person hearing for good cause.

In other words, virtual appearances are proposed to become the default norm for most proceedings, unless something or someone requires an in-person hearing.

Leading up to adoption of the proposed rule, members of the Committee ran an informal survey for several months (both in private communications and through the Nevada Bar family law list serv), collecting all comments, suggestions, complaints, and criticisms, and examining each at length.

The responses were overwhelmingly positive, despite the fact that, because the proposal was to change to virtual hearings as a default, the motivation to comment at all was greatest for those objecting to the proposal.

Most objections that were received were of the "I want my day 'in court'" variety. Closer examination indicated that most of these comments were *really* about the same economics described above – there are lawyers whose business model ***depends*** on the inefficiencies and waste of travel time and waiting time to make their practices more profitable. The Committee did not see that as a legitimate basis for objection to improving the economics of court hearings for the general public.

We also heard rumors that there were judicial officers who did not feel sufficiently "respected" without the trappings of having people physically stand up when they entered the room, etc. The Committee did not see *that* as a legitimate basis for a different rule, either.

The bottom line reason the EDCR 5 Committee made virtual hearings the default is economic; however, some of the finer points go back to equal protection and access to justice.

The reality of the adversarial process is that some wealthier litigants will wish to schedule as much litigation – including in-person hearings – just to increase the cost and inconvenience to the other party. The experienced judges and lawyers on the EDCR 5 Committee, knowing this, made the default virtual, but permitted any party at any time to request an in-person hearing, with the ultimate decision on the matter belonging to the judge, who presumably can weigh the proffered rationale for requesting an in-person hearing against the indisputable increase in expense and inconvenience to everyone resulting from granting such a request.

As of this writing Phase Two of the EDCR 5 rule set has been approved by the family court and the entire Eighth Judicial District, and is awaiting review, hearings, and enactment by the Nevada Supreme Court.

VI. THE INTERESTS OF THE BENCH; DEFAULTS AND JUDICIAL DISCRETION

Any mechanical process ***other*** than making virtual appearances the default would unnecessarily require additional expense, delay, and inefficiency to both the courts and almost every party in almost every case.

For example, requiring people to file "notices of A/V appearances" would mandate such requests by both sides and both counsel for almost every hearing. There is no known legitimate justification for requiring that level of wasteful bureaucracy and paperwork, given that the overwhelming majority of litigants and attorneys prefer *all* motion hearings to be virtual.

The ultimate decision as to any particular hearing remains vested in the trial court judge, who might know of some legitimate reason to have people incur the additional expenditure of time and money for an in-person hearing. This is true whether anyone requests an in-person hearing or not. As a practical matter during the last two years, most judges have required personal appearances only by people who have demonstrated an inability to control themselves outside of the formal court setting.

The Commission looking at best practices should explicitly consider how to address those judges (rural or otherwise) who state that they simply "want" everyone to appear in person, regardless of the economic and other effects on litigants and counsel.

Again, both elected judges and judicial administration must make every effort to keep in mind that the purpose of the courts is to serve the public, not the reverse. Policies and procedures should be focused primarily on how best to accommodate the public interest, especially the economic interests of litigants; that is a core component of actual "access to justice."

VII. MATTERS OF COURTROOMS AND INFRASTRUCTURE

The 2019 Report of the National Center for Juvenile Justice (NCJJ) on Nevada's family courts identified infrastructure as the single largest

challenge facing those courts. One of the positive results of the pandemic pivot to virtual hearings has been to illustrate how an embrace of technology can enormously extend the usable lifespan of the existing physical plant.

It has been made clear that the existing family courtrooms in Clark County should be adequate not just for the current family court of 26 departments, but potentially for twice that number. Physical courtrooms are simply unnecessary for the great majority of hearings and decisions.

Submission of decisions on the papers is already the norm in Washoe County; it was slightly expanded in Clark County the 2016 rule revisions, and set to be further expanded in the 2021 proposed revisions. Between that and virtual motion hearings, which simply require electronic connections between a judge (in chambers or at any other location), a court clerk, and the litigants, actual courtroom use is enormously reduced.

There are more mixed and nuanced reactions and evaluations of *trial* proceedings by virtual means. Virtual trials certainly are possible, and have been routinely and successfully done for a couple of years at this point, but some lawyers and judges prefer the immediate availability of moving physical paper around a courtroom, and some people have suggested that credibility determinations are easier in person.

Others, including me, dispute the latter point; frankly, I find it easier to see, hear, and judge credibility and body language on a screen rather than by some angled view of a person who is looking in some other direction while sitting in a witness box on the other side of a large room.

The Commission should explicitly investigate and report on the impact of a transition to virtual motion hearings on the need for courtrooms, chambers, and other traditional structures used for court operations. I predict that budgets can be enormously lowered, the usable lifespan of existing infrastructure can be greatly extended, and otherwise-necessary dispersal of judicial officers to multiple locations can be reduced, avoided, or even reversed.

VIII. ACCESS TO JUSTICE; REFLECTION OF PHYSICAL COURTROOMS

Several aspects of access to justice are mentioned above: boosting options to have counsel of choice; reducing economic impact on the poor; and reducing the ability of wealthy litigants to oppress poorer ones.

One additional legitimate concern about virtual proceedings during the pandemic has been how to ensure equal access to those individuals who lack the means or ability to utilize video for virtual appearances. This was raised as an equal protection concern by the Self-help Center, and from other quarters.

To some degree the concern is overblown. Preliminary reports from the most recent census statistics, still being compiled and published, indicate that 85 percent of adults owned a smartphone as of February 2021. As far back as 2016, 89% of households had some kind of computer with video capability, including 81% of the population with smartphones, which indicates that the 2021 percentage of the population with access to some kind of video-capable computer technology should now be well over 90%. Such a phone is all that is needed for full virtual participation in a court proceeding.

In any event, once pandemic restrictions on access to the courthouse and other public buildings are lifted, access to justice issues should be not only as good as it was before virtual hearings, but should be easily made to be greatly ***superior***.

Specifically, the judges of the Eighth Judicial District have largely come to agreement on norms and uniform procedures whereby virtual hearings mirror, as closely as possible, the functionality of physical courtrooms. Typically, this includes a "static link" enabling anyone to "enter" the virtual courtroom as easily as they could walk into a physical courtroom.

Access to justice includes ensuring public access to all non-sealed, non-

closed proceedings by way of publicly-available links. This actually *increases* public access to court proceedings, as an individual at home could "observe" proceedings in a dozen courtrooms, physically located in different buildings, all during the same hour. Any study of "Best Practices" should create a template for all courts on how to provide such access as simply and openly as possible, but this should not prove difficult.

As for hearing participation for those people without the necessary equipment or the ability to operate it, it would be both inexpensive and simple to arrange for laptop kiosks at the family court building, making participation in a virtual hearing no more difficult for those persons than a personal appearance would have been. And by extending those kiosks to public facilities at *remote* locations – Pahrump, Laughlin, Mesquite, elsewhere – equal access to justice can be ***enormously*** improved for everyone, including the small percentage of the population who do not have or cannot operate their own devices.

This is not to say there have not been some complaints and hiccups. When the survey was run in late 2020, the most common complaint in surveying family court attorneys in Clark County was about the small number of judges who took advantage of the remote appearances to not appear visually at all during such hearings. Criticized by lawyers as the "Wizard of Oz" problem, it has been largely or completely resolved at this time, and any stragglers could and should be directly addressed by the Best Practices Commission.

The idea should be to duplicating as nearly as possible what litigants and lawyers have in a physical courtroom – including the ability to see the judicial officer's mannerisms and expressions.

Otherwise, complaints have to do with technological glitches – freezing, accidental muting, etc. All such matters should ameliorate as a matter of course, as infrastructure continues to improve and people get more used to using the technology.

IX. RURAL COURTS

The reluctance, or outright refusal, of some rural courts to permit audio-video appearances, electronic filing, and other 21st century practices have been noted as an access to justice impediment for the citizens of those locations for years. See "What's Up With Hooterville," *supra*.

Several such courts continue practices such as demanding not just in-person appearances at hearings, but original "wet" signatures on all documents and the personal delivery of ***all*** papers to their court clerks irrespective of any rational concern for authenticity. These practices are, for want of a better word, stupid.

While equipment and forms permitting remote access have been made available to several of those courts for a decade, some of them refuse to allow use of any of it, effectively denying equal access to justice to citizens of those locations who are then economically prohibited from employing counsel of their choice in any of the population centers where lawyers best suited to their cases are located. It makes no sense to have two lawyers from Las Vegas spend several hours of travel and waiting time to have a 15-minute motion hearing in Pahrump.

This problem was repeatedly brought up years ago in the Rural Sub-Committee of the Access to Justice Committee, where I was asked to participate and assist by former Justices Douglas and Gibbons; to my knowledge, no substantive action to improve the situation was ever taken, apparently for political reasons.

Such courts have ignored the Nevada Supreme Court initiatives where A/V equipment was distributed around the state, as well as both the Supreme Court Rules regarding audio-video appearances and the holdings in cases such as *Campfield v. Campfield*, No. 69373, Order of Reversal and Remand (Unpublished Disposition) Dec. 21, 2016. The Court's A/V rules should also be revised at the conclusion of the work of this Commission to see if the distinctions of the kinds of hearings at which virtual appearances may be made continues to make sense.

Certainly part of the work of the Best Practices Commission should be how

to ensure equal access to justice by Nevada citizens in rural counties, including getting the courts of those counties, no matter how reluctant, to begin employing both virtual hearings and electronic document filing as part of their standard operations.

X. CONCLUSIONS

There is an opportunity here to make the entire court bureaucracy more accessible, affordable, and efficient, and therefore inherently more "equal" than it has been. That opportunity should be embraced by the Best Practices Commission, fully drawing on the knowledge and experience of persons knowledgeable in both technological and court operations matters.

Back in 2013, I suggested that:

> With modest effort, a process for litigants to request and actually get audio-visual equipment use from one court to another could be set up in 90 days. But without that expression of will, making the equipment actually available should be expected to remain "somebody else's problem" to the people that could actually make it work.

It is a pity that it took a worldwide pandemic to generate the will to see that "real people actually get the benefit of the rules and equipment." But at least it has now happened.

As noted many times in prior legal notes, there is an unfortunate but near-universal tendency for a bureaucracy to make all proceedings as convenient as possible for the people operating the machinery of the courts as opposed to the public the courts were created to serve. Experience has proven that this is an extremely difficult concept to get some bureaucrats to wrap their heads around, but overcoming it is critical to making any reforms substantively useful to the actual public.

The challenge at this point will be to retain the economic and other advantages to the public and the Bar even if doing so is not the most

convenient thing to do for the bureaucracy of administration. The bureaucracy should be given every direction to focus on the interest of the members of the public required to be participants in court proceedings.

The recommendations of that Commission should be promptly evaluated and implemented state-wide as expeditiously as possible.

XI. QUOTES OF THE ISSUE

"It is not the strongest or the most intelligent who will survive but those who can best manage change."
– Charles Darwin

"You can't build an adaptable organization without adaptable people – and individuals change only when they have to, or when they want to."
– Gary Hamel

"The price of doing the same old thing is far higher than the price of change."
– Bill Clinton

"Each of us has the opportunity to change and grow until our very last breath. Happy creating."
– M.F. Ryan