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A handwritten signature in black ink that reads "Brian D. Boatright". The signature is written in a cursive, flowing style.

Virtual Technology in Colorado State Courts

BY BRIAN D. BOATRIGHT

Since I took over as chief justice, many of my conversations with attorneys and judges inevitably touch the subject of virtual proceedings in our courts. I've heard humorous stories and frustrating stories; I've been lobbied to expand our use of virtual proceedings and lobbied to curtail virtual proceedings; I've heard of both the benefits and challenges of virtual proceedings for attorneys serving rural populations; and, of course, I've heard about the benefits of virtual proceedings for litigants who were previously expected to take hours out of their day to appear in person for a hearing that might last 15 minutes.

One common theme in these discussions is a completely valid concern about transparency in our courts' use of virtual proceedings. We owe it to attorneys, litigants, and the public to create baseline expectations about how virtual technology will be used in our courtrooms. Even with a clarification of the courts' baseline expectations, however, it is abundantly clear to me that judicial officers need to retain discretion on the use of virtual technology based on the facts and circumstances of the case. For example, a judge in a criminal case might recognize a breakdown in communications between a defendant and their counsel. In that case, the judge may appropriately decide that a defendant should appear in person to facilitate communication with counsel. Or a judge may want parties to appear in person if there is an established diversion or mediation program that may help resolve a case or issues in a case. Judges in many cases will decide that evidentiary

proceedings cannot be effectively conducted through a virtual platform because of evidence presentation, credibility determinations, witness identification or sequestration, or many other relevant and legitimate concerns related to the fairness of the proceeding and ensuring a just outcome.

Virtual Proceedings Through COVID

As most of you know, our state courts have used the Cisco platform Webex for virtual proceedings. Before the pandemic, the Judicial Department licensed Webex for limited use with virtual meetings. Many judges and staff had access to Webex, but few of us had used it. At the start of the pandemic, the Judicial Department scrambled to evaluate the best tools for conducting court business virtually. We very quickly realized that Webex supported the essential functions of many court proceedings. What followed was a frenzied effort to adapt Webex to court proceedings, understand the capabilities of Webex, expand our Webex licenses so that every trial court could use this technology, and create training programs for judicial officers and staff. Our probation departments also saw the value in using Webex for probation supervision. Our quick shift to virtual proceedings was certainly complicated by the differing technology in our courthouses around the state and bandwidth issues in our rural jurisdictions. Quite literally, we had judicial districts where our courts and probation departments had to alternate Webex schedules because the Internet bandwidth could not accommodate all court business.

I cannot overstate the enormous efforts of our trial court judges and staff to quickly integrate virtual technology into our core business and how hard our chief judges, trial court judges, and court and probation staff worked to keep our courts open, implement new technology, and protect the public in an unprecedented health crisis. Unfortunately, I heard comments that the courts simply declared mistrials and were not collaborative partners in adapting to the pandemic. From my perspective, that criticism is misguided. Attorneys on the outside of our operations might have seen different practices in counties and judicial districts, but I wish every one of you could have seen the collaboration and dedication that we saw behind the scenes. Our chief judges met weekly to share ideas and experiences. Our trial court judges worked with district attorneys, defense attorneys, their counties, jails, and sheriffs to prioritize dockets, process cases, transport inmates, safely reduce jail populations, continue our core operations, and work through staffing reductions. We even had one chief judge research and circulate a recipe for courtroom sanitizer when effective sanitizer was impossible to buy. Through all of this, virtual technology proved to be vital in allowing our courts to continue to operate, albeit on an emergency and limited basis.

At the start of the pandemic, the Judicial Department had around 250 Webex licenses. We have expanded that to more than 4,000 licenses today. Every day, the Department uses nearly 1,000 combined hours of videoconferences. Every month, we have around 17,000 virtual events (including hearings, probation appointments, and meetings) and more than 130,000 users who participate in virtual court proceedings. This has been a drastic shift in how our courts do business.

Virtual Proceedings Moving Forward

As we adapted and learned through the pandemic, the benefits of virtual hearings to our court users became undeniable. In the proceedings most appropriate for virtual participation, we saw reduced disruption to litigants' lives, reduced cost for represented litigants because they weren't paying for attorney travel time, and increased availability of legal representation for

rural Coloradans. Despite those clear benefits, it is a reality that virtual proceedings are less efficient for our judges and trial court staff.

Because we had nearly two years of experience with Webex and everyone saw a need for more consistency, at the end of 2022, I tasked a select group of trial court judges and court staff, including chief judges, district and county court judges, a court executive, a clerk of court, and staff at the State Court Administrator's Office (including staff from the Office of Language Access, Pathways to Access, Court Services, and IT) to convene with an eye toward developing Chief Justice Directives (CJDs) that would help establish more standardization statewide on our use of virtual proceedings. Beginning in December 2022, this group met weekly to develop policies that would benefit attorneys and litigants and that would not undermine the fairness of court proceedings. The committee drafted two CJDs for my consideration—one concerning the broadcasting of criminal proceedings and the other concerning virtual participation in court proceedings more broadly.

In March of this year, I decided to post the draft CJDs for public comment. I'm not aware of any previous CJD that was posted for public comment, but I'm glad we did so in this instance. We received over 100 comments—which were also posted publicly—that provided valuable suggestions to make the CJDs better. While the comments emphasized the many competing interests, they also exposed some of our blind spots in creating the CJDs (some commenters read portions of the CJDs differently than what we had intended), and there was a surprising level of agreement among many stakeholders regarding the goals and potential consequences of the CJDs. The comments also made it abundantly clear that it was going to be impossible to please everyone. The reality is that much like the court proceedings themselves, there are a lot of competing interests.

The committee incorporated many revisions based on the comments. On April 12 of this year, I signed CJD 23-02 regarding livestreaming of criminal proceedings. Effective on May 15, the CJD creates a policy that presumes the courts will livestream non-evidentiary criminal proceedings

but also leaves discretion to the judge to expand or limit livestreaming based on the needs of the case. The CJD tries to balance the public's interest in transparency with concerns about the effect of livestreaming on the fairness of the proceedings and the impact of livestreaming on victims and witnesses.

As of this writing, the committee is revising the draft virtual proceedings CJD based on comments received, and I anticipate the final review and adoption very soon. Concurrent to our efforts, the General Assembly is considering legislation that touches on both livestreaming and virtual court proceedings. In my view, policies contained in CJDs are much nimbler and more responsive than legislation because, as we inevitably continue to learn best practices, I can periodically make adjustments to the policies. More important, I fundamentally believe that the courts should be responsible for managing courtrooms and dockets.

I hope that these measures will increase access to our courts and improve transparency in our operations. Litigants, attorneys, and the public should know how our courts are using this technology and what to expect in our courthouses. However, we will never be completely uniform in the use of this technology. Every case is different. It is absolutely essential for our judges to retain discretion to manage their courtrooms based on the needs of an individual case.

As we implement the CJDs on virtual court proceedings and livestreaming, we will continue to review what's working and what's not. I recognize that the CJDs will not make everyone, or maybe anyone, completely happy. People rightly have different reasons for wanting or not wanting virtual participation in court proceedings or livestreaming of court proceedings. As a result, I plan to ask a durable committee to receive feedback on the CJDs, suggest modifications, and recommend expansion of virtual technology when appropriate.

To be sure, this is an exciting time for the courts. Along with the rest of society, the courts are learning as we go. While we will continue to experience bumps in the road, in the end the courts will be more accessible and convenient for everyone. 