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Recommended Citation

Herbert M. Kritzer, *COVID-19 and the Multiple Worlds of Litigation*, 71 DePaul L. Rev. 393 (2022)
Available at: <https://via.library.depaul.edu/law-review/vol71/iss2/9>

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COVID-19 AND THE MULTIPLE WORLDS OF LITIGATION

*Herbert M. Kritzer*¹

INTRODUCTION

The COVID-19 pandemic forced sudden and immediate changes in the work of litigators and judges.² Working face-to-face with colleagues, opposing litigants, and their lawyers and arguing before judges came to a crashing halt. Initially, most scheduled litigation events were canceled or put on hold: no oral arguments or hearings, no scheduling conferences, no trials, no depositions. Lawyers, judges, and support staff shifted to working remotely. Slowly some activities involving direct interaction resumed using an online platform such as Zoom, WebEx, GoToMeeting, or Microsoft Teams. The question this Article addresses is whether any of the adjustments made during the pandemic will outlive COVID-19? That is, has litigation practice and process been changed permanently by the pandemic? A central element in answering this question is recognizing that—surprise, surprise—all litigation is not the same. A second key element is understanding that some changes were already taking place even before the pandemic; this leads to the question of whether the pandemic led to changes that would not have occurred, or simply sped up changes that were already happening or were very likely to happen in the future?

This Article has four parts plus a brief conclusion. The first Part discusses the significance of what might be labeled the “multiple worlds of litigation.” The second Part discusses pre-pandemic trends in litigation and dispute resolution processes. The third briefly de-

1. Marvin J. Sonosky, Chair of Law and Public Policy, University of Minnesota Law School; B.A., Haverford College; Ph.D., University of North Carolina at Chapel Hill. Law Librarian Scott Dewey provided valuable assistance tracking down articles and other materials regarding the use of technology to conduct court proceedings.

2. This Article focuses almost exclusively on the United States; for perspectives on how civil litigation has been affected by COVID-19 in other countries, see Bart Krans & Anny Nylund, *Civil Courts Coping with Covid-19 – Exceptional Times, Normal Times, New Times?*, in *CIVIL COURTS COPING WITH COVID-19*, at 1 (Bart Krans & Anna Nylund eds., 2021), <https://british-association-comparative-law.org/2021/06/11/civil-courts-coping-with-covid-19-by-bart-krans-and-anna-nylund/>.

scribes how litigation was conducted during the pandemic. Finally, the fourth speculates on which changes, if any, will be permanent.

To guide my understanding of what adjustments were made during the pandemic and to get a sense of what is likely to continue and what is likely to revert to the pre-pandemic norm, I had a series of conversations lasting fifteen to thirty minutes with nine lawyers whom I already knew, either personally or from previous research;³ the initial conversations took place in early to mid-April 2021 as the vaccines were becoming more available. Four of these lawyers are commercial litigators, two handle tort defense, and three are plaintiffs' lawyers handling personal injury and professional liability. The questions I asked were:

- Prior to the pandemic, had you used video conferencing for any kinds of meetings or hearings?
- What have you done remotely that in the past you would have done face-to-face?
- Has anything you have had to do remotely been problematic from your perspective?
- What would you say has gone particularly well?
- What do you see continuing to be done remotely that in the past would have been done face-to-face? Do you expect any pressure from clients (or others) to continue to do some things remotely?
- What do you see not continuing to be done remotely? Why not?

In late August 2021, I recontacted the lawyers I had spoken to several months earlier with a set of follow-up questions:

- Have you started having any in-person hearings?
- Any in-person depositions?
- Any in-person client meetings?
- Are you now back in the office, and if not, when do you expect that to happen?
- Have your expectations about what will continue to happen virtually, rather than in-person, post-pandemic changed at all?

3. For reasons of confidentiality, I do not identify the people with whom I spoke. The quotes provided below are from detailed notes made during the conversations (no recordings, and hence no transcripts, were made).

Additionally, I had my law library reference staff search for any reports of experience during the pandemic using video or other new technologies.⁴

I. MULTIPLE WORLDS OF LITIGATION

Although civil litigation in a jurisdiction is governed by a single set of rules, in practical terms there are major differences in the way litigation is conducted based on a variety of factors. In a brief 1987 monograph, Deborah Hensler and her colleagues at the RAND Institute for Civil Justice distinguished among three distinct “worlds” of tort litigation: routine personal injury (exemplified by traffic accident suits), high-stakes cases including some types of personal injury suits (products liability, malpractice) and business torts, and mass latent injury cases (asbestos, drug injury cases, toxic torts).⁵ Although Hensler and colleagues were primarily interested in distinguishing among these worlds of tort litigation in describing various trends (e.g., volume of litigation, jury awards, litigation costs),⁶ the work of litigation differs in important ways (scale, costs, content, complexity) across these three worlds.

In a recent book on legal malpractice litigation, Neil Vidmar, Professor Emeritus, Duke University School of Law, and I distinguished two worlds of such litigation, one involving claims from individuals and small businesses brought against solo practitioners and small law firms and one involving claims from corporations brought against large corporate law firms.⁷ Key differences between these two types of claims turned on the ability of potential claimants to secure expert representation which was related to whether potential defendants had professional liability insurance and whether the potential recovery could produce an adequate contingency fee.⁸ Other important differences were the kinds of matters leading to claims and the nature of the errors alleged to have been made by the defendant lawyer.⁹ Although the identification of the two worlds of legal malpractice litigation arose primarily from the research data, it did not come as a surprise.

4. The initial search was done in mid-April 2021, with a follow-up in late August 2021.

5. DEBORAH R. HENSLER ET AL., TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS 2–3 (1987). See also Deborah R. Hensler, *Reading the Tort Litigation Tea Leaves: What's Going On in the Civil Liability System?*, 16 JUST. SYS. J. 139, 141–42 (1993) [hereinafter Hensler, *Reading the Tort Litigation Tea Leaves*].

6. Hensler, *Reading the Tort Litigation Tea Leaves*, *supra* note 5, at 141–42.

7. HERBERT M. KRITZER & NEIL VIDMAR, WHEN THE LAWYER SCREWS UP: ACCESS TO JUSTICE FOR VICTIMS OF LEGAL MALPRACTICE 4–6 (2017).

8. See *id.* at 147–48.

9. *Id.* at 72–75, 84–90.

The two worlds we found mirrored the distinction between the two hemispheres of the bar discussed by John Heinz and Edward Laumann in their study of the Chicago Bar circa 1975,¹⁰ one hemisphere servicing what they labeled the personal services sector (including criminal, family, plaintiffs' personal injury, wills and probate, and small family businesses) and the other servicing corporations (corporate, finance, intellectual property, corporate tax, business litigation). They labeled these "hemispheres" because they found that the effort of the Chicago bar divided roughly in half, with 53 percent devoted to work in the corporate sector and 40 percent to the personal services/small business sector.¹¹

From this brief discussion, one can see the importance of not treating tort litigation as a unitary phenomenon. This is even more true when one extends beyond tort litigation. There are many ways one might slice the litigation pie. One is the amount or nature of the stakes involved, which is one of two key distinguishing features of the first two worlds of tort litigation identified by Hensler and her colleagues; the other distinguishing feature, which also distinguishes the third world of tort litigation, is the complexity of the factual issues involved. Another way one could slice the litigation pie is based on the legal issues involved: tort, contract, real and personal property, civil rights and discrimination, other employment, securities, intellectual property, anti-trust, regulation, real estate, etc. Some cases usually involve an individual (or small group of individuals) pitted against a corporate entity in a fairly routine type of matter or, alternatively, in a nonroutine type of matter; a few cases pit a large group of individuals, either in a class-action or through a multidistrict litigation (MDL), against one or more corporations. Other cases involve two wealthy litigants, often two large corporations, litigating against each other. Thus, there are many dimensions—stakes, complexity, legal issues, types of litigants—that structure the various worlds of litigation.

10. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319–23 (1982) (distinguishing between the corporate and personal client hemispheres). Earlier research had described the differing worlds of the solo practitioner and the wall street lawyer. See generally JEROME E. CARLIN, LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO (1962); ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? (1964). Even earlier writings had argued that the working world of what Heinz and Laumann labeled the two hemispheres was so great that different educational models would be appropriate. See ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 406–10 (1921).

11. HEINZ & LAUMANN, *supra* note 10, at 40. When the study was replicated in 1995, the split in effort had shifted, with 64 percent devoted to corporate work and only 29 percent to personal services/small business. See JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 42 (2005).

For purposes of this Article, I will focus on two “worlds of litigation” defined largely by the types of litigants involved: the world of personal litigation which pits an individual (or small group of individuals) against other individuals, a business, or a governmental agency; and the world of corporate litigation which pits two large business entities against one another, a large business entity against a governmental agency, or a large business entity against a large group of individuals such as in a consumer class action. As a shorthand, I label these two worlds “individual litigation” and “corporate litigation,” recognizing that both worlds can involve both individuals and corporations.

II. PRE-PANDEMIC DEVELOPMENTS IN LITIGATION AND DISPUTE RESOLUTION

Although pandemic restrictions shifted many activities online that normally were conducted face-to-face, technology had already made online tools an important part of everyday life. Grandparents who live some distance from their grandchildren can have regular, even daily, contact rather than visiting a few times a year; many grandparents read to their grandchildren using tools such as Skype, WhatsApp, and Facetime, in some cases nightly, and they can “be present” at birthday parties. Job candidates can be interviewed remotely, particularly when recruitment is being done beyond a local area. It is no longer necessary to go to the library to check out books; one can checkout and download eBooks and audio books without setting foot in the library. College students no longer have to go to the library to do research for term papers or to access reserve reading because materials are available remotely.

Well before the pandemic, the world of litigation was increasingly reliant on various types of technology. The electronic case law research databases Lexis and Westlaw both made their initial appearances in the 1970s, the former in 1973¹² and the latter in 1975.¹³ By the 1990s, technology began to play a role in interaction during litigation. In an article written about twenty-five years ago, I described what at that time was a new service called CyberSettle.com that provided an

12. *The LexisNexis Timeline*, LEXISNEXIS, http://www.lexisnexis.com/anniversary/30th_timeline_fulltxt.pdf (last visited May 3, 2021).

13. William G. Harrington, *A Brief History of Computer-Assisted Legal Research*, 77 LAW LIBR. J. 543, 553 (1984).

online platform for settling monetary disputes.¹⁴ A 2006 report by the Federal Judicial Center described the use of video conferencing for oral arguments by several courts of appeals.¹⁵ Services offering systems for remotely taking depositions have been around for at least a decade.¹⁶

In 1996, I spent three months observing in the offices of three plaintiffs' lawyers. Only one of the lawyers had a computer on his desk. None of them interacted with opposing lawyers other than by letter, telephone, or in-person.¹⁷ Nine years later, I spent three months observing in an insurance defense firm. By then, all lawyers at the firm had computers on their desks and most communication with opposing lawyers that was not in-person was via email, as was the communication between the lawyers and the insurance companies that had retained them.¹⁸

The rise of high-volume online transaction systems such as eBay, Amazon, and PayPal produced large numbers of disputes.¹⁹ Traditional methods, including the then extant approaches to alternative dispute resolution (ADR), did not provide a viable means of resolving the volume of disputes that arose. The solution to the problem was a system of online dispute resolution (ODR) that went beyond resolving disputes over the amount to be paid, the kind of issue that CyberSettle.com was designed to handle.²⁰ eBay developed a system called

14. Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 *LAW & SOC'Y REV.* 713, 743 (1999). CyberSettle.com continues to operate. See CYBER SETTLE, *cybersettle.com* (last visited Feb. 21, 2022).

15. See generally MEGHAN DUNN & REBECCA NORWICK, FED. JUDICIAL CTR., REPORT OF A SURVEY OF VIDEOCONFERENCING IN THE COURTS OF APPEALS (2006), <https://www.fjc.gov/sites/default/files/2012/VidConCA.pdf>.

16. See, e.g., VERITEXT, <https://www.veritext.com/services/veritext-virtual/> (last visited Apr. 8, 2021); *Virtual Depositions Forced by COVID Expected to Stick*, BLOOMBERG L. (Dec. 29, 2020), <https://news.bloomberglaw.com/coronavirus/email-print?type=newsletter&id=00000176-af16-dab5-a7fe-bf5fa32b0000>.

17. See generally HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004).

18. Herbert M. Kritzer, *The Commodification of Insurance Defense Practice*, 59 *VAND. L. REV.* 2053, 2056–57 (2006).

19. It is worth noting that the auto insurance industry had long operated a relatively high-volume arbitration system to resolve disputes over which company should pay property damage claims; the system was started in the 1940s. See *The Coverage, News and Opinions: Intercompany Arbitration Agreement Successful*, 378 *INS. L. J.*, July 1954, at 498, 503. The program came to be operated by the Committee on Insurance Arbitration and expanded to include other types of intercompany claims. Bernard I. Hines, Jr., *The Committee on Insurance Arbitration*, 13 *THE FORUM*, Fall 1977, at 216, 216 [hereinafter Hines, *The Committee on Insurance Arbitration*]. In 1973, the various intercompany arbitration programs resolved 129,000 intercompany controversies. See Bernard I. Hines, Jr., *Committee on Insurance Arbitration*, 10 *THE FORUM*, Winter 1974, at 805, 805.

20. Kritzer, *supra* note 14, at 743.

the Resolution Center which was employed by both eBay and PayPal,²¹ the latter having been acquired by eBay in 2002 and then spun off in 2015.²² Early writing about ODR foresaw that it had applications in a wide range of areas.²³ In 2011, eBay made its Resolution Center software available to other entities, and it was adopted to handle such things as property tax assessment appeals and disputes over payment amounts between medical providers and insurers.²⁴ Not surprisingly, there has been tremendous growth in the use of various ODR systems in connection with eCommerce; by 2010, there were many millions of disputes handled every year.²⁵ Subsequently, ODR has made its way into courts.²⁶

Another arena where online processes were in use prior to the COVID-19 pandemic is international commercial arbitration.²⁷ This is not surprising given that international commercial disputes can involve parties around the world. Online arbitration makes it possible for parties to appear synchronically without incurring the time and expense of international travel. Unlike the kind of high-volume arbitration involved in resolving disputes common with eCommerce, proceedings in online commercial arbitration mimic more traditional arbitration in terms of witnesses presenting testimony at hearings and lawyers presenting arguments orally. This translates to a process that has a lot of similarities to court trials. Additionally, an increasing number of ADR providers offer online arbitration for other kinds of claims.²⁸

Courts have long provided for remote hearings in some situations. Typically, these have involved preliminary matters, although they

21. Colin Rule, *Online Dispute Resolution and the Future of Justice*, 16 ANN. REV. L. & SOC. SCI. 277, 281 (2020).

22. See *History & Facts*, PAYPAL (Dec. 31, 2021), <https://about.pypl.com/who-we-are/history-and-facts/default.aspx>.

23. M. ETHAN KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 45–70 (2001).

24. Rule, *supra* note 21, at 281.

25. *Id.*

26. *Id.* at 283.

27. Ihab Amro, *Online Arbitration in Theory and in Practice: A Comparative Study in Common Law and Civil Law Countries*, KLUWER ARB. BLOG (Apr. 11, 2019), <http://arbitration-blog.kluwerarbitration.com/2019/04/11/online-arbitration-in-theory-and-in-practice-a-comparative-study-in-common-law-and-civil-law-countries/>. See generally IHAB AMRO, ONLINE ARBITRATION IN THEORY AND IN PRACTICE: A COMPARATIVE STUDY OF CROSS-BORDER COMMERCIAL TRANSACTIONS IN COMMON LAW AND CIVIL LAW COUNTRIES (2019).

28. See Amy J. Schmitz, *Arbitration in the Age of COVID: Examining Arbitration's Move Online*, 22 CARDOZO J. CONFLICT RESOL. 245, 266–72 (2021).

could also deal with contested issues.²⁹ One of the lawyers I observed in 1995 as part of my study of contingency-fee practice handled a range of litigation in the personal services sector including divorce; I sat in on a telephone conference involving a court commissioner and lawyers for the divorcing couple, the goal of which was to determine how to get the divorce done quickly at minimal expense to the couple. In the criminal arena, bond and other preliminary hearings have been conducted remotely with the defendants appearing by video from the facilities where they were being detained.³⁰ The idea of a fully online court is not new, going back to at least the 1990s, if not before.³¹ In the early 2000s, the Michigan legislature authorized the creation of an online, nonjury “Cyber Court” that was to handle business and commercial cases involving more than \$25,000.³² However, the cyber court was never sufficiently funded to come into operation,³³ and the authorizing legislation was repealed in 2012.³⁴

The most recent,³⁵ and probably most extensive, consideration of developing fully online courts is by Richard Susskind,³⁶ a British expert in law and technology.³⁷ Susskind limits his focus to high-volume civil matters of modest or low value.³⁸ Susskind provides both a narrow and broad definition of an online court.³⁹ He labels the narrow

29. See Gordon Bermant & Winton D. Woods, *Real Questions About the Virtual Courthouse*, 78 JUDICATURE 64, 65 (1994).

30. See generally Ronnie Thaxton, *Injustice Telecast: The Illegal Use of Closed-Circuit Television Arraignments and Bail Bond Hearings in Federal Court*, 79 IOWA L. REV. 175 (1993).

31. Brian A. Pappas, *Online Court: Online Dispute Resolution and the Future of Small Claims*, 12 UCLA J. L. & TECH., Fall 2008, at 1, 9 (2008).

32. Lucille M. Ponte, *Michigan Cyber Court: A Bold Experiment in the Development of the First Public Virtual Courthouse*, 4 N.C. J. L. & TECH. 51, 60 (2002).

33. Tony Niescier, *Virtual Courts and the Future of Personal Jurisdiction*, JURIST: LEGAL NEWS & COMMENTARY (Mar. 26, 2012), <https://www.jurist.org/commentary/2012/03/tony-niescier-personal-jurisdiction/>.

34. Letter from Valerie Brannon, Research Assistant, to Mich. Law Review Comm’n (May 13, 2015), <http://www.gongwer.com/public/MLRC%20Meeting%20Documents-May%2013%202015.pdf>.

35. RICHARD SUSSKIND, *ONLINE COURTS AND THE FUTURE OF JUSTICE* (2019).

36. See CIVIL JUSTICE COUNCIL ONLINE DISPUTE RESOLUTION ADVISORY GRP., *ONLINE DISPUTE RESOLUTION FOR LOW VALUE CIVIL CLAIMS* 3, 6 (Feb. 2015), <https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf> (much of the basic description of what Susskind proposes in his book appear in this report, prepared by Civil Justice Council’s Online Dispute Resolution Advisory Group which was chaired by Susskind).

37. Susskind’s prior writings focused heavily on the role of technology in legal practice. See, e.g., RICHARD E. SUSSKIND, *TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (2013).

38. SUSSKIND, *supra* note 35, at 11, 149–50. For a report of an experiment with virtual trials in criminal cases in England, see WEND TEEDER ET AL., *VIRTUAL COURTROOM EXPERIMENT: DATA REPORT: THIRD EVALUATION OF A VIRTUAL PILOT STUDY* (Oct. 4, 2020), <https://justice.org.uk/our-work/justice-covid-19-response/>.

39. SUSSKIND, *supra* note 35, at 6.

definition “online judging,” which refers to the adjudication of cases by human judges without the parties and the judge coming together in physical courtrooms; evidence and arguments would be submitted through online systems and decisions rendered without a hearing either live or virtual.⁴⁰ This essentially involves the adoption of the types of ODR processes already used outside the public court systems. Presumably, a key difference would be a combination of availability for a wide range of disputes and public access to the decisions of the adjudicator. Susskind labels his broader conception “extended courts.”⁴¹ The extended courts would apply technology broadly to aid litigants in understanding the law and their legal options, assisting them in formulating their claims, offering mechanisms of resolving claims short of adjudication, and providing a range of mechanisms (e.g., apps, messaging, video calling, chat bots, live bots, etc.) to make it easier for nonlawyers to interact with the courts.⁴²

Importantly, Susskind does not envision anything that is a direct analogue to the in-person hearing or trial.⁴³ Hearings would be replaced by an asynchronous process that resembles in some ways the investigatory model found in civil law systems.⁴⁴ Cases would be processed over a period of time using an interactive process; litigants would submit evidence and arguments electronically with the opportunity to respond to materials submitted by the opposing parties, submit additional materials as needed and appropriate, and respond to questions raised by the judge.⁴⁵ Susskind describes the process as similar to “continuous online hearings” used by some administrative tribunals in the United Kingdom.⁴⁶

Hazel Genn, the leading empirical scholar of civil justice in England, identified a wide range of concerns with the model envisioned by Susskind.⁴⁷ Some of these concerns are:

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 230.

45. *Id.* at 60, 154.

46. *Id.* at 146.

47. Hazel Genn, Professor, Faculty of Laws UCL, Birkenhead Lecture: Online Courts and the Future of Justice 5–6 (Oct. 16, 2017), <https://discovery.ucl.ac.uk/id/eprint/10062267/1/Birkenhead%20Lecture%202017%20Professor%20Dame%20Hazel%20Genn%20Final%20Version.pdf>. Genn’s comments were made prior to the book’s publication and presumably were based on the report for the Civil Justice Council. See generally ONLINE DISPUTE RESOLUTION FOR LOW VALUE CIVIL CLAIMS, *supra* note 36.

- Given that much of Susskind’s plan is built on private ODR models that assume privacy, how well will those models adapt to values inherent in the public arena of courts, particularly the commitment to substantive justice?⁴⁸
- Does the proposal undercut the idea of a right to a “day in court” to present one’s view of the dispute?⁴⁹
- Will the absence of an in-person hearing undercut the legitimacy of the process?⁵⁰

Genn goes on to identify a wide range of research issues, both in preparation for adopting the kinds of proposals Susskind makes and in assessing the functioning of the system he lays out.⁵¹

This review of actual and proposed methods of adjudicating disputes shows that developments and proposals for the use of virtual approaches to adjudication have been heavily concentrated in the personal hemisphere identified in the preceding Part. Susskind is very explicit that he is not considering the kinds of matters that fall in the corporate hemisphere, and that is true of the kinds of systems developed and used by eBay, Amazon, and PayPal.⁵² However, the corporate hemisphere has not been ignored. In addition to international commercial arbitration, there is a long-standing, high volume system for arbitrating claims disputes between insurance companies that is now handled almost entirely with an online system.⁵³ American courts have also used online tools in some proceedings involving commercial disputants; one lawyer with whom I spoke reported an example of a federal trial in a commercial case where one witness testified from Germany. The strongest development has probably been in the arena of international commercial arbitration. A second significant area of success that lies heavily in the corporate arena is the Uniform Domain-Name Dispute-Resolution Protocol (UDRP) developed by the Internet Corporation for Assigned Names and Numbers (ICANN) to deal with disputes regarding the ownership of internet domain names.⁵⁴ Not all efforts on the corporate side have succeeded as evi-

48. Genn, *supra* note 47, at 11.

49. *Id.* 12.

50. *Id.* at 13.

51. *Id.* at 14–15.

52. SUSSKIND, ONLINE COURTS AND THE FUTURE OF JUSTICE, *supra* note 35, at 98–102.

53. See Hines, *The Committee on Insurance Arbitration*, *supra* note 19, at 218. Today these programs are managed by Arbitration Forums, Inc., which oversees the arbitration of about 869,000 intercompany disputes of various types. *Arbitration Forums, Inc.*, ARB. FS., INC., <https://home.arbfile.org/company-information/about-af> (last visited Apr. 7, 2021).

54. Rule, *supra* note 21, at 288–89. Rule notes that the UDRP has been used to resolve over 60,000 disputes. *Id.* at 288. It is unclear what percentage of these disputes were between two

denced by Michigan’s unsuccessful attempt to create the cyber court for commercial disputes exceeding \$25,000.⁵⁵

III. LITIGATION PROCESSES DURING THE PANDEMIC⁵⁶

With the outbreak of the pandemic, much of the usual face-to-face interactions among people came to an end. Where possible, many of these interactions continued online. This was true for major life cycle events ranging from celebrations of births (e.g., baby namings, ritual circumcisions, christenings, etc.) to graduations to weddings to funerals. Religious services, schooling at virtually all levels,⁵⁷ business meetings, and some medical appointments moved online (or were either canceled or postponed). Legal proceedings were just as affected as other interpersonal activities.⁵⁸ Arguably, this shift to a total reliance on communication technology came easier for some than for others. For those lawyers who could be described as “digital natives”—those who grew up with technology and are “‘native speakers’ of the digital language of computers, video games and the Internet”⁵⁹—the change was probably not a big deal. However, for many older lawyers and many judges, “digital immigrants,”⁶⁰ and a few “digital resisters,” the shift may have been a greater challenge. Among the lawyers with whom I spoke, none reported having had significant experience using video technology in their litigation work pre-pandemic; several did report having had occasional remote depositions involving minor witnesses that would have required significant travel. Also, those in large multi-office law firms reported that video conferencing had sometimes been used for internal meetings concerning firm-related business.

corporate entities versus between a corporation and an individual engaging in what has been labeled cybersquatting.

55. See Ponte, *supra* note 32 and accompanying text.

56. My focus is on legal practice and how lawyers adjusted during the pandemic. For an excellent discussion of the response of courts, see Helen Hershkoff & Arthur R. Miller, *Courts and Civil Justice in the Time of COVID: Emerging Trends and Questions to Ask*, 23 N.Y.U. J. LEGIS. & PUB. POL’Y 321, 360–95 (2021).

57. One possible exception may have been preschool programming for the youngest children.

58. Thomson Reuters conducted a survey of 238 judges and court professionals in June 2021 that asked about their participation in remote court proceedings. See *The Impacts of the COVID-19 Pandemic on State & Local Courts Study 2021: A Look at Remote Hearings, Legal Technology, Case Backlogs, and Access to Justice*, THOMSON REUTERS INST. (Aug. 24, 2021), <https://www.thomsonreuters.com/en-us/posts/legal/pandemic-impact-courts-report-2021/> [hereinafter *The Impacts of the COVID-19 Pandemic*].

59. Mark Prensky, *Digital Natives, Digital Immigrants Part 1*, 9 ON THE HORIZON, Oct. 2001, at 1, 1.

60. *Id.* at 1–2.

It is important to note that as early as the summer of 2020, some courts had started in-person proceedings, including criminal trials.⁶¹ These were taking place in modified courtrooms where there were arrangements for social distancing, the use of plexiglass partitions, and audio systems so that participants could speak softly and so that bench conferences could be held at some distance rather than closely gathered around the bench.⁶² The arrangement of the courtroom in the April 2021 criminal trial of Derek Chauvin, the police officer accused of causing the death of George Floyd, provided an example of how this type of distancing was done.⁶³ The few examples of in-person proceedings are dwarfed by the shift to online, remote processes, particularly in the context of civil litigation, and that shift continues, albeit with increasing exceptions (described below), as this Article was finalized in late August 2021.

The sudden shift online in the context of civil litigation started with nonformal activities. These included client meetings, meetings to get background information on the client and the case, planning/strategy sessions, meetings with fact witnesses, and meetings with expert witnesses, all of which moved to online platforms.⁶⁴ Non-court events such as the taking of depositions⁶⁵ and pre-trial mediation needed to be done virtually rather than in-person. One plaintiffs' lawyer commented that his Zoom mediations "had been terrific, particularly when the mediator knew how to use Zoom features such as breakout rooms." Preliminary court events, such as scheduling, discovery, and status conferences, some of which were previously done telephonically, now became entirely remote often using video conferencing technology.⁶⁶ Video conferencing became the standard means of con-

61. Regarding some of the issues in conducting remote trials, particularly remote jury trials, see generally Kimberly K. Henrickson, *COVID-19 & the Courts: The Pandemic's Impact on the Practice of Litigation and Considerations for Future Remote Proceedings*, 40 REV. LITIG. 305 (2021).

62. See *As Courts Restore Operations, COVID-19 Creates a New Normal*, U.S. CTS. (Aug. 20, 2020), https://www.uscourts.gov/news/2020/08/20/courts-restore-operations-COVID-19-creates-new-normal?utm_campaign=usc-news&utm_medium=email&utm_source=govdelivery.

63. An image of the courtroom arrangement can be found at *Chauvin Trial Courtroom*, STAR TRIBUNE, <https://static.startribune.com/newsgraphics/dailies/CourtroomDIGITAL853px-03.svg> (last visited Sept. 1, 2021).

64. Scott Dodson et al., *The Zooming of Federal Civil Litigation*, 104 JUDICATURE 13, 14 (2020).

65. See *Virtual Depositions Forced by COVID Expected to Stick*, *supra* note 16.

66. Dodson et al., *supra* note 64, at 14. One of the lawyers with whom I spoke reported that some of the Seventh Circuit hearings he had during the pandemic were done telephonically rather than using video technology.

ducting formal hearings,⁶⁷ many concerning contested matters, although some types of matters might have been problematic for remote processes.⁶⁸ One plaintiffs' lawyer commented that, "I think [Zoom] has been a wonderful equalizer for hearings." Yet more problematic were trials. Bench trials were held in some types of cases,⁶⁹ and at least some civil jury trials did occur.⁷⁰ One lawyer with whom I spoke commented that he found remote hearings increased the cognitive burden compared to working face-to-face.

At the appellate level, oral arguments went virtual.⁷¹ Judges heard the arguments from their homes (or their personal offices) and attorneys presented their arguments from similar locations, although some of the lawyers with whom I spoke reported going to their office for important hearings (e.g., summary judgment hearings) to have technical support staff immediately available should any glitches arise.⁷² Most prominent here was the U.S. Supreme Court which chose to hear arguments via telephone. Rather than the traditional free-for-all format in which justices jumped in whenever the spirit moved them, justices asked questions serially, being called on by the Chief Justice with the Chief Justice cutting off lengthy responses by attorneys.⁷³ In

67. This shift to online hearings applied to commercial arbitration hearings as well. Joshua Karton, *The (Astonishingly) Rapid Turn to Remote Hearings in Commercial Arbitration*, 46 QUEEN'S L.J. 399, 400 (2021).

68. Dodson et al., *supra* note 64, at 15. For an empirical study of online hearings in Texas, see Elizabeth G. Thornburg, *Observing Online Courts: Lessons from the Pandemic*, 54 FAM. L.Q. 181, 184 (2020).

69. *As Pandemic Lingers, Courts Lean into Virtual Technology*, U.S. CTS. (Feb. 18, 2021), https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology?utm_campaign=usc-news.

70. Christopher Robertson & Michael Shammas, *The Jury Trial Reinvented*, 9 TEX A&M L. R. 109, 121 (2021).

71. See Margaret D. McGaughey, *Remote Oral Arguments in the Age of Coronavirus: A Blip on the Screen or a Permanent Fixture?*, 21 J. APP. PRAC. & PROCESS 163, 164–80 (2021).

72. No one wanted to have a problem such as that encountered by Rod Ponton who appeared at a Zoom hearing as a cat. See Daniel Victor, *'I'm Not a Cat,' Says Lawyer Having Zoom Difficulties*, N.Y. TIMES (Feb. 9, 2021), <https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html>.

73. Adam Liptak, *Supreme Court Hears First Arguments via Phone*, N.Y. TIMES (May 4, 2020), <https://www.nytimes.com/2020/05/04/us/politics/supreme-court-coronavirus-call.html>. One noteworthy aspect of this procedure was that the Court provided a live audio feed allowing the public to listen in as the arguments were being made. *Id.* A surprising result of the change in format was the level of participation by Justice Thomas who previously asked questions very rarely. See Timothy R. Johnson et al., *COVID-19 and Supreme Court Oral Argument: The Curious Case of Justice Clarence Thomas*, 21 J. APP. PRAC. & PROCESS 113, 115 (2021). For additional analyses of the change to serial questioning based on the remaining months of the 2019–2020 court term, see generally Tonja Jacobi et al., *Oral Argument in the Time of COVID: The Chief Plays Calvinball*, 30 S. CAL. INTERDISC. L.J. 401 (2021). On October 4, 2021, the Supreme Court returned to in-person arguments. Adam Liptak, *One Justice Missing and Only One Masked, Supreme Court Returns*, N.Y. TIMES (Oct. 4, 2021), <https://www.nytimes.com/2021/>

the U.S. Courts of Appeals, as well as many state appellate courts, oral arguments employed video conferencing technology;⁷⁴ some of those courts had already been live-streaming oral arguments and several circuits of the U.S. Court of Appeals had previously conducted en banc arguments using video conferencing technology.⁷⁵ Importantly, the pandemic forced appellate judges who had not previously used video technology for hearings to do so, and according to one informal survey, the “judges seemed to embrace this new technology with somewhat surprising enthusiasm,” even as they continued to say “that they preferred in-person arguments to Zoom.”⁷⁶ Several of the attorneys with whom I spoke had done appellate arguments; they reported that the courts they appeared before had not shifted to the seriatim questioning system adopted by the U.S. Supreme Court. A survey of attorneys who had appeared before the Ninth Circuit via video conferencing were fairly satisfied with their experience, with 47 percent finding the format similar to in person and 15 percent finding it better than the experience of appearing in person; however, a significant minority, 38 percent of the respondents, said that in person was better than remote.⁷⁷

A. *Beginnings of a Return to the Office*

By the middle of August 2021, things had begun to shift for the seven lawyers I was able to recontact. Most reported being back in the office full or part time, although larger firms were delaying full return to office (to the degree they were planning to do so), due to the late summer surge associated with the COVID-19 Delta variant. One lawyer at a firm of about fifteen lawyers said that most lawyers and staff were back (all were vaccinated, no masks required); the firm had moved to new offices during the pandemic and had been able to revise the layout so that each person had their own office rather than having

10/04/us/politics/supreme-court-returns.html. Justice Thomas continued to be an active participant, frequently asking the first question. *Id.* Moreover, the argument procedure combined the traditional free-for-all with “an opportunity for justices to ask questions in order of seniority one by one after each lawyer argued.” *Id.*; Adam Liptak, *To Tame Oral Arguments, Supreme Court Revises its Procedures*, N.Y. TIMES (Nov. 1, 2021).

74. Eric M. Fraser & Krissa Lanham, *Remote Appellate Oral Arguments*, 57 ARIZ. ATT’Y, Mar. 2021, at 12, 13–14.

75. *Id.* at 13–14.

76. Pierre H. Bergeron, *COVID-19, Zoom, and Appellate Oral Argument: Is the Future Virtual?*, 21 J. APP. PRAC. & PROCESS 193, 203 (2021).

77. William Cracraft, *Remote Argument Survey Highlights Positives and Negatives of Streaming During Pandemic*, U.S. CT. OF APPEALS FOR THE NINTH CIR. (Nov. 23, 2020), <https://www.ca9.uscourts.gov/ninth-circuit-news/remote-argument-survey-highlights-positives-and-negatives-of-streaming-during-pandemic/>.

support staff in cubicles in a central area. That lawyer also commented that folks were encouraged to be in the office because “we work better together.” At least two of the lawyers had resumed travel for some meetings and depositions, although other depositions continued to be done remotely. However, most of the lawyers reported that they had still not done any in-person depositions.

There have been at least some professional meetings taking place in-person; even though those meetings required that all attendees be fully vaccinated, there were breakthrough COVID-19 cases after at least two of the meetings. One commercial lawyer reported being okay with not being on scene for depositions when he was taking the deposition but wanted to be present to defend depositions of his clients and his witnesses; another lawyer commented that some depositions had been done in-person when everyone who would be there was vaccinated (masks optional). One lawyer reported that some client meetings had been in-person if the client had been vaccinated but also noted that some clients like meetings on Zoom because it avoided them having to come to downtown Minneapolis. Only one of the lawyers reported having any in-person hearings; that lawyer also reported having had in-person mediations and in-person depositions. Another lawyer had an in-person trial scheduled in the near future, although the lawyer was uncertain whether the schedule would slip. Some hearings were simply canceled with the judge(s) relying upon briefs.

IV. WILL ANY OF THE CHANGES CONTINUE POST-PANDEMIC?

This brings me to the central question of whether any of the adjustments made due to the pandemic will constitute lasting changes to the civil justice process?

Presumably, civil trials will resume as in-person events, although it is not hard to imagine that some bench trials might continue to use remote technology for at least some participants. The chief judge of the Federal District of Minnesota, John Tunheim, described Zoom as “a very effective tool for bench trials” and said that going forward he would offer the option of a virtual civil jury trial.⁷⁸ It is worth noting that circa 2005 (the last year with good data) while 90 percent of state tort trials were jury trials, in contract cases just over a third (36.0 percent) were jury trials, and just over a quarter (26.4 percent) of real

78. Cara Salvatore, *Minn. Judge Calls for More Zoom Trials – Pandemic or Not*, LAW360 (Mar. 30, 2021), <https://www.law360.com/articles/1370514/minn-judge-calls-for-more-zoom-trials-pandemic-or-not>. Judge Tunheim also noted that potential use of remote trials during periods of unpredictable winter weather in Minnesota. *Id.*

property trials were jury trials.⁷⁹ Thus, leaving aside tort cases, there is a potential for significant numbers of online bench trials. One possible distinction, clearly regarding jury trials but also possibly with the bench trials that are more likely to continue to occur virtually, is when the lawyer sees the need to build sympathy for a witness; this is almost certainly easier to do when a witness is appearing in person before the adjudicator.⁸⁰

One result of the pandemic is that large numbers of judges who had used conference calls but not video conferencing to conduct preliminary hearings and conferences have now had substantial experience with services such as Zoom and WebEx.⁸¹ To facilitate this, courts had to obtain needed equipment and accounts with one or more video conferencing services. Some senior lawyers and judges who had been digital resisters may have been dragged unwillingly into using the video technology and may have needed substantial handholding by support staff, but they are now familiar with the technology. The sudden shift to video conferencing from telephonic conferencing may have created technical problems and caused stress because of the new format,⁸² but as of this writing, lawyers and judges have had well over a year of experience with the video conferencing technology.⁸³

Regardless, there are potential problems that do not exist for in-person hearings. In the words of one lawyer with whom I spoke, “[a] lot more can go wrong remotely.” Specifically, the communication

79. LYNN LANGTON & THOMAS H. COHEN, U.S. DEP’T OF JUST., NCJ No. 223851, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 2 (2008), <https://bjs.ojp.gov/content/pub/pdf/cbjtsc05.pdf>.

80. One insurance defense lawyer did not think it was likely that there would be remote jury trials in the types of cases he handles, even if the technology issues would be worked out. He explained in terms of opposition from plaintiffs’ lawyers and their need to build a relationship with the jurors.

81. See NAT’L CTR. FOR STATE COURTS, CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL, RECOMMENDATIONS TO THE CONFERENCE OF CHIEF JUSTICES BY THE CIVIL JUSTICE IMPROVEMENTS COMMITTEE 37 (2016), https://www.ncsc.org/__data/assets/pdf_file/0029/19289/call-to-action_-achieving-civil-justice-for-all.pdf (recommending “the use of remote audio and video services for case hearings and case management meetings”). See also NAT’L CTR. FOR STATE COURTS, CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL, RECOMMENDATIONS TO THE CONFERENCE OF CHIEF JUSTICES BY THE CIVIL JUSTICE IMPROVEMENTS COMMITTEE APPENDIX G: REMOTE CONFERENCING—FINDINGS AND RECOMMENDATIONS 3–5 (2016), https://www.ncsc.org/__data/assets/pdf_file/0022/25726/ncsc-cji-appendices-g.pdf.

82. See Jordan Rothman, *Most Remote Court Conferences Should Be by Phone, Not Videoconference*, ABOVE THE LAW (June 10, 2020), <https://abovethelaw.com/2020/06/most-remote-court-conferences-should-be-by-phone-not-videoconference/>.

83. Some have expressed concerns about whether video proceedings impact fairness. See *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court> (last visited Apr. 12, 2021). However, the concerns seem to focus more in areas such as immigration and bail proceedings.

technology can fail unexpectedly.⁸⁴ One lawyer reported panicking when his Zoom connection went down in the middle of his time-limited appellate argument; fortunately for him, the failure was on the court side of the technology, and he got his full time allotment. Technology failures are probably less likely, and could be dealt with more promptly, when participants are connecting not from home but from their offices with higher quality internet connections and onsite technical support immediately available.

Despite these problems, there is a clear shift in thinking about participation in remote hearings and depositions. A survey of about 200 lawyers conducted in March 2021, by a company offering remote deposition services, found that before the pandemic, 87 percent of the respondents had never or only rarely participated in remote depositions or legal proceedings,⁸⁵ but by the time of the survey, only 17 percent said they expected to never or rarely participate in such proceedings post-pandemic.⁸⁶ Moreover, 21 percent expected that their involvement in more than half of those proceedings would be remote,⁸⁷ and 32 percent thought a quarter to half of their depositions would involve remote participation by some but not all of the attendees.⁸⁸ A survey of 238 judges and court officials from state, county, and municipal courts conducted by Thomson Reuters in June 2021 found that 57 percent planned to conduct virtual hearings in civil cases post-pandemic.⁸⁹ This is probably an underestimate because it does not take into account whether a respondent was involved in handling civil cases.

It is likely that the future use of remote technology will differ significantly between the two hemispheres discussed in the introduction. Those paying the costs of litigation may see remote tools as a way of significantly reducing those costs. In the tort context, insurers are likely to see the use of technology as a way of sharply cutting expenses related to lawyers traveling for hearings or depositions; in the words of one lawyer, “[c]arriers won’t want to pay travel time and travel costs.” This could even extend to relatively short travel times of an

84. While teaching a first-year torts class remotely from my home in fall 2020, my wired internet went down. I had not configured my telephone to be able to quickly switch to it as an alternate connection. Of course, once I had the phone setup, I did not experience any further failures over my wired connection.

85. *Remote Proceedings in a Post-Pandemic World*, VERITEXT LEGAL SOLS (Mar. 2021), <https://info.veritext.com/rs/239-1NX-871/images/Veritext%20E-Book%20Remote%20Proceedings.pdf>.

86. *Id.*

87. *Id.*

88. *Id.* at 6.

89. *The Impacts of the COVID-19 Pandemic*, *supra* note 58, at 10.

hour or less. For depositions, this may not be limited to insurance-funded litigation.⁹⁰ Savings would also accrue by not having to pay lawyers for time spent waiting in court for their cases to be called. These savings are likely to be most salient in the smaller, routine cases found in the personal services sector. In those cases, any marginal advantage of handling some things in-person compared to virtually will be offset by the additional costs, particularly when considered across the full portfolio of cases that a high-volume player such as an insurance company pays to litigate.

Plaintiffs' lawyers handling relatively routine cases will also like the time-savings of handling many tasks virtually. This reflects the incentive for efficiency that is produced by working on a contingency-fee basis. This incentive was very apparent in my study of contingency-fee practice.⁹¹ One lawyer in that study stated, "[w]e pride ourselves on being really cost-efficient. We think about every penny we spend."⁹² Those pennies are not just costs, but also the lawyers' time because that is the major investment that lawyers working on a contingency-fee basis make in the cases they handle.⁹³ One of the plaintiffs' lawyers commented that she had found client meetings to be more efficient over Zoom. I suspect that even if virtual meetings are more efficient, corporate litigators will prefer to have in-person meetings with their clients when possible because such meetings serve to build the lawyer-client relationship more than Zoom meetings do. This is less of an issue for plaintiffs' lawyers because they are not dependent in the same way on repeat business.

Several people drew distinctions regarding which depositions and hearings they thought would continue remote and which would revert to in-person. The key distinction for depositions was that short depositions of non-crucial witnesses were more likely to be done remotely in the future than depositions for central witnesses. Depositions of expert witnesses were another type that some saw as more likely to continue to be done remotely; I suspect this will be truer for experts some distance away who must produce a report prior to the deposition which will serve to focus the deposition. For hearings, one advantage of witnesses being permitted to appear remotely, particularly expert witnesses, is that it would reduce problems with witness availability.

90. See *Virtual Depositions Forced by COVID Expected to Stick*, *supra* note 16.

91. See KRITZER, *supra* note 17, at 137–38, 240.

92. *Id.* at 137.

93. *Id.* at 138. Insurance defense lawyers also have incentives for efficiency, but that incentive flows from the need to maintain their relationships with the insurance companies that retain them to represent the companies' insureds. This need for efficiency flows from the kind of monitoring that insurers do of the lawyers they retain. See Kritzer, *supra* note 18, at 2070–76.

There is an important issue regarding remote witness interviews and depositions related to access to high-quality internet service.⁹⁴ One situation where virtual tools would seem particularly attractive is when a litigant or witness lives some distance from the other litigation participants. Some of those witnesses will live in a distant city, others in nonurban areas. The problem arises with the latter group which is less likely to have ready access to high quality internet service. This is just one of many potential problems persons in nonurban areas have with access to civil justice.⁹⁵

Another aspect of litigation that insurance companies will find advantageous to handle through remote technology is mediation. One insurance defense lawyer with whom I spoke estimated that when an insurer is involved, the mediator spends much more time with the plaintiff side than with the defense side. Moreover, the “rooms” function of Zoom and other virtual tools allow the mediator to meet separately with the two sides and for each side to caucus privately. This defense lawyer described how, with the mediation done over Zoom, he was able to sit at his computer and work on other matters during the time the mediator was with the plaintiff side.⁹⁶ The same would apply to the insurance adjusters who are sometimes expected to be at the mediation; the adjusters can save travel time and can also be working in their offices while the mediator meets with the plaintiff side. These advantages of remote mediation may be particular to routine personal injury matters. In other types of matters, such as commercial disputes, the balance of time that the mediator meets separately with each of the parties may be more balanced, and much more may need to transpire when the mediator is with all parties together. Moreover, mediations in commercial cases may involve more complex issues or more than two parties. One of the commercial litigators who handles the kinds of cases frequently involving multiple defendants stated point blank that he did not expect “Zoom mediations” to continue post-pandemic in his cases.

Except for minor witnesses, commercial litigators seemed more eager to get back to in-person depositions than were those working in the personal services sector. One of those litigators noted that he felt

94. Problems of access to the necessary technology extends to remote court proceedings. Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875, 1917 (2021).

95. Michele Statz et al., “*They Had Access, But They Didn’t Get Justice*”: *Why Prevailing Access to Justice Initiatives Fail Rural Americans*, 28 GEO. J. ON POVERTY L. & POL’Y 321, 341–43 (2021).

96. This insurance defense lawyer reported that by August, at least some of his mediations had returned to occurring in-person.

he had much less control during remote depositions; he felt it was more difficult to “surprise witnesses with documents” they were not expecting. This same lawyer noted that he had less problems defending a deposition being done remotely than when he was taking a deposition of a witness from the opposing side, and he further noted that he expected that clients will likely want to continue with remote depositions where possible for the cost savings involved. This does not mean that the remote depositions raised a lot of problems. Another commercial litigator commented that he had taken about fifteen depositions remotely and they had gone “incredibly smoothly”; moreover, the remote depositions had “saved the client a ton of money.” Overall, the suggestion here seems that there may be some pressure from clients to continue with remote depositions when there will be significant cost savings and when there is not a clear advantage to conducting the deposition in-person.

Routine hearings over scheduling and status matters, many of which were already handled telephonically, will continue to allow remote participation. What is less clear is whether the increased experience with video technology will mean that telephonic hearings and conferences will be replaced with video sessions. Dispositive hearings and hearings on matters such as class certification are another matter, particularly for lawyers handling large commercial cases. In the words of one commercial lawyer, “there is too much at stake” to risk the limitations inherent in doing something like a summary judgment hearing remotely, even with good technology support immediately available; he believed that “in big-ticket matters, the parties will want to be in-person.”

One commercial litigator described a remote hearing where he wished he had been able to show the judge a document in which he had highlighted a passage that directly contradicted what the opposing lawyer had just argued. That same lawyer commented that remote hearings were challenging when there is a large record and noted that he had encountered judges who would not allow the advocate to use the share screen capability of the video software. However, even with video screen sharing available, this lawyer felt it was easier for all involved to skip around in the record using a printed (and tabbed) copy of the relevant materials. Interestingly, that same lawyer qualified his preference for in-person hearings by noting that he might prefer a remote hearing when he was arguing for the status quo because he thought it was harder to get judges to change their minds when arguing remotely than when arguing in-person.

CONCLUSION

Overall, the personal services lawyers seemed more comfortable with retaining the use of video technology when it produced significant cost savings. This was true of both the plaintiffs' lawyers and the defense lawyers. For the plaintiffs' lawyers, it reflects, in significant part, the need for efficiency created by working on a contingency-fee basis. One of those lawyers said explicitly that he "hoped to continue doing a lot remotely" because it "produced great savings." For the defense lawyers, it reflects the incentives of the insurance companies that retain and pay those lawyers. The typical defense lawyer is dependent on a relatively small set of insurers, and the pressures from those insurers for efficiency undercut what is often seen as a desire or need for defense lawyers to work cases to build hours.⁹⁷ The economic incentives of both the plaintiffs' lawyers and the insurance companies are built around a portfolio of cases, which means that the outcome of any individual case will be less important than the performance of the overall portfolio of cases.

The situation looks very different on the commercial litigation side. The matters that comprise commercial litigation involve substantial sums of money, and even when there are a series of related cases, each of those cases will often involve at least a seven-figure claim. The parties in such cases care about the outcome of each case and are prepared to spend what is necessary to prevail. This does not mean that they will write a blank check to the law firm handling the case, but it does mean that they will not choose to economize when the economies will put the case at risk. Paying for lawyer travel to handle depositions, hearings, mediations, and arbitrations will make sense if there is a measurable advantage to handling the matter in-person over employing remote technology. Thus, having seen how remote technology can work, there likely will be pressure from commercial clients to continue to use that technology for some activities that previously were done in-person. It will be a balancing act reflecting the combined judgment of the lawyers and their clients.

None of the plaintiffs' lawyers with whom I spoke handled class actions or MDL litigation, although at least one of the commercial litigators had experience defending consumer class and securities class actions. My sense is that online processes will prove to be a cost-sav-

97. On the perception that defense lawyers need to build hours, see KRITZER, *supra* note 17, at 130–31; for an economic analysis tending to support this, see Earl Johnson, Jr., *Lawyer's Choice: A Theoretical Appraisal of Litigation Investment and Decisions*, 15 LAW & SOC'Y REV. 567, 575–80 (1980-81). On how the insurance companies paying defense lawyers effectively constrain the lawyers they hire, see Kritzer, *supra* note 18, at 2070–76.

ings for lawyers on both sides of these cases. This may be particularly true for a mass tort MDL where there could be the need to take many depositions from individual plaintiffs. Certainly, the clients on the defense side will want to see many things handled remotely when it is not a major dispositive matter. Plaintiffs' lawyers may at times be conflicted if they are concerned that their ultimate fee will depend somewhat on the time they have invested in the case (e.g., if a lodestar cross-check is applied to assessing the reasonableness of a percentage-based fee request). Short of those concerns, the time efficiencies provided by using virtual tools for many activities should result in substantial utilization of those tools in these kinds of cases.

During my conversations, several issues came up related to working remotely as distinct from using remote technology to handle interactions with witnesses, courts, and others during litigation. An issue noted by all of the lawyers working in firms was the problem of mentoring young lawyers in the absence of both young and experienced lawyers being together at firm offices. In the words of one lawyer, “[t]he remote work environment will hurt the career of associates . . . they need to be seen and perceived as hard workers”; this is more difficult when people are not in the office. The inability to walk down the hall to ask a quick question or to go to lunch to discuss how to handle a problem or issue makes it difficult to help new lawyers develop the skills they will need to succeed in the firm and in their professional careers more generally.

Related to this, perhaps more for firms in the thirty to seventy lawyer category, is that working remote does nothing to build a sense of identity with a firm and a broader sense of loyalty to the firm. How important this issue is may vary with it being less important for very large firms where lawyers come and go with much greater frequency than once was the case. Finally, one lawyer in a large firm noted that the inability to interact face-to-face and in social settings created barriers to client development work, both in terms of meeting with existing or future clients and in collaborating with firm colleagues in doing that work. Arguably all three elements, but particularly the needs related to mentoring and firm loyalty, will produce pressures pushing firm lawyers back to the firm offices for the bulk of their time. Nonetheless, both the lawyers with whom I spoke and surveys that have been done of lawyers during the pandemic⁹⁸ indicate that remote

98. See, e.g., STEPHANIE A. SCHARF & ROBERTA D. LIEBENBERG, PRACTICING LAW IN THE PANDEMIC AND MOVING FORWARD: RESULTS AND BEST PRACTICES FROM A NATIONWIDE SURVEY OF THE LEGAL PROFESSION 38 (2021), <https://www.americanbar.org/content/dam/aba/administrative/digital-engagement/practice-forward/practice-forward-survey.pdf>.

work, at least part of the time, will become much more common in the wake of the pandemic.

