

Guiding Principles for Post-Pandemic Court Technology

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Each year more than 83 million cases are filed in the nation's courts. Prior to the COVID-19 pandemic, in almost all cases, tens of millions of court users had no choice about whether to visit a courthouse to resolve their case; they were required to appear in person. The pandemic forced state courts to figure out how to maintain access to justice while keeping court users, the public, and court employees safe. Courts improvised in-the-moment solutions built upon existing continuity plans and have shown remarkable creativity, resourcefulness, and willingness to embrace new technologies. Over the last 120 days, courts have shared ideas, innovations, and problem solving across jurisdictions and should be commended for their commitment to keeping the legal system running.

This national emergency led state courts to embrace online platforms like never before. To varying degrees before the pandemic, courts had been using online processes like electronic filing, online case management, video- and teleconference hearings, online payment platforms, text message notifications, and Online Dispute Resolution (ODR). These technologies acted as gateways to modernization that this pandemic has accelerated. As a direct result of the pandemic, courts have improved their business processes and increased access for court users by deploying remote services to conduct essential functions and provide greater flexibility for court users and staff alike. While some of these solutions have been tested and proven for years, the disruptive pandemic expedited the courts' use of them and resistance to change.

With all of the advancements, courts should not just rest on the accomplishments of the past quarter but should view this moment as an extraordinary opportunity to deliver better justice. Courts have often felt insulated from the pressures of the private marketplace that has forced many businesses to adapt to new technology, but court users are demanding advancements and choosing to take their disputes elsewhere. To better serve court users, we must modify decades-old court procedures put in place before laptops, email, text messages, or even the Internet – many times even the mechanical typewriter. Courts now have a unique opportunity to leverage creative thinking, seize on an emergency-created receptivity to change, and adopt technology to create long-term and much-needed improvements.

The COVID-19 pandemic is not the disruption courts wanted, but it is the disruption that courts needed: to re-imagine and embrace new ways of operating; and to transform courts into a more accessible, transparent, efficient, and user-friendly branch of government. Institutional inertia should not end this transformation once the pandemic passes. The process of developing new business processes and technologies to better meet the

needs of court users and staff should continue, and courts must be willing to adjust as necessary in response to user input and experience. This moment in history marks a unique opportunity to create long-term and much-needed change for state courts.

Technology is not a panacea. It does not and should not replace the fundamentally human character of justice. However, it provides a unique opportunity for courts to ensure that all parties to a dispute—regardless of race, ethnicity, gender, English proficiency, disability, socio-economic status or whether they are self-represented—have the opportunity to meaningfully participate in court processes and be heard by a neutral third-party who will render a speedy and fair decision.

The technological improvements made recently provide benefits beyond this pandemic, as these same solutions allow state courts to prepare disaster plans to maintain court operations during other challenges, such as power outages, natural disasters, or cybersecurity attacks. As court processes become increasingly intertwined with technology, disaster plans must create redundancies to address situations that may specifically impact mission-critical technologies.

In consideration of all of this, the Post-Pandemic Planning Technology Working Group of the Conference of Chief Justices/Conference of State Court Administrators recommends that state courts consider the following six key principles as they embrace technology:

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

Although adopting new technologies may allow courts to become more efficient, it is imperative that the principles fundamental to the court are preserved when processes go online. Courts should:

- Ensure parties receive proper notice of a case. This includes adapting statutes and court rules to allow for electronic service and other tech-friendly options.
- Include plain language procedural and substantive legal information for all parties at various stages of their cases, so that users can access easy-to-understand and relevant information in real time.
 - This is true within both traditional in-person court processes and in online court processes.
 - Within online systems specifically, court users need access to plain language legal information directly from the court website or court-annexed online dispute resolution (ODR) platform easily and without having to toggle between multiple websites or additional sources of information.
- Design systems that connect litigants to available legal help and, if applicable, develop solutions where attorneys can participate fully with their clients during remote hearings or ODR.

- Live chat for the public, chatbots, telephone hotlines, and other interactive features allow court users to ask questions to self-help court staff and outside attorneys and to locate available legal referrals on court websites, within ODR platforms, and within remote hearing platforms.
- Courts should design systems that allow for multiple users to access case files and legal information; and for online negotiations that specifically accommodate the use of breakout rooms.
- In ODR, facilitate court or staff review of proposed agreements and orders prior to hearings or enforcement.
 - Once reviewed and confirmed by a judicial officer, orders should be fully enforceable.
 - Parties should maintain the same rights to appeal whether a judge resolves the case via ODR or in a traditional court process. For ODR specifically, cases that do not resolve through online systems should proceed through an in-person court process in a timely manner.

2. Focus on the user experience.

Courts should implement technology that is designed to meet the needs of all users and reduce barriers to access. Court users should include not only judges, clerk and court staff, but also attorneys, self-represented litigants, community partners, researchers, and the public. In particular, courts should:

- Ensure that online services are mobile responsive, compatible with the most used browsers, and easy for users to provide the necessary information to advance their cases. In the era of paper, this meant giving court users easy access to a plethora of court forms. Today, as remote services become more available, this means finding easy ways to collect data from users in a way that facilitates the transfer of that data across the court system.
- Look to the impact the innovation would have on underserved communities and ensure their perspectives and needs are effectively addressed in design and functionality. Implement technologies only after carefully considering the benefits, costs and burdens on court users and ways to bridge the digital divide.
- Ensure accessibility.
 - Comply with the Americans with Disabilities Act, applicable state laws and regulations and commonly accepted accessibility guidelines related to accommodations for persons with disabilities. This requires ensuring the compatibility of online platforms with screen-reading software, confirming that web pages can be easily magnified, and using video technology that integrates closed captioning.
 - Reduce barriers for individuals with limited English proficiency by designing systems that allow for online translation and remote live

interpretation. Offer online tools in whatever languages are commonly spoken in the populations being served. Consider creating videos and spoken language assistance to address the needs of people with low literacy, American Sign Language as well as limited English proficiency.

- Make non-protected court case records and documents publicly available online and, where appropriate, enforce confidentiality requirements for information, pleadings, proceedings, negotiations, and communications in online settings.
- Provide alternatives such as telephone or SMS texting services, to ensure information is available to the broadest range of communities, including those without internet access.
- Avoid requiring users to pay additional costs to use technology or remote services and streamline the process for obtaining civil fee waivers.
- Accommodate the payment of fees and fines via electronic, telephone, or community pay point (such as gas stations, grocery, or convenience stores) eliminating the requirement for individuals to come to courthouses to make payments. Be mindful of unbanked court users; and consider payment options from credit card and/or electronic wallet options (like Venmo, Apple Pay, PayPal) as well as cash through community pay points.

3. Prioritize court-user driven technology.

The speedy release and adoption of court technology—with room for modification and iteration—has been especially important during this pandemic, where emergency court closures have forced courts to make rapid technology decisions relating to teleworking software, hardware, and remote hearing platforms. Going forward, courts should make intentional technology decisions, based on the needs of and feedback from a range of diverse court users. While the experiences of other courts can provide valuable insights, it is essential that courts analyze court user and their own business needs in making technology choices that will respond to local problems and maximize return on investment.

The court user experience should drive innovation and the transitioning of traditionally in-person processes online where appropriate. Courts should focus on implementing technology improvements that better serve both court users and staff; and as such, are open to working with public/private entities to achieve desired innovation. Technology vendors should be included collaboratively to ensure a common understanding of the business problems being addressed and user needs.

In addition, courts should collaborate with one another to define needs to achieve efficiencies with vendors. Requiring technology customization for institutional local court cultures is likely to increase the cost of products and processes. Courts should consider collaborating on a local or regional basis to standardize requirements and leverage negotiations with vendors. The tendency to regard each court as a unique business problem permits vendors to charge bespoke prices for what may be across-the-board very similar solutions.

Courts often look to off-the-shelf products developed by private companies. While many can be quickly customized and implemented, some platforms can require costly modifications to align with existing court rules and procedures. Courts in this instance need to make informed choices between standardization, which facilitates the use of off-the-shelf solutions, or customization, which provides tailored products but compromises the hoped-for savings in choosing an off-the-shelf product. Gaps between court needs and vendor offerings have often created challenges. Some may not fully integrate with the court's other systems, resulting in user frustration and duplication of staff effort. In some instances, products have been implemented that are not designed for court users, resulting in low levels of adoption and use. Wherever practicable, state courts should explore platforms that allow for increased flexibility when implementing off-the-shelf software, should explore choices in operational processes, and should simplify the training process. This avoids simply replicating decades-old paper processes with a digital substitution, or "paving the cow path."

To avoid these pitfalls, courts should:

- Clearly define what user challenges and business problem(s) the court is trying to solve before settling on a specific technology.
 - During this analysis, the court should review and adjust business processes to reduce redundancy and eliminate unnecessary steps.
 - Map current processes and determine which elements can be eliminated or combined and/or consider how existing processes can be re-imagined to better meet user needs.
 - Review established court technologies to assess whether they can be re-purposed (to avoid "re-inventing the wheel") and/or whether a new technology will be necessary to solve the business problem at hand.
- During the design phase, test the anticipated new process with real users, with an emphasis on external stakeholders.¹
 - This review can also highlight when and where court users can and should receive legal information within new technologies.
 - Review existing court administrative orders, procedures, rules, and cultural habits to identify those that should be modified or eliminated to conform with more modern, technologically innovative processes.

¹ See, e.g., Hagan, Margaret. "Participatory Design for Innovation in Access to Justice." *Daedalus* 148, no. 1 (2019): 120–27. https://doi.org/10.1162/DAED_a_00544; Aldunate, Guillermo, Margaret Hagan, Jorge Gabriel Jimenez, Janet Martinez, and Jane Wong. "Doing User Research in the Courts on the Future of Access to Justice." *Legal Design and Innovation*. Stanford, CA, July 2018. <https://medium.com/legal-design-and-innovation/doing-user-research-in-the-courts-on-the-future-of-access-to-justice-cb7a75dc3a4b>; Maier, Andrew, and Sarah Eckert. "Introduction to Remote Moderated Usability Testing, Part 2: How." 18F, US General Services Administration agency, November 20, 2018. <https://18f.gsa.gov/2018/11/20/introduction-to-remote-moderated-usability-testing-part-2-how/>; 18F. "18F Methods: A Collection of Tools to Bring Human-Centered Design into Your Project." US General Services Administration, 2020. <https://methods.18f.gov/>; O'Neil, Daniel X, and Smart Chicago Collaborative. *Civic User Testing Group as a New Model for UX Testing, Digital Skills Development, and Community Engagement in Civic Tech*. Chicago: The CUT Group, 2019, <https://irp-cdn.multiscreensite.com/9614ecbe/files/uploaded/TheCUTGroupBook.pdf>; and Hagan, Margaret. "Community Testing 4 Innovations for Traffic Court Justice." *Legal Design and Innovation*, 2017. <https://medium.com/legal-design-and-innovation/community-testing-4-innovations-for-traffic-court-justice-df439cb7bcd9>.

- Issue competitive requests for information or proposals (RFIs/RFPs) that invite and empower vendors to propose solutions that are responsive to court users' needs, rather than promoting specific products. Leverage the creativity and expertise of vendors, without letting vendors determine court technology priorities.
- Explore low-code development and application platforms that allow for a more flexible approach to implementing off-the-shelf software.

4. Embrace flexibility and willingness to adapt.

Cost-effective technology design is achieved by doing three important things:

- Identifying the technology solution only after clearly articulating the business problem that the technology will address, informed by user input and experience;
- Solving the business problem by proposing user-experience based solutions; and
- Testing for success at each step.

This approach, pioneered in Silicon Valley, is an on-going process that shapes technology solutions through multiple versions of a product until the goal is achieved; and even then, technologies can continue to be improved to better meet the changing law and user needs. Agility maximizes return on scarce court technology dollars by spotting and avoiding expensive mistakes early in development. This process also identifies opportunities to streamline and simplify court operations through available technology choices as the design progresses.

Put another way, courts should adopt an agile approach to piloting innovation and technology. This means a willingness to test and adapt, anticipating that changes will be required after the initial launch. It means being willing to try things and fail. It also means being willing to jettison technologies or court processes that do not deliver intended benefits and/or cause unanticipated harms. By identifying small failures in assumptions quickly, expensive mistakes can be avoided, corrections will be easier to make, and overall success is more likely.

- Start with a minimum viable product, pilot test, learn from user experience, and identify needed features. This will allow courts to learn how the technology works in practice, which will inform how to improve future versions and releases; and will likely result in more cost-effective innovation.
- Neither the minimum viable product nor the updates that follow should affect fundamental due process.
- Every version of a technology product under development is examined and reexamined to avoid “scope creep” and assure the product remains oriented to the project goal, including considerations of due process, procedural fairness, transparency, and equal access.
- Be open to public/private partnerships, including with civil legal aid offices, law

school technology innovation labs, charities, community organizations, non-profits, start-up technology ventures, private vendors, and large law firms to accomplish what is required.

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

Courts should implement technology that is deliberately designed to allow court staff, judicial officers, and external court users to advance court processes remotely where appropriate, while respecting the fundamental court processes that will always be best served by live participation. Courts should ensure that the needs of external court users are paramount in all decisions.

In particular, courts should:

- Build supportive infrastructure around remote work practice for court staff, judicial officers, probation and pre-trial officers, self-help staff, court-annexed mediators, and interpreters. This will require courts to promulgate the necessary employee and human resources remote policies, as well as to set the expectation for good home internet connections and quiet working space for court staff to allow for court business to continue remotely.
- Move as many court processes as possible online. This will not only facilitate the resolution of legal issues during the pandemic, but will also reduce the inconvenience and burden of in-person processes including taking time off work, getting childcare, and/or commuting far distances to courthouses once the risk of COVID-19 has passed.
- Allow for remote attendance at hearings (by either telephone or video) and ensure that court staff and court users are provided with the training, plain language instructions, and resources necessary to participate effectively.
- Identify options for those without meaningful and/or limited access to the Internet or equipment required to participate in court processes remotely. To bridge the digital divide, courts should allow participation via telephone or court- or community-based kiosks.

6. Take an open, data-driven, and transparent approach to implementing and maintaining court processes and supporting technologies.

As courts seek to improve their effectiveness through online services, they should collect data to monitor and evaluate new processes and technologies to determine success and address any challenges, while also maintaining appropriate data management protocols. Specifically, courts should:

- User-test technology with the public during development. Ensure the system meets user needs, including accessibility, ease of use, and language.

- Establish baseline metrics from existing processes/systems.
- Collect data at frequent intervals. Monitor the effectiveness of online services as compared to baseline metrics. Ensure collected data helps court leaders accurately assess the technology's impact on the identified business problem and make any necessary adjustments.
- Protect personal identifying information (PII) in the use and reporting of court data.
 - When working with vendors, courts should consider who owns the case, configuration, and usage data; the parameters and timeframes for the transfer or destruction of this data; and restricting vendor and third-party usage of data.
 - Use the RFI/RFP bidding process to specify requirements relating to data collection, legal information and limited English proficiency/disability accessibility.
 - Work to provide transparency while balancing the privacy and safety needs of litigants, witnesses and jurors.
- Evaluate all technology innovations to aid with continuous improvement and, when resources permit, consider working with third-party evaluators to conduct external review.
- Share developed technologies (for free or limited cost, if practicable) and lessons learned from court technology projects with other courts.
- Prepare for costs associated with continuous improvement. Develop and follow through with sustainability and maintenance plans for all technology innovations. Budget anticipated future costs to modify technology due to changes in the law or user needs over time.

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.