

INFLECTION POINT: CAN COURTS USE TECHNOLOGY TO SPUR TRANSFORMATIONAL CHANGE OR WILL THEY RETURN TO THE TRADITIONAL WAY OF DOING BUSINESS?

Zach Zarnow* & Danielle Elyce Hirsch**

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* Zach Zarnow is a Principal Court Management Consultant at the National Center for State Courts, focusing on increasing access to justice. He has worked with courts and their partners at the local and national level on civil legal system modernization and process simplification. Zach is co-creator and a co-host of Tiny Chats. Prior to joining NCSC he was Program Director at the Illinois Equal Justice Foundation, where he led an overhaul of data collection, grant management procedures, and outcome measurements and designed and launched the Illinois Armed Forces Legal Aid Network, which he still manages. He is a graduate of Brandeis University and American University's Washington College of Law.

** Danielle Hirsch is the Interim Court Services Director at the National Center for State Courts, focusing on access to justice initiatives. She leads several large national access to justice projects for NCSC and serves as lead staff for the Conference of Chief Justices and Conference of State Court Administrators' Access and Fairness Committee, the Post-Pandemic Planning Technology Supergroup, and the Blueprint for Racial Justice's Improving Diversity of the Bench, Bar and Workforce Working Group. In addition, Danielle is the co-creator and a co-host of Tiny Chats. Before joining NCSC, Danielle was the Assistant Director of Civil Justice Division of the Administrative Office of Illinois, where Danielle was responsible for leading and managing the judicial branch's work to promote, facilitate, and enhance access to justice in Illinois. Danielle previously served as the Executive Director of the Illinois Supreme Court Commission on Access to Justice and the Director of Advocacy at The Chicago Bar Foundation. Among many highlights of her work, Danielle developed and managed an innovative new program, Illinois JusticeCorps, which places college and law students in courthouses to provide procedural assistance to people without lawyers.

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I. INTRODUCTION

Richard Susskind has famously argued that “court is a service, not a place.”¹ We agree, and due to the most unimaginably horrible circumstance of the ongoing pandemic, courts have indeed largely stopped being physical places where people go. Courthouses closed, trials were delayed, and some courts even paused the filing of cases. Courts began to adapt, modifying rules and procedures and offering remote services to keep the state courts operational. These adaptations include online filing of pleadings for both lawyers and self-represented litigants, online clerk and self-help functions, remote hearings, remote payment of court fees and fines, remote bench trials, and in some instances remote jury trials.² Courts have scrambled to answer the questions of how to provide services remotely that meet the needs of court users, keep everyone safe, and do not leave anyone out. Can technological

¹ See Richard Susskind, *The Future of Courts*, 6 THE PRACTICE 5 (2020), <https://thepractice.law.harvard.edu/article/the-future-of-courts/> [https://perma.cc/7XQR-4BP4]; Richard Susskind, *Richard Susskind: My Case for Online Courts*, LEGAL CHEEK (Dec. 17, 2019, 8:46 AM), <https://www.legalcheek.com/2019/12/richard-susskind-my-case-for-online-courts/> [https://perma.cc/6P9L-WJ8N].

² See, e.g., *File New Cases and Motions by Email or Fax*, ALA. CT. SYS., <https://courts.alaska.gov/court/efiling.htm> (last visited Apr. 2, 2021) (The FAQ page of the Alaska court’s remote filing system that now exists because of covid) [https://perma.cc/8BH3-XD56]; *Virtual Clerk’s Office*, R.I. JUDICIARY <https://www.courts.ri.gov/Courts/FamilyCourt/Pages/Virtual.aspx> (last visited Apr. 2, 2021) [https://perma.cc/8US9-75BA]; *Court Coronavirus Information*, TEX. JUD. BRANCH, <https://www.txcourts.gov/court-coronavirus-information/electronic-hearings-zoom/> (last visited Apr. 2, 2021) [https://perma.cc/RX9D-YQP8]; *COVID-19 News and Resources*, MICH. CT. <https://courts.michigan.gov/News-Events/covid19-resources/Pages/VCR.aspx> (last visited Apr. 2, 2021) [https://perma.cc/5DKA-58C3]; *Online Payment Home*, ARIZ. CT. ONLINE PAYMENT <https://wmq.etimspayments.com/pbw/include/arizona/newinput.jsp> (last visited Apr. 2, 2021) [https://perma.cc/QA6W-X25V].

solutions maintain and increase access to justice while the physical courthouse remains closed?

We think the answer is yes, but to understand why it should be understood that the corollary to “court is a service, not a place” is that courts do not have technology projects or technology solutions. Instead, they have business process needs that can sometimes benefit from or be improved by using technology. If court is a service and not a place, then technology is a tool that can be used to provide services or improve services, but it is not a solution unto itself. It lives within and throughout court business processes, which must be sensitive to issues of procedural fairness and constitutional mandates like due process. As such, technology can be one of the means to satisfy the goal of open and fair courts. The adoption of smart technology, together with business process simplification, can allow *all* court users—including judges, court staff, members of the private bar, and people without lawyers—to more easily and successfully engage with the judicial system. Anecdotally, we have seen significant, undeniable changes in behavior:

- (1) Increased participation rates in virtual hearings in high-volume case types where, traditionally, there were high default rates when in-person proceedings were required;³
- (2) Tech adoption across judges, court staff, members of the private bar, and self-represented litigants at levels never seen before;⁴ and
- (3) Expanded participation in virtual jury service from traditionally underrepresented populations.⁵

³ See, e.g., Justin Jouvenal, *Justice by Zoom: Frozen Video, a Cat—and Finally a Verdict*, WASH. POST (Aug. 12, 2020), https://www.washingtonpost.com/local/legal-issues/justice-by-zoom-frozen-video-a-cat--and-finally-a-verdict/2020/08/12/3e073c56-dbd3-11ea-8051-d5f887d73381_story.html?utm_medium=social&utm_source=twitter&utm_campaign=wp_main [<https://perma.cc/J9PU-5JFF>]; Arya Sundaram, *How Texas Courts Went Virtual*, TEX. OBSERVER (Feb. 10, 2020), <https://www.texasobserver.org/how-texas-courts-went-virtual/> [<https://perma.cc/23DJ-25MY>].

⁴ See, e.g., Baker McKenzie, *The Future of Disputes: Are Virtual Hearings Here To Stay?*, <https://www.bakermckenzie.com/-/media/files/insight/publications/2021/01/future-of-disputes-campaign-brochure.pdf> (last visited Apr. 2, 2021) [<https://perma.cc/3PL6-QTS9>]; National Poll: *Public Warming to Idea of Remote Court Appearances*, NAT’L CTR. FOR STATE CT. (Jun. 24, 2021), <https://www.ncsc.org/newsroom/at-the-center/2020/national-poll-public-warming-to-idea-of-remote-court-appearances> [<https://perma.cc/GS4F-CXK9>]; State Courts, *Tiny Chat: Lawyer Cat*, VIMEO (Feb. 10, 2021), <https://vimeo.com/510852041> [<https://perma.cc/3347-V9VQ>]; Emily Miskel (@emilymiskel), TWITTER (Feb. 25, 2021, 4:54 PM), <https://twitter.com/emilymiskel/status/1365057494180106243> [<https://perma.cc/6WME-88HS>].

⁵ See, e.g., David Slayton (@davidslaytonx), TWITTER (Nov. 23, 2020, 11:25 AM), <https://twitter.com/davidslaytonx/status/1330910444920459265> [<https://perma.cc/W3RT-WSRG>]; Elizabeth Zavala, *San Antonio Lawyers' Early Verdict on Virtual Trials: Let's Keep Them*,

However, we are acutely aware that technology itself is not a panacea, and not all technology leads to progress. Some technologies may worsen long-standing societal problems, like racial and economic injustice.⁶ Even when certain technologies better meet the needs of court users as compared with traditional court practices, the pandemic has also laid bare the pervasiveness and disadvantages of the digital divide.

This is a defining movement for the state courts. What we do collectively to support and modernize courts and to reset inequities will be

SAN ANTONIO EXPRESS-NEWS (Feb. 21, 2021), https://www.expressnews.com/news/local/article/San-Antonio-judges-lawyers-brainstorm-how-to-15947407.php?utm_source=newsletter&utm_medium=email&utm_campaign=SAEN_DailyHeadlines&utm_term=news&utm_content=headlines&sid=5bbcfed43f92a45e831e2920 [<https://perma.cc/339T-ZT9W>]; Arya Sundaram, *How Texas Courts Went Virtual*, TEX. OBSERVER (Feb. 10, 2020), <https://www.texasobserver.org/how-texas-courts-went-virtual/> [<https://perma.cc/2B8P-XBC5>].

⁶ There are countless examples: Internet platform algorithms spreading disinformation, Paul Lewis, *'Fiction is Outperforming Reality': how YouTube's Algorithm Distorts Truth*, THE GUARDIAN (Feb. 2, 2018), <https://www.theguardian.com/technology/2018/feb/02/how-youtubes-algorithm-distorts-truth> [<https://perma.cc/MR6L-35J9>]; AI-powered advertising that hyper targets the vulnerable, Ryan Browne, *UK Urged to Regulate how Tech Giants like Facebook and Google Target you with Content*, CNBC (Feb. 3, 2020), <https://www.cnbc.com/2020/02/03/uk-ai-advisor-regulate-social-media-firms-over-online-targeting.html> [<https://perma.cc/C499-NN9G>]; Kyle Wiggers, *AI Weekly: Facebook's Discriminatory Ad Targeting Illustrates the Dangers of Biased Algorithms*, VENTURE BEAT (Aug. 28, 2020), <https://venturebeat.com/2020/08/28/ai-weekly-facebooks-discriminatory-ad-targeting-illustrates-the-dangers-of-biased-algorithms/> [<https://perma.cc/QC3A-WPQU>]; or just as harmful, excludes them, Alex Engler, *Auditing Employment Algorithms for Discrimination*, BROOKINGS (Mar. 12, 2021), <https://www.brookings.edu/research/auditing-employment-algorithms-for-discrimination/> [<https://perma.cc/2E6T-YQMS>]; or the digital divide that precludes access to and meaningful participation in court processes and hearings in both rural and urban communities. Microsoft estimates “that some 157.3 million people in the U.S. do not use the internet at broadband speeds.” Shelley McKinley, *Microsoft Airband: An Annual Update on Connecting Rural America*, MICROSOFT (Mar. 5, 2020), <https://blogs.microsoft.com/on-the-issues/2020/03/05/update-connecting-rural-america/> [<https://perma.cc/825V-GZJW>]. See also, Katrina vanden Heuvel, *America's Digital Divide is an Emergency*, WASH. POST (Jun. 23, 2020), <https://www.washingtonpost.com/opinions/2020/06/23/americas-digital-divide-is-anemergency/?outputType=amp> [<https://perma.cc/8M8D-ZGUU>]; Monica Anderson & Madhumitha Kumar, *Digital divide persists even as lower-income Americans make gains in tech adoption*, PEW RES. CTR. (May 7, 2019), <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/> [<https://perma.cc/Z88N-VC7S>]; Andrew Perrin & Erica Turner, *Smartphones help blacks, Hispanics bridge some—but not all—digital gaps with whites*, PEW RES. CTR. (Aug. 20, 2019), <https://www.pewresearch.org/fact-tank/2019/08/20/smartphones-help-blackshispanics-bridge-some-but-not-all-digital-gaps-with-whites/> [<https://perma.cc/LZP3-5B3C>].

studied for decades to come. Crises often create new opportunities, and discontinuity can be the trigger for innovation, if we act responsibly.

Accordingly, this Article will first situate the use of technology by courts in recent guiding principles disseminated by the Conference of Chief Justices/Conference of State Court Administrators (CCJ/COSCA). Second, applying these principles, we will illuminate examples from across the country of courts using technology well to solve problems. Third, we will then provide a framework for addressing how any process improvements and technology solutions to come out of the pandemic can be evaluated, continued, and strengthened.

This last section strikes at the reason for the title to this Article. Courts are at an inflection point. They have made more changes more rapidly in nearly every aspect of their operations than at any other moment in modern times. Changes that once took committees, court staff, and judges years to debate, test, and implement were rolled out in a matter of weeks and months. What changes will hold, and which should last? How can courts effectively resist the powerful urge to simply return to the way things were? Equally important, how can they evaluate and measure the impact of current changes to demonstrably prove benefit?

II. GUIDING PRINCIPLES FOR POST-PANDEMIC COURT TECHNOLOGY

The National Center for State Courts (NCSC) serves as the secretariat for the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA), and NCSC works closely with them on crafting guiding documents and resolutions that act as important resources and standards to which the country's state courts can aspire. CCJ/COSCA jointly adopted Resolution Two on July 30, 2020,⁷ which, along with the accompanying Guiding Principles for Post-Pandemic Court Technology,⁸ outlines the ways in which courts should continue to responsibly embrace technology as they move closer to re-opening their doors to the public. These two documents are worth examining in their entirety, but for the sake of brevity here, we will summarize. To start with the end, here is the last paragraph of the guiding principles document:

⁷ See Resolution 2, CONF. OF CHIEF JUSTICES, CONF. OF STATE CT. ADM'RS (Jul. 30, 2020), https://ccj.ncsc.org/__data/assets/pdf_file/0019/51193/Resolution-2-In-Support-of-the-Guiding-Principles-for-Post-Pandemic-Court-Technology-.pdf [<https://perma.cc/7GNM-45QJ>].

⁸ See *Guiding Principles for Post-Pandemic Court Technology*, CONF. OF CHIEF JUSTICES & CONF. OF STATE CT. ADM'RS (Jul. 16, 2020), https://www.ncsc.org/__data/assets/pdf_file/0014/42332/Guiding-Principles-for-Court-Technology.pdf [<https://perma.cc/7R2N-RXHT>].

Technology has played a critical role in the courts' response to the pandemic. As courts begin to resume some in-person proceedings and to consider a post-pandemic world, courts must not leave the technological advances behind but instead use these guiding principles to build upon the success of the past months to better serve court users and provide greater equal access to justice for all.⁹

The document lays out the six principles listed below:

- (1) Ensure principles of due process, procedural fairness, transparency, and equal access are satisfied when adopting new technologies.
- (2) Focus on the user experience.
- (3) Prioritize court-user driven technology.
- (4) Embrace flexibility and willingness to adapt.
- (5) Adopt remote-first (or at least remote-friendly) planning, where practicable, to move court processes forward.
- (6) Take an open, data-driven, and transparent approach to implementing and maintaining court processes and supporting technologies.

III. APPLYING THE GUIDING PRINCIPLES: A NATIONWIDE SCAN OF COURTS EMBRACING TECHNOLOGY

Principle 1: Ensure principles of due process, procedural fairness, transparency, and equal access are satisfied when adopting new technologies.

Principle one underscores the point that courts have processes that may use technology, but the use of technology does not abdicate responsibility to uphold the fundamental principles of the court system. If a court uses a new technology, that technology must do no harm when it comes to due process, procedural fairness, transparency, and equal access to the legal system.

In keeping with the principle, states like Vermont, Massachusetts, California and Wyoming have created easily accessible and understandable websites. These websites ensure that people can obtain court forms, access plain language self-help resources, and find easy referrals to private and legal aid attorneys.¹⁰ They also do a good job of communicating changes in court procedures due to the pandemic. At their best, they offer this information in

⁹ *Id.*

¹⁰ See CAL. JUD. BRANCH, <https://www.courts.ca.gov/> (last visited Apr. 3, 2021) [<https://perma.cc/C8WL-WGUJ>]; MASS. CT. SYS., <https://www.mass.gov/orgs/massachusetts-court-system> (last visited Apr. 3, 2021) [<https://perma.cc/FFW6-XLFX>]; *Legal Assistance & Self-Help Form*, WYO. JUD. BRANCH, <https://www.courts.state.wy.us/legal-assistances-and-forms/> (last visited Apr. 3, 2021) [<https://perma.cc/YTV9-ZQRZ>]; VT. JUDICIARY, <https://www.vermontjudiciary.org/> (last visited Apr. 3, 2021) [<https://perma.cc/47TM-BHRB>].

common languages and at a low reading level.¹¹ Some court systems, like New Jersey and California, have started using chat bots to provide people remote access to information and to answer common procedural and logistical questions.¹² Illinois has started a telephone hotline staffed by the court's administrative office that provides callers with information about how to navigate the court system or find the right form.¹³

Hawaii, Kansas, Tennessee, and Florida either have or are close to launching online dispute resolution (ODR) platforms,¹⁴ and Michigan now has a statewide ODR system after working in this area for years in certain counties.¹⁵ ODR allows a court user to start a case, negotiate with the other party, and come to a resolution, all without ever having to come to court, take time off work, find childcare, or pay for parking.¹⁶ These platforms are at their best, and most strongly adhere to the first principle, when they connect a court user with in-time, as-needed legal information and access to self-help resources as they navigate the platform.

When utilized well, these technologies remove the need for a physical place for the delivery of a service, while still adhering to the foundational principles of the courts.

¹¹ It is critical to offer legal information in languages other than English to ensure that court users can navigate the system. *See, e.g.*, LIMITED ENGLISH PROFICIENCY, <https://www.lep.gov/state-courts> (last visited Apr. 3, 2021) [<https://perma.cc/33BD-88RU>]. Experts also recommend that public facing materials be written at no greater than an eighth grade reading level, with most suggesting between a fifth and sixth grade level. *See, e.g.*, *Tiny Chat 39: Plain Language*, VIMEO (Feb. 8, 2021, 8:12 AM), <https://vimeo.com/509773198>; PLAINLANGUAGE.GOV, <https://www.plainlanguage.gov/> (last visited Apr. 3, 2021) [<https://perma.cc/GM7L-W5N8>].

¹² *See* Quick Response Bulletin: Getting Started with A Chatbot, NAT'L CTR. FOR STATE CT. (Apr. 20, 2020), https://www.ncsc.org/__data/assets/pdf_file/0028/28567/2020-04-15-qr-getting-started-with-a-chatbot.pdf [<https://perma.cc/9R46-AJXP>]; Notice to the Bar: Judiciary Adds Chatbot to Its Website – Launching the Judiciary Information Assistant (JIA) -Expanding the Use of Technology to Provide Quality Service (Sep. 9, 2019), <https://njcourts.gov/notices/2019/n190909a.pdf> [<https://perma.cc/34Q4-Z7QT>].

¹³ *See* Rhys Saunders, *Illinois Supreme Court Hires Lisa Colpoys to Run New Illinois Help Program*, ILLINOIS STATE BAR ASS'N (Jan. 4, 2021), <https://www.isba.org/barnews/2021/01/illinoisupremecourthireslisacolpoy> [<https://perma.cc/DM8U-QZR6>].

¹⁴ *See* ODR Around the Country, NAT'L CTR. FOR STATE CT., <https://www.ncsc.org/odr/odr-around-the-country> (last visited Apr. 3, 2021) [<https://perma.cc/C8VE-5BKV>].

¹⁵ *See* *Resolve a Dispute with MI-Resolve*, MICH. CTS., <https://courts.michigan.gov/Administration/SCAO/OfficesPrograms/ODR/Pages/MI-Resolve.aspx> (last visited Apr. 3, 2021) [<https://perma.cc/J9U7-ZHMU>].

¹⁶ *What is ODR?*, NAT'L CTR. FOR STATE CT., <https://www.ncsc.org/odr/guidance-and-tools> (last visited Apr. 3, 2021) [<https://perma.cc/2JKJ-NG25>].

Principle 2: Focus on the user experience.

As courts rightfully embrace technology, they first need to continue to think first and foremost of court users. The digital divide is real.¹⁷ Millions of Americans do not have reliable access to high-speed internet. Many lack the technical savvy to effectively navigate online spaces and tools. They may only have a smartphone at home, which can be limited by data allowances and be cumbersome to use for some court processes.¹⁸ This divide requires courts to be sensitive to the need for public internet access points, the needs of users with limited technological capability, those who may not speak English as a first language, and those who may have a disability that could make using technology difficult.¹⁹

Jurisdictions have engaged in some creative partnerships to address the digital divide. West Virginia's Attorney General partnered with Tractor Supply Store to offer Wi-Fi hotspots at their store parking lots.²⁰ In Hawaii, the state supreme court worked with the law library and an access to justice coordinator to create a searchable map of free Wi-Fi hotspots to assist court users who need to get online.²¹ The city of San Jose, California worked with

¹⁷ See Shelley McKinley, *Microsoft Airband: An Annual Update on Connecting Rural America*, MICROSOFT (Mar. 5, 2020) (explaining that 157.3 million people in the U.S. do not use the internet at broadband speeds), <https://blogs.microsoft.com/on-the-issues/2020/03/05/update-connecting-rural-america/> [<https://perma.cc/3WVQ-P3LC>]; see also Katrina Vanden Heuvel, *America's Digital Divide is an Emergency*, WASH. POST (June 23, 2020), <https://www.washingtonpost.com/opinions/2020/06/23/americas-digital-divide-is-an-emergency/> [<https://perma.cc/9RRV-TSS3>]; Monica Anderson & Madhumitha Kumar, *Digital Divide Persists Even as Lower-income Americans Make Gains in Tech Adoption*, PEW RES. CTR (May 7, 2019), <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/> [<https://perma.cc/XPS3-4ZHJ>]; Andrew Perrin & Erica Turner, *Smartphones Help Blacks, Hispanics Bridge some – but not all – Digital Gaps with Whites*, PEW RES. CTR (Aug. 20, 2019) <https://www.pewresearch.org/fact-tank/2019/08/20/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/> [<https://perma.cc/EC9J-V9M3>].

¹⁸ See *id.*

¹⁹ See, e.g., Monica Anderson & Andrew Perrin, *Disabled Americans Are Less Likely to Use Technology*, PEW RES. CTR (Apr. 7, 2017), <https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/> (“Disabled Americans are about three times as likely as those without a disability to say they never go online and are much less likely to have broadband access at home. Disabled Americans are less likely to use technology”) [<https://perma.cc/C479-CDTL>].

²⁰ Tractor Supply (@Tractor Supply), TWITTER (Oct. 15, 2020, 4:46PM), <https://twitter.com/tractorsupply/status/1316842818258829314?s=11> [<https://perma.cc/WRX2-VLBE>].

²¹ *Hawai'i Free Wi-Fi HotSpots*, HAW. STATE LAW LIBRARY SYS. (last visited Mar. 28, 2021, 9:00AM), <https://histatelawlibrary.com/home/hawaii-free-wi-fi-hotspots/> [<https://perma.cc/8EEQ-X5NB>].

AT&T to offer 11,000 Wi-Fi hotspots.²² In New York, The Legal Aid Society partnered with Columbia Law School to offer a “justice tablet” to those who need to participate in a virtual hearing, but do not have the technology to do so at home. The tablet is pre-loaded with all necessary software, has a data connection, and is mailed to a court user’s home. A similar effort by NCSC and courts in New Jersey, Arizona, and Texas will offer technology to jurors to enable their participation in remote trials.²³

For those who are not impacted by the digital divide, courts have made strides to ensure a good user experience and adherence to this principle. The Salt Lake City Justice Court,²⁴ the Eleventh Judicial Circuit of Florida,²⁵ and the Friends of the Court unit within the Family Division of the Circuit Court in Oakland County, Michigan²⁶ have adopted online scheduling tools to allow litigants to select hearing times that work for them. As a result, anecdotal evidence suggests a decline in no-shows and default judgments. In Idaho, the courts had remote access points installed in the local convention center so that court users without internet access at home could still accomplish tasks like file documents or participate in hearings. Alaska, which had previously embraced telephone hearings, but which did not have a statewide e-filing system for self-represented litigants, simply created an email address and changed rules to accept filings and pleadings electronically. Arizona and New Jersey contracted with private vendors so that court users that need to pay a fee can take a barcode to most any convenience or grocery store, have it scanned by a cashier, and then pay in cash. This assists those who do not have bank accounts and who cannot come to court during working hours or live somewhere that has closed its courts. A last notable example is from Rhode

²² Bob Redell, *San Jose to Provide 11,000 Hotspots to Address Digital Divide During Pandemic*, NBC BAY AREA (Aug. 3, 2020, 9:25AM), <https://www.nbcbayarea.com/news/local/south-bay/san-jose-to-provide-11000-hotspots-to-address-digital-divide-during-pandemic/2337770/?amp> [<https://perma.cc/8TUK-F9QT>].

²³ Per internal NCSC conversations. The program is also mentioned in a few NCSC webinars. *See State Courts, Reestablishing Jury Pools in the COVID-19 Era*, VIMEO (Jun. 5, 2020, 10:43 AM), <https://vimeo.com/426265829> [<https://perma.cc/6HCF-RT42>]; *see also State Courts, Jury Service and Accessing Court Services Remotely in a (Post) Pandemic America: Results From a New National Public Opinion Poll*, VIMEO (Jun. 19, 2020, 11:53 AM), <https://vimeo.com/430765431> [<https://perma.cc/X8LB-UZ2S>].

²⁴ Salt Lake City Justice Court (@saltlakejustice), TWITTER (June 22, 2020, 7:56PM), <https://twitter.com/saltlakejustice/status/1275216046186733568> [<https://perma.cc/63BX-XLWN>].

²⁵ courtMAP, <https://www.jud11.flcourts.org/Programs-and-Services/Online-Services/courtMAP> (last visited Apr. 3, 2021) [<https://perma.cc/WS5C-QG7M>].

²⁶ *Scheduling Directions for Friends of the Court Division of the Oakland County Circuit Court*, SETMORE (last visited Mar. 28, 9:27AM), <https://oaklandfoc.setmore.com/> [<https://perma.cc/UE9N-AEF3>] (follow “Book Appointment” hyperlink; then choose desirable time slot).

Island, where the court opened a virtual clerk's office, where court users can conduct all of the same business they normally would in person at the clerk's desk, except now done virtually using video chat.²⁷

Principle 3: Prioritize court-user driven technology.

Too often when a court uses a new technology tool they fail to think through the process and the desired outcome they hope to achieve for staff and for court users. Taking a decades-old paper process and moving it online may have marginal benefits, but if the effort is not made to take stock of how an entire process could be improved and how technology might assist, the effect is "paving the cow path."

For example, when Texas, Michigan, and many other jurisdictions moved to online trials, they did not just take the previous process and move it to Zoom. Those jurisdictions also eliminated the requirement to have in-person signatures (wet signatures) on documents to allow for electronic signature on documents.²⁸ They similarly relaxed the requirement that certain documents be notarized and witnessed, instead relying on the penalty of perjury and sworn declarations to ensure accuracy.²⁹ They considered how remote interpreting and subtitling features could be integrated into their processes to improve them, and they disseminated training materials and best practices to their judges.³⁰ They also took steps to ensure that people who

²⁷ Press Release, Rhode Island Judiciary, Family Court Opens 'Virtual Clerk's Office to Further Assist Public During Pandemic (Sep. 1, 2020), <https://www.courts.ri.gov/PublicResources/media/PDF/Family%20Court%20virtual%20clerk%20090120%20web.pdf> [<https://perma.cc/AAT2-36LR>].

²⁸ See, e.g., Mich. Exec. Order No. 2020-45 (May 11, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-525891--,00.html [<https://perma.cc/BC4B-E2X7>]; Mich. Exec. Order No. 2020-41 (May 6, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-525178--,00.html [<https://perma.cc/W22M-TQXM>]; Mich. Exec. Order No. 2020-74 (Jun. 20, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-528192--,00.html [<https://perma.cc/6ULT-D35N>].

²⁹ See, e.g., Mich. Exec. Order No. 2020-41 (May 6, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-525178--,00.html [<https://perma.cc/W22M-TQXM>]; Amy Starnes, *Governor Suspends Physical Presence Requirement for Notaries in Certain Matters*, Tex. BAR BLOG (Apr. 9, 2020), <https://blog.texasbar.com/2020/04/articles/coronavirus/governor-suspends-physical-presence-requirement-for-notaries-in-certain-matters/> [<https://perma.cc/BR9G-CGAY>]; Texas Attorney General, https://gov.texas.gov/uploads/files/press/Office_of_the_Attorney_General_Guidance.pdf (last visited Apr. 3, 2021) [<https://perma.cc/R445-P3UQ>].

³⁰ See, e.g., Memorandum from the Mich. Sup. Ct. (Aug. 7, 2020), <https://courts.michigan.gov/News-Events/covid19-resources/Documents/08-07-20UpdatedResources.pdf>, [<https://perma.cc/8Q9X-T35K>]; *Guidance on Conducting Remote Hearings with Self-Represented Litigants*, Mich. Sup. Ct., <https://courts.michigan.gov/News-Events/covid19->

joined a hearing by phone only were not disadvantaged, nor were people who had technical difficulties.³¹ Finally, to ensure that those hearings were open to the public as a normal in-person hearing would be, they published online directories where anyone could watch a live-stream of the proceedings.³²

Principle 4: Embrace flexibility and willingness to adapt.

In Silicon Valley they say, “fail fast.” Courts are generally budget constrained and risk averse, but when it comes to implementing technology, there is value in adopting as agile an approach as possible. Courts should be willing to test, adapt, and listen to users, and if something is not working, change tactics. They should also embrace partnerships with the private sector, with legal aid, and across government and experiment with how those relationships can augment and improve services.

In Utah, the court recognized the value of ODR and the value of this principle. Rather than spending months or years contracting, revising, and preparing a product for launch, they worked fast and nimbly to deliver a minimum viable product.³³ This allowed them to start with something they could build from, and they took user testing and the need to improve and iterate seriously. The University of Arizona recently completed the first exhaustive user testing review of the platform, and the court is now working to build from those lessons learned and further improve the platform.³⁴

Principle 5: Adopt remote-first (or at least remote-friendly) planning, where practicable, to move court processes forward.

resources/COVID19/GuidanceForCourts_SRLremote.pdf (last visited Mar. 28, 2020) [<https://perma.cc/K7W6-EBRQ>]; 245th Family District Court, Harris County, TX, Zoom, or: How I Learned to Stop Worrying and Have Remote Hearings, YOUTUBE (Apr. 8, 2020), <https://www.youtube.com/watch?v=Cp7UeW-kUts> [<https://perma.cc/Z8XV-BQ4B>].

³¹ See *id.*

³² See, e.g., Texas Courts Live Stream Directions, TEX. JUD. BRANCH, <http://streams.txcourts.gov/> [<https://perma.cc/BY4W-E8SK>] (locate desired case information and then click “Watch” hyperlink); Michigan Courts Virtual Courtroom Directory, MICH. JUDICIARY, https://micourt.courts.michigan.gov/virtualcourtroom_directory/ [<https://perma.cc/7SD6-HSTP>] (fill in either judge name or county information, scroll down to desired case and then click “Watch” hyperlink).

³³ See STACY BUTLER et al., THE UTAH ONLINE DISPUTE RESOLUTION PLATFORM: A USABILITY EVALUATION AND REPORT (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696105 [<https://perma.cc/F9TT-7JW7>].

³⁴ See *id.*; see also Emma Cueto, *Online Court Pilot Gets Low Marks Ahead of Wider Launch*, LAW360 (Sep. 13, 2020, 8:02PM), <https://www.law360.com/articles/1309437/online-court-pilot-gets-low-marks-ahead-of-wider-launch> (regarding the eagerness of the Utah Online Dispute Resolution program to embrace lessons learned and improve its program) [<https://perma.cc/Q8YR-9G6C>].

This pandemic will end and courts will re-open. That does not mean that all court processes need to return to the courthouse. The biggest lesson to be learned from this moment is that there are other, better ways of conducting court business. We will expand upon this in more detail below and have offered many examples of the ways in which courts can offer remote services above, so here we offer a comparison to other industries.

The medical space has been offering remote services for decades. Diagnoses and care are routinely administered over the phone or via video chat, in the physical health (even dental) and mental health spheres. While not every pandemic-related shift to online education has been smooth, many colleges and universities, for example, have been offering online and remote courses for decades as well. The world of business has come to the realization that not every meeting should require costly flights and hotel stays. Americans are comfortable shopping, banking, and buying groceries online. Not all court services should be remote—it will depend on the service and circumstance, but it is not the case that all (or almost all) of the services courts previously required to take place in person must still be confined to the courthouse walls.

IV. MOVING FORWARD, A DEEPER LOOK AT PRINCIPLE 6: “TAKE AN OPEN, DATA-DRIVEN, AND TRANSPARENT APPROACH TO IMPLEMENTING AND MAINTAINING COURT PROCESSES AND SUPPORTING TECHNOLOGIES.”

There will be a loud chorus of voices arguing that courts should “return to the way things were.” For many, that is what is familiar and comfortable, and after months of the uncomfortable and unfamiliar, a return feels safe. The many examples of courts changing to embrace technology and modify processes to provide services can be lasting, but it will require an equally loud and data-supported chorus of voices to ensure that they are so.

The courts have already made many big changes, so now is the time to study and evaluate them. Data must be brought to bear that show that those fundamental principles of the court were not degraded by using technology. Evidence must be produced that verifies that changes were at worst neutral to court operations, and hopefully show improvements in things like default rates, case processing time, participation rates, compliance rates, and user satisfaction.

Critically, courts cannot let the perfect be the enemy of the good when it comes to evaluation. Yes, long-term and in-depth study by academics and others should be encouraged, but courts have the capacity on their own to do the work necessary to track many of the above-mentioned metrics. So long as courts can look at historical data, isolate data from the pandemic, and establish baselines and metrics moving forward, they can be effective evaluators of their own changes.

Courts must also be good stewards of this data. They should ensure that the technology platforms they use protects both personally identifying information and any reporting or evaluations they undertake. This will require transparency about data security, protections, and ownership between courts and vendors and court patrons. It will also require proper budgeting for ongoing maintenance and upgrades to technology.

Lastly, this work should not be siloed. During the pandemic, NCSC and others have tried to help spread best practices and share innovations. Moving forward, continued collaboration and information sharing remains equally important. As much as possible, software developed for one court and candid assessments of what has worked and not should be shared with others.

V. CONCLUSION

This is an inflection point. Courts can either move forward, embrace the changes they have made, and demonstrate the value and efficacy of those changes, or they can retreat and abandon the embrace of technology and shifts in operations that the pandemic forced upon them. Fortunately, many courts across the country have been at the forefront of this tectonic shift to embrace new ways of operating, working collaboratively with members of the private bar, state access to justice commissions, philanthropy, technologists, other government branches, and many others to drive innovation. It is our view that if courts abide by the Guiding Principles for Post-Pandemic Court Technology, undertake evidence gathering and study, and continue to share best practices and learn from one another, there is no reason that court services must once again be confined to a single place.