

COVID-19 Focus Groups Summary

Themes and Highlights⁺

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1 Executive Summary

The Federal Judicial Center (FJC) conducted focus groups with district court judges and clerks of court, bankruptcy court judges and clerks of court, and magistrate judges from November 2020 to February 2021. The focus groups convened to discuss (1) what challenges district and bankruptcy courts faced during the early stages of the COVID-19 pandemic and (2) how the participants' courts overcame these challenges. This report outlines the common themes that emerged in challenges and solutions the participants identified. Their courts' solutions are summarized in the "What Made It Work" sections. Issues that remain undetermined or that could warrant further study are discussed in the "Considerations for the Future" sections. The report concludes by discussing the implications of the pandemic for access to courts and the administration of justice in the federal judiciary.

The following themes were identified from the participants' responses:

- **Decision Making.** Decision making during the early months of the pandemic was challenging and time-consuming, and required knowledge of ever-changing public health conditions that was outside of judges' and clerks' normal areas of expertise. Focus-group participants indicated that courts with centralized decision-making processes, decisive chief judges, and flexible leaders oriented toward problem-solving were better able to make decisions efficiently.
- **Physical Space.** The limitations of courts' physical spaces led to restrictions on the number of in-person proceedings that could be conducted simultaneously. Some courts were more easily able to adapt their physical spaces to implement safety precautions than others, depending on their budgetary resources or the layouts of their buildings.
- **Coordination and Collaboration.** Regular contact and good relationships with stakeholders and collaborating agencies helped courts communicate effectively with all actors involved in their operations. Judges and clerks leveraged their existing networks to share information across districts and jurisdictions. Hiring outside experts helped courts navigate informational challenges.
- **Juries.** Courts differed in the extent to which they had attempted in-person jury trials as of when the focus groups were conducted. Many districts decided to pause or resume in-person trials as COVID case numbers rose or fell in their jurisdictions. Limits on how many in-person jury trials courts could hold at once led some courts to incur significant trial backlogs. Although courts needed to send out more summonses than usual and excused a large number of potential jurors for COVID-related reasons, focus-group participants reported that their courts were generally able to obtain sufficient numbers of jurors and that, anecdotally, they did not observe that these jurors were

unrepresentative of the overall public. Participants were impressed with the willingness of potential jurors to participate in jury selection and the dedication of those selected for service.

- **Virtual Proceedings.** Virtual proceedings were used widely across courts, though the frequency of their use, the types of proceedings they were used for, and the technology used (telephonic or video) varied by court and individual judge. Judges differed in their views of the effectiveness of virtual proceedings, but many thought such proceedings would be used more often moving forward because of time and cost savings as well as increased convenience for many attorneys and court users, depending on their technological capabilities.
- **Criminal Cases.** In criminal cases, district courts had to coordinate with a large number of actors, chief among them correctional facilities that lacked sufficient resources to conduct virtual proceedings early in the pandemic. These challenges, as well as attorney-client communication issues and the inability of many courts to conduct criminal trials, caused delay and led focus-group participants to have concerns about the administration of justice, especially for pretrial detainees. Judges differed in their views of how well virtual proceedings worked for different aspects of criminal cases and whether the judiciary should consider allowing judges to use them permanently.
- **Bankruptcy Courts.** Bankruptcy courts were generally able to transition more smoothly to virtual operations because many had a history of using telephonic proceedings. However, bankruptcy courts had to coordinate with their district courts and U.S. trustees, manage fluctuating caseloads, and ensure sufficient access and support for self-represented debtors.
- **Transition to Telework.** Telework became an integral part of many courts' operations during the pandemic. Courts that allowed or encouraged regular telework before the pandemic experienced smoother transitions.
- **Staffing.** Telework and flexible work schedule policies were generally regarded as successful. Many focus-group participants said that their courts would be more open to expanded telework or flexible work schedule policies moving forward. The transition to telework and virtual proceedings in many courts highlighted the need for staff in a range of positions to be technologically proficient.
- **Morale.** Focus-group participants were grateful for the extraordinary efforts court staff made that kept their courts functioning amid the ongoing challenges presented by the pandemic. Given this tremendous work, as well as significant disruptions to normal court operations, focus-group participants expressed concern about the morale of employees and colleagues. Court leadership and employees in critical positions like IT were under great stress for prolonged periods of time. In courts that primarily operated virtually, focus-group participants worried about the loss of social contact and in-person connections and the consequences for their courts as institutions.

- **Budget Issues.** Courts with more financial resources or more flexible budgets were better able to meet the challenges of the pandemic. Courts needed to purchase a great deal of computer equipment and software to facilitate telework and virtual proceedings and also needed to pay for enhanced cleaning protocols, safety equipment, and outside experts to consult on safety issues.
- **COOPs.** The pandemic highlighted the need for each court to regularly review, revise, and test its Continuity of Operations Plan (COOP). Focus-group participants discussed making their COOPs more comprehensive and better able to prepare for scenarios that before had not seemed likely.
- **Access to the Courts.** For people with adequate resources and technological knowledge, focus-group participants generally agreed that allowing virtual proceedings during the pandemic improved access to the courts. But the participants were concerned that access to the courts was negatively impacted for those who lacked the resources or technological knowledge to participate in virtual proceedings.
- **Administration of Justice.** The most pressing concern was the delay in trials across all types of cases, though participants expressed the greatest concern about criminal cases. Focus-group participants differed in their views on the impact of the pandemic, especially the effects of virtual proceedings, on the administration of justice.

2 Using Focus Groups to Identify Challenges of the Pandemic and Considerations for the Future

The Federal Judicial Center (FJC) conducted focus groups with district court judges and clerks of court, bankruptcy court judges and clerks of court, and magistrate judges from November 2020 to February 2021. The objective of these focus groups was to discuss the challenges participants faced in responding to the COVID-19 pandemic, the specific effects of the pandemic on different types of cases and people, and practices adopted during the pandemic that participants wanted to continue once normal operations resume. The Center held 13 focus groups with a total of 75 participants: 3 district judge groups, 3 magistrate judge groups, 2 bankruptcy judge groups, 3 district court clerk groups, and 2 bankruptcy court clerk groups. Participating district judges, magistrate judges, and district clerks of court served on 38 separate district courts. Participating bankruptcy judges and clerks of court were from 14 separate bankruptcy courts. Focus groups included 4–7 participants each. Participants were selected to ensure the inclusion of judges and clerks from across the country, with a range of experience in their roles.¹ Participation in the focus groups was voluntary, and participants were promised anonymity.²

Because the participants were not drawn from a random sample of court personnel, this report is not representative of all judges' and clerks' views. Instead it captures the experiences of these 75 judges and clerks to identify common issues that may require further study or that may be instructive about what courts learned from the early stages of the pandemic. The Center is more systematically researching certain topics, such as views on virtual proceedings, in other projects.

This report reflects the participants' opinions at the time the focus groups were conducted, in winter 2020–2021. Participants were asked to reflect on how they and their courts met the challenges posed by the early months of the COVID-19 pandemic. The period under discussion was a time of national turmoil, when uncertainty about COVID-19 was at its peak. Since then, courts and individuals have had more time to adapt to the circumstances created by the pandemic. This means, of course, that court practices and judges' and clerks' views on some of the issues discussed in this report may have changed. After these focus groups were held, several factors led COVID-19 case numbers to fluctuate throughout the country. Additional work may be needed to study how courts have operated amid subsequent developments like widespread vaccine availability or the circulation of more virulent COVID-19 variants.

1. Nearly all of the 16 district judges, 16 magistrate judges, 16 bankruptcy judges, 20 district clerks of court, and 14 bankruptcy clerks of court who were invited to participate in a focus group did so. Four judges and three clerks of court were not able to participate because of scheduling and work conflicts.

2. Since focus-group participants were promised anonymity, their direct quotations have been redacted to protect their identities and have been edited for length and clarity.

Since this report is based on the accounts provided by the focus-group participants, references to *judges* or *clerks* holding a particular viewpoint pertain only to the judges and clerks in the focus groups. To capture how common a particular perspective was among the participants, this report uses terms like *many* and *some* to approximate how many focus-group participants articulated or agreed with a statement. *Some* or *a few* are used when two or more participants expressed similar opinions but there was no indication that this opinion was shared by the majority of participants. *Many* or *most* are used when an observation was the most common view stated (though one or two participants may have differed, or not all participants may have stated a view). The report also notes when only one participant expressed a particular sentiment. Not every participant stated an opinion on every topic of discussion, so generalizations about the popularity of particular opinions are based only on those that were expressed; therefore, no numeric values can be assigned to the prevalence of a viewpoint among participants, unless otherwise noted.

While some statements apply only to certain participants or courts, such as magistrate judges or bankruptcy courts as noted, most sections of this report draw on common experiences across all participants and all courts. There are also two sections that address additional issues unique to criminal cases and bankruptcy courts.

Highlighted in the report are the general themes and recurring issues that emerged in the focus groups. Federal courts faced a range of common challenges—decision making amid uncertainty, navigating physical space limitations, coordinating with internal and external collaborators, conducting in-person jury activities, implementing virtual proceedings, continuing operations in criminal cases, continuing operations in bankruptcy courts, transitioning to telework, handling staffing issues, addressing morale concerns, responding to budgetary issues, and implementing COOPs. For each of these topics, the report examines “what made it work” for courts, focusing on particular practices that allowed courts to continue operating. After each of these sections, the report raises “considerations for the future,” such as whether certain practices that courts implemented in response to the pandemic might improve their operations moving forward.³ The report concludes with judges’ and clerks’ assessments of how the pandemic affected access to courts and the administration of justice during its early months.

3. Although the report provides examples of steps that courts and other institutions have already taken to address some of these “considerations for the future,” it cannot comprehensively account for or assess these efforts. There are likely many initiatives currently underway that are not noted here.

3 Challenges and Solutions

3.1 Decision Making Amid Uncertainty

The most fundamental challenge that courts faced during the pandemic was how to make decisions in the face of an unanticipated and ongoing crisis. Courts initially lacked basic information needed to decide how to structure their operations in response to the emergency, and key decision makers often disagreed over important aspects of how to proceed. The process by which judges made collective decisions differed by court, with some courts doing so more efficiently than others. Courts also varied in the range of decisions on which they sought consensus versus decisions left to individual judges' discretion. For many focus-group participants, the experiences of their courts highlighted the importance of the attitudes of court leadership when responding to an emergency, with several participants stressing the value of flexibility and persistence among leaders.

As was generally the case for many organizations and individuals during the beginning stages of the pandemic, the federal courts faced the central challenges of finding information, knowing which sources of information were reliable, and making decisions in a rapidly changing environment. Judges and clerks struggled with where to obtain guidance and expertise and reported that it was difficult to stay up to date on new information. Many expressed frustration with having to make decisions in the face of ever-evolving scientific guidance about COVID transmission and best practices for safety. Those in leadership roles, especially chief judges and clerks of court, invested significant time into researching public health issues, despite having no background or training in the field. Along with the time spent developing their own expertise on these issues, chief judges and clerks spent a great deal of time ensuring that information was disseminated to their court staff and communicating with others, like public health experts, court stakeholders and partners, and other courts, to obtain and share information. The uncertain timeline of the pandemic also made planning difficult for court leadership. Some implemented short-term solutions at first, making more extensive or permanent changes to their operations as the crisis continued.

Judges and clerks also found decision making and rule implementation to be challenging because of diverse views about the seriousness of the pandemic and personal risk. In some courts, judges' conflicting perceptions made it difficult to reach consensus on safety policies. Judges and court staff all had different risk factors for COVID-19—age, particular health conditions—that influenced how rigorous they thought safety precautions should be. Many judges and clerks expressed concerns about the high average age of their benches, leading their courts, or particular judges, to implement strict safety protocols and avoid in-person operations. Courts located in areas that were severely affected by COVID at the outset of the pandemic also were quick to enact extensive changes to their operations.

The level of cooperation between judges in responding to the crisis created by the pandemic varied. While many participants reported that judges on their courts were successfully able to collaborate and come to agreement, others said their judges were extremely divided over particular decisions. Many judges worked together well prior to the pandemic, and those courts generally experienced less friction than courts in which there was less preexisting collegiality. But focus-group participants from a small number of courts reported that preexisting collegiality did

not matter, with one saying that the pandemic motivated judges who were not collegial beforehand to pull together to respond to the crisis. Another said the court worked together well prior to the pandemic, but differences in views about the pandemic and which policies to implement challenged collegial bonds. Given the need for chief judges and clerks of court to work closely on many issues related to a court's pandemic response, good relationships between chief judges and clerks helped facilitate decision making related to day-to-day operations.

The processes by which judges made decisions about pandemic operations varied. Some courts made decisions collectively, either attempting to build consensus and secure agreement from all judges before setting policies, or voting on policies following majority rule. Representatives from some courts operating by consensus reported that this type of decision making was slow, requiring multiple rounds of review and consideration, and that it was at times difficult to reach unanimity. In general, problems with operating by consensus were most apparent in larger courts, whereas courts composed of few judges reported operating well using a consensus-driven model.

A number of courts delegated decisions to committees to make decision-making processes more efficient. Some courts established new committees whose sole focus was on pandemic operations and left many aspects of the courts' pandemic responses to these committees. Other courts assigned issues to existing committees based on the committees' subject-matter expertise. For example, one court asked its existing technology committee to select the video software to use for proceedings. Another court gave its courthouse facilities committees control over deciding when to resume in-person operations at each courthouse.

Courts also differed in the extent to which they set court-wide policies or allowed for individual judges' discretion over procedures. Some judges differed on whether their courts should establish uniform procedures, and in those courts, individual judge discretion prevailed regarding most policies. Most courts set court-wide policies on teleworking for staff, but individual judges could decide to work from chambers if they preferred. Many courts came to agreement on which platforms to use for virtual proceedings, but some allowed individual judges to choose their own systems. Even in courts that settled on certain platforms, individual judges had discretion over the types of cases and proceedings they would conduct in person, telephonically, by video, or in a hybrid format. In many courts, judges generally agreed that most civil and bankruptcy matters other than trials would be handled virtually, so individual discretion was exercised more often in criminal matters and for trials.

Several courts had issues with individual judges' compliance with court-wide policies, since chief judges had little recourse to formally enforce policies like mask wearing if judges chose to disregard them. One strategy that helped leadership obtain buy-in on safety protocols was to get recommendations from an outside public health expert. Several participants said that judges were more willing to accept recommendations from an expert than from a chief judge or clerk of court.

Focus-group participants noted that the use of different courtroom procedures by different judges was potentially burdensome on lawyers and court staff. While some reported that lawyers were frustrated by varying expectations from judges, others said that prior to the pandemic, lawyers were already accustomed to judges having different preferences. For court staff, the burden of individualized protocols was greater when judges had to share courtrooms for in-person or hybrid proceedings because of limitations on physical space, since court staff had to change courtroom layouts and prepare different technology depending on the judge. IT staff had to accommodate judges' individual preferences for technological hardware and software for

both proceedings and telework and had to support judges working in the courthouse and at home. One judge noted that allowing individual judges to have discretion over conducting certain proceedings in person was divisive because of the implications for court staff:

[S]ome judges think that if they want to proceed, they should But the pushback on that is, well, whether you want to come into the courthouse and bring your staff—that’s fine. But the [clerk’s] office, including the jury pool, probation, the court reporters and all the other people that fall under our umbrella, don’t work for any individual judge. They work for the court as a whole. That is where the court differs.

Several participants said that the attitudes or approaches of their chief judges, clerks of court, or IT directors to decision making significantly affected the success of their courts’ emergency responses. Assertive leadership on the part of chief judges was crucial to their courts making decisions quickly and efficiently, as chief judges were often able to set the agenda, have the final say on a decision, or persuade other judges to accept a given policy. Clerks of court were charged with figuring out details, managing day-to-day operations, and implementing decisions, so their attitudes were integral to the success of translating policies into practice. Across chief judges, clerks, and other unit leaders, the most effective were those who adopted and encouraged an outlook focused on “making it work” and problem solving. These leaders anticipated issues, acted quickly, were responsive to input from staff and judges, and were at times willing to make exceptions to existing policies that would facilitate operations and employees’ productivity. For example, a few focus-group participants mentioned that their courts allowed employees to take their office chairs home because, as one participant said, they did not want employees having to telework while “sitting in hard chairs in the kitchen.” In contrast, one judge said that judges and employees were specifically prohibited from using courtroom equipment to telework, even though the court was operating remotely, and it did not have enough computers or printers for staff or adequate telework equipment for the judge.

Focus-group participants noted that the approach of one leader versus another could make a huge difference in the agility of court operations. A few participants said that transitions in leadership (in chief judges or clerks of court) during the pandemic greatly changed their courts’ ability to solve problems, or that they would ask only certain members of their court leadership for assistance because of differences among individual leaders in their responsiveness and flexibility. One judge observed that the attitudes of leadership seemed to be an important factor across courts as well, saying “if you have a star person in the role [of clerk], it’s like the world is your oyster. But if there is a culture of ‘you can’t’ . . . it’s just you need to figure out a way to penetrate that.”

What Made It Work

- Court leaders needed to be creative, flexible, resourceful, and willing to continue learning about the COVID-19 virus as scientific knowledge progressed. Doing so required substantial time commitments from chief judges and clerks of court.
- Representatives from courts that operated efficiently commonly reported that more centralized decision making among a narrower subset of judges worked well. Small courts could make decisions relatively easily because not as much

- coordination was required. Larger courts were able to streamline decision making by delegating decisions to committees.
- Preexisting collegiality between judges and good relationships between chief judges and clerks facilitated efficient decision making.
 - When judges differed on how to handle safety precautions or public health issues, deploying an expert was effective in achieving consensus.
 - It was helpful when chief judges, clerks, and IT managers were problem solvers, trying to facilitate improvements instead of resisting change. Leaders also were most effective when they were assertive or used their final say to resolve gridlock.

Considerations for the Future

Given the considerable burden that researching COVID-19 placed on court leadership, more robust resources to help court leadership find information in a range of emergency circumstances could be developed, for example, in consultation with the Federal Emergency Management Agency (FEMA). See section 3.3 for a discussion of information-sharing between courts and other agencies during times of crisis and collaborative resources that could be developed for the judiciary as a whole.

Some courts found it challenging to come to agreement on particular policies or even determine which policies should be decided by the court as a whole and which could be decided judge by judge. If courts' COOPs do not specify emergency decision-making processes explicitly, they could be revised to include emergency decision rules (for example, whether judges will vote by majority rule or whether decisions need to be agreed on unanimously). COOPs could also identify categories of decisions that a court could agree in advance either need to be adopted by the court as a whole or could be left to the discretion of individual judges. For instance, could courts establish whether courthouse safety precautions need to be implemented on a court-wide basis for certain types of emergencies? Could they determine that all judges need to use the same virtual proceeding platform, but have individual discretion over when to use it? COOPs could also define *emergency* so that it is clear when these procedures would go into effect.

Considering that centralized decision making was most efficient, courts could institute ways to streamline their emergency decision-making procedures. One option could be to employ committees, either establishing an emergency committee that could be convened to make decisions about operations in crisis circumstances or outlining processes for delegating specific emergency-related issues to existing committees. Another option could be to explicitly give a chief judge "emergency powers" to make quick decisions during crises. These options may be especially useful for larger courts to explore.

Overall, judges and clerks spent considerable time making decisions about their courts' pandemic responses, taking judges' attention away from the management of their cases and requiring clerks' full devotion. Having emergency decision-making rules in place and additional informational resources could reduce the extra burden placed on court leadership during crises.

3.2 Physical Limitations of Courthouses and Courtrooms

Focus-group participants reported that their courts differed in the extent to which they modified operations or closed down their courthouses and offices. Some went completely virtual immediately

and remained almost fully virtual through winter 2020–2021 when these focus groups were conducted. Several courts stayed open, with adjustments to their normal operations. Others initially teleworked, but returned to mostly in-person operations after a few months. Many reopened for in-person operations, at least in part, in the summer of 2020, but closed again when COVID-19 cases started to surge during the fall and winter months. Almost all courthouses implemented precautions like requiring physical distancing, limiting capacity, restricting public access to varying extents, adopting mask mandates, and performing enhanced cleaning. Courts conducting in-person operations at any point through early 2021 faced several common challenges with their physical spaces: the layout of current spaces not being conducive to safety protocols, safely accepting filings and payments, implementing safety procedures and enhanced cleaning, and coordinating with the General Services Administration (GSA).

Many courts reconfigured or repurposed their physical spaces to implement safety precautions. Courts with modular furniture could more easily change the layout of their courtrooms. In courthouses where all courtrooms used the same layout, this process was simplified. A few courts remodeled their courthouses or courtrooms to allow for physical distancing and better airflow. In many courts, few courtrooms were large enough to accommodate physical distancing. Proceedings involving relatively small groups, such as grand juries, often used the largest rooms available. However, even the largest rooms could not allow for physical distancing for proceedings such as jury selection, which then necessitated the use of multiple rooms for a single proceeding. Instead of relying simply on the size of rooms, a number of courts conducted airflow tests or used information about their air-handling systems to guide their decisions about how to use their physical spaces. Several participants reported that the results of airflow tests in their courthouses were counterintuitive, indicating that the largest rooms in their courthouses did not have the best airflow or air turnover rates because of air filtration issues or patterns of air stagnation in these large rooms, and that certain smaller rooms would be safer to use for proceedings involving large numbers of people.

A few physical challenges with space were difficult for courts to change, such as needing to use elevators in multilevel buildings. Because of space constraints, and to reduce the risk of virus exposure more generally, courts put limits on the number of in-person proceedings that could occur at once. These restrictions negatively affected the speed and efficiency of court operations.

Courts also had to decide how to handle their intake and front-desk operations. Some that completely closed their courthouses did not have any in-person contact with those wishing to file documents or make payments, while other courts kept their front desks open throughout the pandemic. A few clerks mentioned that they stopped accepting cash at their front desks because of safety concerns. Another clerk's court was able to keep its front desk open with minimal disruption because it already had a glass barrier in place similar to those used by banks and ticket offices.

Many courts installed drop boxes for filings to eliminate contact between filers and staff while still allowing for the submission of physical documents, though some judges were worried about the security risks of doing so. One court posted a phone number to allow filers to alert court staff when they were placing a filing in the drop box close to a deadline. Courts also created email addresses for filings or expanded the use of existing email addresses previously used for emergency filings.

Courts purchased a wide range of safety equipment and PPE for use in their courthouses, such as plexiglass, masks, microphone covers, temperature-check machines, and hand sanitizer, in

addition to implementing new cleaning protocols. Focus-group participants differed in their views of the usefulness of certain measures. In particular, some clerks and judges thought installing plexiglass and using temperature-check machines contributed significantly to preventing virus transmission. Other participants questioned the effectiveness of these precautions based on developing scientific knowledge about COVID and favored emphasizing other safeguards like improving courthouse ventilation. A number of courts hired experts to assess their air-handling systems or conduct smoke tests to understand how air flowed in each individual courtroom, aiding in their placement of plexiglass, alerting them to issues with ventilation, and helping them determine capacity limits for individual courtrooms. One court built glass HEPA enclosures with negative-pressure units like those used in hospitals, for witness stands and podiums, so witnesses and attorneys could speak without wearing masks.

Several focus-group participants noted that following enhanced cleaning protocols during, or in between, proceedings, such as changing microphone covers after each speaker or disinfecting courtrooms between proceedings, significantly slowed down operations. A number of courts could afford to clean and disinfect only a certain number of courtrooms, limiting the number of spaces available for proceedings. This restriction required multiple judges to share a courtroom, creating scheduling issues and necessitating additional coordination on the part of staff.

Implementing procedures quickly and obtaining the required equipment to do so was generally easier for courts that controlled their own facilities. Courts in private or non-GSA buildings had more flexibility than those in GSA-controlled spaces. Courts operating in stand-alone courthouses did not need to coordinate with other tenants, while courts housed in multitenant buildings faced this additional challenge. For those who did need to coordinate with GSA, experiences varied according to GSA administrator or building coordinator. Some reported positive experiences with GSA, saying that their building coordinators were responsive and helpful in devising safety protocols for the participants' courthouses. Other participants said they would have preferred GSA to be more forthcoming in providing information about its facilities. Some desired unified, nationwide guidance from GSA concerning the implementation of safety protocols.

One specific concern raised by participants was how to obtain more information on airflow systems in GSA facilities. While many courts hired outside experts to provide them with information on their ventilation and air-handling systems, some thought GSA could have been more proactive in testing its buildings and making airflow data available to courts. One clerk suggested that GSA could have replaced ventilation systems according to need nationwide. Several participants were concerned that experiences with GSA varied across geographic areas. For judges involved in communications with GSA, some would have preferred assistance from the Administrative Office of the U.S. Courts (AO), with one judge noting that it was an "inefficient use of [a] judge's time" to "beg, and threaten, and cajole" GSA. See section 3.11 for budgetary issues related to working with GSA.

What Made It Work

- Preexisting circumstances eased some courts' difficulties with their physical spaces, namely having movable furniture, having larger rooms in their courthouses, being the sole occupants of their buildings, or being housed in spaces that did not require extensive use of elevators.

- Courts that already allowed electronic document submission or payments were able to transition more smoothly to virtual intake and front-desk operations and thus limit contact between staff and court users while maintaining court operations. If courts did not have such systems in place, they had to adopt new practices to limit staff/public contact. These included expanding access to CM/ECF, establishing email addresses for document submission, installing document drop boxes, and implementing electronic payment systems.
- For courts that needed to reconfigure their courtrooms, having judges agree on a standard layout made operations more efficient.
- Consulting experts about air-handling systems and conducting airflow tests helped courts determine whether safety precautions such as plexiglass installation and physical distancing would be effective in their specific spaces.

Considerations for the Future

Several clerks and judges anticipated interest in using the efficiencies gained through telework and virtual proceedings to reduce costs by allowing courts to eliminate some of the physical space they currently occupy. Proposals ranged from completely shutting down rarely used courthouses in rural areas to narrower suggestions to downsize employee office space. While some judges said that maintaining an in-person presence throughout their districts was important, others raised the possibility that overhead and travel expenses could be reduced if courts used virtual proceedings instead of keeping rarely used facilities. As one judge said,

I do think it's interesting if the judiciary is looking to save some money . . . [W]e've got some lean budget years. The whole idea of space and the design guides and what we pay . . . there's a lot of work that can be done remotely. So in terms of the judiciary's footprint and the rent that we pay to GSA, I think we need to reexamine some of that because we don't need it.

Several participants also discussed the possibility of eliminating personal office space for staff and instead moving toward “hoteling” or shared office space if teleworking on a regular basis continues. Even if courts do not want to reduce staff office space, some judges and clerks were concerned that it may be difficult to justify their budgets for physical space if court staff can work remotely effectively.

Many judges mentioned that they or their colleagues were interested in allowing hybrid proceedings moving forward, where some parties or witnesses attend in person, while others appear virtually. Although some courtrooms may already be equipped for hybrid proceedings, many courts may need to reconfigure their courtrooms permanently if they anticipate using hybrid proceedings more frequently in the future. One participant observed that courtrooms would need to have adequate hardware installed, such as monitors, cameras, and audio equipment, and that this equipment would need to be placed throughout a courtroom so that both in-person and virtual attendees can see and hear all aspects of proceedings. Some focus-group participants also noted that the reliability of internet connectivity in courthouses varied, with at least one judge's courthouse not allowing Wi-Fi because of security concerns. Thus, internet connectivity in court facilities may need to be reevaluated if courts want to expand their virtual capabilities.

Courts could consider whether any safety-related modifications to their physical spaces should be implemented permanently. Outside of a pandemic, some of these measures could be effective in limiting the spread of other illnesses, like influenza. Glass enclosures for intake windows or in courtrooms could also be useful for security reasons. For intake and front-desk operations, courts could retain expanded systems for filing and payment to improve access, including more on-site options, such as no-contact drop boxes, as well as virtual alternatives. However, while some of these additional options might alleviate burdens on staff, others might increase the workload of staff. For instance, allowing a wider range of court users to electronically file documents themselves may reduce demands on staff to process those documents, but allowing documents to be submitted by mail or drop box requires staff to perform extra tasks like retrieving, opening, timestamping, and scanning documents.

If certain safety procedures become permanent in courthouses, courts could consider ways to make these processes more efficient so as not to prolong proceedings or limit the number of proceedings that can take place at once. For example, if courts continue enhanced cleaning, how frequently does it need to be done to be effective? Do courtrooms need to be sanitized between every proceeding? Do podiums need to be wiped down between every speaker? How can courts provide an adequate level of cleaning to more courtrooms so that all their available space can be used?

Individual courts or the Administrative Office might work with GSA to determine which safety precautions to retain. The Administrative Office might determine the consensus of the most up-to-date scientific evidence about which safety precautions are most effective so that courts are implementing the most worthwhile measures and are not spending money on approaches that do not work. Courts that have not conducted smoke tests or upgraded their ventilation systems could consult with GSA to do so. When revising their COOPs, courts could also ask GSA for additional information about their facilities to use in planning for other types of emergencies. Air-handling system information has been vital during the COVID-19 pandemic. Are there other kinds of information that courts can anticipate needing in other crises? For example, can courts obtain information now about the stability of their electrical systems in case of power outages or issues with the power grid? The judiciary as a whole could work in coordination with GSA to identify vulnerabilities in courthouses that could be improved according to need.

3.3 Coordination with Other Parts of the Judiciary and Collaborating Agencies

As the example with GSA illustrates, federal courts needed to cooperate with many different internal and external organizations during the pandemic, and the ease of doing so varied across districts and partners. Other than GSA, district and bankruptcy courts coordinated with each other, the Administrative Office, their circuit courts, state and local governments, the local bar, and outside experts. In criminal matters, district courts also coordinated with the Bureau of Prisons (BOP), the U.S. Marshals Service, U.S. attorneys' offices, federal defender organizations, probation and pretrial services, and state and local correctional facilities. Bankruptcy courts also needed to coordinate with U.S. trustee offices and Chapter 13 trustees.

Communication with all these partners was paramount, especially during the early stages of the pandemic. Many courts found that establishing regular meetings with all stakeholders in their operations was extremely beneficial. Some courts also held recurring meetings for specific

groups, such as meetings between judges and attorneys, or meetings specifically for the civil bar or the criminal bar, to keep lawyers apprised of court expectations for appearances and any changes to operations. A number of courts also participated in regular meetings of all courts in their circuit or geographic region.

Many courts hired their own public health experts, such as epidemiologists or environmental scientists, to advise them. Most experts were local to the district and were found through local or state health departments. A few courts found experts through personal contacts. These experts met with courts regularly, sometimes multiple times a week, or even daily in some districts. While judges and clerks expressed satisfaction in their experts' ability to evaluate their courts' specific, local COVID risks and to advise them on how to design safety precautions in their courthouses, they were frustrated that they had to find these experts themselves and were duplicating the efforts of other federal courts. One judge's court shared its expert with all courts in its region, including state courts, which the judge said has "brought . . . consensus and consistency to the whole . . . region." Another judge thought that using the same expert as stakeholders like the Marshals Service and the U.S. Attorney's Office facilitated agreement on procedures.

One of the main challenges that participants highlighted was the need for more coordination within the judiciary itself. Many expected that higher authorities like the Supreme Court or the circuit judicial councils would provide guidance that all courts could use during the pandemic. Participants looked to the Administrative Office in particular for direction. But several participants felt that the information provided by the Administrative Office was not streamlined enough to be useful (for instance, being directed to pages of links to information was overwhelming), that guidance was vague, or that resources were not distributed quickly enough to be helpful.

Many expressed the need for more national guidance regarding safety protocols and technological solutions; however, it should be noted that these requests were in tension with participants' desires to set their own policies when AO guidance did not suit their preferences. In several instances where uniform guidance was issued, certain courts disregarded it in the interest of facilitating their operations. Most notably, many courts decided to use Zoom for virtual proceedings against the guidance of the Administrative Office because Zoom was already familiar to many court employees, lawyers, and court users, was perceived as easier to use, and was free for court users. Although some courts spent time and effort trying to use a different platform to comply with the Administrative Office's guidance, many eventually switched to Zoom. In general, participants said they wanted the Administrative Office to provide a range of options for courts to choose from without immediately prohibiting certain alternatives. Moving forward, focus-group participants also wanted the Administrative Office to reconsider some of its policies regarding pandemic operations, especially the policy regarding Zoom, allowing courts to give input.

Some judges and clerks felt that deciding policies at the national level would have saved individual courts valuable time and effort. A number of judges expressed concern that the process of deciding administrative issues at the court level diverted their attention from their case-loads. One judge said that more AO guidance on divisive issues like mask wearing also may have prevented conflicts between judges, possibly preserving collegiality.

Other participants liked the flexibility of creating their own policies and said that one-size-fits-all solutions would not work because of differences in the severity of outbreaks across the country and regional variation in attitudes toward the seriousness of the pandemic. Several thought that nonspecific guidance from the Administrative Office allowed them to adapt their

policies to suit their courts' individual needs, while more explicit guidance would have limited their options.

Focus-group participants also felt that coordination of the procurement of goods and services needed to respond to the crisis could be centralized. Many clerks who were tasked with finding experts to advise them would have preferred that the Administrative Office had coordinated that process to save both time and money. Some thought that leaving procurement to individual courts meant the judiciary as a whole was losing out on economies of scale that would have helped individual courts better afford certain services and equipment. For PPE in particular, participants did not understand why the judiciary did not have a centralized stockpile, as some executive branch agencies did. One clerk shared an experience related to procuring hand sanitizer:

[E]veryone knows you couldn't get antibacterial, you know, the gel, right? Literally, the warden was getting his pickup truck to go to a distillery to get 55-gallon drums and bringing it and asking me if I wanted to go with him to get 55-gallon drums for the courthouse. It was as if we were trying to go back to the days of Prohibition. We were stealing it and sneaking it in. I mean we had no leadership where other agencies had a national warehouse where they can go and get it and get it distributed, we had nothing.

Participants wished the Administrative Office and the Center had done more to facilitate information sharing between courts early in the pandemic, when they felt it would have been most useful. Clerks also thought the Administrative Office should have contacted court staff to learn about their day-to-day experiences and challenges to better inform the resources the Administrative Office developed for the courts.

On their own initiative, judges and clerks obtained ideas about potential practices and procedures by sharing information between districts or with other courts in their region, giving courts with well-networked clerks or judges an advantage. District court clerks also communicated through the clerk listserv. Some courts shared experts or drafts of general orders to reduce their respective individual expenses or efforts.

What Made It Work

- Courts that established frequent, regular meetings with stakeholders were able to successfully coordinate operations with these partners. Sharing experts with stakeholders increased stakeholder buy-in on safety protocols.
- Sharing information between courts helped facilitate operations and decreased duplicated effort. Judges and clerks shared information with their peers in many ways, such as reaching out to established networks for advice, exchanging orders, sharing experts, and discussing challenges and solutions on the district clerk listserv.
- Coordination was easier if courts already had good relationships with the many entities to which they were connected.

Considerations for the Future

Communication within and across jurisdictions, both among judiciary staff and stakeholders, was one of the main issues that focus-group participants raised. How can the judiciary improve internal communications and facilitate communications with stakeholders during future emergencies? Some participants suggested that emergency working groups or regular meetings with stakeholders helped their courts during the early stages of the pandemic. Good preexisting working relationships with stakeholders also made communication and decision making easier during the crisis. What efforts can courts make during normal operations to foster good relationships with stakeholders and partners?

Chief judges and clerks participating in these focus groups said that they benefited from informal methods of sharing information between courts. Is there information that could be centrally provided or organized that would help courts operate more efficiently during crises? For example, the Administrative Office collected orders related to COVID and posted them on their website.⁴ Are there other types of resources courts might need, like a centralized database of regional experts for different types of emergencies, or infrastructure that would allow courts to communicate with each other during crises?

Focus-group participants specifically mentioned that they thought the judiciary should attempt to centralize procurement of safety and protective equipment. Is such an effort possible, and if so, what types of emergencies would the judiciary stockpile equipment for? How would this equipment be distributed to individual courts?

In terms of centrally coordinating specific policies, some participants noted that unified guidance on certain issues would have saved courts time and effort in crafting policies for themselves. However, some participants reported that they did not follow unified guidance on issues like selecting videoconference software. On what types of issues do courts most want unified guidance? On what types of issues do courts want autonomy to decide themselves? The Administrative Office or the Center could further research the types of issues that the courts want guidance on in times of crisis and the types of issues over which the courts want autonomy.

3.4 In-Person Juries and Jury Trials

There was substantial variation across courts in whether they conducted in-person jury trials or convened grand juries.⁵ Almost all reported at least a temporary pause on jury activities at the beginning of the pandemic, with some courts resuming after a few months. A few participants said their courts had not conducted any in-person jury trials. Most participants' courts had conducted a small number of in-person trials, with individual judges differing over whether they were willing to do so. Courts often piloted their procedures on grand juries or short, simple trials. Even after resuming regular jury trials, courts delayed long or complex trials. Many courts also paused jury trials and grand jury meetings after COVID case numbers began rising again in the fall of 2020. Courts attempting to convene grand juries and conduct in-person jury trials faced many challenges, including significant demands on resources, implementation of enhanced safety precautions, and concerns

4. Admin. Office of the U.S. Courts, *Court Orders and Updates During COVID-19 Pandemic*, <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic> (last visited Dec. 2, 2021).

5. Courts may have changed some practices discussed in this section after COVID-19 vaccines became widely available in spring 2021.

about representativeness of the jury pool. Resuming trials and working through trial backlogs is one of the biggest concerns of courts moving forward.

Conducting in-person jury activities placed significant demands on courts' physical space, staff, budgets, and schedules. Both jury selection and the trials themselves required a great deal of space, many staff on hand, and expensive safety protocols and cleaning. Jury trials also restricted the ability of courts to conduct other business. The most challenging aspect of jury activities was jury selection, which required the greatest number of members of the public to be in the courthouse at once. Most courthouses did not have a room large enough for jury selection with physical distancing, so prospective jurors had to be spread over multiple courtrooms or report in multiple sequential groups. Even though selection was conducted in person, some courts' selection processes still required IT assistance because courts placed video monitors in each room so that participants could follow proceedings. One court conducted some selection procedures outdoors. Selection also took longer because courts set limits on the number of people who could assemble at once.

Many courts restricted how many trials they set per week because of space requirements for physical distancing, cleaning protocols, and demands on staff, with most courts limiting trials to one or two per week. Coordination between judges was a challenge for courts conducting trials. Limited space meant that judges had to share courtrooms, requiring courts to combine their trial calendars and requiring staff to change the setup of courtrooms frequently to suit individual judges' preferences. When judges were able to agree on courtroom setup, that saved time and effort for staff, but judges frequently were not willing to do so. Most courts restricted public access, and some had to remove public seating from their courtrooms to allow for physical distancing. Some courts provided virtual access to family members or interested journalists, which required its own technical support.

Courts enacted a range of procedures to prevent the spread of COVID-19 during jury activities and to address positive tests among jurors when they occurred, hoping to assuage prospective jurors' fears about serving in person by demonstrating courts' commitment to safety. But despite their best efforts, several courts experienced disruptions to jury activities because of positive COVID tests, as well as rising community spread. Before prospective jurors appeared for selection, many courts did some online screening to reduce the number of people who had to report in person. Some courts automatically excused certain groups, like those over 65, people homeschooling children, and those with COVID-related health concerns. No focus-group participants reported that their courts attempted virtual jury selection for in-person trials. District court clerks raised concerns about the technical capabilities of the general public to participate in virtual jury selection and anticipated some pushback from judges and attorneys.

Clerks and judges said they "over-communicated" with jurors before and after trials. Before a trial, courts sent the jurors detailed letters outlining all safety precautions. Staff in some courts called jurors multiple times before trial to answer questions and ask COVID screening questions. During trials, courts enacted such safety procedures as temperature checks, masking, and routine COVID screening. Courts also provided jurors with detailed information about what to do if they were exposed to or tested positive for COVID, as well as what the court would do if an exposure occurred. After trials, jurors were debriefed and asked to report any COVID symptoms or positive tests to the court. Some courts sent jurors follow-up questionnaires that included questions about COVID symptoms in addition to asking for feedback on jurors' comfort with safety protocols.

Relying on jurors to self-report symptoms or positive tests during or after a trial was problematic. A court could not track whether there was any potential spread during a trial if jurors did not respond to posttrial questionnaires. During a trial, once a juror did report symptoms or a positive test to the court, it was often too late to contain an outbreak. For courts doing contact tracing themselves, that process was time-consuming for staff and also required people to self-report their contacts. A few courts said they experienced problems with jurors not following safety precautions. Clerks noted that they could not enforce mask mandates during jury deliberations. Even if a court took all possible precautions, operating in person involved some risk, especially in areas with high community spread. Several focus-group participants reported having to postpone or cancel trials after spending considerable resources preparing because a defendant or juror tested positive for COVID. One focus-group participant's court required parties and attorneys to sign a form confirming their agreement to all procedures in case of appeal, and that the documentation included pictures of the courtroom.

Despite focus-group participants' concerns that the jury pools and juries convened during the pandemic may not have been representative of their communities, they said that anecdotally they had no reason to believe these juries were not representative. Before resuming jury trials, a central concern of courts was whether enough people would be willing to serve. Although courts reported they were excusing large numbers of jurors for COVID-related reasons, many courts were able to compensate by increasing the number of summonses they issued. This practice did, however, place an additional burden on their jury departments, which had to both carefully track data on summonses to see how many were needed and send out up to three times more summonses than usual. Courts also selected more alternates than usual. Several judges and clerks were surprised at how many people reported for jury duty and at how enthusiastic petit and grand jurors, even those told they would be serving for one to two years, were about fulfilling their civic duties. Others noted issues with obtaining quorums in their grand juries, especially as case numbers in their districts rose. Judges and clerks said they would like a more systematic examination of whether their juries were representative during the pandemic, especially since many courts were automatically excusing large segments of the population. A few courts were monitoring internal data to study this themselves and said they had not found any discrepancies based on preliminary inspection. Because of concerns about representative juries, one judge implemented the practice of confirming with defense counsel that they were comfortable proceeding with the selected jury.

Courts conducting in-person jury trials were limited in how many trials they could hold. As a result, courts prioritized certain trials, and some courts have accumulated trial backlogs. Because of concerns about protecting the constitutional rights of criminal defendants, most district courts prioritized in-person criminal jury trials, resulting in a civil-trial backlog in some district courts. Some districts were able to conduct a number of in-person civil trials, hold civil jury trials virtually, or have parties consent to civil bench trials, preventing backlog. And some courts that did conduct criminal jury trials still accumulated a criminal-trial backlog because of restrictions on the number of trials. Courts are concerned about how to work through their trial backlogs moving forward—scheduling being a primary issue given that all judges want priority for their trials.⁶ Several courts established committees to manage their collective trial schedules.

6. When these focus groups were held, many courts seemed to be continuing to restrict the number of trials that could be conducted at one time and the number of courtrooms used for trials. Restrictions may have relaxed since then in some courts, which may have reduced the severity of this problem.

What Made It Work

- Participants thought that enhanced communication with potential jurors helped ensure that an adequate number showed up for selection and thought that some of these practices could be retained.
- Conducting some juror screening online helped courts limit the number of jurors who had to report in person.
- Judges' cooperation was necessary to coordinate trial calendars because of limits on the number of courtrooms that could be used at once.
- Courts were able to use technology to address difficulties with conducting jury trials in person, specifically connecting multiple rooms by video for a single proceeding and providing access to family members or the press by video- or teleconference.

Considerations for the Future

Depending on the severity of the pandemic moving forward, courts could consider testing jurors for COVID-19 instead of relying on jurors to self-report symptoms, exposures, or positive tests. What other safety precautions could facilitate safe in-person trials as the pandemic continues, or in future emergencies?

The Jury Subgroup of the COVID-19 Judicial Task Force has developed guidance for resuming jury trials.⁷ Can unified guidance provide direction on how and when to conduct in-person trials under various emergency circumstances? How can individual courts address in-person jury trials in their COOPs?

As of fall 2021, several courts have conducted virtual jury trials in civil cases during the pandemic. The judiciary could consider expanding the use of virtual trials in certain types of cases or doing portions of jury selection virtually. More research could be conducted into the experiences of those who have participated in virtual trials during the pandemic so that courts can consider whether, how, and when virtual trials should be permitted.

Even though focus-group participants did not themselves observe a lack of representativeness in the jury pool, they expressed a desire for more systematic study of this question. As the pandemic continues and courts change entry restrictions to courthouses, potential requirements like vaccine mandates could also affect the representativeness of the jury pool.

3.5 Virtual Proceedings

Selecting and implementing technology to use for virtual proceedings was one of the biggest challenges faced by participants' courts.⁸ Given that the goal of these focus groups was to reflect on the early months of the pandemic, participants' opinions on issues related to virtual proceedings may have since changed. Some judges may have worked through the initial challenges

7. COVID-19 Jud. Task Force Jury Subgrp., *Conducting Jury Trials and Convening Grand Juries During the Pandemic* (2020), https://www.uscourts.gov/sites/default/files/combined_jury_trial_post_covid_doc_6.10.20.pdf.

8. Most of the computer hardware courts purchased was used for both virtual proceedings and telework, especially if court employees remotely administered virtual proceedings. The platforms courts selected for virtual proceedings were also used for routine meetings of court staff and events like conferences. See section 3.8 for a separate discussion of telework.

with virtual proceedings reported here or may have had more time to decide the circumstances in which they feel virtual proceedings are appropriate. Participants' views on the necessity of virtual proceedings in crisis situations also may have changed with the shifting circumstances of the pandemic, such as the prevalence of outbreaks in their districts, vaccine availability, and the circulation of more virulent strains of COVID-19.

Early in the pandemic, courts used technology they were already comfortable with, which was mainly telephone conferencing, especially in bankruptcy courts. Some districts immediately implemented videoconferencing (which, for criminal proceedings, was possible because of the CARES Act), but for many courts, obtaining the necessary equipment, software, and training took several months. Although most courts used a combination of telephone and video for virtual proceedings, as of late 2020/early 2021, a few judges participating in the focus groups said that they or a colleague had not used videoconferencing at all. A number of courts tried different platforms before settling on one primary software to use. However, even if a district court preferred to use a certain platform, it often had to be able to use multiple different platforms depending on the capabilities of the correctional facilities with which it interfaced. Within the same court, individual judges often used telephone versus video conferencing for different types of proceedings and to various extents. Most judges and clerks agreed that implementing virtual proceedings was essential for their courts to be able to function during the pandemic. They also made a number of observations about the pros and cons, which will be helpful when considering the use of virtual proceedings after the pandemic.

Telephone Proceedings

Implementing telephone proceedings was a quick and easy solution for many courts. Almost all courts were already equipped to conduct teleconferences. Some courts or individual judges had been using teleconferences before the pandemic for certain proceedings and simply continued or expanded that practice. Judges reported using teleconferences widely during the pandemic in civil and bankruptcy matters, and to some extent in criminal matters, saying that teleconferences worked well for status proceedings, case-management conferences, scheduling conferences, oral arguments on simple motions, and the like. Judges held different views about the extent to which teleconferencing worked for evidence presentation, in complex proceedings, and for trials. In general, judges and clerks noted that telephone proceedings were accessible to almost everyone, as they required few resources (a phone) and little technical knowledge. Judges reported that the downsides were that they could not see who was on a call and had no control over muting and unmuting participants, which was an issue if people were in noisy environments or did not remember to unmute themselves to speak. Participants in teleconferences also frequently talked over one another, since they could not see visual cues that someone had finished talking. A number of judges, especially from bankruptcy courts, liked that fee-based services like CourtCall and Court Solutions had more options to manage teleconferences than AT&T, which was free for court users. But several participants said their courts found the costs to litigants assessed by CourtCall and Court Solutions to be prohibitive (see section 3.7 for further discussion of fee-based teleconference services).

Video Proceedings

Although some judges were satisfied with conducting virtual proceedings by telephone, many courts added a videoconferencing option or switched to videoconferencing for a good deal of

their proceedings. A few courts were able to immediately transition to video proceedings, but most had to find an acceptable platform, train staff and judges on its use, and make sure that other stakeholders, like lawyers and correctional facilities, could access the platform. Many courts chose to use Zoom because lawyers and some judges were already familiar with it and found it easiest to use. However, U.S. attorneys, U.S. trustees, and Social Security Administration attorneys could not use Zoom (at least initially) on their work equipment because of agency security rules, which created problems when those government representatives were involved in proceedings. Several focus-group participants reported that their courts were using Cisco's WebEx because WebEx was already in place in some facilities, especially federal prisons, or Microsoft Teams, which was supported by the Administrative Office.

District courts used videoconferences for both civil and criminal proceedings, and bankruptcy courts implemented videoconferencing as well. Judges' views about video proceedings seemed to be strongly influenced by whether they found the videoconferencing software easy to use and whether their internet connections were reliable. Those using platforms that were not user-friendly or who were plagued by connectivity problems generally had a negative perception of video proceedings.

Videoconferences had several benefits over telephone proceedings. Judges generally agreed that they liked knowing who was in attendance, seeing the faces of those participating in the proceeding, allowing participants to see them, and having control over muting participants. Several judges noted that they thought it was easier for participants in the proceedings to understand them over video than over the phone. Some thought video could effectively be used in more complex matters and when evidence was being presented. For accessibility reasons, judges thought it was important that platforms like Zoom still provided a telephone option for those who could not use video.

Focus-group participants also noted several downsides to video proceedings. Video proceedings were burdensome on staff in several ways. Courtroom deputies and other staff without prior technological experience had to learn how to use videoconference software, often for multiple platforms depending on correctional facilities' capabilities and judges' preferences. IT staff had to be available for video proceedings to support judges and other participating staff, as well as lawyers and court users. Some courts did not have enough IT staff to support every proceeding, making it essential that courtroom deputies knew how to use and troubleshoot the software and hardware used in video proceedings. One district court clerk said that courtroom deputies' "jobs changed overnight because they had to become quasi-technical savvy to make sure that the technology was working, the videos, the evidence presentation—whatever it was." As courtroom deputies and other non-IT staff became more familiar with the technology their courts used, the need for IT staff to be constantly available for support waned.

In courts that did not publicly post links for proceedings, staff had to email Zoom links to all parties attending each proceeding; when staff administered proceedings from home, the smooth functioning of the proceedings depended on the quality of staff's home internet connections. One court addressed this problem by buying Wi-Fi hotspots to supplement staffs' home Wi-Fi. While some courts were able to use one platform for recording both audio and video, other courts had to use two platforms for a single proceeding because they could not conduct the proceeding and record the audio for transcription on the same platform. A few judges also expressed dissatisfaction with the lack of decorum exhibited by some participants in video proceedings. Judges had observed litigants who appeared from inappropriate locations, like beds,

bathrooms, or moving vehicles; had noisy distractions in the background; brought alcoholic beverages to proceedings; wore inappropriate attire; or ate on camera.

Although many lawyers and court users were familiar enough with computers and the necessary hardware to easily access video proceedings, courts' abilities to implement video proceedings were sometimes constrained by the capabilities of lawyers and court users. Some lawyers knew little about computers, making them resistant to the adoption of video proceedings. When they did participate in video proceedings, their inability to use the software impeded the flow of proceedings. Just as courts experienced problems securing the necessary hardware for video proceedings, it took several months for many lawyers to procure webcams. Attorneys, especially sole practitioners working remotely, and court users also often did not have reliable internet connections, creating problems with freezing and buffering during proceedings. Some courts' IT staff provided in-proceeding support to lawyers and court users, and one court offered lawyers the opportunity to practice using Zoom before proceedings. In terms of access issues, even though a telephone option did provide wider access, if proceeding participants did not have internet-connected devices or stable internet connections, did not know how to use the video conferencing software, or could not appear on camera for any other reason, judges expressed concerns that they would be treated differently than those appearing on camera. Some courts had separate processes for those appearing by video versus phone. In one bankruptcy court, telephone appearances had to wait until the end of a calendar call and were set up in a separate virtual conference room.

Judges expressed different opinions on several key issues related to video proceedings. Although some thought that assessing the demeanor and credibility of witnesses did not work over video, others appreciated that video provided a close-up, straight-on view of a witness's face. Some judges thought this view allowed them to better observe a witness's reactions and facial expressions, which was at the very least an improvement over not seeing a witness during telephone proceedings and at best preferable to a judge's view of a witness during an in-person proceeding, which is often from the side at a distance.⁹ One judge who held the latter view explained,

[T]here was this concern expressed and continues to be expressed—that, Judge, we need you to see the witness in person. I always reassure them that I am seeing much more of the facial changes, the anxiety, the concerns about what they're saying, maybe the cues of somebody not being entirely truthful when their face is very close on the screen. I find that I do a lot better job of evaluating witnesses' credibility when they are on the other side of a screen and I'm very close looking at their face than when they're sitting in the witness chair.

Some judges also liked that videoconferencing put all participants on relatively equal footing by placing them in the same-sized box and that it removed some of the formality from court proceedings, allowing participants to be more relaxed and less intimidated by the grandeur of the courtroom. Other judges thought video proceedings lacked the necessary formality to ensure that participants took the proceedings seriously. A number of judges appeared on video

9. Social scientists have empirically tested the effects of factors like camera angle and framing on bias and assessments of credibility in videotaped interrogations, confessions, and testimony. *E.g.*, G. Daniel Lassiter et al., *Videotaped Confessions: Is Guilt in the Eye of the Camera?*, 33 *Elsevier* 189 (2001), [https://doi.org/10.1016/S0065-2601\(01\)80006-X](https://doi.org/10.1016/S0065-2601(01)80006-X); Holly K. Orcutt et al., *Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials*, 25 *L. & Hum. Behav.* 339 (2001), <https://link.springer.com/article/10.1023/A:1010603618330>. Researchers could build upon this work to study these factors in the context of video proceedings.

from their benches wearing their robes, with court signage in the background, to lend gravitas to video proceedings.

Pros and Cons of Virtual Proceedings

Virtual proceedings in general, both by telephone and video, had some common benefits and drawbacks. One judge summed up the benefits of virtual proceedings, saying they “made court really accessible to people in a way where the substance is pretty similar and the transaction costs are vastly lower.” One of the main costs that virtual proceedings eliminated was travel. Virtual proceedings also had benefits for scheduling and access to the courts.

Conducting proceedings virtually eliminated the need for litigants, lawyers, and witnesses to pay for transportation and parking expenses or to spend valuable time in transit. These savings seemed especially important to judges and clerks from districts that were geographically large or that had few courthouses, meaning that their constituents often had to drive long distances to appear in person, and in districts with courthouses in major cities where parking was expensive and using public transportation could be time-consuming. One bankruptcy judge said,

I don't think . . . that it's fair to expect that the lawyers, the debtors, the creditors, and then all the unrelated witnesses . . . to drive—I mean to the closest courthouse I've got if it's within my district—three or four hours each way. That's an incredible burden on the participants, especially in consumer cases.

Focus-group participants reported that attorneys liked being able to appear virtually in multiple jurisdictions on the same day and that virtual proceedings eliminated superfluous travel for them, saving time and money. As one judge observed,

It used to be, particularly in my bigger cases, a lawyer would think nothing of flying from [across the country] the day before, staying in a hotel, coming in for [a] 9:30 a.m. hearing, talking to me at most—at most—for 45 minutes at a case-management conference or probably less, getting on a plane and flying back. The clients expected it. The law firm expected it. . . . [W]e don't do any of that [now]. People just get on Zoom.

Virtual proceedings also made appearances easier for out-of-state witnesses, again saving time for the witnesses and money for clients. Clients did not have to pay for experts' travel or for the time experts would have spent waiting for a proceeding to begin in the courthouse. One judge also appreciated that virtual proceedings did not put out-of-state witnesses for courts running trailing dockets in the position of having to travel during a pandemic to testify, only for their case not to be called. Allowing witnesses to appear virtually was also efficient for courts. As another judge stated, not being restricted by out-of-state witnesses' ability to travel allowed progress to be made on cases:

[S]ome of these adaptations, using video and phone even for a proceeding, for remote witnesses—for example I'm going to do a violation of supervisor[y] release and the guy was arrested in [another state] in a stolen car, but I said I'll see those witnesses via video—I don't think they need to come in . . . nor am I going to wait until [the state] resolves its process. So, some of these things make you more efficient to get to the endpoint. I don't think they sacrifice access, or fairness, or justice.

Judges also liked that eliminating travel made it easier for lawyers to be punctual, and that lawyers were often more prepared for virtual proceedings, since they conducted their side conversations with opposing attorneys prior to proceedings. Judges said they also appreciated the flexibility of being able to hold court from different locations.

Participating judges agreed that adding virtual proceedings increased accessibility to courts, especially for certain people. For court users with adequate technological knowledge and stable internet or telephone connections, appearances were more convenient than in-person proceedings. Virtual proceedings also allowed members of the public, the press, and family members to attend from any location, enhancing access for those groups and providing family support for detainees held in locations far from family.

Finally, virtual proceedings decreased the need for physical space. Under conditions of a pandemic, virtual proceedings eliminated the need for courts to enact safety protocols that would place heavy demands on court resources.

Judge focus-group participants noted several drawbacks to virtual proceedings. Many missed the ease of interacting in person, especially being able to read social cues and body language, as well as being able to have the informal conversations that build relationships with attorneys and agents. The inability of judges to observe the surroundings of witnesses led to concerns that witnesses could be coached or otherwise influenced by people off-camera during proceedings. For attorneys, their ability to communicate informally or privately with their clients during proceedings was a concern. Unlike during in-person proceedings, lawyers could not talk to clients throughout a virtual proceeding, and certain types of virtual proceedings had to be stopped entirely if attorneys and clients wanted to confer privately. Although tools like breakout rooms in Zoom provided one way for attorneys to speak with clients, use of such features impacted the video time reserved for the proceeding as a whole and was not strictly private, as judges or court staff could access the breakout rooms. In criminal proceedings, defendants in detention might have correctional staff in the room with them to facilitate the proceeding, which also impeded the privacy of communication with their attorneys.

Focus-group participants said the effectiveness and efficiency of virtual proceedings depended on the reliability of the technology used. If the technology was not working correctly, proceedings were delayed or could not be held. This reliance on technology could be a burden for court staff, since they had to learn and provide support for new systems. In districts with unfilled judicial vacancies where judges from other districts provided coverage, staff had to manage additional software if visiting judges used platforms that were not used by judges in their district. Virtual proceedings also required more coordination in advance than in-person proceedings because staff had to manage registration and check-in processes and ensure that attendees were sent or knew how to find the links or phone numbers to access proceedings.

Judges held differing views on several key issues surrounding virtual proceedings. While some judges thought virtual proceedings impeded interpersonal connections with court users, others said they were better able to communicate with court users in virtual proceedings. A few judges said that virtual interactions were too impersonal, with one judge explaining,

[It's] hard to understand the humanity of the individuals who are impacted by our decisions and by our work processes, by how quickly we can get things done when we're only seeing them virtually from the head up . . . I'm a little worried that we may look at the cost of having proceedings in person and the cost of having space for our court staff to work in chambers and maybe cut off our

noses to spite our face . . . if [the people affected] are not present, I think it would be easier to have the emotional distance.

On the other hand, several judges found that court users were more forthcoming and comfortable in virtual proceedings. Some judges said that being in one's own environment and not having to travel to court or deal with courthouse security may have relieved some of the anxiety surrounding a court appearance. Other judges, as mentioned above, said that the video setting with all participants in equal-sized boxes, or just speaking with a judge over the phone, was less imposing than the formal atmosphere of a physical courtroom where a judge speaks from an elevated bench. Regardless of the specific cause, a number of judges thought that virtual proceedings allowed court users to speak more freely and judges to have more productive conversations with them. One bankruptcy judge felt that this openness enhanced discussions with self-represented debtors, while a district court judge reported being more satisfied conducting criminal sentencings over video than the judge expected because of better communication with defendants.

Although courts were able to provide interpretation for non-English speakers in virtual proceedings, some noted that the technological capabilities for interpretation could improve. Judges said interpretation was especially slow over the phone when documents had to be reviewed because the interpreter had to read out the documents one-by-one. But focus-group participants using Zoom reported that Zoom was able to provide simultaneous interpretation.

Magistrate and district judges generally reported that using telephone or video for mediation and settlement conferences seemed to be as effective as in-person mediation or settlement. Some judges were enthusiastic about continuing to mediate and conduct settlement conferences virtually after the pandemic. One magistrate judge noted likely never doing mediation any other way than using Zoom, while another preferred doing telephonic settlement conferences because they allowed better concentration without the distractions of the courtroom or Zoom. Other judges wanted to return to in-person mediations and settlements because they did not like the mechanics of conducting conferences virtually, or they did not think that virtual conferences imparted the same atmosphere as did in-person mediation and settlement. One judge was concerned that parties did not see judges as impartial arbiters on Zoom, while another thought the imposing setting of the courthouse was more "impactful," motivating parties to settle.

The quality of evidence presentation was also the subject of debate. Judges generally preferred to use video over telephone, although a few judges said they or their colleagues had good experiences with evidence presentation in telephonic proceedings. In video proceedings, the efficacy of evidence presentation depended on the capabilities of the video software and the skill level of the presenting attorneys. In proceedings where attorneys and judges were able to use the screen-share function of video conference software, judges liked the ability to review and point to portions of documents onscreen. One judge liked using screen share to highlight defendants' indictments during criminal proceedings and planned to continue using the screen-sharing feature during in-person proceedings. But a few judges were worried about the difficulty of witness impeachment in virtual proceedings. One judge said that lawyers had not yet mastered screen sharing and had issues with "impeachment, refreshing recollection, anything where you would originally have to hand something to the witness." Another judge agreed, saying that "we make them swap the documents ahead of time and email them to the court . . . that's fine. But . . . [impeachment] kind of loses its punch if you have to take a break for five minutes and start emailing it around." A third judge, however, admitted being satisfied with impeachment using screen share, noting that the lawyers appearing in one virtual trial were proficient in using Zoom.

Judges across focus groups were of different minds on the issue of virtual trials. At the time these focus groups were conducted, a little more than a quarter of both the district and bankruptcy judges reported having personally conducted one, two, or “several” video trials.¹⁰ One bankruptcy court judge had conducted a telephonic trial. Of the clerks participating in the focus groups, again, a little more than a quarter of district and bankruptcy clerks said that their courts had held one or more video trials.¹¹ All district court participants said these virtual trials were civil bench trials, with the exception of one district clerk who reported judges were also conducting civil jury trials using Zoom.

All four district judges who had conducted at least one virtual trial reported positive experiences, noting the cost savings of virtual trials and that the technology worked well. As one district judge summarized,

I had a [multi-day] civil trial that I did by video. The lawyers were all over . . . The witnesses were all around the country. Everybody appeared by video throughout the trial. Afterwards, the parties commented about how much less expensive it was for them to get a resolution of their case than if we had the trial in person and everybody had to come to [my district] . . . Even after the pandemic is over, there may be instances where there are proceedings that we can proceed forward with by video. That makes it a lot less expensive and a lot more convenient for the parties and the lawyers. I was surprised that it was as easy to do as it ended up being.

Another judge was able to assess witness demeanor adequately during a video trial. Of the bankruptcy judges who conducted video trials, only one gave an overall opinion, saying video trials were “not great.” The bankruptcy judge who conducted a telephonic trial was not satisfied, noting a preference for seeing participants. Clerks whose courts had conducted virtual trials generally expressed satisfaction that virtual trials allowed their courts to keep cases moving. One clerk observed that, “once the judge takes the plunge, they realize it’s really not that much different” and that being able to conduct virtual trials facilitated civil settlements.

Focus-group participants who had not conducted virtual trials expressed opinions about virtual trials, with some saying they were willing to try them, and others expressing hesitation. There was little discussion of using virtual trials for criminal cases, as most participants thought that would be unlikely or inappropriate.

Desire to Retain Virtual Proceedings

Most participants thought their courts would continue to use virtual proceedings post-pandemic. However, individual judges varied in their desire to do so. While some judges wanted guidance outlining the circumstances in which virtual proceedings were appropriate, others wanted to exercise their own discretion over these decisions on a case-by-case basis. How to balance the various goals of courts, such as accessibility, efficiency, and fairness, in deciding when to use virtual proceedings, remained unclear. There was general agreement that short or

10. In the focus groups, 4 of 15 district court judges and 4 of 14 bankruptcy court judges said they had overseen a video trial. However, because focus-group participants were not randomly selected, these numbers should not be interpreted as representative of district and bankruptcy judges overall; they are simply intended to show that the majority of focus-group judges had not personally overseen a virtual trial by the conclusion of the focus groups in winter 2020–2021.

11. Of the clerks participating, 5 of 19 district clerks and 4 of 14 bankruptcy clerks said at least one judge on their courts had overseen a virtual trial.

straightforward proceedings not involving evidence, such as status hearings, conferences, and simple motions, could be conducted virtually. There was a greater desire to, and less concern about, using telephone and video proceedings more widely in civil and bankruptcy cases than in criminal cases. Judges and clerks thought civil and bankruptcy attorneys and parties would want to continue to hold some proceedings virtually. In general, judges who had less trouble with technology and connectivity were more enthusiastic about keeping at least some virtual proceedings in place.

Some judges who were previously skeptical about the use of virtual proceedings changed their minds during the pandemic, especially for nonevidentiary proceedings. As one district judge explained,

Litigation is not a drive-by sport. If you're going to try a case in my court, you got to show up at least once. But that takes time and money because we regularly have attorneys coming from quite a distance. So this has shown me I can allow them to appear by Zoom at least for initial scheduling and probably for some oral arguments.

But judges were still in the process of determining the circumstances in which to use virtual proceedings. One judge wanted guidance on this issue in anticipation of attorneys' behavior in the absence of rules:

[T]here were courts in the past which said, you may never appear in any way other than showing up in my courtroom. And I think those days are probably gone because we've all shown that it can be done, and it can be done effectively in a variety of different ways. But I don't want to go to have our lawyers arguing, well, I could come there but it's just so much easier if we do it by Zoom. Can't we just do it? What are the reasons and what are the scenarios that electronic is going to be used in a smart choice? And when do we start putting our foot down and saying, no, this is really something that needs to happen in the courthouse? . . . I look forward to . . . having those types of discussions between judges as things start to become safe to figure out where is that line. I don't know if there will ever be the same line for everyone.

Some judges were anxious about how courts would weigh the tradeoffs of conducting virtual proceedings moving forward, worrying that courts would prioritize certain goals, like cost-effectiveness and speed, over fairness and building personal relationships. One judge explained,

I think this is going to result in more and more justice being rendered at a distance . . . [N]ow you never see your judge. And if you see your judge, it's only if you go to trial. Perhaps now you won't see him even in a pretrial because all of that will be done electronically . . . I think justice will be swifter though because we just have all these electronic devices there making it easier for people to communicate with their judge and get their pleadings filed, but I'm not sure that the justice will be necessarily fair.

In the case of this pandemic, or in other ongoing emergency situations, it is unclear how to balance any potential downsides of using technology for court users with the risks that judges and court staff would have to take if they were to hold court in person. One judge was willing to do as much as possible remotely, prioritizing personal health:

I'm certainly willing to do a trial on Zoom . . . I do think we have a responsibility to keep people safe. I'm not personally willing to volunteer to get COVID. So as long as I can provide access to justice from my little office here, I'm going to try to do that.

What Made It Work

- The extraordinary efforts of court staff to facilitate virtual proceedings was a significant factor in their success, as were the efforts of partners and stakeholders. Virtual proceedings would also not have been possible without judges' willingness to try new ways of conducting court.
- Courts' openness to trying new platforms allowed them greater functionality and facilitated attorneys' and court users' use of the platforms.
- Virtual proceedings were convenient for many judges, court users, attorneys, witnesses, jurors, and court staff. Especially for those with stable internet connections and technological capabilities, virtual proceedings were easier and cheaper than in-person proceedings.
- Virtual proceedings did not put participants at risk of virus transmission and allowed courts to keep in-person presence at courthouses to a minimum.
- Providing both telephone and video options for virtual proceedings reduced access concerns.
- Training non-IT staff to provide technical support for virtual proceedings reduced the burden on IT staff.

Considerations for the Future

Whether and how to integrate virtual proceedings into courts' normal, postpandemic operations was the subject of extensive discussion in these focus groups, demonstrating the broad interest in this topic throughout the judiciary. While a number of judges participating in these focus groups wanted guidance on when and how to utilize virtual proceedings after the pandemic, others were comfortable with using their own discretion over those decisions. Apart from these focus groups, which reflect the views of only some judges and clerks, the Center is surveying district, magistrate, and bankruptcy judges about their experiences with virtual proceedings before and during the pandemic. The Center is also providing research assistance to a subgroup of the judiciary's COVID-19 Task Force, which is examining the use of video- and teleconferencing for various purposes with detained individuals. FJC education programs and materials also address aspects of conducting virtual proceedings.¹² For hybrid proceedings specifically, courts themselves could consider what hybrid proceedings will look like moving forward and what physical and technical capabilities they need to conduct hybrid proceedings.

Beyond the possible need for guidance on when virtual or hybrid proceedings could be used, focus-group participants also wanted training for staff, judges, attorneys, court users, and the

12. *E.g.*, Federal Judicial Center, *Please Proceed: Judicial Education Videos Worth Sharing*, <https://fjc.dcn/content/349117/please-proceed-judicial-education-videos-worth-sharing> (last visited Dec. 2, 2021); Bankruptcy Best Practices Forum: Remote Hearings (hosted on the Federal Judicial Center's intranet site) <https://fjc.dcn/forums/bankruptcy-best-practices/remotes-hearings> (last visited Dec. 2, 2021).

public aimed at different levels of technological comfort and knowledge. Courts, the Federal Judicial Center, or the Administrative Office could provide training to judges and attorneys for tasks that the focus-group participants expressed varying levels of comfort or satisfaction with, like using screen sharing for evidence presentation, recording proceedings for transcription, and providing simultaneous interpretation. Transitioning as many federal courts as possible to the same teleconference and video platforms would allow more support and training for these platforms. Conducting virtual proceedings would also be easier if stakeholders and partners adopted the same platform used by the courts.

If virtual proceedings will be used extensively moving forward, courts could consider how virtual proceedings affect demands on staff. Several participants thought that virtual proceedings required more preparation from staff before the proceedings. Are there ways to automate scheduling virtual proceedings? Do platforms offer integrated scheduling solutions? Besides scheduling, do virtual proceedings impose any other excess demands on staff that in-person proceedings do not?

Several participants said that the judiciary should be doing more to help courts share information about common technological problems and solutions. The Administrative Office and the Center have worked to facilitate ways for courts to share information about what worked for them in technical matters by providing resources like the Administrative Office's COVID resources webpage and the FJC forums (especially the Bankruptcy Best Practices Forum).¹³ The Center or the Administrative Office could survey judges and clerks or solicit input from them on whether these resources are sufficient or if there are other resources that could be developed to help courts learn from one another on these issues.

Participants also raised concerns about possible unequal access to virtual proceedings based on court users' affluence or technological savvy. Courts could consider the obstacles that prevent certain court users from participating in virtual proceedings and ways courts could address these challenges. For example, some state courts have recognized that people who do not have internet-connected devices or stable internet connections are at a disadvantage in virtual proceedings; to address this, these courts are providing workstations at their courthouses that allow members of the public to connect to virtual proceedings.

Although many courts have provided telephone options for video proceedings to ensure access to those without internet-connected devices, a number of judges in these focus groups expressed a preference for video proceedings. At least one participant noted that a different procedure was used for video than for telephonic appearances for the same type of hearing. Courts could consider whether court users appearing by video and by telephone are receiving the same treatment, or this could be the subject of empirical research.

3.6 Challenges Specific to Criminal Cases in District Courts

Criminal cases posed the greatest logistical challenges for district courts. While district judges, clerks of court, and magistrate judges were all heavily involved in criminal proceedings, magistrate judges felt that they carried the heaviest burden for testing new procedures in criminal

13. Admin. Office of the U.S. Courts, *Coronavirus (COVID-19) Guidance*, JNET, https://jnet.ao.dcn/news-events/coronavirus-covid-19-guidance?utm_campaign=jnet-round-up&utm_medium=email&utm_source=govdelivery (last visited Dec. 2, 2021); Bankruptcy Best Practices Forum (hosted on the Federal Judicial Center's intranet site) <https://fjc.dcn/forums/bankruptcy-best-practices> (last visited Dec. 2, 2021).

cases because they are generally responsible for the initial stages of a criminal case. For many cases, these initial stages (and quite often subsequent stages) took place with persons held in detention; this had a great impact on technological support needs, budgets, coordination with other entities, and scheduling.

Criminal cases involved coordination with a particularly wide range of actors, including the Federal Bureau of Prisons (BOP), state and local correctional facilities, federal defenders, U.S. attorneys' offices, the U.S. Federal Marshals Service, and probation and pretrial services. While some districts or court divisions primarily served those detained in a single, federally run facility, in other districts defendants were held at any of a number of federal, state, and local facilities. Judges and clerks in these districts needed to communicate, coordinate, and interface with all of these facilities, which meant being able to use different technological systems and methods of communication, as well as coordinating scheduling according to each facility's restrictions and capabilities.

In addition to the courts' own issues with access to detainees, cases were delayed because federal defenders and private attorneys faced significant challenges in communicating with their clients. In-person visits were largely prohibited, or attorneys did not want to risk COVID exposure. Virtual attorney access to detainees was limited because of high demand and lack of resources for video and telephone meetings.

Needing to coordinate with so many organizations and people increased the likelihood that COVID cases or exposures would disrupt court operations. Many correctional facilities experienced COVID outbreaks, limiting the ability of detainees to appear in person.

Judges also needed to coordinate with the BOP and probation and pretrial services in making determinations on compassionate release petitions. Several judges said their districts received large numbers of compassionate release petitions, diverting judges and law clerks' attention from their existing caseloads. One judge said making decisions on these petitions was difficult because data from the BOP on the prevalence of COVID in its facilities was often incomplete or varied in quality depending on the institution. Judges were also aware that probation offices could only supervise a certain number of people, which constrained how many compassionate release petitions judges could grant. One court successfully streamlined its process for ruling on compassionate release petitions by organizing a weekly group of representatives from the court, the U.S. Attorney's Office, and the federal defender organization, who made recommendations on these petitions.

The ability of pretrial services to function during the pandemic impacted magistrate judges' decisions on pretrial detention or release. Some pretrial services officers had difficulty interviewing defendants in a timely manner for pretrial reports because of access restrictions at detention facilities and increased demand on telephone connections. One magistrate judge suggested that these complications delayed pretrial reports and affected their comprehensiveness, making review difficult for magistrate judges.

Courts and lawyers experienced similar problems communicating with defendants out on bail as with defendants in custody. Some defendants did not have the resources to access videoconferences, which required courts to set up stations in their courthouses for the defendants' use. Attorneys also had problems finding safe places to meet with clients who were not in custody.

In general, focus-group participants said that many correctional facilities' capabilities to participate in virtual proceedings and meetings were extremely limited. Some facilities did have existing videoconference systems, although many judges expressed dissatisfaction with the difficulties in

using these platforms (specifically Cisco products in BOP facilities). Other facilities lacked hardware, software, or in a few cases even internet connections or sufficient numbers of phone lines. A number of courts purchased cellphones, iPads, or computers for these facilities and paid for the installation of internet or internet upgrades at jails or prisons. Courts also helped train correctional staff and marshals to operate the equipment, often providing their own IT staff for troubleshooting and tech support. Several focus-group participants said that securing the agreement of staff at the facilities to operate the equipment was initially challenging.

Scheduling virtual proceedings was also an obstacle because correctional facilities had their own, rigid schedules which often differed from the schedules of courts. For example, one clerk noted that judges were accustomed to continuing proceedings past 5:00 p.m., while correctional facilities would not do so. District courts also had to compete with state courts for access to detainees and time on a facility's proceeding schedule. In some areas, state courts had already been conducting virtual proceedings prepandemic, so federal courts needed to work with detention facilities to secure their own time. Scheduling problems were exacerbated by correctional facilities' not having enough virtual-proceeding stations or enough rooms to install these stations. Safety precautions that prevented multi-defendant proceedings also slowed the pace of virtual proceedings. Even when correctional facilities and courts coordinated the use of virtual platforms successfully, U.S. attorneys were not allowed to participate in Zoom proceedings on their work computers because of DOJ rules.

Virtual proceedings in criminal cases have been permitted under the CARES Act, subject to the consent of the defendant. Several focus-group participants noted the importance of the CARES Act in allowing them to continue making progress in criminal matters. Judges struggled with how to proceed if a defendant did not consent to virtual proceedings when in-person proceedings were not possible because of COVID outbreaks in correctional facilities or communities. Some judges continued cases unless defendants consented to virtual proceedings. One judge explained,

I did a notice and I said, all right, I'll give you an in-person hearing six months down the road or you get it quicker if you consent. So all of a sudden, all of these defendants were eligible. They had departure motions. They had downward variance. Everybody started consenting to Zoom. I think, too, a lot of these defendants . . . realize that they are risking exposure if somebody's putting them in a van and taking them to the courthouse and taking them back. So now everybody is . . . pretty much consenting to Zoom.

Detained defendants also had to weigh consenting to virtual proceedings against having to quarantine if they appeared in person, which in some correctional facilities consisted of two weeks in solitary confinement. Judges expressed concern that detainees were consenting to virtual proceedings because their alternatives were solitary confinement or continued indefinite waiting. Concerns were especially grave for pretrial detainees, since they were facing increased risk of COVID exposure in addition to prolonged detention without trial.

If a defendant did want to appear in person, more planning and in-person staff resources were needed than for virtual appearances because court staff and marshals had to coordinate quarantine, transportation, and physical distancing procedures. If a court housed detainees at multiple facilities, they needed to prevent inmates from different facilities coming into contact with one another. Several courts changed their scheduling procedures to only have detainees from one facility in the building at a time, which constrained judges' calendars. One participant noted that the district's marshals also set a limit on the number of prisoners they could move at

once, similarly limiting judges' abilities to schedule proceedings. Even when detainees appeared in person, they sometimes participated in proceedings from courts' holding cells, which also involved videoconferencing.

Judges differed in their opinions about which types of criminal proceedings could be conducted virtually versus in-person. Some were comfortable handling arraignments and initial appearances virtually, while others thought they needed to be in the same room as the defendants to properly appraise them. Many judges took plea agreements over video, but a few judges thought pleas needed to be done in-person. Judges also varied on whether defendants should be sentenced in person. Some thought virtual sentencing was acceptable as long as the defendant consented. Others believed it was essential to be in the same room as the defendants when sentencing them, especially if the defendants would be sentenced to incarceration. Judges who wanted to sentence in person often felt a moral or ethical obligation to speak to defendants face-to-face. One judge said,

I just don't feel comfortable sentencing someone by Zoom unless it's time served. That just seems Orwellian to me. It seems like something out of the future. But we judges differ on that. I just think if someone is taking away someone's freedom, I should suffer the discomfort of being in the same room with that person.

Other judges differed. One judge noted that defendants' desires not to have to quarantine to appear in-person was an important factor in deciding to conduct most sentencings via video. The judge still felt the gravity of sentencing when it was conducted by video conference, and there was the additional benefit that access for family in the remote district was improved:

I always struggle when I'm sentencing someone. It's probably the hardest thing that we do. But I don't find it any easier to do by video than when they are in the courtroom. The one advantage that I've seen is a lot of their family can attend by video. I've had many, many family members that are from out of state that would not have been able to come to [my district] for a sentencing even pre-pandemic days, but they do appear by video. Then I can listen to them and hear what they have to say and contribute also.

Another judge thought that the federal courts should be more open to using virtual proceedings, including for sentencing, raising the point that concerns about disparities between virtual and in-person sentencing could be studied:

The federal court in particular has been more resistant to the use of technology, whether it be video proceedings or even telephone proceedings, and making people come in. Now that we've been forced to use technology, we realize, okay, the world isn't falling apart. We can still operate successfully using this technology . . . I don't have a problem with sentencing people even if it's not time served over Zoom. I think the important thing is defendants are given the option. We explain the options of proceeding by video or in person. But I think we're going to have to do a study afterwards to see if sentencings are affected at all by these remote proceedings. I'd be surprised to find that there is a difference because I don't think I've sentenced anyone any differently whether it's remotely or in person. In fact, our courtrooms [here] are so big, I actually see the defendant better in Zoom than I would actually in the courtroom. We keep the proceedings open. Anyone that wants to appear and speak can speak. I think it's operated very well.

Sentencing also posed an additional logistical challenge when a defendant was not detained, but needed to surrender after sentencing. Judges said this process was easier to handle through an in-court proceeding because the defendant could be immediately taken into custody. If this type of sentencing was conducted virtually, the court had to rely on the defendant to surrender. If a defendant did not self-surrender, the court had to send marshals into the community, risking their safety.

The CARES Act did not authorize district courts to conduct criminal trials virtually, nor did most judges think virtual criminal trials would be appropriate. Several mentioned constitutional issues with holding virtual criminal trials, namely whether virtual trials would adequately allow for the right to a public trial, the right to confront witnesses, and the right to assistance of counsel. Although judges were excluding time under the Speedy Trial Act, many were concerned about the long delays in criminal cases reaching trial. A number of participants noted that their districts had criminal trial backlogs. Courts that were able to conduct in-person trials often prioritized criminal trials, but limitations on the number of trials that could be held at once meant that progress on backlogs was slow.

Administration of Justice in Criminal Cases

Because detained defendants could be found not guilty at trial, judges were particularly concerned about these persons serving long periods of pretrial incarceration. Even if a defendant was found guilty at trial, a defendant could be held in pretrial detention for a longer period than their eventual sentence might be. Relatedly, judges were concerned that motions for downward departure or variance would effectively be moot because of long periods of pretrial detention. Focus-group participants also worried that the pressures of being incarcerated, particularly given the high risk of contracting COVID in correctional facilities, might lead defendants to plead guilty simply to be released. Judges observed higher than average numbers of changes of pleas, which they worried were due to the pressures of being incarcerated seemingly indefinitely during a pandemic. As one judge said,

[T]he thing that has most concerned me is defendants who were detained pre-trial like early last year and who are still detained . . . [b]ecause their trials have been postponed because of the CARES Act and the suspension effectively of the Speedy Trial Act. Some of them have asked to reopen detention hearings. But if they don't have some medical condition or other factors that would put them at risk for either contracting COVID or having a more severe case of COVID, it's very difficult. That is why they are sort of the forgotten people in this whole pandemic, it's those defendants who we found there was a basis to detain not expecting that here we were going to be a year later and they would still be sitting there sort of in pretrial limbo . . . I have at least one guy who I still stay awake at night [thinking about] . . . [b]ecause he was detained for a few months before the pandemic started. Then he pleads guilty. I say to myself, "Is he pleading guilty because he's got so much time served? His sentence is going to be three years, so he's already served half of it. And is it because he was detained, and he can't get himself brought to trial?"

What Made It Work

- The CARES Act's authorization to use video and telephonic proceedings in criminal matters allowed courts to keep making progress on cases while limiting

COVID exposure for judges, court staff, defendants, and marshals. After initial challenges, courts successfully held a range of criminal proceedings virtually.

- Courts stepping in to fill gaps in the technological resources of the BOP and correctional facilities allowed courts to continue functioning in criminal matters.
- It was necessary for courts to be flexible with their schedules and work within the constraints of correctional facilities. Courts that adapted their schedules to eliminate in-person cross-exposure of inmates from different correctional facilities may have reduced COVID transmission.

Considerations for the Future

These focus groups have suggested a number of considerations for the future in criminal cases, broadly falling into the categories of ways to improve virtual proceedings, whether virtual proceedings should continue to be used after the pandemic, and how to address administration-of-justice issues.

The difficulties with conducting virtual criminal proceedings that focus-group participants discussed indicate several ways these proceedings could be improved. First, encouraging as many correctional facilities and partners as possible to adopt the same technological platforms could reduce the burden on judges and court staff to operate multiple systems in districts where detainees are housed at more than one facility. Even if state and local facilities could not adopt the same platforms as the federal courts, if federal partners like the Bureau of Prisons, the Marshals Service, federal defenders, and U.S. attorneys' offices all used the same system, that would reduce some technological issues.

Second, given that many participants said that their courts supplied hardware, internet connections, and IT support for correctional facilities, courts or the Administrative Office might work with the Bureau of Prisons to see if correctional facilities can obtain budgetary resources to maintain their own IT infrastructure and train their own staff.

Third, more facilities ("Zoom rooms," that is, physical space with computer or telephone hardware) at correctional institutions for defendants to participate in virtual proceedings would alleviate some scheduling issues caused by limits on how many defendants at an institution can participate in proceedings at once. More facilities would also make it easier for attorneys to virtually communicate with their clients—also a source of delay in criminal matters during the pandemic. Courts or the Administrative Office might work with the BOP to see if this type of expansion is possible.

Courts could also consider other ways they can facilitate communication between defendants and attorneys, including defendants who are not in custody, so that attorneys' inability to communicate with clients does not delay cases. And are there better ways for attorneys to communicate privately with their clients during virtual proceedings? Focus-group participants raised concerns that virtual breakout rooms and attorney-client conversations held with correctional personnel in the room were not private enough.

In multidefendant cases, magistrate judges reported that having to conduct a separate hearing for each defendant in the same case was burdensome. Are there ways to allow multiple defendants to participate in the same virtual hearing?

As noted earlier, judges participating in these focus groups did not hold the same views on the circumstances in which virtual proceedings in criminal cases should be permitted once

courts return to normal, postpandemic operations, or whether virtual proceedings should be used at all in those cases. Some judges worried that the convenience and efficiency of virtual proceedings might lead courts to continue to allow their use at the expense of justice. One judge explained,

I think a lot of us have an attitude that maybe [COVID-19 will] go away and it'll be back to business as normal, but it won't . . . I can tell you our marshals love all this. They haven't gotten into a car to go get someone for a long time . . . and they're going to want us to keep doing it. A lot of lawyers like it. They don't have to get out of their homes. So that really worries me because . . . [i]t's working for a lot of people. Jails don't mind it because they don't have to take people out and bring people in. I understand that. So I think it's just extremely important to right now start thinking about what are things going to look like [in the future] . . . Because . . . who cares about due process other than us? I mean the general public doesn't, right? Unless it's their case . . . [W]e have to balance . . . this whole notion of safety and due process. But I'm afraid, once the safety issue is gone, due process is going to continue to be compromised because there's not a force to speak for [it]. So I think we need to be the guardians of that . . . I just hope that, as judges, we never get comfortable for how this has really, really hurt, I think, those who are charged with crimes.

But another judge was enthusiastic about continuing to use virtual proceedings in criminal cases, expressing concern instead that those making decisions about virtual proceedings may be influenced by members of the legal community who have not experienced virtual hearings:

I have a number of academic friends who are on various law faculties that are quite disturbed by our emphasis on technology to have these hearings. I would say it's been refreshing to hear from my colleagues today. I have heard no one say that they think they're not able to assess defendants and their statements by video and their credibility. I've had hearings of witnesses under oath by video and I have found it flat out enjoyable. But people much smarter than myself and people that have the ear of policy makers and decision makers are really disturbed that we can have a detention hearing by video. I think it's a wonderful thing. I'd love to be able to keep it going forward. But if the rule doesn't exist, I can't do it.

With all these considerations at play, careful study may be necessary to determine post-pandemic policies on virtual proceedings in criminal cases. Whether criminal defendants are treated differently in virtual hearings than in in-person hearings has been empirically studied only in limited contexts.¹⁴ As noted in section 3.5, the Center is currently conducting research on a range of questions related to virtual proceedings.

While several focus-group participants said that the effect of the pandemic on criminal defendants, especially on pretrial detainees, was their greatest concern in terms of how their courts had fallen short during the crisis, participants did not discuss many ways to address this issue beyond resuming trials and working through trial backlogs. Given that the COVID-19

14. *E.g.*, Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 *J. Crim. L. & Criminology* 869 (2010), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7365&context=jclc>; Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 *Geo. Immigr. L.J.* 259 (2008), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/geoimlj22&div=18&id=&page=>; Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 *Nw. Univ. L. Rev.* 933 (2015), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1217&context=nulr>.

pandemic has persisted through 2021 with no clear end date, are there ways to better provide criminal defendants with opportunities to go to trial, even as COVID cases fluctuate or surge? Looking to the future, can the judiciary devise contingency plans for criminal trials during emergencies so that they are not disrupted to this degree again? Although many courts have already explored alternatives to pretrial detention, can courts use or expand on these options to ensure that as many defendants as possible do not spend prolonged periods in detention while awaiting trial? Are there ways to augment the resources of probation and pretrial services so that they can adequately supervise as many defendants or probationers as needed, ensuring that resource constraints do not factor into judges' decisions about release?

3.7 Challenges Specific to Bankruptcy Courts

While bankruptcy and district courts faced many common challenges, bankruptcy courts' experiences during the pandemic differed in a number of ways. Focus-group participants from bankruptcy courts said their operations had been completely or almost completely virtual throughout the pandemic. Most bankruptcy courts were able to move to telephonic proceedings very quickly at beginning of the pandemic, resulting in little disruption to their work. A number of courts had already been holding some proceedings (especially preliminary proceedings or routine matters) over the phone for years. As one bankruptcy judge explained, court discussions about technology were more likely to be nuanced deliberations of the pros and cons of different platforms and technological approaches, and bankruptcy courts' operations were not affected by the pandemic to the degree that other court systems were:

Even though there was a learning curve for the bankruptcy system, we started so much above most systems . . . that the learning curve, while it's been steep, it has not been Mount Everest. It's been more of a Blue Ridge Mountain.

However, bankruptcy courts faced several unique challenges: coordinating with district courts and with U.S. trustees, anticipating and responding to changes in bankruptcy filings, and ensuring access to the bankruptcy courts.

One of the primary challenges facing bankruptcy courts has been the extent to which they have been able to coordinate with their district courts. According to focus-group participants from bankruptcy courts, some district courts communicated well with their bankruptcy courts, met with them frequently or included them in regular meetings with coordinating agencies, and consciously included their bankruptcy courts in decision-making processes. Some district court orders were written to cover bankruptcy courts as well (especially where district and bankruptcy courts occupied the same facilities) or were shared with bankruptcy courts to allow them to implement the same orders if they wished. But a number of bankruptcy judges wanted, or assumed there would be, guidance from or coordination with their district courts, yet they found this was not forthcoming. Several judges said their district courts made decisions and issued orders without "even remembering there was a bankruptcy court" or that their district court felt it had "no authority to make orders governing the bankruptcy court." The vagueness of the statute that governs chief bankruptcy judges also contributed to a lack of clarity about who should be in control in an emergency.

The main actors with whom bankruptcy courts coordinated but with whom district courts did not were U.S. trustees and Chapter 13 trustees. Similar to U.S. attorneys, U.S. trustees were not originally allowed to use Zoom on their work computers. In order to participate in Zoom

proceedings, U.S. trustees had to use their cell phones, iPads, or other personal equipment (though focus-group participants said trustees could eventually use Zoom). According to participants, the pace of the U.S. trustees' work during the pandemic affected bankruptcy courts' operations, with one judge noting that consumer cases, especially Chapter 7 cases, were particularly impacted.

Bankruptcy clerks and judges were concerned with fluctuations in their caseloads. Many observed that case filings had declined since March 2020, but they anticipated that filings, motions for relief from automatic stay, and motions to modify plans would greatly increase when government-mandated protections such as the foreclosure moratorium ended. Judges and clerks were considering how to structure their operations knowing that their caseloads would increase. One court had plans to lay off staff during 2020, necessitated by a downturn in filings. After some months' delay, it did so, increasing pressure on remaining staff; another court that did not want to lay off employees struggled to keep them busy when filings were down. However, the reduction in filings did allow many bankruptcy courts to keep up with their caseloads, despite the interference of the pandemic. A few judges also worried about rising numbers of motions to dismiss in Chapter 13 cases, especially by debtors who had nearly completed their repayment plans. Although judges did not know why motions to dismiss were increasing, they speculated that attorneys might have been experiencing problems communicating with their clients because of COVID. Judges observed some debtors refile after their cases had already been dismissed.

Bankruptcy judges discussed how their courts attempted to accommodate the financial consequences of the pandemic on Chapter 13 debtors. Some courts suspended payments or dismissal orders by local rule or general order, but judges in the focus groups raised concerns about whether bankruptcy courts or chief bankruptcy judges had the authority to do so unilaterally. In other districts, Chapter 13 trustees came to informal agreements with debtors to temporarily suspend payments or made motions to stay dismissal orders. Judges were generally more comfortable with these suggestions coming from the trustees, and they noted disagreement among districts in the limits of the authority of bankruptcy courts to make these kinds of accommodations.

Bankruptcy courts had similar concerns about access as district courts, including worries that those who are not proficient in the use of technology or who do not speak English as a first language may be disadvantaged in a primarily virtual court environment. Judges and clerks were especially concerned whether they were doing enough to support self-represented debtors. A clerk from one court reported that they continued to facilitate the free counseling for self-represented debtors that previously occurred outside the courtroom during consumer docket calls by using breakout rooms in Zoom. Another court established a virtual help desk for self-represented debtors, so they could call in for assistance with electronic case filing. A few judges noted that conducting proceedings over the phone was slower than in person because they were consciously taking more time to make sure debtors understood the proceedings, but judges seemed to view this as a positive development. Courts also relaxed certain filing requirements, for instance allowing self-represented debtors and others to email documents without also providing a paper copy. Several courts temporarily, or without a specific end date, suspended wet signature requirements for self-represented debtors, as they had with lawyers. Courts were interested in exploring other ways to ensure that self-represented debtors' access to court was not negatively impacted by the pandemic.

Participants from bankruptcy courts in particular expressed concern about requiring fee-based services, such as CourtCall or Court Solutions, to access virtual proceedings. Many bankruptcy

courts already used these platforms prior to the pandemic, so they were able to continue or expand their use at the start of the pandemic. While this made the transition to fully virtual operations relatively easy for many bankruptcy courts, judges were concerned about the cost to lawyers when virtual participation was required rather than merely optional, as it was pre-pandemic. One court sought and received guidance from Administrative Office general counsel that using the fee-based service under such circumstances was tantamount to assessing a fee that was not authorized by the Judicial Conference of the United States and could present ethical problems if construed as endorsing a particular private company. Lawyers and the press also were unhappy with paying to use these services to access the courts. Courts were able to negotiate with CourtCall or Court Solutions so that self-represented debtors (and in some courts, the press, anyone providing pro bono representation, trustees, and certain consumer attorneys) could participate for free, but many courts still ended up moving to a free solution for all involved. The majority of focus-group participants reported that their courts eventually chose AT&T for conference calls and Zoom for video because these services were free and easy to use for debtors and lawyers.¹⁵ However, a few courts were still using fee-based services at the time these focus groups were conducted.

Bankruptcy clerks and judges noted several practices unique to their courts that they would like to continue after the pandemic. Courts seemed open to extending modifications of the physical signature requirement into the future. Also, although many courts already used negative motion practice (that is, only holding hearings on motions when an objection was filed), one participant's court instituted it during the pandemic to reduce the size of its motions calls and decided to keep the practice in place because it worked well.

As with district court judges, individual bankruptcy judges' preferences about returning to in-person proceedings after the pandemic varied, with a few bankruptcy judges wanting to return to pre-pandemic operations. But most focus-group participants from bankruptcy courts agreed that virtual proceedings would continue to be used in their courts after the pandemic, especially in a few specific circumstances. Judges generally thought section 341 meetings being held telephonically by the U.S. trustee worked well and should continue because of the ease of access for debtors. Several judges and clerks noted that in-person section 341 meetings required debtors to miss work and travel to the courthouse for a very short conference. One judge said,

We do our 341s completely by telephone . . . We have protocols and procedures where the driver's license has to be uploaded beforehand and all that. It's worked like a charm. I'm not sure we'll ever go back to live 341s, because I have always hated the fact that you've got the most vulnerable part of your population, people who rely on their hourly work, and we're taking them out of their job for a day to sit there for a five-minute conference. So my vote will always be, let's continue to do them telephonically.

Judges also said that motion dockets, Chapter 13 calls, and reaffirmation calendars could be done virtually. One judge observed that motion dockets were more efficient over the phone because attorneys have to prepare ahead of time. Another judge raised the possibility of some Chapter 11 cases being handled virtually, though large Chapter 11 cases needed to be in person. Focus-group participants thought virtual appearances could help improve access to bankruptcy

¹⁵ As of September 28, 2021, the Administrative Office announced that the judiciary would discontinue use of AT&T for audio conferencing in September 2022 because of the cost for using this service. The Administrative Office encouraged courts to transition to Microsoft Teams for audio conferencing. Memorandum from Constance P. Porzucek, Chief of Sys. Dev. & Support Off., Admin. Office of the U.S. Courts, to Circuit Executives et al., Federal Judiciary (Sept. 28, 2021), https://jnet.ao.dcn/sites/default/files/pdf/ATT_Audio-Conferencing_Alternatives_and_Teams_Add-Ons.pdf.

courts moving forward, especially in consumer cases. They noted that virtual appearances relieve lawyers, debtors, creditors, and witnesses of the burden of traveling, and that for people in rural areas where there are few bankruptcy practitioners, virtual technology could help connect debtors with courts. Finally, bankruptcy judges thought the ability to hold proceedings virtually would be useful as a security precaution in cases in which there was a known domestic situation.

What Made It Work

- Having experience with, and a culture of using, telephonic proceedings allowed many bankruptcy courts to easily transition to virtual operations at the beginning of the pandemic.
- Using virtual proceeding platforms that were free to attorneys and court users instead of fee-based services like CourtCall and Court Solutions addressed access-to-justice issues and concerns about charging unauthorized fees to participate in court proceedings.
- Adapting support programs for self-represented debtors to the virtual environment allowed courts to continue to provide assistance to these debtors without any in-person contact.
- Suspending wet signature requirements and relaxing other filing rules made it easier for attorneys and self-represented debtors to submit documents electronically.
- Negative motion practice reduced the size of motions calls.

Considerations for the Future

A number of focus-group participants thought that greater collaboration and enhanced communication between bankruptcy and district courts was needed. Bankruptcy and district court leadership could assess their efforts to work together during the pandemic and consider whether explicit procedures for coordination in future emergencies are necessary. Furthermore, chief bankruptcy judges could be provided more guidance on their authority to issue independent orders.

Having bankruptcy courts and U.S. trustees use the same videoconference platform would eliminate technological issues with trustees not being able to access video proceedings. For telephone proceedings, since the functionality of fee-based teleconference platforms like CourtCall and Court Solutions was popular among bankruptcy judges participating in these focus groups, but assessing a fee on court users and lawyers was not desirable, individual courts or the Administrative Office might explore options for free (to court users) teleconference systems with similar functionality.

Bankruptcy clerks and judges expressed concerns about fluctuating caseloads and are likely considering ways to prepare for increases in filings as pandemic protections expire and ways to adapt their operations when filings decline. More research about caseload patterns may be needed to help anticipate and better account for fluctuations and in assessing staffing needs.

Focus-group participants from bankruptcy courts mentioned that continuing to provide access to bankruptcy courts and support for self-represented debtors was one of their central concerns. Some bankruptcy courts have enacted accommodations like suspending wet signature

requirements or altering procedures for establishing proof of identity for debtors. The judiciary could evaluate the impact of these changes and consider whether to keep these accommodations in place. Courts with support programs for self-represented debtors might consider whether to continue providing virtual options for assistance even after the pandemic subsides.

3.8 Transition to Telework

According to focus-group participants, their courts' levels of readiness for telework varied widely.¹⁶ While some were not equipped with even basic hardware for telework, others had the equipment, but had little practice teleworking on a routine basis. Several courts had allowed or required staff to telework regularly before the pandemic and were therefore positioned quite differently from courts with little experience. But even on the same court, staff members varied in their levels of familiarity with the technology they needed to do their jobs, often according to their positions. For example, case administrators may have had some experience working remotely, but courtroom deputies generally had not teleworked and needed to learn how to use new software. Many judges were even less comfortable with teleworking, although again this varied, sometimes by age, but also according to judges' individual preferences and experiences with technology. Therefore, all courts went through some level of transition in moving their operations to being partially or fully virtual, whether they simply needed to provide additional training to some staff and settle into a teleworking routine, or whether they needed to build teleworking capabilities from scratch.

Courts with a history of teleworking were able to transition to full-time telework more smoothly than courts with little to no practice. Some courts already had staff telework for a number of days each pay period, generally ranging from one to three depending on the court. Others ran annual or semi-annual telework drills, often as part of their COOPs, to be prepared for natural disasters, inclement weather, or other events in their districts that could affect operations, like protests. These courts already had the necessary equipment and some practice teleworking, especially among staff. One judge from a district with more frequent natural disasters reported that all the judges in the district had been equipped with full telework capabilities, complete with Wi-Fi hotspots in case a disaster affected internet connectivity. Another judge from a disaster-prone district explained that a standing technology committee regularly reviewed judges' equipment needs for telework, allowing the court to maintain emergency readiness:

We have a technology committee of judges that meets quarterly. There's the scorecard that the Administrative Office puts out, and we're constantly trying to make sure we meet it. Every judge has a court-issued iPad, state of the art phone, state of the art laptops . . . They sent us all a MiFi device in case we were having Wi-Fi issues . . . they got everybody this device recharger . . . But a lot of that was already in our DNA because we were trying [to be prepared] . . . So I think there's a lot of homework to be done. You can't expect [large courts] to figure this out in March of 2020 when that hits the fan.

One clerk noted that the court's introduction of virtual desktops in 2019 made the switch to teleworking easier as well. Courts that were already paperless also experienced easier transitions. However, even courts that were already equipped for telework realized that they needed

16. This section focuses on the technological aspects of teleworking. See section 3.9 for discussion of the implications of telework for courts' staffing needs.

additional equipment once they began teleworking on a daily basis, such as larger monitors, webcams, printers for certain staff, and, in some instances, office-style furniture for those who had no suitable furniture.

Courts without a history of teleworking had to obtain the necessary equipment, get it to staff, and provide training and IT support for employees on both software and hardware. Some courts that did not have hardware for teleworking experienced problems acquiring in-demand items like webcams. Several courts had to ask staff to use their personal equipment initially. Getting equipment to staff was also difficult given safety precautions, with several focus-group participants saying they had to coordinate meetings in parking lots to distribute laptops and other hardware. One clerk said IT staff visited judges' houses in person to set up their telework equipment. Even for staff and judges conducting virtual proceedings from their courthouses, the scarcity of hardware meant that judges and staff initially needed to share equipment like webcams and iPads.

What Made It Work

- Having a history of telework or having practiced teleworking prepared courts both in terms of having the hardware needed to telework and having staff trained in teleworking.
- Courts with more flexibility in their operating budgets were able to pivot and purchase the necessary equipment for staff to achieve a successful transition to teleworking.
- Facilitating ways to get staff the necessary training on hardware and software, especially for courts with little experience with teleworking, was essential.
- Being paperless or providing greater access to CM/ECF, for example, for self-represented litigants, decreased issues with document submission. Clerks wanted to continue using electronic methods for submitting payments, and almost all magistrate judges wanted to continue to review arrest and search warrants electronically.
- Online meeting platforms allowed courts to conduct judges' meetings, staff meetings, trainings, meetings with bar associations, conferences, and other internal and external meetings and events virtually.

Considerations for the Future

Having acquired hardware for telework during the COVID-19 pandemic, courts could consider ways to use and maintain this equipment moving forward. For courts that transition back to mostly in-person operations, how will they manage or supplement this equipment to be ready to telework in case of future emergencies? Will courts maintain two computers for every employee? Or will courts move towards one laptop that can be used in or out of the office? For courts who will allow more telework moving forward, do employees have all of the equipment they need at home, such as printers or other hardware for certain employees? For new employees, what does the ideal flexible work set-up look like? How should courts outfit new court staff and new judges so that no transition is needed if another crisis occurs?

Participants reported that depending less on paper documents and in-person methods of document submission and payment made their transitions to telework easier. Courts could consider implementing paperless systems or providing electronic options for document submission or payment, if they have not done so already, to decrease interruptions to their administrative work in case of emergency, in addition to other reasons, such as increasing efficiency or access for certain litigants.

In terms of using telework to facilitate operations moving forward, courts could consider using online meeting platforms to have more frequent contact with stakeholders such as bar associations, to hold virtual judge meetings in districts where travel is burdensome, and to conduct conferences, trainings, and CLE programs virtually or in a hybrid format. Supplementing in-person meetings with virtual options could provide flexibility to attendees with little additional cost to courts.

3.9 Staffing

The number of staff who worked in the courthouse varied from court to court according to focus-group participants. Even courts that were fully closed needed some employees in the office to perform tasks like receiving packages and processing mail. Some courts had just one employee come in at a time to handle matters, or used small shifts. In many courts, chief judges or clerks worked in person routinely. Some courts asked for volunteers to work in person and did not require employees to report to the courthouse. Others assigned staff to specific groups that would work in person on alternating days or weeks, teleworking the rest of the time. This allowed courts to reduce capacity and be better able to contact trace and contain spread if an employee tested positive, while still maintaining in-person operations.

Many judges, even in courts that were otherwise fully virtual, continued to come to the courthouse to work or to conduct proceedings from the bench. IT staff often needed to be in the courthouse to assist judges working in chambers or to support proceedings. Courtroom deputies needed to be in person depending on the proceedings occurring. Because so many people were working remotely in some courts, if a judge wanted to hold in-person proceedings, it required “another layer of discussion” about who would be in the office to cover proceedings.

Many judges and clerks said staff were just as productive, or were more productive, working remotely, but a minority did raise concerns about decreases in productivity when teleworking. The issue of distractions at home, especially related to family demands or childcare, was commonly noted. Several courts addressed this by allowing employees to work flexible schedules. One court with a history of telework used hour-by-hour logs to monitor staff productivity and found those to be useful if corrective action was required.

Even in courts that returned to in-person operations, the improved readiness for telework allowed these courts to easily handle positive COVID tests or exposures among staff, who were then able to telework as needed while quarantining.

Almost all participants predicted that telework would be more frequent, as well as more accepted, after the pandemic subsides. Many judges and clerks in the focus groups said that the experience of the pandemic demonstrated to judges and court administrators that telework was possible. As one clerk said,

I don't know how many of you have this sort of mindset of your judges that . . . court clerk staff, they obviously weren't working when they were teleworking

so they didn't want them doing that. This has shown that our people get things done, the cases get opened, the papers get filed. Everything is being done and it can be done remotely. So that remote work genie is not going back in the bottle. I think that's a really good thing.

Judges and clerks discussed expanding their telework policies to allow more telework days per pay period for staff, and perhaps requiring some regular telework to ensure that their court stays prepared for future crises. A few mentioned that telework had allowed staff and judges to meet and work with colleagues across divisions, suggesting that they may want to allow some telework to continue to connect employees working from different physical locations and to offer judges increased services by removing the need for employees to be physically present in their division to support them. Some expressed an intention to telework more frequently themselves, saying that it was more efficient for certain tasks, such as writing complex opinions, though individual preferences varied. Even those who personally preferred working in the office acknowledged that their courts would need to be more open to telework because of current employees' satisfaction with telework and to be attractive to prospective job candidates, especially younger applicants. Similarly, participants raised the possibility of courts continuing to allow flexible work schedules to better accommodate employees' individual needs.

Judges and clerks were concerned, however, about staff wanting to telework full time and not being willing to come back into the courthouse. Many worried that social connections, court culture, and other intangibles would be lost if staff did not return in person. According to one clerk,

[E]mployees are going to say, well, we've demonstrated during a pandemic that we don't need to come back. You know, they have a point. But we also need them in the office. There's a huge amount of what happens in an organization based on personal interaction. So while telework has been fantastic and I'm glad we're ready for [it], I'm a little worried about how to keep the glue and the tribe together if we're going to be in disparate locations.

Judges especially wanted chambers staff to return so that they could regain the camaraderie and social ties they were missing. Participants also worried about a potential wave of retirements when courts returned to in-person operations. Courts would not only need to replace retiring employees, but also could potentially lose some institutional knowledge that may have been transferred more successfully if retiring employees were able to train new staff in the office.

As for specific staff requirements, the possibility of eliminating electronic court recorder operators (ECROs) to save money was raised, given that the ability to record proceedings has vastly changed during the pandemic as courts have adopted new technology. However, some said that the backup provided by ECROs was good to have if recordings failed. Participants also frequently raised the issue of telework and virtual proceedings requiring more technological fluency on the part of staff, suggesting that some IT knowledge or computer skills may need to be a hiring requirement for a greater number of positions moving forward. For leadership in particular, one participant noted that the move to telework and virtual proceedings during the pandemic made courts dependent on IT specialists, but court managers and judges did not know enough about IT themselves to monitor these specialists or make informed decisions about their courts' IT needs. Similarly, several focus-group participants said that having clerks of court with IT backgrounds or chief judges who were technologically fluent made their transitions to increased virtual operations easier.

What Made It Work

- Courts with a history of teleworking or at least some practice teleworking were able to transition smoothly to increased or full-time telework, especially among staff.
- Telework was effective, especially for certain positions that did not require any presence in the courthouse. In general, focus-group participants did not think productivity suffered and reported that employees liked working remotely.
- Allowing flexible work schedules helped teleworkers maintain productivity while navigating the challenges posed by not having dependent care or having to fulfill other personal responsibilities. Flexible work schedules may have also increased employee satisfaction, which was helpful given the mental health challenges posed by the pandemic.
- Using shifts of employees for in-person operations reduced capacity at courthouses, minimized the potential spread of COVID, and made contact tracing easier while maintaining essential operations.
- Even in courts that transitioned back to fully or mostly in-person operations, the ability of individual employees to pivot to telework if they were exposed to COVID or tested positive allowed courts to limit outbreaks with minimal disruption to operations.

Considerations for the Future

Focus-group participants generally agreed that telework would continue in some form in their courts after the pandemic. Many acknowledged that maintaining the ability to transition to telework will allow courts to respond more quickly to future crises. What remained undecided to many participants was how often, and under what circumstances, their courts would allow telework moving forward. Focus-group participants also thought their courts may continue to allow flexible work schedules.

Courts will be considering how to update their telework and flexible work-schedule policies to balance employee desire for these options with courts' need to provide in-person services and preserve a sense of community among staff. Feedback from these focus groups suggests several issues that courts might contemplate when crafting these policies. Outside of an emergency situation like the COVID-19 pandemic, how does the court view the role of telework? As a temporary stopgap in crisis that should be avoided when courts can operate in-person, or as part of a court's normal operations? During normal operations, does a court want to allow remote work only to the extent required to maintain their ability to pivot to telework during crises, does a court want to provide telework opportunities to staff as an incentive, or does a court want to integrate telework into its day-to-day operations? Should all positions be telework-eligible, or are there certain positions that must be done in-person? Do courts want any positions to be telework only? How will telework policies in normal times differ from those in emergency situations?

In terms of staffing needs, have courts' requirements changed as a result of the pandemic? Are certain positions no longer needed? Or do job requirements for positions like courtroom deputies need to be altered to give preference to applicants with greater computer expertise? Should courts give preference to applicants for court unit executive (CUE) or administrator

positions who have IT experience if they anticipate permanent transitions to increased telework and virtual proceedings?

Several focus-group participants mentioned the need for more varied training on the technological equipment and systems courts used, with training available for users who are more comfortable or less comfortable using technology. Some court staff and judges who are computer-savvy may only need brief introductions to new systems or support in certain situations when issues arise, and lengthy trainings may not be a productive use of their or IT staff's time. Others may need more detailed, step-by-step training. Now that courts are no longer in the initial stages of transitioning to telework and virtual court proceedings, what training or support do existing staff and judges still need? What resources could be developed for new staff and judges?

Many focus-group participants mentioned that judges in particular continued to work from their chambers or conduct virtual proceedings from their courtrooms, even when courthouses were mostly closed or at reduced capacity, because many judges felt more comfortable working with their chambers or courtroom equipment, or with support staff nearby. In preparing for future emergencies, how can courts make these judges more comfortable working independently or working remotely in case their courthouses need to be fully shut down?

3.10 Morale

Participants were grateful for the extraordinary efforts made by court staff to keep their courts functioning amid the ongoing challenges presented by the pandemic. Given this tremendous work and significant disruptions to normal court operations, judges and clerks alike expressed concerns about employee morale and how to maintain social ties while working virtually. Many were concerned with how colleagues and employees were managing the stress of the pandemic, in addition to the upheaval of concurrent political and societal crises. Several worried about burnout from working long hours, especially among those in leadership roles or critical support positions, like IT, as well as their own inability to take meaningful time off given the need to continually address new issues and maintain continuity of operations. Chief judges and clerks of court, especially, said that the constant pressure to make decisions and find solutions, often for problems in which they had no expertise and for which they had no outside guidance, but which they were expected to handle, impacted their own mental health. As one clerk explained, clerks felt responsible for a myriad of burdensome issues, including providing expertise, providing for the mental health and physical safety of others, and maintaining the administration of justice:

We all had to become epidemiologists, I feel like, and none of us are trained. I don't think one course, one class, one COOP training ever dealt with how to be an epidemiologist. I know more about the science of spit than I ever want to know and I know more about people's personal life. Because, when you call the warden and you say, hey what's going on, and he just wants to vent because he's got . . . prisoners that are very sick, you let him vent. You kind of do that wellness check . . . [S]afety overrode everything else, the safety of our staff, the safety of the judges, safety of the defendants. At the end, yes, our civil cases aren't moving as fast as they were. So be it. We're still moving criminal cases. We're still having the grand jury meet. We're still giving everyone their constitutional rights. Even today, when the numbers are outrageous, we still have . . . grand juries meeting. We have to do that.

Judges faced morale challenges of their own. Magistrate judges were under constant strain to keep up with initial appearances for criminal defendants, as those could not be continued, unlike other types of proceedings. For one magistrate judge who was a parent of young children, the inflexible schedule made it difficult to meet the demands of both the docket and parental responsibilities. Across all types of judges, many missed the ability to socialize, engage in small talk, or maintain close relationships with their chambers staff and the lawyers and agents with whom they frequently interacted. Several judges also mentioned that having conversations with court users in person was one of the “fun” parts of being a judge, and that the opportunities for such interactions over telephone or video were not as common. Some judges said that working remotely in particular was lonely, especially since judges are already relatively isolated. Furthermore, judges making decisions about detention, sentencing, or compassionate release motions in criminal cases worried about the impact of their choices on defendants’ health or even their survival.

Judges and clerks also thought the social contact necessary to maintaining morale and organizational culture was impacted by teleworking. Informal communication that took place in settings like hallways or over lunch while working in-person did not occur in the virtual workplace. Judges and clerks expressed concern about how to be aware of major life events for staff, like deaths in the family or sickness, as well as ways to celebrate milestones and keep up familiarity and camaraderie. Court leadership struggled with replicating in-person social events and contacts virtually, though many tried to hold traditional events like summer conferences or holiday parties online, with mixed results. Several judges felt that they were not able to mentor their law clerks adequately in a virtual environment and that term law clerks’ experiences suffered.

For courts that experienced conflict over decisions about pandemic operations, some reported a loss of collegiality among judges as a result. One judge noted that the loss of informal contact aggravated this issue, since the only time judges saw each other was when controversial, divisive topics needed to be discussed.

Some court leaders reported that a sense of unfairness around different expectations for different employees harmed morale as well. Workloads and expectations about working in-person varied according to position and personal circumstances. While many staff were working long hours, others did not have as much to do, especially in courts where filings decreased during the pandemic. Some employees could not work in person because of health conditions or childcare responsibilities, placing the burden of maintaining in-person operations on those without such restrictions and fostering resentment among some staff.

What Made It Work

- Clerks and judges conducted informal check-ins with colleagues, peers, staff, and partners to discuss their challenges and share experiences.
- Court leadership thought creatively about how to maintain social traditions and adapt them to a virtual environment. For example, some courts tried virtual happy hours for judges, email newsletters to keep up on news in their staff’s personal lives, or virtual holiday events.
- Many clerks tried to maintain traditions that showed appreciation for staff, like providing bonuses if they were able, or giving small stipends to staff to purchase lunch in lieu of the usual catered holiday parties.

Considerations for the Future

Since courts are likely to allow more telework moving forward and future emergencies may occur that require staff to work remotely, how can courts stay connected with colleagues and maintain a sense of community when all court staff, or significant portions of court staff, are teleworking? If courts will allow some employees to telework full-time in the future, how can fully remote staff members create social ties with other staff?

What measures are necessary for courts to be aware of the morale or mental health challenges that staff have faced, or continue to experience? Can courts survey their staff or use other methods to gauge whether staff are experiencing such challenges, whether any efforts to improve morale are working, and what other support they think courts could provide?

In terms of assistance for court leadership, devising emergency informational and support resources for court leadership as discussed in section 3.3 could reduce stress on chief judges and clerks during crises. What other resources could help court leadership maintain their own morale during crises? During a prolonged crisis such as the COVID-19 pandemic, are there ways to allow court leadership to take meaningful (undisturbed) time off to recharge?

Magistrate judges specifically mentioned their unrelenting criminal dockets and their roles on the front lines of processing criminal cases during the pandemic. How can courts protect criminal defendants' rights to appear before a judge as soon as possible while also giving individual magistrate judges some flexibility or support during an emergency?

If there has been a significant disparity in workload or permission granted to telework based on personal circumstances during the pandemic, how can courts ensure that the workload is shared as equally as possible and that accommodations are fair to all employees? Are there ways to reward staff who have assumed heavier workloads or more risk? In planning for future emergencies, is there a way to consider beforehand how different types of employees may be affected, while setting expectations for employees in certain positions during emergencies?

3.11 Budget Issues

Several common budgetary issues arose across district and bankruptcy courts in responding to the pandemic. First, courts needed to purchase a great deal of computer equipment and software to facilitate telework and virtual proceedings. Second, courts had to implement enhanced safety protocols, necessitating the purchase of supplies and services. Courts bought PPE like masks for staff and others entering courthouses, in addition to hand sanitizer, plexiglass dividers, and temperature check machines in some districts. Courts also paid for frequent deep cleaning and disinfection of courtrooms, as well as outside experts to consult on issues like airflow and courthouse capacity (although some experts volunteered their services). Courts differed in their ability to meet these financial challenges, with many worrying that the costs were unsustainable. Clerks and judges also expressed frustration with the rigidity of budget rules and the lack of coordination within the judiciary in procuring essential equipment.

Although a number of courts were already equipped for telework or had some equipment in place in courtrooms to enable virtual proceedings, most courts had to purchase some amount of new computer equipment. While a few courts simply needed to supplement their existing equipment with items to better facilitate regular telework, like printers for judges, other courts needed to purchase laptops, webcams, and other hardware for their entire staff. Many district

courts also paid out of their own budgets to equip correctional facilities with the computers, tablets, cellphones, and in some districts, internet connections needed to conduct virtual proceedings. In addition to hardware, courts purchased licenses for video-conferencing software. Several courts expressed frustration about the costs of licenses for Zoom for Government, with some not being able to afford licenses for all their judges or law clerks. One clerk noted that the court wanted to use Zoom but ended up using Teams because they did not have to pay for it.

For both PPE and cleaning services, courts were concerned about the high cost of equipment and services, and at times the inability to procure them because of high demand. Clerks reported that finding reliable, high-quality cleaning services was very difficult and that this was one of their biggest challenges, given the enormous pressure on them to protect their judges, staff, and court users. Several noted that judges were uncomfortable conducting proceedings in the courthouse in the absence of rigorous cleaning.

Clerks and judges of courts housed in GSA facilities found the equipment and services provided by GSA to be expensive, especially temperature check machines and cleaning services. Several courts found lower-cost work-arounds or other providers for these services, or they went without. For example, after deciding that they could not afford GSA's temperature-check services, courts wanting to implement temperature checks in their courthouses found their own machines, hired their own outside contractors to administer temperature checks, used temperature checks only on jury-selection days in the courthouse, or decided not to have temperature checks at all. Some complained that the cleaning services were also poor quality, that they took too long to obtain and perform, and that GSA did not ensure that cleaners were adequately tested for COVID. Several participants expressed confusion as to why the costs of equipment and services varied widely from area to area. For example, one clerk reported paying \$36,000 per quarter for cleaning, while a clerk in another district said GSA was not charging the district for cleaning at all. Overall, focus-group participants viewed their safety costs as unsustainable and said that they were unsure whether they would be able to continue to provide enhanced cleaning and PPE in their facilities.

Courts reported varying degrees of financial difficulty resulting from the pandemic. Several clerks said they were able to pay for their increased technological and safety needs because their courts were not spending any money on travel, and to a lesser extent, office supplies, with these savings completely covering the costs of responding to the pandemic. Clerks noted, however, that there was wide variation in financial resources across courts, and some courts were not able to afford the same equipment, cleaning, or experts that others could. A few participants said their budgets had already decreased in recent years and that they were in financial distress or anticipated budget shortfalls if pandemic spending continued at the same pace.

Clerks and judges expressed a desire for more support on financial matters from the Administrative Office. Several courts were grateful to the Administrative Office for granting them additional funding to meet their technological needs. However, many participants thought the Administrative Office's budgetary constraints and rules were not sufficiently flexible to allow courts to respond to the crisis quickly and according to the requirements of their specific districts. A number of participants wanted more emergency funding and fewer obstacles to obtaining it. Others thought exceptions should be granted to rules that would usually result in an audit finding. For example, clerks were dissatisfied that they could not buy HEPA filters for courtrooms or temporarily pay parking expenses for employees who volunteered to work in the courthouse but did not want to risk exposure to COVID on public transportation. In several instances, clerks or chief judges found ways to work around budget rules, or they consciously

disregarded them in the interest of employee well-being. Participants also would have preferred procurement of equipment and services to be centrally coordinated because they were concerned that courts were driving up prices by bidding against each other and that individual courts making purchases on their own was less cost-effective than centralized procurement for the judiciary as a whole.

What Made It Work

- Courts that saved significant amounts of money on travel, and to a lesser extent, on office supplies, were able to use these savings to pay for technology and safety needs.
- Several courts reported emergency funding from the Administrative Office helped them meet their technology needs.
- Courts with more financial resources were better able to be creative and comprehensive in their responses to the pandemic, implementing more safety precautions, reconfiguring their physical spaces, and purchasing necessary technology.

Considerations for the Future

Participants raised questions about policies for emergency funding, including the process for obtaining it and how it can be used, indicating that their courts want to be able to access it quickly and tailor its use to their individual needs. Participants also were concerned with the inflexibility of general budget policies, wondering whether there were ways to ensure that courts would not be sanctioned for using resources outside the guidelines to deal with an emergency.

Given that districts across the country are continuing to face fluctuating COVID case numbers as of late 2021, and that many in the judiciary are interested in maintaining at least some ability to operate virtually, are courts financially prepared to continue providing enhanced safety protocols and maintain the technological equipment purchased during the pandemic? Will courts' current funding even allow them to implement the permanent changes they wish to make to their physical spaces, such as remodeling courtrooms to allow for better airflow or physical distancing, installing safety equipment like HEPA enclosures, or setting up courtrooms for hybrid proceedings? The judiciary has submitted budget requests to Congress that ask for additional funding to support some of these needs.¹⁷

Many focus-group participants raised the issue of videoconference software cost, several mentioning that the inability of their courts to afford licenses for all employees hindered their operations. Is any additional funding available for courts that cannot afford the necessary number of licenses? Alternatively, how can courts that are comfortable with Zoom be encouraged to migrate to Microsoft Teams so that they do not have to pay for Zoom licenses?

Participants also raised the point that courts' ability to respond to emergencies depended in part on the capabilities and preparedness of collaborating agencies and stakeholders, some of whom lacked sufficient budgetary resources themselves to respond to the challenges of the

17. See Admin. Office of the U.S. Courts, *Judiciary Seeks Funding, Legislative Changes to Aid COVID-19 Response*, Judiciary News (May 5, 2020), <https://www.uscourts.gov/news/2020/05/05/judiciary-seeks-funding-legislative-changes-aid-covid-19-response>; Admin. Office of the U.S. Courts, *Judiciary Seeks 2022 Funding, Cites Caseload Resurgence and Security Needs*, Judiciary News (Feb. 24, 2021), <https://www.uscourts.gov/news/2021/02/24/judiciary-seeks-2022-funding-cites-caseload-resurgence-and-security-needs>.

pandemic. How can courts work with partners like the Bureau of Prisons to make sure they also consider their emergency budgetary resources, and specifically for the BOP, that they have sufficient resources to maintain the technology that courts have purchased for them?

3.12 COOPs

Many participants said that their courts had COOPs in place at the onset of the pandemic. One participant did not know whether the participant's court had a COOP and planned to make sure that it would have one moving forward. Participants who had experienced natural disasters like the hurricanes Katrina, Sandy, or Maria reported making efforts after those storms to strengthen their courts' COOPs. As one judge from a disaster-prone area noted:

[C]ourts [say] "Okay. I did that. The AO required me to have a COOP plan. Check, I did it." And then you don't look at it because it's done. But you have to have a mechanism. You either look at it every two years, every four years, or every year, or after an event to update it because [you've] got to incorporate lessons learned and things that need to be added, because you've learned from the experience.

The pandemic revealed common weaknesses of courts' COOPs. Existing COOPs often did not address pandemics or situations in which all divisions or courthouses were affected. Several courts wrote their COOPs under the assumption that only one physical location would be impacted by an emergency, allowing operations from that location to simply move temporarily to another location. COOPs also differed in the extent to which they addressed procuring PPE. One clerk noted that although a COOP may require a range of supplies, in practice, a court may not actually have all of those supplies on hand.

Focus-group participants expressed a desire to make sure that their COOPs were more comprehensive, addressing the emergency conditions raised by the pandemic, and to more regularly revise and test their COOPs and general emergency preparedness. As one judge said, "[Y]ou can't . . . be in the dark ages and then rally when a pandemic comes along."

What Made It Work

- Courts that had a COOP in place and reviewed it periodically were more prepared for the pandemic.
- Courts that frequently experienced severe weather or other recurrent emergencies generally seemed to more regularly test or practice their COOPs' procedures. These courts found their COOPs to be more effective when addressing the pandemic.

Considerations for the Future

Even courts with detailed COOPs seemed focused on the most likely emergencies for their areas or emergencies they had already experienced. What types of emergencies should courts plan for? Would it be useful for courts to consider how seemingly unlikely emergencies might affect their operations? How can a court evaluate the comprehensiveness of its COOP? The Administrative Office could consult with FEMA or public health authorities to determine which crises

the judiciary may want to prepare for, provide guidance on emergency preparedness to all courts, and suggest ways for courts to evaluate their COOPs.

As courts continue to consider how to leverage technology in their day-to-day operations, what technological resources or practices might also help them operate virtually during an emergency? Participants said that going paperless, using virtual desktops, and obtaining transportable computer hardware for staff, for example, both aided courts' routine operations and made them more prepared for the COVID-19 crisis.

4 Implications and Conclusion

Access to Courts

Feedback from these focus groups suggests that changes in operations as a result of the pandemic may have increased access to courts for some groups and curtailed access for others. Judges and clerks observed that for large segments of the population, especially those with resources and technological knowledge, accessing court proceedings virtually was much more convenient because of time and cost savings. Virtual proceedings allowed family members and the press to more easily attend proceedings. The use of technology in court proceedings may also expand access to courts and legal representation in rural or remote areas. On the other hand, focus-group participants were particularly concerned about people without internet-connected devices, knowledge of technology, or access to stable internet being able to access virtual proceedings, people who do not speak English as a first language being able to access effective and efficient interpretation of court proceedings, and self-represented bankruptcy debtors and civil filers being able to obtain in-person support in navigating their cases.

Providing more options for filing documents, such as giving members of the public access to CM/ECF or relaxing certain filing requirements (wet signature requirements for bankruptcy filings, etc.) may also have reduced barriers to filing for court users. Although these alternatives were implemented as emergency measures, courts may consider whether permanent adoption of some of these practices or procedures could increase access in the long term.

Administration of Justice and Due Process

Many participants reported that their courts were functioning well under the extremely trying circumstances created by the pandemic. Some said that there was little disruption to their operations, especially after they worked through an initial period of adjustment. Others reported that the speed at which they conducted proceedings or processed cases slightly slowed as a result of changes to operations during the pandemic, but that courts were able to perform their core duties, and judges still made good progress on their caseloads. Many participants viewed the safety of judges, court staff, attorneys, and court users as their first priority and were very appreciative of the efforts of court staff and stakeholders to work together to keep the courts functioning under emergency conditions.

Some participants did raise concerns about the administration of justice during the pandemic. Certain issues created delays across criminal, civil, and bankruptcy cases. In district courts specifically, there were concerns about balancing attention to civil and criminal dockets, as well as issues unique to criminal cases. Overall, judges and clerks were of different minds as to how well their courts provided justice during the pandemic. In courts that were able to transition to virtual operations with little disruption, like many bankruptcy courts, participants were generally more confident that the administration of justice had not suffered. However, a number of courts struggled to balance safety concerns with providing due process. Even for civil cases, some participants worried that delays or not being able to provide trials in the interest of preventing the spread of COVID impacted the administration of justice.

Because of the variation in views of the severity of the pandemic, courts and individual judges differed in how they prioritized limiting potential exposure to COVID-19. Focus-group participants said some of their colleagues did not think there was any way to safely conduct in-person proceedings for much of 2020, while other judges they worked with did not think in-person operations should have been curtailed as severely as they were. Participants also varied in the degree to which they thought virtual proceedings were an acceptable substitute for normal court operations, although many recognized the critical need for such proceedings during the pandemic and had great praise for the court staff who made such proceedings possible. According to judges and clerks from courts conducting in-person proceedings, rigorous safety and cleaning protocols slowed the pace of individual proceedings and limited the number of proceedings that courts could hold. Case delays created backlogs in some courts that may affect their ability to swiftly administer justice moving forward.

Several concerns about the administration of justice were common to all types of cases. First, focus-group participants worried that fear of the virus was impacting the behavior and decisions of attorneys and court users. District judges said lawyers and their clients in both civil and criminal cases were hesitant to come to the courthouse, which impeded the progress of cases. Some judges feared that cases had settled or defendants had pleaded guilty to avoid an in-person court date. However, many judges thought that in districts that were not able to conduct trials, the lack of a deadline in the form of a trial date led cases to stall. Many participants said that cases needed a trial date to force the parties to settle or come to a plea agreement. As one judge explained,

I don't know when I'm going to get to my civil cases. I have some very, very big civil cases where the defendants have, I think, figured out, why should I pay settlement money? The plaintiff has no realistic probability of getting a trial any time soon. So I have some very large cases that are just hanging now. That concerns me. It's not statistics. I don't care about that. But it means that the system is failing a certain category of its client base, and it doesn't feel like there's much that we can do about that. That's very frustrating.

Some judges also thought attorneys had filed more motions and engaged in more discovery disputes in attempts to gain advantage when cases did not have a trial date. A few judges used referrals to settlement conferences as a form of a deadline in civil cases when they could not set a trial date.

However, the observation that the lack of trial dates was significantly impeding the progress of cases was not universal. Some judges reported that their dockets were moving along normally, noting that most cases resolved without trial before the pandemic and that, in their experiences, the pandemic did not significantly disrupt plea and settlement rates.

Apart from the inability to set trial dates, cases were delayed for other common reasons. The pandemic affected the operations of offices from which attorneys obtain documents, slowing down records requests. Judges specifically mentioned medical and Social Security records requests taking much longer than usual. Judges were also asked for more extensions because of illness, and they found it difficult to question those

requests during the pandemic. In districts with several judicial vacancies, judges and clerks were concerned that administration-of-justice issues were even more pronounced than in fully-staffed districts. One judge said,

[W]e had a serious problem to begin with because of our judicial vacancies and lack of new judgeships. This really has felt as if it's not as flat on some level. So our ability to move things with the additional motions and just the stressors of COVID, I worry that people do not see us as a place where they can get justice. Absence of trials is certainly a big part of that. So absolutely there's an impact on access to justice, I think, for any court, but particularly those emergency districts. There are five or seven of those across the country.

District courts and individual district judges were able to make different amounts of progress on civil versus criminal dockets. Districts conducting in-person trials prioritized criminal trials because of constitutional issues, leaving little time or resources for civil trials. Several judges worried about neglecting civil cases but considered their obligations to protect criminal defendants' rights to be paramount.

Other districts that had halted in-person trials reported that civil cases were proceeding well virtually, but criminal cases were backlogged. These districts were able to conduct civil proceedings, settlement conferences, and even trials virtually. They were not able to make similar progress in criminal cases because conducting the same range of proceedings virtually was more challenging. Although some districts were able to avoid accumulating criminal backlogs because their grand juries were not meeting, they worried about how to handle an influx of indictments once their grand juries resumed work.

Administration of justice issues were especially pronounced in criminal cases. Along with the challenges of conducting criminal proceedings virtually, concerns about the representativeness of juries, whether virtual proceedings provided sufficient ability to confront witnesses, communication challenges affecting the quality of representation, and Speedy Trial Act questions impacted all criminal defendants regardless of whether they were in custody. But substantial delays in setting trials especially affected defendants in custody. Focus-group participants worried about defendants serving long periods of detention pretrial, as it was possible that such defendants could eventually be found not guilty or that the length of their pre-trial detention would exceed the length of their eventual sentence. Another concern was that the pressures of being incarcerated, particularly given the high risk of contracting COVID in correctional facilities, might lead defendants to plead guilty simply to be released from detention.

Finally, participants discussed that courts will need to balance various goals in making their decisions about what aspects of pandemic operations to retain moving forward. Judges and clerks specifically raised the possibility that the increased use of technology would facilitate goals like efficiency and cost, but whether these processes preserve fairness and sufficiently allow court users to have their day in court will need to be carefully studied and considered. As one district judge said,

I think we're going to see more of this electronic ability to do arraignments, change of pleas and other things, use of the phone more. All of which goes toward, remember, we have to have the just, speedy, and inexpensive determination of every proceeding according to the civil rules. So this helps the inexpensive. We have to keep in mind the just and the speedy. Speedy certainly can be accomplished through some of the electronics . . . I'm concerned that some people will become overly dependent on the electronics to the exclusion of the personal, the face-to-face. Especially in a country that right now is very polarized, this further distances people from each other and I think can create more friction in the long run, but that being said, I think there are some positive things we have learned from this. Hopefully, we'll keep the good and reject the bad.

Conclusion

Overall, the early stages of the COVID-19 pandemic placed great demands on federal district and bankruptcy courts. Judges and court staff worked extremely hard to meet these challenges. As a result, focus-group participants reported that the pandemic forced their courts to rethink entrenched practices, accelerated the technological training of staff and judges, and increased acceptance of telework and virtual proceedings. Several participants expressed satisfaction that they were able to experiment and be creative in devising solutions, which they said would have been discouraged before the pandemic. They worried that the benefits realized during the pandemic would be abandoned once courts were able to return to in-person operations and traditional methods. Others were anxious that the technology embraced during the pandemic would continue to be relied on, even after courts could operate in person, as courts prioritized efficiencies and cost-effectiveness at the expense of social connections, the rights of criminal defendants, and the needs of court users who lack technological resources and knowledge.

Judges and clerks also noted other long-term effects of the pandemic that courts may need to address, such as morale and mental-health issues among staff, potential surges in case filings, and working through trial backlogs.

In order to process lessons learned, several courts have established committees to evaluate the practices implemented during the pandemic. As some focus-group participants noted, innovations developed under these emergency conditions may need to be addressed by local or national rule changes to be permanently adopted moving forward. The Federal Judicial Center is currently studying the effects of the pandemic on outcomes like caseloads and practices such as the use of virtual proceedings. Questions for further research will be developed based on this report and additional work.