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— PERSPECTIVE —

## Our justice system is finally warming up to tech

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The day has finally arrived where remote technology may find a permanent place in our judicial system. Last week, as part of a longstanding effort to maintain ongoing access to the courts in the wake of COVID-19, Gov. Gavin Newsom signed into law Senate Bill 241, which will protect Californians' ability to remotely access the courts through its sunset provision of July 1, 2023. This article provides an introduction to the new legislation and an understanding of its evolution.

In March 2020, Newsom first declared a state of emergency in response to COVID-19. Statewide court closures immediately followed, which prompted the Judicial Council to adopt a series of temporary emergency rules to assist courts in their effort to provide ongoing court access to Californians. One of the rules enacted by the Judicial Council was Emergency Rule 3, which authorized courts to require that proceedings and general court operations be conducted remotely. As many now realize, this emergency rule has had prolific benefits, ranging from easier access to the judicial system for those who rely on public transportation, to significant preservation of resources for time that might otherwise be spent battling traffic.

However, like its companion COVID-19 emergency legislation, Emergency Rule 3 was never designed to be permanent; it is slated to expire 90 days after the state of emergency is lifted. This would leave Californians in a serious bind. Individuals in litigation who are ill or immuno-compromised, or even those who were forced to relocate as a result of the crisis, would need to be prepared to withstand the crowded courtrooms, long lines, and long drives in a relatively short window of time. For some, that switch may come easy. For others, it

would be taxing, particularly as the virus and its many variants show no signs of slowing down. Recognizing these palpable concerns and the great utility remote access has provided to litigants, state legislators and attorneys got to work.

After many months of negotiation with attorneys, bar associations, legislative groups and unions statewide, SB 241 was developed under the authorship of State Sen. Thomas Umberg, chair of the Senate Judiciary Committee. In early September, SB 241 was unanimously approved by the California Legislature and, on Sept. 22, Newsom signed the bill into law. The new law is multi-faceted and includes amendments to multiple sections of the Code of Civil Procedure and the Business and Professions Code. Only the amendments to Code of Civil Procedure Section 367.75 will be discussed here.

California Code of Civil Procedure Section 367.75 authorizes courts to conduct hearings and proceedings for all civil cases through the use of remote technology, and allows parties to appear remotely upon proper notice — the deadlines for which will be determined by the Judicial Council. See Cal. Civ. Proc. Code Section 367.75(k)(1). Courts may conduct trials and evidentiary hearings entirely or partially through remote means absent a showing by the opposing party as to why remote appearances should not be allowed. See *id.* Section 367.75(d)(1). Even expert witnesses can appear remotely absent good cause to compel in-person testimony, which should save litigants tremendous costs associated with compensating expert witness travel time. See *id.* at Section 367.75(c).

Senate Bill 241 also considered that the needs for each case vary, and that courts should be left with discretion to compel in person attendance when needed. Under Code of Civil Procedure Section 367.75(b), courts may require a party or witness to appear in person at any hearing if the quality or audibility

of the technology would implicate the management or resolution of the proceeding, if the court plainly lacks the technology necessary to conduct the proceeding, or if the court determines that in-person appearance would materially assist the case in any way. See *id.* at Section 367.75(b)(1)-(6). The new law also requires courts to electronically transmit documents on a party that has consented to accept electronic service.

So, what changed? Before SB 241 was enacted, a party was authorized to provide notice of a telephone appearance at specified conferences, hearings, and proceedings, and could attend by telephone unless the court required otherwise. See Cal. Civ. Proc. Code Section 367.5(b)(c). But the code did not contemplate remote technology as a manner of appearance, and certainly did not identify trial or evidentiary hearings as a specific instance in which remote attendance was authorized. The new law also expands the right for remote appearances to expert witnesses, absent good cause otherwise.

Surprisingly, SB 241 did not come without opposition. Among the most vocal opponents was Service Employees International Union, which expressed concern

over remote appearances as it related to the ability of court reporters to maintain the sanctity of the official verbatim record and to get the court's attention when audible or technological issues presented. In an effort to mitigate those concerns, the new law requires courts to have a process for a court reporter, or a party, to alert a judicial officer if technological or audibility issues occur on their end. See Cal. Civ. Proc. Code Section 367.75(e). Additionally, except as provided in Section 269 of the Code of Civil Procedure and Section 69957 of the Government Code, if the court conducts a trial through the use of remote technology, the official reporter or official reporter pro tempore must be physically present in the courtroom. See *id.* Section 367.75(d)(2)(A).

Ultimately, this legislation should be viewed as part of a broader push for the California Legislature to make remote hearings and proceedings permanent. With the technological advances that come with each passing year, and with the utility and safety that remote appearances offer to litigants, we can only hope that this goal of permanency becomes more palatable as the July 1, 2023 expiration of the law draws near. ■

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