

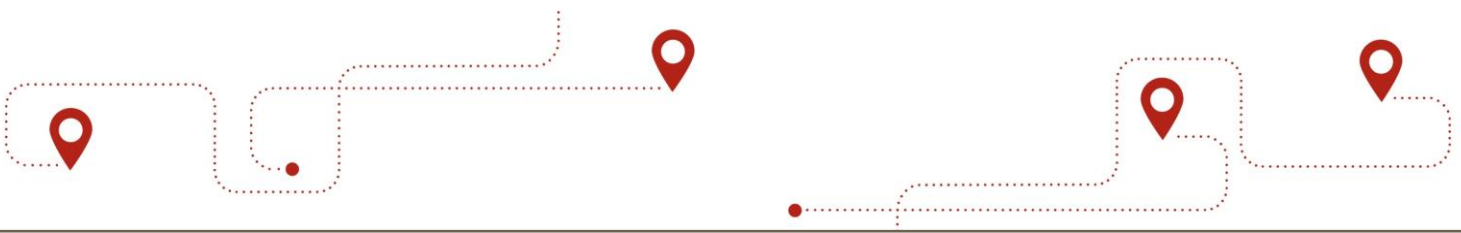
Civil justice reform has had a long tradition in the United States. In the last fifteen years, there has been a significant focus on the cost, delays, complexity, and barriers to access in the American civil justice system, at both the state and federal levels—and a significant effort to address these concerns. We’ve made progress through rule changes, case management, technology innovation, and efforts to change the overall culture, but change has been slow. Committees and task forces often take years to develop recommendations before launching multi-year pilot projects. *Enter the pandemic.* We’ve seen rapid, inspirational change and disruption to norms that have the potential to lead to significant and long-term changes to how our civil justice system functions—and to the ultimate delivery of civil justice in this country.

This is an excellent time to ask a key question: what are the emergent reforms that courts, attorneys, litigants, and others in the justice system have made that have helped our civil justice system become more efficient and less costly while ensuring an accessible, fair, equitable, and accountable justice system? What has worked well during this “nationwide pilot project,” and what has this pandemic-induced experiment highlighted that needs further improvement? How can we leverage innovation at this moment without losing the important values that ensure a trusted and trustworthy system of justice for all?

In August 2021, IAALS held a convening to brainstorm these important questions, focusing specifically on standard and complex litigation in both state and federal courts. The goal was to bring together a group of diverse perspectives and partners to capture the lessons we have learned from the past year, identify continuing challenges, and inspire additional research. We hope the following summary helps to bring focus and clarity to the dialogue and ongoing innovation.

Lessons Learned

Flexibility already exists and is largely built into the rules. When national and state executive orders first declared public health emergencies, courts acted swiftly, using the flexibility and discretion deliberately designed into the rules of civil procedure. Courts also used—and continue to update—administrative, court, or standing orders that apply to all matters of particular case types, often driven by public health data and the need for the continued administration of justice. Courts have also used discretion and shown flexibility in case-specific orders that may go against a standard practice but are permissible under the civil rules. When Congress passed the CARES



Act in early 2020, the Act directed the Judicial Conference and the Supreme Court to consider rules that govern cases in future emergencies within the framework of the Rules Enabling Act.¹ Each of the five Advisory Committees, including the Advisory Committee on Civil Rules, conducted in-depth analyses of their respective rules. After research, discussion, and collaboration across committees, four of the five Advisory Committees drafted proposed amendments that govern rules in federal courts during emergencies.² The Advisory Committee on the Civil Rules propose only two recommendations for rule changes, and only in extraordinary circumstances.³ First, a court may order an alternative means of service of process by a method that is reasonably calculated to give a defendant notice.⁴ Second, a court may order extensions of time to strict deadlines for post-trial motions.⁵ The Committee recognized that inherent flexibility is already intentionally built into civil rules. This flexibility also exists at local and state levels. *We don't need to rewrite the system—we have found the rules include flexibility to run efficiently even in changing circumstances.*

Case management is more critical than ever. Case management is essential for managing through change. The number one recommendation of the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators' (COSCA) [Call to Action in 2016](#)—that courts take responsibility for managing civil cases from the time of filing to disposition—shifts the paradigm that historically puts the pace and process of civil litigation on the attorneys and litigants. *The importance of courts taking responsibility for managing cases has been underscored in the pandemic.* Given continued changing circumstances, active case management is even more important than ever. We have seen the benefits of judges embracing an early understanding of the needs of particular cases and taking a hands-on approach to case management. While the pandemic has cut off in-person communication, judges and their teams

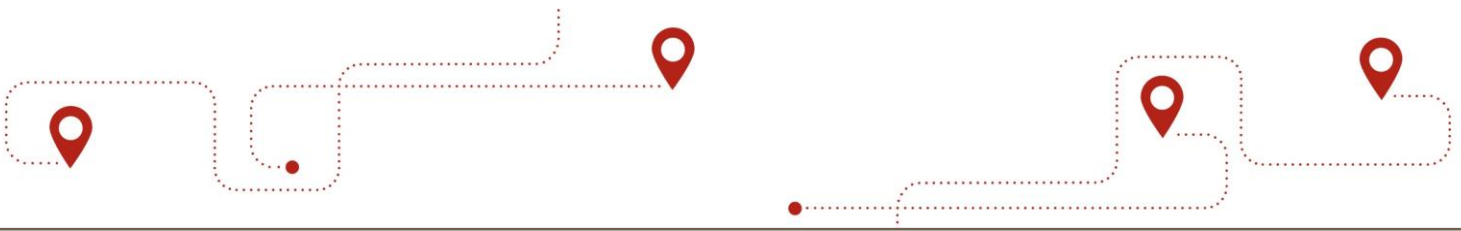
¹ CARES Act, § 15002(b)(6).

² See Committee on Rules of Practice and Procedure of the Judicial Conf. of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules* (Aug. 2021), https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_2021_0.pdf.

³ Proposed amendments to the Federal Rules of Civil Procedure are drafted into a single new Emergency Civil Rule 87. See Advisory Committee on Civil Rules Agenda Book 133 (Apr. 23, 2021), https://www.uscourts.gov/sites/default/files/2021-04-23_civil_agenda_book_4-16-21_with_supplemental_materials_0.pdf.

⁴ Proposed Emergency Rule 87(c)(1) allows for alternative methods of service of process during a declared emergency by a method reasonably calculated to give notice under Rule 4 subdivisions 4(e) (individuals), (h)(1) (corporations), (i) (federal government), and (j)(2) (state or local governments).

⁵ Proposed Rule 87(c)(2) creates Emergency Rule 6(b)(2), allowing courts to extend specific post-judgment motions in district courts.

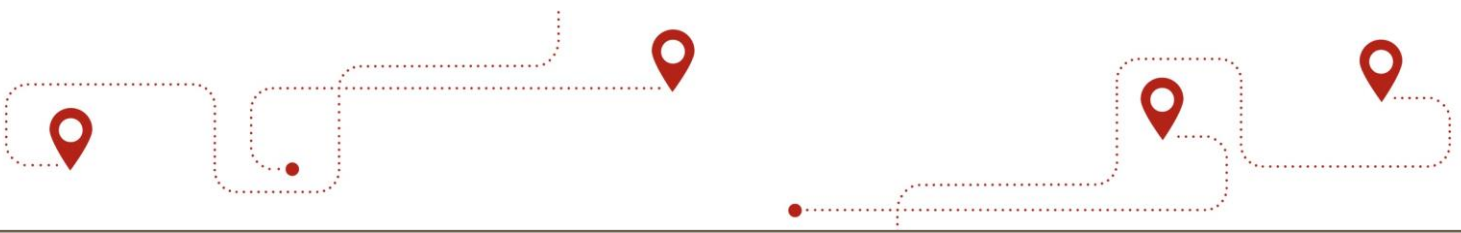


have responded by connecting with parties virtually, and status conferences have become even more important to communicate expectations and discuss issues promptly. IAALS has long advocated for the importance of case management and conferences with the court in particular, with the goal of raising and resolving issues early—whether for discovery or dispositive motions. The pandemic has reinforced the importance of communication, whether it be to convey the latest guidelines and procedures or to discuss and resolve key issues in the case.

Effective communication also lessens confusion on everything from high-level court closures to detailed call-in instructions for virtual court proceedings. IAALS' [Redefining Case Management](#) includes litigants in the civil case management process with the goal of meeting the needs of the user/consumer. The pandemic demonstrates that judges should still drive case management, but in ways that also meet litigants' needs. Courts are finding creative ways to engage litigants so that cases continue to move forward.

Firm trial dates continue to drive behavior and, where possible, courts must hold litigants, attorneys, and clients to firm trial dates. When firm trial dates are not possible, courts can still actively manage cases in other ways, such as setting other key deadlines. That said, such deadlines must be paired with humanity. All who serve in the justice system—judges, attorneys, staff—are human beings. We must all be mindful of the elements that have created delay over the past year, including COVID-19 and natural disasters. *While justice delayed is justice denied, court deadlines must also take into account circumstances beyond the parties' control, particularly at this time.* Courts need to recognize these added challenges, and attorneys and litigants need to speak up where a deadline, schedule, or trial is not feasible.

Much of the pre-trial process works well and can be done more efficiently, remotely. The justice system has expanded its toolkit in the last year. WebEx, Microsoft Teams, and Zoom have been added to the arsenal of tools for the court, the attorneys, and litigants. Remote appearances reduce costs and increase efficiency. In 2021, CCJ and COSCA adopted [Resolution 2](#) in support of remote and virtual hearings. On the federal side, the Administrative Office of the U.S. Courts issued guidance enabling lower federal courts to implement virtual access to most proceedings. Remote technology has been a vital tool that has allowed courts to remain open while keeping court staff and the public safe. Remote proceedings have increased appearance rates at court hearings. Additionally, the public's ability to observe court proceedings may increase public trust and confidence in the courts and allow a better understanding of the court system.



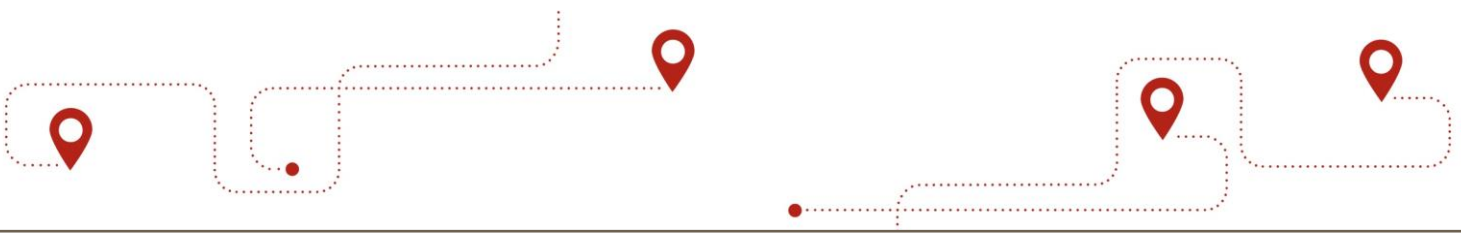
Pre-trial procedures such as status conferences, Rule 16 conferences, pre-trial conferences, and motions hearings may be optimal for remote appearance unless a party objects or when credibility may be an issue. Courts have even developed software and the ability for parties to set motions hearings online. Attorneys should also take these same lessons to their practice to integrate technology into their client interactions, saving costs and making for a better client experience.

While we have seen the benefit of remote hearings, we also have to recognize the challenges of virtual proceedings and acknowledge they may not be appropriate for all circumstances. Challenges arise when litigants do not have reliable internet access. Remote hearings may not be optimal in sensitive matters; privacy is a genuine concern in some instances. Resolution 2 contains important guiding principles for courts to consider when using remote technology going forward. The guiding principles include: ensuring all users can participate in proceedings when litigants have difficulty using technology or do not have access to reliable highspeed internet; being mindful of privacy issues when allowing remote appearances; determining the case types and hearings appropriate for virtual hearings; ensuring meaningful participation for all parties regardless of language barriers, disabilities, socioeconomic status, or whether litigants are self-represented; adjusting schedules to allow litigants time to orient themselves with new technology; and encouraging innovation, evaluation, the establishment of best practices and shared resources, and proper resources to bridge the digital divide.

Remote proceedings outside the courtroom may also require extra consideration from attorneys, litigants, and the courts. For example, attorneys may have reasons not to hold a deposition virtually. Depending on the type of case, the party being deposed, the relationship between opposing counsel, and other circumstances, attorneys may seek to depose a witness or party in person. Considerations include witness credibility, nonverbal cues that could be missed if remote, or concerns of coaching.

While remote processes may be less costly, a change in mindset toward an all-remote approach may be too quick to disregard an appreciation for how much human nature is exposed when in another's physical presence.

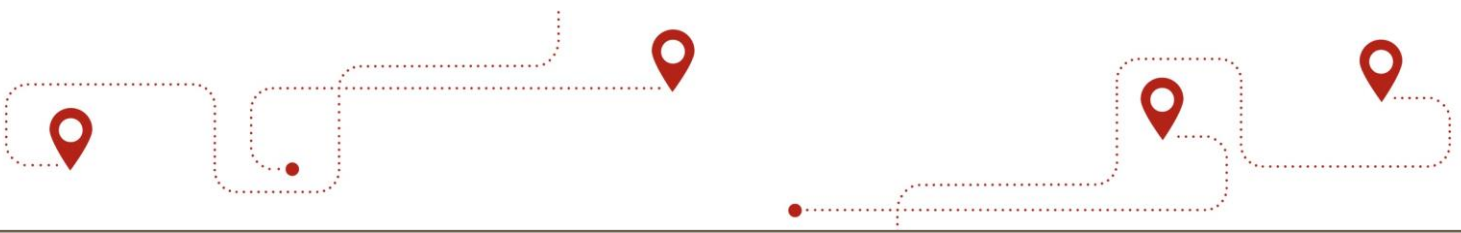
Trials are a separate matter, and one size doesn't fit all. Trials require separate analysis, particularly jury trials. *While there seems to be a recognition that much of the pretrial process can benefit from virtual proceedings, trials are unique and warrant a separate analysis of*



lessons learned. We have learned that some parts of trials can be done remotely—such as jury prequalification—so it may be best to think about the different components of trial rather than trial as a whole. We have also learned that while virtual jury trials are possible, they aren’t always ideal. For trials, considerations have to be balanced related to credibility, type of case, backlog, and the parties’ preferences. Trial attorneys are trained to understand how to read the room and how to deliver information in person, and many attorneys and judges will still prefer in-person trials. This is a place where additional research and focus is needed, and where there are still important lessons to learn.

Cooperation, civility, and professionalism remain paramount. Cooperation among the parties was an important theme in the 2015 amendments to the Federal Rules of Civil Procedure, and the revisions to Rule 1 and the Committee Notes highlighted the importance of cooperation in reducing unnecessary costs. Courts, judges, and attorneys have demonstrated a remarkable ability to adapt to a remote and technology-driven version of our justice system in response to the COVID-19 pandemic. Advancements in technology within the legal system are not new, but this shift has had a dramatic impact on how attorneys practice, bringing with it fewer opportunities to have the face-to-face interactions that are often critical to cooperation among the parties. In this changing landscape, cooperation has become more important than ever. Dialogue between counsel and engagement with fellow bar members help to maintain accountability, civility, and collegiality in the legal system. While in-person opportunities have decreased, attorneys should look for opportunities to engage by phone or zoom, with opposing counsel and with other attorneys. In addition, when appearing virtually—be it with the court or a fellow attorney—attorneys must maintain professionalism and fidelity to their role as officers of the court. *As we all adapt to great changes in our justice system sped up by the pandemic, it is critical for attorneys to work together for the benefit of their clients and the overall administration of justice.*

Virtual proceedings have made courts more participatory. Remote appearances have removed many barriers for litigants and attorneys. [Arizona Supreme Court’s Post Pandemic Recommendations for the COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup](#) (“Plan B Workgroup”) concludes that allowing parties to appear through virtual platforms has significantly increased appearance rates. Litigants have the ability to appear without having to take off time from work or drive to a particular location. Some of the initial jury information can also be performed virtually, which saves time. We have also seen more diverse jury pools with virtual trials. Courts have noticed a higher “watch rate” for virtual events,

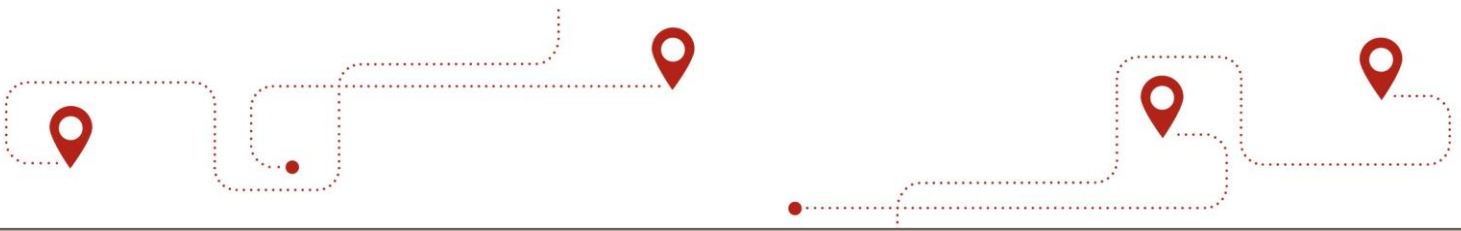


like oral arguments. Courts are now seeing lower failure to appear rates as well. The pandemic has created a unique opportunity for more participation for new attorneys in remote virtual proceedings because many of the cost barriers have been removed. This has allowed young attorneys to be in the virtual room, and to have more opportunities for early engagement and experience. However, all present must be fully engaged at the same time when virtual; otherwise, this creates additional delay.

The courtroom still matters. There are times when being together in person is critical, whether to “read the room,” for collaboration, or “meeting of the minds.” Certain types of proceedings require in-person court attendance. There are varied opinions on this, and this is an area where further consensus can be developed, although one size doesn’t fit all even within certain types of proceedings. Judges and attorneys have missed the traditional courtroom customs, the level of formality, and the feelings of responsibility they have when present in a physical courthouse. The counterbalance is that many litigants find the environment intimidating, time-consuming, or have conflicts that create barriers to in-person attendance at the courthouse. The requirement to attend in person drives down appearance rates—there is something to learn from this. However, the loss of spontaneous interactions that attorneys usually had to meet in the hall—which leads to resolving underlying issues that complicate cases or prolong them—don’t naturally exist in a remote environment. *We should remain alert to circumstances where there is a real need for spontaneous exchange and figure out ways to have those conversations.*

The quality of technology also matters, as does security. When we rely on technology to this high of a degree, the technology needs to work. Network outages, dropped Zoom conferences, and connectivity issues have, and will, continue to happen. Some courts have developed best practices for technology. *Until courts are given the proper infrastructure, equipment, manpower, and training, all parties and courts should have a backup plan.* This could be as simple as picking up the phone for a phone conference. Security is also critical, and it becomes even more critical as more is done online.

Not all courts, attorneys, or litigants have the same resources and abilities. Court resources can vary even within a state or local jurisdiction. However, courts that adopted technology prior to the pandemic are in a much better place to adjust to the pandemic. The same is true for attorneys. Innovation helps lessen the impacts of future challenges that we cannot predict—but that at this point we should anticipate.



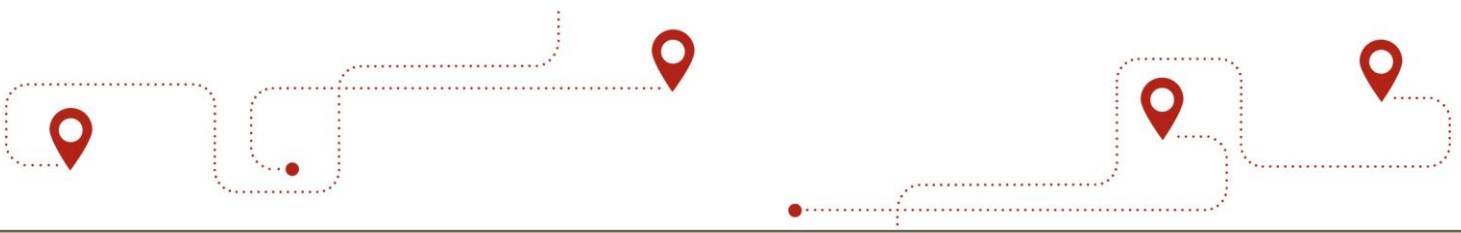
Upcoming Challenges

We must continue to focus on change management and devote time and energy to it. We are still in the midst of the pandemic and will continue to experience challenges that we have not yet fully tackled. *Now is not the time to assume we have reached the other side, but to recognize we are still in the midst of innovation, growth, and learning. We have a unique opportunity to study each challenge and to become more resilient in the face of continued change.*

The hybrid world is the hardest. Some changes in behavior are required in an all-virtual world. Managing different views will be more challenging as judges and attorneys navigate more choices, and differences of opinions between the parties regarding in-person versus remote appearances. Hybrid proceedings may be the most difficult issue to tackle. As health restrictions are lifted, and courthouses open again, there will be matters where parties appear both remotely and in person. Unforeseen circumstances may require that individuals appear remotely (positive COVID-19 test), while others appear in person. The lessons learned from 100% virtual hearings do not all translate to the hybrid world—we need to recognize the new challenges presented and innovate for these proceedings just as we have done so for the past year. *Often, the key to the unpredictable is communication.* Ideally, all counsel, courts, and litigants will be in continuous communication so that, even when disruption happens, all parties and the courts can quickly adapt.

Our future: backlogs, shadow cases, and the unknown. The impacts of the pandemic will continue for many years to come, as the justice system deals with the backlog of trials and the increase in certain cases as a result of the impacts of the pandemic on people's lives and businesses. Given that filings have been lower in the pandemic, it is also possible that there are “shadow” cases that have yet to be filed, and that may result in a post-pandemic surge of cases in the court system. These impacts will be felt by the courts, attorneys, and the litigants who are seeking justice in our system. Where we can anticipate and make adjustments in advance, such as implementing reforms in debt collection cases, we should do so now. *We have more data than ever before on filings data in our courts, and we should utilize this data to track changes in the system and be responsive to changing circumstances to decrease the impact of cost and delays on everyone in the system.*

Courts need resources to address these challenges. Not all courts have the same resources and capabilities. Court resources vary even within state or local jurisdictions. In 2021, CCJ and



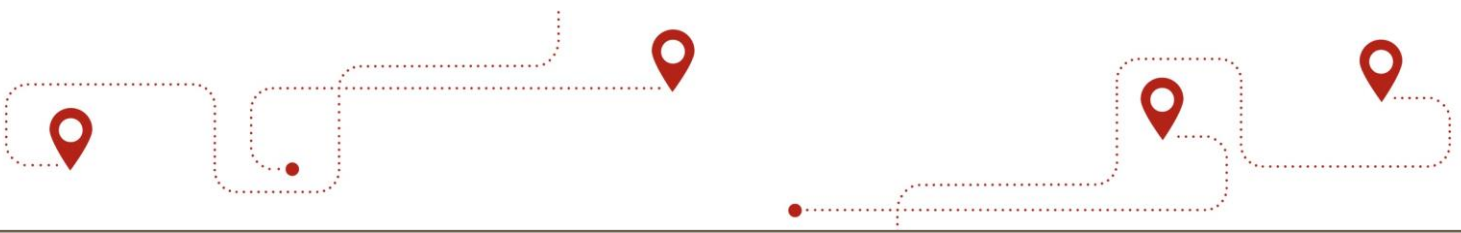
COSCA adopted [Resolution 6](#), recognizing that state courts are essential in emergencies. State court leadership should be involved in emergency management decisions, and judicial personnel must be recognized as valuable and treated as first responders. Federal and state emergency relief funds should be earmarked for courts to protect personnel and safeguard judicial facilities. In addition to technology, we also need to invest in training—including training on changing technology and changes to procedures. *We also have to recognize that people are our greatest resource in the courts, as is their health—both physical and mental.*

Attorneys may be taking into consideration filing cases in courts that have adapted and learned new technology. They may opt to file matters where courts and judges have adapted and use technology well and in the right circumstances. *These market forces are one more reason for policy makers to ensure that our courts have the resources they need to adapt and innovate.*

Need for Continued Dialogue, Research, and Learning

Around the country, task forces, committees, individual judges and attorneys, and numerous other stakeholders are engaged in this process of determining lessons learned and recommendations for what changes should be continued. We urge this dialogue to continue, as our justice system has not fully processed the lessons learned or the innovations needed.

A key piece of this analysis must be further research. At IAALS, we believe in the importance of evidence based-reform that support what works for improving the justice system. The challenge—particularly in a pandemic—is that research takes time. Courts had to respond to the crisis quickly, putting in place changes without long-term study or research. We have seen the value of innovation in this moment, and we should continue to encourage an agile approach to change management. We should bolster these efforts with data wherever that is possible. And we need to identify the places where it is essential to slow down and conduct research, particularly where key system values are at stake such as due process. Research into jury trials and virtual versus in-person presence (including concerns of attention span, credibility determinations, and witness interference and misconduct) are key areas for focus. Research will also be helpful to understand the trends resulting from the pandemic, including potential shifts to bench trials, alternate dispute resolution, and changes in caseloads.



We now find ourselves in 2021 in a new world, where our justice system has adapted in a time of crisis. We need to continue to think outside the box and innovate in this moment. We also need to make sure we take time to pause and reflect so that lessons learned can be embedded into our system going forward.

IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system.

This issue paper is from IAALS' Paths to Justice Summit Series, comprised of multiple invite-only virtual convenings and public webinars—and corresponding issue papers—focused on the unique challenges facing our justice system in this time. Themes include the paths of the pandemic, the paths to access, and the paths to racial justice that our system must walk. Our goal is to connect with other stakeholders tackling these issues, foster conversations among stakeholders and across systems, and move the conversation—and innovation—forward.

Thank you to the attendees of IAALS' August 2021 convening on this topic who generously gave of their time and expertise to brainstorm around these important questions.

For more on the Paths to Justice Summit Series, including additional issue papers as they are published, please visit <https://iaals.du.edu/paths-justice-summit-series>

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