
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: SB 22 **Hearing Date:** March 21, 2023
Author: Umberg
Version: February 14, 2023
Urgency: Yes **Fiscal:** Yes
Consultant: MK

Subject: *Courts: remote proceedings*

HISTORY

Source: Author

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

Support: California Association of Collaborative Courts; California District Attorneys; Association; Judicial Council; Judicial Council of California; Superior Court of Los Angeles County

Opposition: (all unless amended) AFSCME; California Court Reporters Association; California Labor Federation; California Public Defenders Association; California Public Defenders Association (CPDA); California State Council of Service Employees International Union (seiu California); Communities United for Restorative Youth Justice (CURYJ); Initiate Justice; International Union of Operating Engineers; Orange County Employees Association; Pacific Juvenile Defender Center; SEIU California State Council

PURPOSE

The purpose of this bill is to extend the right of a party to appear remotely and a court to conduct specified conferences, hearings and proceedings in criminal cases and specified juvenile and commitment cases until January 1, 2026.

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 extend the sunset until January 1, 2028.

Existing law provides that a witness may testify in any misdemeanor or felony criminal proceeding, except for felony trial, through the use of remote technology with the written or oral consent of the parties on the record and with the consent of the court. The defendant shall waive the right to have a witness testify in person on the record. (Penal Code § 977.3(a))

Existing law provides that notwithstanding the above, the court may allow a witness to testify through the use of remote technology as otherwise provided by statutes regarding the examination of victims of sexual crimes and conditional examinations of witnesses. (Penal Code §977.3(b))

This bill provides that notwithstanding the above, the court may allow a witness to testify through the use of remote technology as otherwise provided by any law including specified Penal Code Sections and case law.

Existing law provides that these remote proceeding provisions in Penal Code Section 977.3 shall sunset on January 1, 2024. (Penal Code § 977.3 (e))

This bill extends that sunset to January 1, 2028.

Existing law provides that except as otherwise provided, the defendant in a preliminary hearing shall be personally present. (Penal Code § 1043.5(a))

Existing law provides that the absence of the defendant in a preliminary hearing after the hearing has commenced with them physically present, shall not prevent the hearing from continuing hearing in the following circumstances:

- a) In a case where the defendant was removed after being warned by the judge that their disruptive behavior would cause removal and the behavior continued.
- b) Any prosecution for an offense not punishable by death where the defendant is voluntarily absent. (Penal Code § 1043.5(b))

Existing law provides that the above shall not limit the right of a defendant to waive the right to be physically present or to appear through the use of remote proceedings. (Penal Code § 1043.5(d))

Existing law provides that Penal Code Section 1043.5 sunsets on January 1, 2024.

This bill extends that sunset to January 1, 2028.

Existing law allows for remote proceedings in civil cases under specified circumstances and outlines those circumstances. Those provisions sunset on July 1, 2023 (Code of Civil Procedure § 376.75)

This bill provides that a party may appear remotely and the court may conduct conferences, hearings and proceedings through the use of remote technology when a party has provided notice to the court and all parties that it intends to appear remotely in any of the following proceedings:

- a) Juvenile court, delinquency proceedings under Welfare and Institutions Code Sections 61 and 602.
- b) An extension of a juvenile commitment under Welfare and Institutions Code 1800.
- c) A proceeding involving a commitment pursuant to Section 4355 of Title 9 of the California Code of Regulations.
- d) A proceeding related to an intellectually disabled and dangerous commitment.

This bill provides that except as otherwise provided by law, the court may require a party or witness to appear in person at one of the above proceedings if any of the following are present:

- a) The court with jurisdiction over the case does not have the technology necessary to conduct the conference, hearing, or proceeding remotely.
- b) Although the court has the requisite technology, the quality of the technology or audibility at a conference, hearing, or proceeding prevents the effective management or resolution of the conference, hearing, or proceeding.
- c) The court determines on a hearing-by-hearing basis that an in-person appearance would materially assist in the determination of the conference, hearing, or proceeding or in the effective management or resolution of the particular case.
- d) The quality of the technology or audibility at a conference, hearing, or proceeding inhibits the court reporter's ability to accurately prepare a transcript .
- e) The quality of the technology or audibility at a conference, hearing or proceeding inhibits an attorney from being able to provide effective representation to the attorney's client.
- f) The quality of the technology or audibility at a conference, hearing, or proceeding inhibits a court interpreter's ability to provide language access to a court user or authorized individual.

This bill provides that an expert witness may appear remotely absent good cause to compel in-person testimony.

This bill provides that except as provided by law, upon its own motion, or the motion of any party, the court may conduct a trial or evidentiary hearing, in whole or in part through the use of remote technology, absent a showing by the opposing party as to why a remote appearance or testimony should not be allowed.

This bill requires the official court reporter to be physically in the courtroom if the court conducts a trial in whole or in part through the use of remote technology.

This bill requires, upon request, that the court interpreter be physically present if a court conducts a trial in whole or in part through the use of remote technology.

This bill provides that before the court with jurisdiction over the case may proceed with a remote conference, hearing, proceeding, or trial, the court shall have a process for a party, witness, official reporter, court interpreter or other court personnel to alert the judge about any issues.

This bill provides that the court shall require that a remote appearance by a party or witness have the necessary privacy and security appropriate for the conference, hearing, proceeding, or trial.

This bill provides that the court shall inform all parties about the potential issues that could arise when using remote technology and make information available to self-represented parties about appearing in person.

This bill provides that the court shall not require a party appear through the use of remote technology, but if remote technology is used the court shall ensure that the technology permits all parties, remote or in person, can participate fully.

This bill provides that a self-represented party may appear remotely through the use of remote technology only if they agree to do so..

This bill provides that a juvenile dependency proceeding may be conducted in whole or part through the use of remote technology under specified conditions.

This bill provides that it is not intended to prohibit the use of appearances in civil cases through the use of remote technology when stipulated by attorneys for represented parties.

This bill requires the Judicial Council to adopt rules to implement policies and provisions on remote technology to promote statewide consistency.

This bill requires a report by each superior court to Judicial Council regarding: the number of civil proceedings conducted with the use of remote technology; any superior court in which technology issues or problems occurred; the superior courts in which remote technology was used; the types of civil trial court conferences, hearings, or proceedings in which remote technology was used; the cost of purchasing, leasing, or upgrading remote technology; and, the type of technology and equipment purchased or leased.

This bill sunsets the Code of Civil Procedure Section it creates on January 1, 2028.

COMMENTS

1. Need for This Bill

According to the author:

Widespread and pervasive inefficiencies in our courts were well-documented before the COVID-19 pandemic. However, the pandemic exacerbated these issues, as it made it more difficult to appear in court physically, especially for people of low income, juveniles, and people suffering from mental illnesses. SB 241, signed by Governor Newsom in 2021, was absolutely critical in protecting access to justice for California's

vulnerable populations. According to the Judicial Council of California, the option for remote hearings “has great benefits for youth who are sensitive to a change in environment or who struggle with health issues (including serious mental health conditions), by allowing them to appear without having to travel to a courtroom. Some youth in treatment programs would not otherwise be able to attend their proceedings due to individual facility restrictions or the location of their facility.”

Terminating the option to use remote technology in civil commitment proceedings will have significant adverse consequences for our youth and individuals with serious mental illness issues. There can often be a lack of transportation options for youth and families, many of whom would have to take time off from school/work to travel long distances for in-person juvenile proceedings. Furthermore, many individuals with serious mental health conditions are unable to leave their care facilities due to their condition, and not allowing them the option to appear remotely in court jeopardizes their treatment. Courts have commonly used remote appearances in these types of cases for years prior to the pandemic, and have found it effective in allowing these populations to appear in court without jeopardizing their respective situations. It is of the utmost importance that we extend these provisions to protect access to justice, and keep our courts efficient, fair, and just. SB 22 will do this by allowing parties in certain civil proceedings, like civil commitment and juvenile delinquency proceedings, to appear remotely in court until January 2026. Furthermore, SB 22 will extend the sunset for the option for remote access in all criminal hearings until January 2028, which will allow for more flexibility for the parties.

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. This bill will extend that sunset to January 1, 2028.

While having some concerns with portions of the bill, those who are opposed unless amended are not generally opposed to the concept of remote hearings for some criminal proceedings provided concerns regarding adequate technology and the ability of a person to appear in person, if they wish are worked out.

3. Remote proceedings in juvenile and commitment proceedings.

This bill applies the procedures for remote proceedings in civil cases to juvenile delinquency and criminal proceedings and to civil commitment proceedings. The bill generally allows a party to appear remotely if the technology is available and working unless the court determines that an in-person appearance would materially assist in the determination of the proceeding, or if the technology inhibits communication between an attorney and client or interpreter and the individual.

a. Who decides to be remote

The intent of the bill is not to force any individual party to attend remotely—that it should be up to the parties. As created by this bill, CCP 367.6(f) specifically states the court shall not require a party to appear through the use of remote technology, however CCP 367.6(d) appears to allow a court to “upon its own motion” as well as the motion of any party conduct a trial or evidentiary hearing with remote technology. These two sections seem to be in conflict. Concerns raised by those opposed include a person being forced to have a remote hearing when their liberty is at stake. At some point these sections should be clarified.

b. Dependency

This bill includes provisions (CCP 367.6 (h) which includes dependency proceedings. This is more appropriately in SB 21 (Umberg) which deals with civil proceedings.

4. No retaliation

In discussion with court reporters last year, they expressed concerns about potential retaliation if they stopped a proceeding due to inadequate technology. This bill extends the sunset on the provisions that provides a court shall not retaliate against a court reporter who notifies the judge that technology or audibility issue are interfering with the verbatim record.

5. Argument in Support

The California Association of Collaborative Courts States:

The use of remote technology in criminal proceedings for collaborative courts has enhanced access to justice for participants, allowed proceedings to operate more efficiently, and allowed courts to be more equitable and accessible to participants, while at the same time making it an option for individuals subject to those proceedings to participate remotely.

Additionally, our association is concerned about the impact of the June 30, 2023 sunset on civil remote proceedings on particularly vulnerable populations that often end up in civil proceedings, for example in proceedings under the Lanterman Petris Short Act and then competency to stand trial proceedings and then only to end up in criminal proceedings, specifically those individuals with behavioral health needs.

Remote appearances reduce barriers to court participation that particularly hinders people who have behavioral health needs, people from traditionally marginalized communities, and people experiencing indigence and homelessness — many of the very people who benefit most from collaborative courts. This also applies to civil commitment proceedings.

Remote appearances, for example, benefits participants who have limited access to transportation and struggle to physically come to courthouses, and supports participants engaged in residential mental health or substance use disorder treatment programs whose treatment would be interrupted with in-person court check-ins. Remote appearances also improve court processes and case processing. It improves the caliber of interaction with participants, leading to more meaningful connections with judicial officers, and it enables witnesses who are otherwise difficult to schedule, such as psychiatrists, to appear. The benefits and efficiencies of remote appearances have assisted not only collaborative courts, but criminal courts as a whole have also observed improvements in case processing, court appearances, and other vital activities necessary to the administration of justice. Having the continued capacity to conduct proceedings through remote technology is essential to improving access to the courts and access to justice.

This legislation will create options for the ways that participants can access collaborative courts and criminal courts. These options will ensure that collaborative courts and criminal courts provide equitable, equal, and reliable access to justice regardless of individual circumstances that may otherwise challenge one's ability to appear in-person in court.

6. Argument in Opposition

The opponents are not opposed to any remote proceedings but have some concerns regarding access to technology, how technology works, and access to justice. Specifically, SEIU California is opposed unless amended and states:

We are not inherently opposed to remote proceedings and recognize that the option can sometimes benefit the court and its users. However, we cannot ignore the limitations of remote technology when an individual's liberty or right to justice is at stake. Proponents of remote proceedings tout its convenience -- but our justice system can never be allowed to prioritize convenience over equitable access to justice.

These points were eloquently made by many of the witnesses who testified at the Joint Hearing of the Senate Judiciary and Public Safety committees on March 7, 2023. We must consider the digital divide, which disproportionately impacts indigent youth, families, and communities of color. Access to remote technology is inequitable, and even those with access are not always comfortable using it. 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, the frequency of internet disconnections, glitches, microphone issues, and background noise during remote proceedings threatens the integrity of verbatim transcripts, which are integral to the justice system. Court reporters are keenly aware of every glitch and interruption, even if they seem insignificant to other parties, because reporters are solely responsible for maintaining an accurate verbatim transcript. An inaccurate or incomplete transcript can deny someone justice or wrongly strip someone's liberty.

This is precisely why some proceedings must be conducted in person. In person proceedings ensure the reporter can capture everything said in court, substantially diminish issues such as witness tampering, and allows jurors and attorneys to physically see witnesses to assess their credibility and demeanor.

Finally, there have been documented incidents of unknown parties infiltrating remote proceedings and using the chat function to masquerade as lawyers or court employees requesting fees from unsuspecting litigants. This raises serious issues regarding the security of these proceedings and those participating in them. The Legislature must establish thoughtful guidelines on when and how remote proceedings should be used, and how to ensure the security of the proceedings.

7. Other Legislation

AB 1214 (Maienschein) also deals with remote proceedings in criminal cases, although it makes a number of changes from existing practices. It is currently in Assembly Public Safety.

SB 21(Umberg) extends the sunset on remote proceedings in civil cases with some changes. It will be heard in Senate Judiciary Committee on March 28.

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