

August 31, 2023

Via E-mail

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Amendment to Federal Rule of Civil Procedure 77

Dear Secretary Byron:

We respectfully request that the Committee on Rules of Practice and Procedure refer to the Advisory Committee on Civil Rules our proposal to amend Federal Rule of Civil Procedure 77 to clarify the continuing availability of remote proceedings in federal courts. As litigating public interest organizations, we have seen firsthand how federal courts' widespread adoption of remote proceedings during the COVID-19 pandemic meaningfully improved access to justice for people who previously lacked the resources to appear in person, particularly where travel was required. Although the pandemic ebbs, and in-person proceedings are once again common, we ask the Committee to take advantage of the benefits that resulted from technological innovation.

The use of remote proceedings can both improve physical access to courts and reduce the cost of litigation, particularly for people and communities who face structural barriers to participating in civil litigation. This affects all participants in the judicial system. When a potential plaintiff weighs the cost of bringing a lawsuit, they must consider not only the cost of legal counsel, but also their own ability to take time off of work to attend court proceedings, or their ability to secure childcare during that time. These costs are amplified when a plaintiff is required to bring suit in a venue convenient for the defendant, but which would require expensive and time-consuming travel for the plaintiff. Traveling to and appearing in court may also be particularly burdensome for people with disabilities. Defendants are not even able to make these calculations, but must appear—or face the choice of settlement, default, or sanctions. And counsel, too—particularly organizations that provide pro bono services, like many of the signatories here—must factor in the time and cost of travel and court appearances when determining whether they have resources to take on a new matter. Permitting litigants and their counsel to appear remotely upon request (even when not required by a public

health emergency) would level the playing field for less-resourced litigants, reducing both the practical and personal costs of litigation.¹

We of course recognize that individual courts should and will retain discretion in how they conduct remote proceedings, and that some proceedings may be more amenable to remote appearances than others. Our proposal, however, is intended to ensure that all federal courts maintain a mechanism to hold remote proceedings, continuing to capitalize on recent technological gains. Courts around the country have successfully held proceedings of all sorts—up to and including trials—remotely during the pandemic. Although flexibility is key in determining which matters may be amenable to remote appearance now, proceedings such as status conferences—which often last only fifteen minutes, and typically do not involve the introduction of evidence or the examination of witnesses—would be particularly appropriate for remote appearances. Indeed, many judges regularly held such conferences telephonically even before the pandemic. Although we are sensitive to the fact that some litigants may prefer in-person proceedings,² individual litigants, witnesses, and counsel should be permitted to personally appear remotely if it is a better fit for their personal circumstances and access to court, particularly in proceedings where other parties’ rights are unlikely to be affected.

A rule clarifying that remote proceedings remain a viable option across the federal court system will ensure that access to justice is consistent across jurisdictions, while providing individual courts discretion in individual proceedings to reflect

¹ See, e.g., National Center for State Courts, *The Use of Remote Hearings in Texas State Courts: The Impact on Judicial Workload: Final Report* ii, 9–11 (Dec. 2021), <https://www.ncsc.org/consulting-and-research/areas-of-expertise/access-to-justice/remote-hearings-and-services/resources-docs/TX-Remote-Hearing-Assessment-Report.pdf> (finding “definite benefits for expanding access to justice for many litigants”); Workgroup on Post-Pandemic Initiatives, *Interim Report: Remote Access to Courts* 4–5 (Aug. 16, 2021), <https://newsroom.courts.ca.gov/sites/default/files/newsroom/2021-08/P3%20Workgroup%20Remote%20Access%20Interim%20Report%2008162021.pdf> (noting “significant barriers to participation in court proceedings” before “the expansion of remote access”); Tara Kunkel, Brad Ray & Kristina Bryant, National Center for State Courts, *Virtual Services in Judicially Led Diversion Programs: Participant Findings* 16 (Jan. 2022), https://www.ncsc.org/__data/assets/pdf_file/0028/72748/Virtual-Services-in-Judicially-Led-Diversion-Programs-Participant-Findings.pdf (survey respondents explaining how virtual court hearings reduced barriers, anxiety, and health concerns); Honorable Samuel A. Thumma et al., *Post-pandemic Recommendations: COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup*, 75 SMU L. Rev. F. 1, 13 (2022), <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1039&context=smulrforum> (noting benefits of reduced time and costs to Arizona state court litigants using technology-based platforms).

² See, e.g., Douglas Keith & Alicia Bannon, Brennan Center for Justice, *Principles for Continued Use of Remote Court Proceedings* 1 (Sept. 10, 2020), https://www.brennancenter.org/sites/default/files/2020-09/Principles%20for%20Continued%20Use%20of%20Remote%20Court%20Proceedings%20final_0.pdf (noting that although there is “reason for caution” around remote court proceedings, if implemented well, they “may have substantial benefits, including expanding access to legal services”).

their own technological investments. We therefore propose that the Committee consider amending Rule 77(b), designating the current language as Rule 77(b)(1), and adding a Rule 77(b)(2) and (3) as follows:

- (b) Place for Trial and Other Proceedings.
 - (1) Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing—other than one ex parte—may be conducted outside the district unless all the affected parties consent.
 - (2) A judge must permit parties, witnesses, and counsel to appear remotely—through video-conference or telephone—upon request, unless the Court deems such remote participation to be prejudicial to the proceeding or to any party.
 - (3) If a judge schedules a proceeding that would normally be held in open court but is entirely or partially remote, the court must provide information about how members of the public may join that remote proceeding on the case’s public docket at least three days before the proceeding, or, if a proceeding is scheduled fewer than three days in advance, at the time the proceeding is scheduled.

Thank you for your consideration of this proposal. Please do not hesitate to contact us via Jessica Morton at jmorton@democracyforward.org or 202-843-1642 if any further information would be helpful.

Respectfully,

Americans United for Separation of Church and State
Bazelon Center for Mental Health Law
Boston College Law School Civil Rights Clinic
Center for Civil Justice
Democracy Forward Foundation
Equal Rights Advocates
First Amendment Clinic, Vanderbilt Law School
Florida Legal Services, Inc.
Institute for Constitutional Advocacy and Protection
at Georgetown University Law Center
Justice in Aging

Lawyers' Committee for Civil Rights Under Law
Life After Release
National Center for Law and Economic Justice
National Employment Law Project
National Health Law Program
National Women's Law Center
Public Justice Center
Shriver Center on Poverty Law
Southern Coalition for Social Justice