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Remote justice in the time of COVID-19 and beyond

Philippe Doyle Gray*

This article surveys the experiences of judicial officers, notably the Honourable Justice Tim Moore and his Honour Judge Gerard Phillips, navigating the new normal of technology in practice — generally and specifically in environmental prosecutions in the L&E Court and workers compensation cases when administering justice in remote hearings. The author has considered caselaw, highlighted legislation, journals, blogs, and government reports, and outlined news ways of working by judicial officers, solicitors and barristers, collating in one place legal principles and discretionary factors when adjudicating remote hearings.

Introduction

The COVID-19 pandemic has demanded astonishing change quickly. No judicial officer would wish to see practitioners, witnesses, or court staff working from their offices, or homes, let alone their bedrooms in pyjamas. But public institutions such as the courts must do all they can to facilitate the continuation of the economy and essential services of government, including the administration of justice.[1] That imperative has demanded an explosive deployment of technology to the day-to-day practice of law in the form of the remote hearing: using videoconferencing software to conduct hearings and so avoid infectious transmission of COVID-19.

The purpose of this article is two-fold: 1. to help judicial officers now, and 2. to help judicial officers plan how to use technology in future.

* The author is a barrister at 8 Wentworth Chambers predominantly practising in civil disputes concerning crimes, fraud, or serious misconduct. Since 2013, he has conducted every appeal, trial, motion, and other court appearance without paper.

1 Adapted from *Capic v Ford Motor Company of Australia Ltd (Adjournment)* [2020] FCA 486 per Perram J at [5].

FEATURES

REGULARS

Remote hearings: television is not radio with pictures

Before March 2020, using videoconferencing in court hearings was rare. Since then, judicial officers have routinely employed videoconferencing to resolve real disputes between real persons — with real consequences — in what were initially called "virtual hearings". We are all discovering these hearings differ from in-person courtroom hearings in significant ways. Videoconferencing, much less telephone attendance, fails to capture the full sensory experience of courthouse architecture, wigs, gowns, uniforms, and all the other factors imparting the solemnity of the occasion. Neighbour's renovations, children, and pets sometimes make it worse. Clients, journalists, and others who might usually sit in the public gallery at the far back now have a close-up of everyone's face all the time: the judge, counsel, solicitors, clients, the accused, and the witness, exposing every wrinkle, yawn, and smile. Video streams displaying only those speaking may make other participants, especially the non-lawyers, feel invisible and ignored.[2] Gone is passing the handwritten note. Gone too is standing up at the Bar table to get the judge's attention. Television is not radio with pictures.

Laser pointers and USB drives: the Honourable Justice Tim Moore

Established on 1 September 1980, the Land and Environment Court of NSW is the first specialist environmental superior court in the world. The court expressly commits itself to exercise its powers and conduct operations 1. to maintain processes that are consistently transparent, timely, and certain, and 2. to maintain accountability in its conduct and its use of public resources.[3]

For several years, Justice Moore, appointed a judge in 2016, presided over hearings, sculpting, embracing, and experimenting with various technologies. By 2017, the court was prepared to launch a paperless trial pilot project. The technology used is simple and inexpensive, comprising a data projector connected to a courtroom computer. The operation of the computer and projection of data is undertaken by the trial judge's tipstaff. The paperless trials have been conducted with all materials (court book and tender bundle, particularly) being tendered on a USB drive. During trial, material is projected on the courtroom wall with the judge and trial counsel having laser pointers to identify different elements of a document, plan, or air photo under consideration. The courtroom computer is connected to the departmental network, meaning that, besides documents tendered electronically, statutory instruments on the NSW legislation website, and cases on NSW Caselaw and other electronic sources can also be projected on the wall.[4]

The first two pilot trials, a 12-day trial, and a 4-day trial, together demonstrated two principal benefits:

1. eliminating vast amounts of photocopying (over 100,000 pages), and
2. enhancing access to justice and open justice.

Eliminating photocopying brought attendant savings, such as transport and storage, professional time, and support staff time. It was estimated that change alone reduced the parties' legal costs by over $200,000. Changing how the trial judge administered justice allowed the presiding judge, counsel, instructing solicitors, clients — whose land had been acquired — expert witnesses, and members of the public seated in the gallery, to see and hear the documentary evidence, legislation, and case law being viewed, considered, and discussed. Justice Moore continued the experiment in chambers, accessing all documents in electronic form as part of preparing reasons for judgment. No additional time was taken in conducting the two trials this way. By the end of 2017, even though the pilot had not finished and more trials were scheduled, such was the success that the court's general intention was to move to a paperless trial model when matters were of five or more days' duration.[5] It has since gone further.

To make this succeed required tolerance, time, tea, and toast. "I quickly understood how it's supposed to work. Counsel have to be partners, not conscripts" said Justice Moore, who learned to invite counsel for a light breakfast in chambers and an induction. He explained to counsel not familiar with technology it was important that advocates became familiar because the hearings would then flow smoothly from their start, and this would be useful to the court. Counsel, especially senior counsel, were not themselves forced to become familiar with the technology, but they were forced to be responsible for its proper use. Justice Moore explained that managing the paperless flow of information was the responsibility of his tipstaff, so he could concentrate on adjudicating. Similarly, senior counsel could rely on their juniors to manage the technology so senior counsel could concentrate on advocacy. But, Justice Moore emphasised, there was a procedure to be followed from which there was not to be departure.

After breakfast, it was time for a tour of the courtroom which had been setup as if for trial. As the tipstaff roamed about the room playing the part of the different characters, counsel could walk around and see from several perspectives what was intended while Justice Moore answered questions. "It's in my interest to do this," explained Justice Moore. Besides the benefits already mentioned, "my tipstaff intellectually engaged at a deeper level and so performed better when helping to find a document stating XYZ or the portion of transcript when counsel submitted on PQR." His favourite part? "Laser pointers. I handed them out to counsel, giving

2 P Magrath, "Remote but transparent? Open justice under the lockdown", *The Lawyer*, 17 April 2020, at www.thelawyer.com/remote-but-transparent-open-justice-under-the-lockdown, accessed 5/8/2020.

3 At www.lec.justice.nsw.gov.au/Pages/about/about.aspx, accessed 30/7/ 2020.

4 Adapted from "Briefing note: paperless trial pilots in the Land and Environment Court", 2 November 2017, at www.lec.justice.nsw.gov.au/Documents/Announcements/Paperless%20trial%20briefing.pdf, accessed 5/8/2020.

5 ibid.

each a different colour. Nobody was allowed to use my favourite colour — that was reserved for me".

By 15 March 2019, the pilot finished and, after evaluation, a new Practice Note was promulgated providing for hearings conducted on a paperless basis by default.[6] At the second directions hearing, parties must discuss with the list judge the appropriateness of conducting a paperless hearing. The judge must still decide whether the hearing proceeds as paper-based or paperless, but the starting point is paperless.[7]

When COVID-19 health measures required a move to remote hearings the transition was easy. "The Court works in a specialist jurisdiction with a small pool of solicitors and barristers who regularly appear, and, by March 2020, everyone was familiar with the paperless trial" said Justice Moore. The only significant change was "using videoconferencing software *Microsoft Teams* instead of the courtroom projector".

After the pandemic ends, how can you use technology to enhance the proper administration of justice in future?

"Counsel should be physically present in court with me. Elderly or infirm eyewitnesses, and witnesses residing in far-western NSW, may be able to give oral evidence remotely. Otherwise, it is likely that most witnesses in some cases will be present in-person but other witnesses in other cases may be connecting remotely, but, usually, oral evidence will likely be given in court. A fast Internet connection to another courthouse provides a reliable videoconference link to the witness box, and delivery of paper copies of documents on which the witness will be asked questions can be delivered to the registry ahead of time. The exception is criminal trials, which should be in-person."

Portals and partnerships: his Honour Judge Gerard Phillips

The Workers Compensation Commission resolves personal injury disputes between workers, employers, and insurers across NSW.[8] Judge Gerard Phillips was appointed to the District Court bench and commenced his term as President of the Commission from 23 January 2019.

Judge Phillips first explained how he eliminated paper. "Last year we phased out all paper; instead we have an online portal. From 1 January 2020 we were no longer accepting paper. You file your material on the online portal. The moment it's filed on the portal, the other side has access to it, and so do our members. The barristers are briefed by being granted access through the portal. Big documents are not a problem: with the portal it's not like if I try and email a big document which your server may not be able to contend with."

When COVID-19 health measures required a move to remote hearings, how was the transition?

"Let me just talk about numbers. We are disposing of exactly the same number of cases. We have not skipped a beat. I closed the Commission for in-person hearings on 23 March 2020 and the whole Commission has been working remotely ever since, including registry staff working from home. We used to print out documents for those of our members who preferred to work with paper, but that is not now possible. In March 2020, we printed about 500,000 sheets of paper, and in April 2020 we printed about 300. [That is not a typographical error.] I used to be at a big law firm; the take-up of remote working has never been great. If there is one thing we have proven here is that it can work. Vladimir Lenin said 'There are decades where nothing happens and then there are weeks where decades happen'. We are living through exactly that circumstance, and it is really interesting how the courts can 1. contend with the virus, and 2. make enhanced use of technology. I think if this goes for another 6 or 12 months, the manner in which cases are being dealt with will be completely different to what it is now."

In terms of solemnity of the occasion, what differences are there between in-person hearings and remote hearings?

"If you had an unrepresented litigant, I don't have a view whether it's fairer for them to appear in person or by video link. If people are very fortunate, then they might only go to court once, or twice, or not at all, throughout their lives, but representing yourself in court without a lawyer is a bit intimidating. I wonder whether a hearing on a remote platform like this lessens or heightens the advantage of one party being represented, particularly if the representative is skilled in remote hearings. I haven't reached a decision on that yet because I can see arguments both ways."

Can a hearing by videoconference be as fair as a hearing in-person?

"I think that's probably the hardest thing to deal with here. It is the judicial officer's job to ensure a fair hearing so that's the sacred duty one has and that's it. Look, there are very few in-person bail hearings. They're done by video. Some people still come into bail courts but a lot of people … have their bail hearing on video … Personally, I would be very uneasy if there were some lawyers in court and other lawyers not in court. You run the risk there would be a fear by the litigants who are not in court that there is something happening which they cannot see. Even though no judge would allow that to happen, I think that would be a fear. At the end of the day you want the litigants to feel that they've been heard, had a fair hearing, and that everyone's been treated equally."

6 Practice Note Class 3 Compensation Claims, 15 March 2019, at www.lec.justice.nsw.gov.au/Documents/class-3-compensationclaims.pdf, accessed 5/8/2020.

7 cf Uniform Civil Procedure Rules 2005, Pt 51.25 and Practice Note SC CA 1 paras 18–23, which require paper by default with parties only "encouraged" to supply an electronic version.

8 At www.wcc.nsw.gov.au/about-us, accessed 5/8/2020. The Commission will soon be renamed the Personal Injury Commission: *Personal Injury Commission Act* 2020, assented to 11 August 2020 (partly commenced, LW 14/8/2020).

After the pandemic ends, how can you use technology to enhance the proper administration of justice in future?

"When you think of the physical court space here, we have 14 in-person hearing rooms, but I've got 25 members' chambers, and so I've got 25 remote hearing rooms. I would envisage that in 12 months' time our lists clerk could be listing 10 in-person hearings at 10am on Monday morning and another 10 remote hearings. If the applicant is from, say Wagga Wagga, you could have that person represented by lawyers online from their solicitor's office in Wagga Wagga, with the counsel in Sydney conducting the hearing online or in-person. Directions hearings, mediations, settlement conferences, and any interlocutory matter could absolutely be heard by video. You don't need to sit for five hours waiting for your 10 minute matter to be heard anymore."

How will you address the problem of the digital divide?

Service NSW is a NSW Government executive agency that provides a one-stop access to government services via online, phone, or in-person at its service centres. "Service NSW has about 160 service centres all around the State with a room which is secure, closed, pretty soundproof, with a computer screen in it. A person could use [their local service centre] to participate in their hearing, from somewhere like Peak Hill, Bega, or Dubbo, with their solicitor and barrister being in Sydney. They could be on the screen hours before the settlement conference starts, or the hearing starts, and then conduct a hearing."

You have the profession to deal with. How are you going to manage the change?

"We will have to provide training in technology for the profession. I completely get it: if I'm saying to someone who has been in practice 30 or 40 years 'you've got to do it this way and it does involve technical skills' well I think it is beholden on us, the Commission, to have the roadshows, to have the training modules, even have some online training modules so that people can become skilled, so they actually develop that confidence. Because with a professional, there's always the fear that 'I will do it poorly', or 'I might fail at it', or 'I might look like I am failing at it'. If it takes a little bit longer that's fine, because we've got to bring everybody along this journey. I think the training of the profession will be the key."

Will you evaluate change?

"Just today, I was sitting with the Commission executive asking 'what does success look like?' We need to define success before making any changes."

Chess and economics

In his 2010 book review "The chess master and the computer", Russian grandmaster Garry Kasparov records the 10-year history over the period 1994–2004 in which computers playing chess against humans went from too weak to too strong. The following year 2005 saw the birth of "freestyle" chess in which anyone could compete in teams of players and computers. Lured by the substantial prize money, several groups of strong grandmasters working with several computers simultaneously entered the competition. At first, the results seemed predictable. The teams of human plus machine dominated even the strongest computers. The chess-specific supercomputer Hydra was no match for a strong human player using a relatively weak laptop. Human strategic guidance combined with the tactical acuity of a computer was overwhelming. The surprise came when the event ended. The winner was revealed to be not a grandmaster with a state-of-the-art PC but a pair of amateur American chess players using three computers simultaneously. Their skill at manipulating and coaching their computers to look very deeply into positions effectively counteracted the superior chess understanding of their grandmaster opponents and the greater computational power of other participants. *Weak human + machine + better process* was superior to a strong computer alone and, more remarkably, superior to a *strong human + machine + inferior process*.[9]

The following year in their 2011 book *Race against the machine*, economists Erik Brynjolfsson and Andrew McAfee tell a fascinating story of something one would expect to be exceedingly dull. During the Great Recession of 2007–2009, they investigated an esoteric economic formula known only to economists and ignored by most. It was misbehaving, producing never-seen-before results. They stumbled upon hard economic data suggesting Kasparov's freestyle chess was a specific example of a more general truth. Future prosperity will depend upon humans embracing information and communications technology in that very specific way of *weak human + machine + better process*:[10]

> This pattern is true not only in chess but throughout the economy. In medicine, law, finance, retailing, manufacturing, and even scientific discovery, the key to winning the race is not to compete against machines but to compete with machines … while computers win at routine processing, repetitive arithmetic, and error-free consistency and are quickly getting better at complex communication and pattern matching, they lack intuition and creativity and are lost when asked to work even a little outside a predefined domain. Fortunately, humans are strongest exactly where computers are weak, creating a potentially beautiful partnership.

That *humans* can use *tools* to enhance *performance* is not novel. But information and communications technology (ICT) is, historically speaking, a novelty. ICT is in its infancy. It is not yet clear how humans can or should use ICT. But the evidence is mounting, collated by Brynjolfsson and McAfee — and Justice Moore and Judge Phillips — that some humans are using ICT to enhance performance right now. In those cases, there are three ingredients present: the right person, the right tool, and the right process.

9 G Kasparov, "The chess master and the computer" (2010) 57(2) *The New York Review of Books*.

10 E Brynjolfsson and A McAfee, *Race against the machine: how the digital revolution is accelerating innovation, driving productivity and irreversibly transforming employment and the economy*, Digital Frontier Press, 2011, Kindle version location 811.

Both Justice Moore and Judge Phillips emphasised the right *process* over the *person* or the *tool*, sharing several similarities:

(a) Stop using paper by making the process work *wholly* with electronically stored information. Printing information onto paper then becomes a preference, like writing with an expensive fountain pen or an affordable plastic ballpoint.

(b) Define success in a way which can be measured. After a change is implemented, make measurements. Adjust the process to produce success according to the overriding purpose of s 56 of the *Civil Procedure Act* 2005 to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

(c) Courts, not anyone else, are responsible for setting the future direction of how they administer justice, they are responsible for defining measurable goals to that end, and they are responsible for measuring changes to ensure success.

(d) Judges already understand litigation process. As judicial officers understand the technology, proficiency is added to the process. Three key matters to grasp are 1. how much does the technology cost, 2. how does its use contribute to success of the process, and 3. how to use the technology and demonstrate it contributes to success.

(e) Courts are responsible for helping the profession adapt to change. A failure to succeed, because of the profession's failure to adapt, is the failure of the court.

Material considerations when assessing fairness of a remote hearing: some useful authorities

Culled from several dozen reports, this list of 14 post-pandemic authorities from around Australia strike me as the most persuasive reasons for judgment covering the material considerations judicially considered so far in light of the pandemic:

1. *R v Macdonald; R v Edward Obeid; R v Moses Obeid* (No 11) [2020] NSWSC 382
2. *Capic v Ford Motor Company of Australia Ltd* (Adjournment) [2020] FCA 486
3. *Kahil v R* [2020] NSWCCA 56
4. *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [2020] WASCA 38
5. *Quince v Quince* [2020] NSWSC 326
6. *Australian Securities and Investments Commission v GetSwift Ltd* [2020] FCA 504
7. *Motorola Solutions, Inc. v Hytera Communications Corporation Ltd* (Adjournment) [2020] FCA 539
8. *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 4)* [2020] FCA 614
9. *Sheahan & Lock v Chan & Ors* [2020] SADC 59
10. *Quirk v Construction, Forestry, Maritime, Mining and Energy Union* (Remote Video Conferencing) [2020] FCA 664
11. *Australian Securities and Investments Commission v Wilson* [2020] FCA 873
12. *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd* [2020] NSWSC 732
13. *Tetley v Goldmate Group Pty Ltd* [2020] FCA 913
14. *Rooney v AGL Energy Ltd (No 2)* [2020] FCA 942

These 14 authorities are a minuscule body of jurisprudence. While they include decisions by intermediate courts of appeal, none are true appeals. The range of issues is diverse. All decisions but one concern procedure in superior courts. Obvious material considerations have not yet been the subject of judicial attention. None concern vulnerable witnesses or self-represented litigants. They reflect a diversity of opinion, consistent with recent remarks I have heard judges make when speaking extra-judicially. Minds differ. We are all working it out as we go. It is premature to suggest legal principles of general application.

It is unclear how pre-pandemic authorities like *Antov v Bokan (No 2)*[11] are to be reconciled with these post-pandemic decisions. Section 22C of the *Evidence (Audio and Audio Visual Links) Act* 1998 (NSW) makes special provisions related to the COVID-19 pandemic. While s 22C prevails to the extent of any inconsistency with any other provision of the Act, including s 5B(2)[12] — determinative in *Bokan (No 2)* — and while s 22C prevails to the extent of any inconsistency with any rules of court, s 22C(7) imposes a requirement that the technology used has a particular feature: the court must be satisfied that a party can privately communicate with their legal representative. To my knowledge, the videoconference software used during the pandemic omits any such feature. This underscores the importance of judicial officers and the profession understanding how software works and being responsible for the choice of technology used.

Solicitors and counsel working in new ways: ethics

The manner in which solicitors and counsel perform work tasks has changed over the last 20 years even without the coronavirus imperative. Some solicitors and some counsel have not changed at all, some have changed dramatically, and many are somewhere in between. This article is an opportunity to illuminate changes so judicial officers are alive to potential factors material to their assessment of whether a trial is fair. For example, using email is widespread, enabling transmission of comparatively large (when compared to facsimile machines) amounts of written information instantaneously. The extent to which written

11 [2019] NSWCA 250.

12 Section 5B(2) provides that "[t]he court must not make such a direction if — (a) the necessary facilities are unavailable or cannot reasonably be made available, or (b) the court is satisfied that the evidence or submission can more conveniently be given or made in the courtroom or other place at which the court is sitting, or (c) the court is satisfied that the direction would be unfair to any party to the proceeding, or (d) the court is satisfied that the person in respect of whom the direction is sought will not give evidence or make the submission."

information first appears before or during a hearing is a well-known factor material to exercising discretion to grant an adjournment, and the speed at which information can be circulated to all lawyers is a relevant consideration to be afforded some weight.

What standard is to be expected from solicitors and counsel relating to their use of technology?

This is the first question. To continue the previous example, notwithstanding that the use of email is widespread, may a solicitor legitimately conduct their professional practice eschewing email and instead post letters? If so, then the outcome of exercising discretion may differ. And that outcome may have very real consequences at first instance and on appeal. The Uniform Civil Procedure Rules 2005 (NSW) are replete with rules based on an unstated assumption that documents are written on paper. In 2018 when applying those rules to electronically stored information (email being the obvious example), one judge politely observed "the usefulness of rules written by persons unaware of basic computer search engine functions deserves reconsideration".[13] If the courts neglect attention to email, then it must be reasonable for lawyers to neglect email too. But the response to this submission may differ if eschewing email is a question of professional ethics.

A proper consideration of the ethics of using technology in legal practice is beyond the scope of this article, but two propositions are uncontroversial:

1. A lawyer should make reasonable efforts to prevent the inadvertent or unauthorised disclosure of, or unauthorised access to, information relating to the representation of a client, and
2. A lawyer, in maintaining high standards of professional conduct who must act honestly, fairly, skilfully and with competence and diligence should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.

An ethical obligation to use technology does not reside in a vacuum. A barrister (or solicitor) must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances, and, in particular, are (a) proportionately and reasonably incurred, and (b) proportionate and reasonable in amount.[14] Lawyers *should* be driven to perform work tasks differently, resulting in lowering legal costs, in the same way as ethics drive them in other ways meeting the expectations of the public whom they serve. My experience of day-to-day legal practice using technology, especially without paper, has demonstrated very significant cost savings.

Solicitors and counsel working in new ways: documents

Unless one is prepared to risk viral infection by community transmission, clients, solicitors, and barristers must participate in remote hearings physically distant from the court and one another. It has emerged that a vital skill for solicitors and barristers to master is how to instantaneously transmit private information absent the traditional whisper, post-it note, or tug of the gown. The instantaneous transmission of information requires a practical grasp of electronically transmitting electronically stored information (ESI).

In a remote hearing, how do we cope with lots of documents? The present method adopted by many courts is the use of paginated bundles. Sometimes this is a court book, which is a repository of all the documents likely to be referred to with each page bearing a unique page number, usually printed on paper, and delivered to court and the other participants. These paginated documents are then referred to as one would in a traditional courtroom, for example saying to the witness: "Look at the court book and turn to page 74".

But there are several problems with this method. Controlling the witness is impossible: if you must courier a court book to a witness before hearing, then there is nothing stopping the witness from looking through the papers ahead of being examined or cross-examined. I have heard the solution to this is to courier a stack of sealed envelopes and ask the witness to open, on camera, sealed envelope number N, only when asked.[15] But this creates problems of its own.

Creating paginated court books and sealing documents in envelopes takes time and effort. While the time and effort might be justified by doing it once for a final hearing, it is not justified for every stage of litigation, such as when briefing counsel, or drawing affidavits with exhibits. After all, the pagination from brief to court book will change, which will require reconciliation, increasing cost, and introduce opportunities for inadvertent error due to multiple handling. The need for pagination and sealed envelopes arises only because it is implied everything must be in paper. In 2020, why everything must be in paper remains unclear. Another problem is that, above a certain size, court books and documents must be printed and delivered as they cannot be transmitted. For example, you cannot attach a 200MB court book to an email, let alone send it by text message.

But what you can do easily, even by text message, is transmit a string of characters. A uniform resource locator (URL) is a string of characters that unambiguously identifies a particular resource on a computer network. It functions much like the way numbers making up the Dewey Decimal System identify a specific book in a library. For example typing https://tinyurl.com/pillars-of-digital-security in your Internet browser accesses those resources. Doing so is transmitting ESI by sharing URL.

To share large court books (to transmit large amounts of ESI instantaneously) is to assign the electronic version of the court book (the ESI) a URL. This is done by storing

13 *Mosslmani v Nationwide News Pty Ltd (No 2)* [2018] NSWDC 113 per Gibson DCJ at [35].

14 *Legal Profession Uniform Law* (NSW), s 172(1).

15 P Hogan, NSW Crown Prosecutor, and S Hall, Samuel Griffith Chambers, *Remote advocacy: questioning witnesses*, presentation for the NSW Bar Association, 25 June 2020.

the ESI on a computer connected to the Internet (a "file server") in a way which generates a URL. There are many solutions for this, but one way is to take advantage of cloud storage services, unless you are lucky enough to care only about documents filed with the Workers' Compensation Commission.

Solicitors and counsel working in new ways: cloud computing

Cloud computing is the delivery of different services through the Internet. These resources include tools and applications like data storage, servers, databases, networking, and software. As long as an electronic device has access to the Internet, it has access to the data and the software programs to run it. Cloud computing is a popular option for people and businesses for several reasons including cost savings, increased productivity, speed, efficiency, performance, and security.[16]

Cloud storage services are businesses which rent space on their file servers which are connected to the internet to store ESI in a way optimised for sharing URLs.

If a lawyer in private practice is not comfortable using these services, then they can always purchase and operate their own computer acting as a file server in their office. This was previously very popular until it became clear doing it properly required significant time, money, and effort beyond the reach of barristers, solo solicitors, and small law firms. Today, only some medium and large law firms disavow the cloud and rely on a client-server solution.

I have used paid cloud services for years without incident. Provided your computers and the Internet connection to the cloud storage services are properly configured, storing electronic information with a reputable cloud storage service is like storing your money with a reputable bank. There is always the risk the bank might be robbed, but this is a lesser risk than storing cash under your mattress.

Vulnerable witnesses and witness vulnerabilities

Elderly and infirm clients often struggle with anything more complicated than voice calls, text messaging, and transmitting photographs, even if they can afford to own a smartphone. Children and vulnerable clients often struggle to afford a smartphone with sufficient connectivity to transmit significant quantities of ESI demanded by videoconferencing. These variations affect whether a particular person participating in a hearing by videoconference suffers from the limitations of their device or their skill. For example, an elderly client may be apparently watching and hearing a video stream but cannot simultaneously communicate privately with their solicitor. This becomes — literally — a matter of justice being seen to be done if the elderly client is too embarrassed, shy, or reserved to do anything if they lose the video stream and cannot adequately see or hear the proceedings. A digital divide should not deny access to justice.

Without forethought and planning, an apparent saving of cost and effort in travel may be offset by losing images or sound. Similar considerations arise with other devices. It might not be enough to rely on a client's/witness's/litigant's laptop, and it may not be any better supplying them with a spare iPad. Perhaps the best solution is for the client to sit beside their solicitor in the solicitor's office. But what about social distancing?

All witnesses exhibit vulnerabilities. One is the ease by which a witness's testimony may be perverted because of the place from which the witness is participating by videoconference. While prudent to always begin asking a remote witness who else is with them, and what documents or devices are they looking at, this may be insufficient. For example, during a hearing of a claim for personal injury in which a plaintiff is giving evidence by videoconference from their residence, alone in a room, there is a real risk of self-censorship if a plaintiff is, understandably, embarrassed about being overheard by their children when testifying about their psychiatric illness or sexual dysfunction. Without forethought and planning, a convenience may precipitate an injustice.

Solemnity of the occasion is a means to an end, not an end in itself. Extolling the virtues of in-person hearings overlooks remote hearing benefits. Doing so risks clothing matters of personal taste in the robes of legal principle. If you dislike a certain dish, then there is no harm in ordering the chef to make you something different, but if you dislike remote hearings and insist on presiding in-person, then you might be cooking up a recipe for injustice. Let's first think of a child, an adult with a brain injury, a person with a psychiatric disorder, a complainant alleging rape, or a witness to domestic violence. Since at least 1986, the benefits of such persons giving evidence by alternative means has been recognised by the *Criminal Procedure Act* 1986 (NSW). These include Closed Circuit Television (CCTV), alternative seating arrangements, using screens, support persons, the admission of pre-recorded out-of-court representations to police — and evidence given via audio visual link.

And now let's think of doctors, nurses, or a person employed in or engaged by any government agency. Since at least 1998, the benefits of such persons giving evidence by audio visual link (in prescribed circumstances) have been recognised by the *Evidence (Audio and Audio Visual Links) Act* 1998 (NSW). With a government agency witness, giving evidence remotely is the default option.[17]

How to tame the genie out of the bottle?

While there is a significant body of jurisprudence and judicial experience from which general principles may be derived, many of those resources suffer from an obsolete provenance. For example, take s 5B(2)(c) of the *Evidence (Audio and Audio Visual Links) Act* 1998. This provides that a court must not direct that a person give evidence or make a submission by audio visual link if the court is satisfied that the direction would be unfair to any party to the proceeding.

16 Adapted from J Frankenfield, "Cloud computing", *Investopedia*, at www.investopedia.com/terms/c/cloud-computing.asp, accessed 5/8/2020.

17 *Evidence (Audio and Audio Visual Links) Act* 1998 (NSW), s 5BAA(1).

What is omitted is any consideration of the converse: whether *denying* an audio visual link as a means of a person giving evidence or making a submission would be unfair to any party. What about technology's benefits? Perhaps legislation, as well as rules, written by persons unaware of basic computer functions deserves reconsideration.

Scanning the future for benefits and risks, and taking proper note of what you see, is a mark of prudent maturity. It is also a salutary expansion of human imagination. Courts of the near future may well be unlike the recent past. Embracing change may be the most efficient way to facilitate the just, quick and cheap resolution of the real issues in the proceedings.[18]

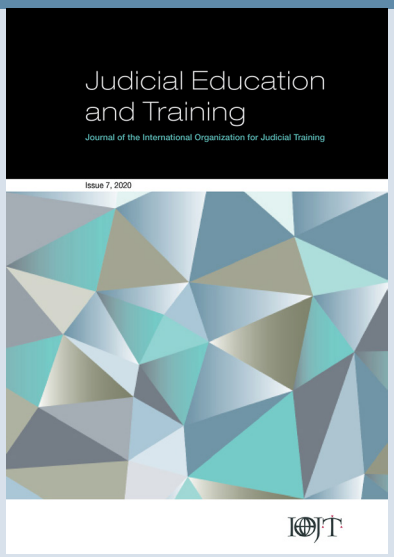
The successes of Justice Moore and Judge Phillips show that making greater day-to-day use of technology, once the pandemic is over, will provide three clear benefits:

1. in a measurable, objective, and defensible way, it will enhance the administration of justice,
2. it will be a more efficient use of public resources while remaining equally effective, and
3. it will substantially reduce financial and environmental costs.

Why would anyone want to put a genie back into the bottle? Isn't it better to be granted three wishes?

18 Adapted from "The next catastrophe. Politicians ignore far-out risks: they need to up their game", *The Economist*, 25 June 2020.

Journal of the International Organization for Judicial Training has been published



The 7th edition of *Judicial Education and Training: the Journal of the International Organization for Judicial Training* has recently been published. The journal reproduces edited versions of key papers presented at the 9th International Conference held in Cape Town, South Africa, 2019, with the theme of "Judicial training: a key to successful transformation of the judiciary."

The IOJT was established in 2002 to promote the rule of law by considering common issues for the training and education of judges, promoting and advancing cooperation among judicial training institutes, and facilitating the international exchange of information. The Joint Editors-in-Chief of the Journal are Mr Ernest Schmatt AM PSM and Dr Rainer Hornung-Jost.

The Journal may be accessed on the IOJT website at www.iojt.org/.

Coronavirus and judicial wellbeing

The Judicial College of Victoria has updated its wellbeing resource for judicial officers. The web-resource is designed to assist judicial officers to understand the anticipated risks to wellbeing through the coronavirus period.

The aim is to cut through the noise and focus on the most pertinent issues, including:

- staying in role
- screen fatigue
- anxiety and worry
- grief
- coming in and out of isolation
- supporting your family
- physical fitness
- self-care, compassion and mindfulness

You may wish to review this carefully curated information as we continue to face uncertainty, difficulty or distress as a broader community. You can access the resource via the JCV website at www.judicialcollege.vic.edu.au/. The JCV website may also be accessed through the JIRS home page by clicking on "Useful Links" then "Judicial Education Organisations".