
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: AB 1214 **Hearing Date:** June 20, 2023
Author: Maienschein
Version: June 13, 2023
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Courts: remote technology*

HISTORY

Source: SEIU California
California Public Defenders Association

Prior Legislation: AB 199 (Budget) Chapter 57, Stats. 2022
SB 848 (Umberg) failed on concurrence 2022
SB 241 (Umberg) Chapter 214, Stats. 2021

Support: ACLU California Action; AFSCME; California Labor Federation, AFL-CIO;
California School Employees Association; California State Council of Service
Employees International Union (SEIU California); Orange County Employees
Association

Opposition: Judicial Council of California

Assembly Floor Vote: 77 - 0

PURPOSE

The purpose of this bill is to extend the sunset for remote proceedings in a criminal court and to make a number of substantive changes in those provisions.

Existing law provides that in all cases in which the accused is charged with a misdemeanor only, they may appear by counsel only, except in domestic violence or driving under the influence cases. (Penal Code § 977(a)(1))

Existing law provides that, in a misdemeanor, if the accused agrees, the initial court appearance, arraignment, plea, and all other proceedings, except jury and court trials, may be conducted remotely through the use of technology. (Penal Code § 977(a)(1))

Existing law provides that in all cases in which a felony is charged, the accused shall be physically present at the arraignment, at the time of plea, during the preliminary hearing, during the portions of the trial when evidence is taken before the trier of fact, and at the time of imposition of sentence. The accused shall be physically or remotely present at all other proceedings unless they waive their right to be physically or remotely present, with leave of court and with approval of defendant's counsel. (Penal Code § 977(b)(1))

Existing law provides that upon waiver of the right to be physically present by the defendant, criminal proceedings may be conducted through the use of remote technology, except a defendant charged with a felony or misdemeanor shall not appear remotely for a jury trial or court trial and a defendant charged with a felony shall not appear remotely at sentencing, except for post-conviction relief proceedings. (Penal Code § 977(c)(1) (A)(D)(E))

Existing law provides that the court may specifically direct the defendant, either personally or through counsel to be present at a particular felony proceeding or portion thereof. (Penal Code § 977(c)(1)(B))

Existing law provides that if the defendant is represented by counsel, the attorney shall not be required to be physically present with the defendant if remote technology allows for private communication between the defendant and attorney prior to and during the proceedings, unless, upon the request of defense counsel the court allows the appearance without private communication. (Penal Code § 977(c)(1)(C))

Existing law provides that a witness may appear at a misdemeanor or felony criminal proceeding, except for a felony trial, remotely. (Penal Code § 977(c)(1)(F))

Existing law provides that a felony defendant who does not wish to be physically or remotely present for noncritical portions of the trial when no testimonial evidence is taken may make an oral waiver in open court prior to the proceeding, or may submit a written request to the court, which the court may grant in its discretion. (Penal Code § 977(c)(2))

Existing law provides that notwithstanding any other provision, the court may allow a defendant to appear by counsel at trial or any other proceeding, if the court finds that: the defendant is in custody and refusing, without good cause, to appear; the defendant has been informed of their right to be personally present; the defendant has been informed that the trial or other proceeding will go on without them; the defendant has been informed of their right to remain silent; the defendant has been informed their absence will constitute a voluntary waiver of their constitutional rights; and, the defendant has been informed whether or not defense counsel will be present. (Penal Code § 977(d)(1))

Existing law provides that a court may, as appropriate and practicable, allow a prosecuting attorney and defense counsel to participate in a criminal proceeding without being physically present. (Penal Code § 977(e))

Existing law provides that except as provided by law, the court shall require a prosecuting attorney, defense counsel, defendant, or witness to appear in person at a proceeding, if any of the following conditions are present and cannot be resolved in a reasonable amount of time:

- a) The Court does not have the technology necessary to conduct the proceeding remotely.
- b) Although the court has the requisite technology, the quality of the technology or audibility at a proceeding prevents the effective management or resolution of the proceeding.
- c) The quality of the technology or audibility at a proceeding inhibits the court reporter's ability to prepare a transcript of the proceeding.
- d) The quality of the technology or audibility at a proceeding prevents defense counsel from being able to provide effective representation to the defendant.

- e) The quality of the technology or audibility at a proceeding inhibits a court interpreter's ability to provide language access, including the ability to communicate and translate directly the defendant and the court during the proceeding. (Penal Code § 977(f))

Existing law provides that before the court conducts a remote proceeding, the court shall have a process for a defendant, defense counsel, prosecuting attorney, witness, official reporter, court interpreter, or other court personnel to alert the judicial officer of technological or audibility issues that arise during the proceeding. (Penal Code § 977(g)(1))

Existing law provides that the official court reporter shall be physically present in the courtroom when remote proceedings are conducted. (Penal Code § 977(g)(2))

Existing law provides that the provisions allowing remote proceedings in criminal cases shall sunset on January 1, 2024.

This bill extends the sunset until January 1, 2026.

This bill provides that if the accused agrees and the court consents, the accused may appear through remote technology for any noncritical portion of a criminal proceeding when no sworn testimony is taken.

This bill provides that at the request of the accused, and leave of the court the accused may participate by remote technology in the initial court appearance, arraignment, bail hearing, resentencing if defendant is incarcerated, and motion hearings and conferences when no sworn testimony is taken.

This bill provides that a trial court shall not retaliate or threaten to retaliate against an official reporter or official reporter pro tempore who notifies the judicial officer that technology or audibility issues are impeding the creation of the verbatim records of a proceeding that includes participation through remote technology.

This bill adds knowingly, intelligently, and voluntary to the waiver to be signed when a defendant is waiving his or her personal presence.

This bill provides that if the accused is present in court, the prosecution and judicial officer shall also be present in the court room.

This bill provides that when the court conducts a criminal proceeding that will require a court reporter, the reporter shall be physically present in the same room as the judicial officer.

This bill provides that when a court interpreter is used in a criminal proceeding the court interpreter shall be physically in the same room as the judicial officer.

This bill provides that a person who participates remotely in a criminal proceeding shall observe the proper courtroom decorum that would be required if they were physically present.

This bill provides that the court shall not permit appearance by remote technology if any of the following conditions are present:

- The court does not have the technology necessary to conduct the proceeding remotely.

- The quality of the technology or audibility at a proceeding or the length of the proceeding prevents the effective management or resolution of the proceeding.
- The court reporter is unable to capture the verbatim record and certify a transcript of any proceeding that is conducted remotely to the same extent and the same manner as if it were not conducted remotely.
- A confidential remote proceeding has been infiltrated or otherwise interrupted by unauthorized parties.
- The quality of technology or audibility at a proceeding inhibits the accused's ability to understand or participate in the proceeding.
- The quality of technology or audibility at a proceeding inhibits defense counsel from being able to provide effective representation of the accused.
- The quality of the technology or audibility at a proceeding inhibits a court interpreter's ability to provide language access, including the ability to communicate and translate directly with the accused and the court proceeding.

This bill provides that Judicial Council shall adopt minimum standard for the courtroom technology necessary to permit remote participation in criminal proceedings.

This bill provides that Judicial Council shall adopt other rules and standards as are necessary to implement the policies and provisions of the law.

This bill provides that a superior court that uses remote technology for criminal proceeding shall post on its internet website a continuing invitation for interested parties to provide feedback to the superior court on the use of remote technology in criminal proceedings. The written feedback shall be forwarded to Judicial Council quarterly and Judicial Council shall compile the feedback and report it to the Senate and Assembly Public Safety and Judiciary Committees semiannually commencing July 1, 2024.

Existing law permits a witness in criminal case to testify remotely only in specified circumstances: if the court determines the witness is too sick or infirm; in specified circumstances when the witness is disabled; under specified circumstances when the witness is incarcerated. (Penal Code §§ 1340; 1347.5, or 2624)

This bill provides that only when authorized as above may a court permit a witness to testify through the use of remote technology.

COMMENTS

1. Need for This Bill

According to the author:

During the pandemic, we learned when remote is beneficial and when its limitations compromise the integrity of our justice system. The seriousness of criminal proceedings requires we maintain the highest standards of integrity for our justice system. Now that the pandemic is over, we don't have to choose between justice or exposure to the COVID-19 virus. AB 1214 would extend procedures for non-critical portions of criminal proceedings and establish minimum standards for appropriate technology and equipment. It also

preserves the defendants' right to be appear in-person with their lawyer at all stages of proceedings.

2. Remote proceedings in Criminal cases

Prior to COVID-19, with the exception of appearances that could be waived, defendants in criminal cases generally appeared in person, with the option of remote appearances limited to in-custody defendants. The Emergency Rules generally allowed defendants and attorneys to appear remotely in proceedings with the consent of the defendant. Prior to the June 30, 2022, sunset of the Emergency Rules and through the budget process, discussions were had amongst interested parties to continue remote appearances in criminal cases. The Courts, Public Defenders, District Attorneys, Probation, Sheriffs, and various criminal justice groups were supportive of the final version of the legislation. The result was a continuation of remote proceedings with some changes to what had been in place during the Emergency Rules. The new provisions, which are currently in place, provide:

- Misdemeanors: Defendants may appear remotely in all proceedings except trials. Attorneys may appear remotely if the court finds it appropriate and practicable.
- Felonies: Defendants may appear remotely in all proceedings except trials and sentencing, unless the court allows a waiver for non-critical, non-testimonial portions of the trial. Remote proceedings are allowed for post-conviction relief proceedings. Attorneys may appear remotely if the court finds it appropriate and practicable.
- Witnesses: may testify remotely except for felony trials, and only with the consent of both parties and the court.
- Court reporters: must be physically present in a courtroom when remote proceedings occur and cannot be retaliated against for reporting technology and audibility issues.
- Courts must have a process for participants to alert the court of audibility or technology issues before and during a proceeding and shall require a person to appear in person if the issues cannot be resolved.

The statutes authorizing these remote appearances in criminal cases are set to sunset on January 1, 2024

a) Noncritical portions of criminal proceedings

This bill provides in a number of places that remote technology shall not be used in noncritical portions of criminal proceedings when no sworn testimony is taken. Is it always clear that no sworn testimony will be taken, is it possible that in a hearing or motion situation that a judge may seek to put some testimony on the record?

b) Waiver

This bill makes some changes to the waiver of personal presence to include the words knowingly, intelligently and voluntarily in Penal Code §977(b)(2). Existing law also already allows a defendant to waive appearance and just appear by attorney in most misdemeanor cases.

In addition to the waiver for personal appearance above, the bill discusses an oral waiver or written request to the court when an in or out of custody defendant does not wish to be

present for non-critical proceedings in Penal Code § 977 (b) Is this provision all or in part redundant? Or is something else intended here, in which case it should probably be clarified.

c) Reporter and interpreter to be physically present with judge

This bill provides that when a defendant or attorney is appearing using remote technology the court reporter and, when there is an interpreter, the interpreter shall be physically present with the judge. Are there ever times when a court reporter may not be able to be physically present with a judge due to weather or other issues? Are there are times when, possibly due to shortage of interpreters in a specific language, an interpreter will need to be remote to not interfere with a defendant's speedy trial rights?

d) No remote when technology issues

This bill makes it clear that a court should not allow for appearances by remote technology when specific issues exist with the technology in that particular courtroom.

e) Witnesses

This bill would limit the ability of a witness in misdemeanor or felony proceeding to testify by the use of remote technology to those circumstances that already exist in law. Is this too narrow? Is there no circumstance when a defendant may wish to have a witness, maybe an expert witness, testify remotely? Should the bill allow for a broader exception if the defendant agrees or is this never appropriate?

f) Reporting

This bill requires superior courts using remote technology to set up on their website a way for participants to give feedback on the use of remote technology. The courts shall then compile the feedback quarterly and submit it to Judicial Council who will then report it to the Legislature semiannually. Is a semiannual report necessary or would an annual report to the Legislature suffice?

g) Sunset extension

This bill extends the sunset on remote technology until January 1, 2026.

h) Other changes

This bill makes a number of other clarifying changes regarding how and when remote technology can be used in a criminal case.

3. Retaliation

This bill provides that a trial court shall not retaliate or threaten to retaliate against an official reporter who notifies a judicial official that technology or audibility issues are impeding the creation of the verbatim records of a proceeding that include participation through remote technology

4. PPIC report

The Public Policy Institute of California recently released a report on remote proceedings during COVID. Among the findings were the fact that conviction rates decreased and sentencing resulted in less prison sentences under remote hearing procedures during the pandemic. Specifically the reports key takeaways were:

This report chronicles how the COVID-19 pandemic affected the courts in 2020, describes policy responses, and assesses the impact of remote hearing policies on conviction and sentencing outcomes within six months of arrest.

- Pandemic conditions challenged the courts' capacity to resolve cases. An estimated 55,000 criminal cases that would have completed within six months remained unresolved at the end of 2020.
- Courts acted swiftly to adapt to pandemic conditions. Three main strategies included modifying pretrial release to reduce jail populations, permitting remote hearings, and extending case timelines.
- Uneven adoption of policies, coupled with geographic differences in where people live, meant that Black and Latino defendants had greater potential than people of other races to experience pandemic policies.
- Remote hearing policies reinforced pandemic trends for lower conviction rates, but counteracted trends in sentencing. When remote hearing policies were in place, rates of conviction within six months of arrest fell, with outcomes for white, Latino, and Black people driving this result. Misdemeanor convictions were less likely to lead to jail and more likely to receive noncustodial sentences such as probation and money sanctions, mainly for white, Latino, and Black people. Felony convictions were less likely to result in prison and more likely to lead to jail, and outcomes for Black people dominated this result.
- Remote hearing policies contributed to racial differences in criminal case outcomes. Inequity in conviction and jail sentence rates narrowed between white and Latino defendants and between white and Black defendants. By contrast, racial inequity widened in the likelihood of being sentenced to money sanctions and probation.

Arguably, whether a criminal proceeding is conducted virtually or in person should not influence whether a person is convicted or how they are sentenced; yet remote hearing policies have affected both. Before Assembly Bill 199 expires, policymakers will need to determine whether these outcomes are desirable and how to factor them into decisions about whether to allow criminal cases to proceed remotely. (Harris, Heather, PPIC "Public Policymaking and Changed Outcomes in Criminal Courts, April 2023. <https://www.ppic.org/publication/pandemic-policymaking-and-changed-outcomes-in-criminal-courts/>)

5. Related Legislation

There are a number of bills relating to court proceedings relating to remote technology, this bill is most directly related to SB 99 (Umberg) which also deals with remote proceedings in criminal cases. At some point these two bills will likely have to be reconciled. The interested parties

have been in ongoing discussions on all the bill related to remote proceedings and those discussions are expected to continue.

6. Argument in Support

The Service Employees International Union (SEIU) one of the sponsors of this bill supports it stating:

The existing law authorizing criminal remote proceedings was created when courts had no option but to operate remotely to avoid COVID-19 exposure. Now that the pandemic is over, we can apply what we've learned over the last three years to enact procedures that utilize remote technology while maintaining the highest standards for our criminal justice system.

Under existing law, some courts require remote appearances by default. While remote may be more convenient for some court users, the digital divide disproportionately impacts indigent youth, families, and communities of color. Not everyone has a personal computer or space in their homes or elsewhere to safely and privately participate in remote proceedings. A party should not be prejudiced by lack of access or inability to use remote technology effectively.

Additionally, many courts have failed to provide the appropriate equipment for court reporters to participate effectively in remote proceedings because the existing statute includes no minimum technology requirements. Remote proceedings are frequently interrupted by internet disconnections, glitches, microphones, and background noise. These issues all threaten the integrity of verbatim transcripts, and in criminal matters, one word can strip someone's liberty or deny someone justice.

AB 1214 would allow defendants in misdemeanor and felony cases to appear remotely for non-critical proceedings upon their request. To address the issues described above, AB 1214 would also:

- Preserve defendants' rights to appear in person and cross-examine witnesses in person.
- Prohibit remote proceedings if technology or audibility impedes the accused and defense counsel's ability to hear or understand the proceeding.
- Prohibit remote proceedings if a court reporter or court interpreter cannot fulfill their statutory duties.
- Require proceedings where sworn testimony is taken, motions where attorney arguments are expected, and jury and court trials to be held in person
- If a court reporter or court interpreter is assigned, require the judicial officer to be physically present in the same room to ensure effective communication.
- Require the Judicial Council to adopt minimum standards for technology and equipment used to conduct remote proceedings.
- Require courts to solicit feedback on remote proceedings on their websites, and the Judicial Council would compile and submit feedback to the Legislature semiannually.

7. Argument in Opposition

While Judicial Council has some concerns with the bill that they outline in the bill. In general they state:

The inability to appear remotely for a “noncritical portion of a criminal proceeding when no sworn testimony is taken” will restrict—and potentially significantly so—the proceedings at which a defendant may choose the option to appear remotely, and is not a workable concept for the courts. Due to the fluid nature of criminal proceedings, sworn testimony may be introduced during the middle of a remote proceeding where sworn testimony was not originally anticipated, which would require a continuance to another date. Further, the council believes that the elimination of remote witness testimony would disadvantage defendants...

The Judicial Council supports the ultimate goal of AB 1214 to extend authorization for remote criminal proceedings as the council has seen the many benefits of giving individuals the *option* to participate remotely in criminal proceedings. The remote option helps preserve access to justice for many Californians and vulnerable court users when they would otherwise lose time from work, childcare, and other obligations and would incur travel and parking costs for short hearings and appearances. It also preserves equal access to justice and increases the efficiency of court services by continuing to allow courts the flexibility to require in-person court proceedings when it is more appropriate.

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