

MARCH 12, 2021

# **The 2021-22 Budget: Authorization of Remote Court Proceedings**

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LEGISLATIVE ANALYST'S OFFICE

# Background

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## Technology Allows Individuals to Participate in Court Proceedings Remotely

- Remote proceedings involve one or more parties using technology—ranging from calling in by telephone or through video conferencing—to participate in a court case, rather than being physically present in court.
- The use of remote proceedings—including the types of technology used and the case types or proceedings they are offered in—differs by trial court and is guided by state law and court rules.

## Remote Proceedings in Civil Cases

- State law, as well as statewide and local Rules of Court, authorize telephone appearance for certain proceedings (such as discovery motion hearings) in certain civil case types (such as unlawful detainer and probate cases).
- State law requires Judicial Council enter into a master agreement with at least one vendor to provide for telephone appearances in civil cases. However, state law authorizes trial courts to directly provide such services as well outside of the master agreement. State law also requires Judicial Council establish civil fees for each telephone appearance. The current fee, which is paid by each party, is generally \$94 (which may be waived by the court), with state law requiring that \$20 of this fee go to support trial court operations. Telephone appearance fees generate roughly \$7 million annually for trial court operations. The remainder of the fee supports the entity that provided the service.
- While state law does not specifically authorize videoconferencing in civil cases, state law authorizes courts to charge a “reasonable” fee to cover the costs of appearing in this manner.



# Background

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## **Remote Proceedings in Criminal Cases**

- For misdemeanor and felony cases, state law authorizes defendants (upon their consent) to appear through video conferencing in certain proceedings—such as arraignment. State law generally requires physical presence in other proceedings, such as preliminary hearings, unless waived by the defendant.
- A statewide Rule of Court authorizes the use of video conferencing in traffic infraction cases under certain conditions.

## **Remote Proceedings Temporarily Permitted on Broader Basis Due to Pandemic**

- In response to the coronavirus disease 2019 (COVID-19) pandemic state of emergency declared by the Governor in March 2020, Judicial Council enacted emergency rules allowing trial courts to require remote proceedings in all case types—but requiring the consent of the defendant in criminal proceedings. These emergency rules will remain in effect until 90 days after the pandemic state of emergency is lifted or until amended or repealed by Judicial Council.
- Trial courts have flexibility in how they use this emergency authority. Most courts have pivoted quickly to use technology to help move proceedings in certain case types forward during the pandemic. However, due to differences in existing local court infrastructure and priorities, the use of remote proceedings can differ substantially by trial court. Additionally, trial courts continue to adopt new technology and modify how they use technology based on their experiences. Accordingly, the extent to which trial courts have implemented remote proceedings and how such proceedings differ by court is unclear.



# Governor's Proposals

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## **Authorizes Remote Proceedings in All Civil Cases**

- The Governor proposes budget trailer legislation authorizing trial courts to conduct all proceedings (including trials and evidentiary hearings) in civil cases remotely when the court deems it appropriate and practicable. Judicial Council would be authorized to adopt statewide Rules of Court for implementation.
- The proposed legislation also includes intent language that this authorization “be interpreted broadly to provide safe and reliable access to justice.”

## **Authorizes Remote Proceedings in All Infraction Cases**

- The Governor proposes budget trailer legislation authorizing trial courts to conduct all proceedings (including arraignments and trials) in infraction cases remotely upon consent of the defendant. Judicial Council would be authorized to adopt statewide Rules of Court for implementation. (The proposed legislation is part of the Governor’s proposal to expand the online adjudication of infractions, which we discuss in more detail in our recent publication *The 2021-22 Budget: Trial Court Operations Proposals*.)



# Assessment

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## Remote Proceedings Could Create Benefits

- Expanding the use of remote proceedings merits legislative consideration as it could help increase equity and access to the courts by making it easier for court users (such as those who live far from the court) to interact with the court.
- To the extent remote proceedings reduce the amount of time proceedings take, the Governor's proposal could reduce litigation costs (such as from the number of hours attorneys bill their clients) and could help process cases more efficiently and effectively.

## Consider Whether Proposed Authority Is Appropriate for All Case Types and Proceedings

- While remote proceedings can create benefits, the Legislature will want to consider whether remote proceedings would be appropriate for use in all case types or proceedings. For example, it could make sense for certain family law proceedings to take place in-person, such as to ensure children involved are not inappropriately influenced by adults. Additionally, the Legislature will want to consider whether state law should include certain minimum standards for the use of remote proceedings to ensure that court users across the state have similar experiences. However, under the broad authority provided to the judicial branch, no such minimums would be required.



# Assessment

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## Proposal Leaves Significant Implementation Details to Judicial Branch

- Additionally, the proposed budget trailer legislation lacks specificity and leaves nearly all implementation details to the judicial branch, with little role for the Legislature. This is because the proposed language defers answers to key implementation questions to the judicial branch. Answers to these questions can have significant impacts on trial court operations, court processes, and appropriate funding levels.
- These key questions include:
  - ***How Would Courts Use the Authority to Conduct Remote Proceedings?*** It is unclear whether remote proceedings will be required by Judicial Council or local courts, how this authority would be used, and in which case types or proceedings it would be used. For example, under the proposal, Judicial Council or local trial courts could require that all civil proceedings take place remotely—or alternatively, none at all.
  - ***How Would Court Processes Change?*** It is unclear how the judicial branch would change existing court processes in order to facilitate remote proceedings. For example, it is unclear how much notice (if any) court users would need to provide if they would like to appear remotely or what specific rules for conducting jury trials remotely there would be.
  - ***Would Fairness, Equity, and Other Issues Be Addressed and in What Manner?*** It is unclear how issues related to fairness, equity, privacy, and public access would be addressed in remote proceedings. For example, it is unclear whether parties who lack the necessary equipment for remote proceedings could choose for proceedings to occur in person. (Under the proposed language for infractions, remote proceedings require the consent of the defendant.)



# Assessment

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## Impacts on Trial Courts Would Depend on Implementation

- The lack of key implementation details, in turn, makes it difficult to determine how the Governor’s proposal would impact trial court costs and revenues, as well as future court facility needs, which could be significant.
- Specifically, these impacts include:
  - **Additional One-Time or Ongoing Technology-Related Costs.** It is unclear the extent to which trial courts would incur additional one-time or ongoing costs (beyond those from the pandemic) for equipment and infrastructure to support remote proceedings. For example, it is unclear the extent to which trial courts would need to provide certain court employees, such as court interpreters, with equipment or Internet access to operate remotely on an ongoing basis.
  - **Court Operations Costs and Workload.** On the one hand, court costs and workload could increase. For example, the convenience of remote proceedings (particularly if offered at no cost to court users) could result in more individuals choosing to file cases than otherwise or interacting with the court in a manner that requires more resources (such as filing more motions in a particular case). On the other hand, court costs and workload could decrease. For example, depending on implementation, courts could address cases more quickly than otherwise.
  - **Court Revenues.** The impact on civil fees that support trial court operations (such as telephone appearance fees) is unknown. For example, it is unclear whether the use of video conference proceedings will result in the reduction or elimination of telephone appearance fee revenues and whether Judicial Council or local courts will adopt a fee for the use of video conference proceedings. We note that, under existing practices, any revenue losses would likely be backfilled by the General Fund.



## Assessment

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- **Ongoing Facility Needs.** A significant shift of proceedings to a remote platform could impact ongoing facility needs. On the one hand, existing facilities may require modernization and maintenance to support extensive video streaming. On the other hand, the number or size of physical courtrooms needed could decrease.



# Recommendations

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## Direct Judicial Branch Submit Implementation Plan

- Given the potential benefits, we think the expansion of remote proceedings is warranted. However, we recommend the Legislature direct the judicial branch to submit a detailed plan for how remote proceedings would be implemented by case and/or proceeding type. At minimum, this plan should answer the key implementation questions described earlier to ensure the judicial branch has fully evaluated how court operations and court users would be impacted.
- After receiving this plan, the Legislature would be in a much better position to determine whether and how to modify the proposed legislation to ensure that the use of remote proceedings reflect its priorities. For example, the Legislature could decide to specify minimum procedural requirements or prohibitions on use in certain case types or proceedings.
- To the extent the judicial branch is able to provide a plan in the next couple of months, the Legislature could consider this proposal as part of the 2021-22 budget. Otherwise, the Legislature could consider the proposal as part of the 2022-23 budget.



## Recommendations

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### **Could Implement Pilot in Less Complex Cases or Proceedings if Priority to Authorize Remote Proceedings in 2021-22**

- We recognize the Legislature may be interested in providing immediate authorization before it receives an implementation plan. If so, we would recommend the Legislature pilot remote proceedings for two years in less complex case types or proceedings (such as infractions and/or small claims cases that do not require jury trials) and require an evaluation by November 1, 2022. We would recommend the Legislature ensure the pilot reflects its priorities for remote proceedings.
- The pilot would inform legislative decisions on whether to extend, expand, or modify the authorization of remote proceedings in 2023-24 when the pilot would end. Testing remote proceedings in such a manner could help ensure that implementation issues are identified and resolved in areas that have less impact on court user lives before expanding to more complex case types and proceedings. This more measured approach, along with an implementation plan for the more complex cases and proceedings, allows for the minimization of unintended consequences and costs while key implementation questions are being addressed through the pilot.

