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CALIFORNIA LEADS NATION IN PRESERVING REMOTE APPEARANCES; PROPOSED LEGISLATION ALLOWS VIRTUAL APPEARANCES, TESTIMONY AND TRIALS

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Top of mind for many legal commentators is whether remote appearances are here to stay. With courts across the nation resuming in-person trials, legal commentators are wondering whether this foreshadows the end of appearing remotely for members of the bar.

Remote appearances have been hailed as a silver lining of the pandemic, saving lawyers and witnesses travel time while offering clients the ability to watch the proceedings from afar. With mask mandates in place, remote appearances allow an opportunity for many to evaluate facial expressions and hear clearly words that may otherwise be muffled. In a closely watched development, California is taking the lead to ensure the ability to appear remotely will be here to stay.

At the outset of the COVID-19 pandemic, courts were forced to pivot and find new ways of processing their caseloads in a remote environment. California's Judicial Council adopted emergency rules to help facilitate access to the courts during the pandemic. Generally, the emergency rules have served their purpose thus far and allowed for the continuation of litigation through the court systems, but some groups are throwing up red flags in opposition to a continuation of these rules.

Most vocal are the labor unions representing court reporters and other courtroom employees. This group has voiced concerns over the accuracy of the record and the difficulty posed should a language translator be needed in the case. On the other end of the spectrum, many trial attorneys and judicial leaders feel that remote access is paramount to clearing the horrendous backlog in the court system exacerbated by the pandemic closures. Regardless of the pros and cons of remote versus in-person court proceedings, the rules necessitated by the COVID-19 pandemic have changed the way the industry views the system of justice and its inner workings.

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OUTLINE OF SB 241 AND ITS PROVISIONS FOR REMOTE APPEARANCES

A few weeks into the COVID-19 pandemic, the Judicial Council adopted emergency rule 3, which became effective on April 6, 2020. This emergency rule authorized courts to hold proceedings remotely via videoconference or by phone. Senate Bill 241 enacts the new Civil Code of Civil Procedure section 367.75, which will be effective from January 1, 2022 through July 1, 2023. The main points of this bill are below:

- A party or witness may appear through the use of remote technology in all civil cases (other than juvenile dependency) after providing notice to the court and all other parties.
- After receiving notice or request for a remote proceeding, the court has the discretion to require an in-person proceeding only if:
 - The court does not have the technology required to host a remote appearance.
 - The court determines, on a hearing-by-hearing basis, that the in-person presence of a party or witness would “materially assist in the determination” of the proceeding, or in the management or resolution of the case.
- At a particular conference, hearing, or proceeding, the quality of the technology or sound is preventing or inhibiting any of the following:
 - The court’s effective management or resolution of the matter.
 - The court reporter’s ability to make an accurate record.
 - Counsel’s ability to provide effective representation; or
 - An interpreter’s ability to provide language services.
- For evidentiary hearings or trial generally:
 - The court, as well as a party, may decide to conduct a trial or evidentiary hearing remotely; and
 - A party may oppose that decision by a court or another party by showing why remote testimony or appearance should not be allowed.
- Section 367.75(k) states that the Judicial Council must adopt rules that address the following:
 - Deadlines for parties to request a remote proceeding.
 - Procedures and standards to guide judicial officers as to when a proceeding may be conducted through remote technology bearing in mind the limited access or transportation and other potential limitations or unequal circumstances of the parties and witnesses.

SB 241 REQUIRES JUDICIAL COUNCIL TO PROVIDE STANDARDS AND PROCEDURES FOR IMPLEMENTATION OF NEW AND REVISED RULES ON REMOTE APPEARANCES

As required by the statute, the proposal set out by the Judicial Council addresses the adoption of rules relating to notice of a request for a remote proceeding as well as procedures and standards for judicial officers when considering these requests. In developing these proposed rules, the Judicial Council considered the varying levels of technological access among local courts as well as the notice systems they already have in place and have been utilizing throughout the pandemic. For example, some have links on their websites where parties can request a remote hearing and may be able to accommodate a request made with relatively short notice. For other localities the experience may not be the same.

NEWS

Although leeway is given for using systems already in place that are working for local counties, some statewide rules will need to be followed, such as the rule for jury trials. These state-wide rules will trump any local rules that are in conflict. There will also be a 90 day grace period to allow any local remote rules to become compliant with the statute if necessary.

PROPOSED RULES FOR NONEVIDENTIARY PROCEEDINGS

Nonevidentiary proceedings are those which do not include any oral testimony under oath, including law and motion hearings as well as status conferences. The newly proposed rules largely mimic the telephone appearance rules in place since COVID began. The party seeking a remote appearance should serve and file a “Notice of Remote Appearance” (form CIV-021). Less formal notice requirements are required for a proceeding set on less than three days notice such as an ex parte application. It is important to note, however, that even if a party misses one of these deadlines, it may still request permission from the court to appear remotely.

PROPOSED RULES FOR EVIDENTIARY HEARINGS AND TRIALS

Evidentiary hearings and trials are those in which oral testimony is provided. In this case, the court may decide to proceed with the hearing remotely and must give notice to the parties directly, or via a local rule already in place. Any party not in agreement with the court’s decision, or another party’s request to appear remotely, may oppose the action and provide a showing of why a remote proceeding should not be permitted. Parties opposing a remote appearance should file an “Opposition to Remote Proceeding at Evidentiary Hearing or Trial” (form CIV_022). Due to the more complicated nature of the evidentiary proceedings, the notice period is longer and requires at least fifteen days notice of the trial or hearing date. If a party misses a deadline, they may still request leave from the court for their request if they have good cause or unforeseen circumstances.

In addition, as to both evidentiary and non-evidentiary proceedings, a party who previously requested a remote appearance may change their mind and later request to meet in person so long as the court and all parties have reasonable notice of the change.

AMENDED RULES AND TELEPHONIC HEARINGS

The new statute enacted in section 367.75 authorizes remote appearances in all civil cases and applies to all types of proceedings within those cases. It does not distinguish between telephonic appearance and videoconferencing appearances. Currently, the telephone appearance rule is limited to general civil actions, unlawful detainer and probate cases. Mainly it has been used for nonevidentiary hearings and is more narrowly drawn than the new statute. The current telephone appearance rules that are in conflict with the new rules will be suspended as of January 1, 2022.

THE JUDICIAL COUNCIL SEEKS PUBLIC COMMENTS

As part of the proposed rules, the Judicial Council is seeking public comments. The deadline for submitting comments is November 15, 2021. It also poses a set of questions and seeks input on specific areas such as proposed notice deadlines, the use of forms, and whether the proposal addresses the stated purpose of the statute. The invitation to comment includes some specific questions; however, you are not limited to answering those questions. For reference, you can find the questions copied below. You can submit your comments by email to invitations@jud.ca.gov.