
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: SB 99 **Hearing Date:** April 25, 2023
Author: Umberg
Version: April 10, 2023
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Courts: remote proceedings for criminal cases*

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: Superior Court of California, County of Los Angeles

Opposition: None known

PURPOSE

The purpose of this bill is to extend the sunset for remote proceedings in a criminal court.

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, 2028.

COMMENTS

1. Need for This Bill

According to the author:

In 2022, Governor Newsom signed AB 199, which, among other things, authorizes, until January 2024, a party to appear remotely and a court to conduct criminal proceedings through the use of remote technology, though with certain exceptions, such as prohibiting a defendant charged with a felony to appear remotely for sentencing, except as specified, and a defendant charged with a felony or misdemeanor to appear remotely for a jury or court trial, except as specified. In *People v. Lujan*, the court ruled that trial courts have an “inherent authority to implement a plethora of alternate procedures for witness testimony”, such as allowing for remote testimonies. This has been reaffirmed in other cases such as *People v. Whitmore*, *Chaparro v. State*, *United States v. Rosenschein*, *People v. Lindsey*, *Maryland v. Craig*, and more.

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.

3. Some concerns raised by opponents.

While all parties seem to see some value in having remote appearances there are still some concerns. A few of them are:

- The current law and this bill require the court reporter to be present in “a courtroom” during the proceedings. Court reporters have raised concerns that they want to be not in any courtroom but in the courtroom with the judges so they can more accurately monitor how any issues with the technology and the judge will also be aware of the issues. Judicial Council has noted that, even pre-covid, there may be emergency situations where the court reporter can’t physically get to the courtroom—the most common example is a big snow storm in the Tahoe area. Speedy trial rights may not allow for continuances in this situation. The author may wish to consider amending the bill to provide that generally the court reporter should be with the judge but allow for extraordinary circumstances to create an exception.
- Court interpreters have similar concerns but they would like whenever possible to be with the person for whom they are interpreting.
- Court reporters would like some way to put on the record when they raise an objection to problems with the technology and the court orders the proceedings to continue.
- There is a question as to whether habeas and other post-conviction proceedings should fall under the same rules and criminal trials.

4. Diversion Courts

While in general, in courts allowing remote proceedings it will be up to the defendant whether or not to appear remotely, should diversion courts have different policies? Should it be clear that a judge in a drug or mental health diversion court, for example, can order a defendant appear in person?

5. Unavailability of court reporters

With a shortage of court reporters, especially in some of the less populated counties, should there be some alternative way to keep a record so that a defendant’s right to a speedy trial is not infringed upon if there is no reporter available?

6. 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/>)

6. SB 22 (Umberg)

This Committee heard this bill within SB 22 on March 21. These Penal Code provisions were separated from the Juvenile and commitment proceedings to ease the discussions of all provisions and because the sunset date on these provisions was later. This Committee passed SB 22 with a vote of 5-0 with an understanding that the author would continue to work with all interested parties to fine tune the use of remote proceedings in all matters.