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Episode title: Looking inside “The Impacts of the COVID-19 Pandemic on State & Local Courts Study 2021”

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Gina Jurva: Welcome back to the podcast. I'm your co-host, Gina Jurva, Attorney and Manager of Market Insights and thought leadership for our government and corporate segments. Today's episode focuses on a hot topic for our judicial system and one that is near and dear to my heart as a former litigator. “How the pandemic has changed or proceedings?”. My conversation today is taken from excerpts from a recent webinar I moderated, “Digital courts access to justice in today's world”, and it featured Mary McQueen, President of the National Center for State Courts and the Honorable Mark Martin, Dean and Professor of law at Regent University School of Law and the former Chief Justice of the North Carolina Supreme Court. We talked about court closures, remote proceedings, access to justice, and the handling of digital evidence. We also discussed a few key points from a report I recently authored titled “The impacts of the COVID-19 pandemic on state and local courts 2021, a look at remote hearings, legal technology Case backlogs and access to justice”. The report was based on a survey of 238 state and local judges, court staff and attorneys from around the country. Let's take a listen.

Mary McQueen: I think what we were challenged with some of you are familiar with the writings of Richard Susskind from the UK, and he's always posited the question our courts of service or a place and I think certainly the pandemic helped us answer that question because the Chief Justice in New York Janet Diorios stated it like this, “Courts didn't close, even those courthouses did.” And so initially we were very concerned about the health and safety of not only the public the users of the court, but also staff and having to assess those risks and put it into a remote workforce and all the issues that all of us now know come with that up to and including security and confidentiality of people working from home on laptops and using the cloud. We also had to consider how to socially distance in buildings that weren't built with social distancing. Some of you may have followed the Chauvin trial on television that courtroom, for instance, was actually built to deal with social distancing. You may have noticed that there wasn't a jury box. The jurors were 10 to 15 feet apart and they limited the number of people that had access to the courtroom, which then creates a constitutional question about open courts and that's why in the state that usually doesn't provide cameras in the courtroom, there were cameras in that case. That was the way that the court in that case ensured that it was noble proceeding, but early on we didn't even know whether or not COVID was transmitted by paper. And so being, you know a paper centric organization there were a lot of questions about you know how do we shift to paperless or paper on demand? We also begin to think about the types of hearings, but every single Supreme Court in the country shifted to online oral arguments, much more quickly than the federal courts, but the rapid response team then started issuing what became a series of over 150 deliverables, and it was everything from a list of how courts would select the platform. What were the kind of checklist that you needed to ensure security because we had always heard all of us now know about “Zoom bombing” and those kinds of early criticisms of online courts and what our data shows is in every one of those cases it wasn't the platform, it was the lack of security conscious workforce in publishing. For instance, the zoom number for accessing the proceeding. So, we very quickly tried to provide courts with those kinds of

tools, including a website where anyone could go click on a state and it would drop down and give you the executive orders, the court lose the forms, the processes that were being put in place. I have to say that the access to justice issues also became quickly evident and I would say especially in some of the areas like domestic violence, how do you get a civil protection order without a wet signature? What would be involved and those kinds of issues? And if we're going to go virtual, how? How are we going to pay for it? A lot of courts still in this country are locally funded. They're not even funded at the state level. Some of them are unified, some of them are not. There are a lot of questions about the governance of abilities and whether or not in some states, like California, for instance, the Chief Justice had to see an executive order to move into some of the more virtual areas. So, I would just I would just say that creating a website establishing, you know, what court rules, what seemed to be working, providing guidelines for personal protection equipment, open courts, the issues about what - and people coming to the courthouse where we're going to establish a priority for types of cases and early on I think all of us remember that masking and taking a temperature and social distancing were things that that we had to deal with right away. So, I would say that most states suspended jury trials that was early on. We also provided that we restricted entry into courthouses, and we found that there were different ways of ensuring social distancing through rotation of staff, so we didn't have the same staff in the courtroom, you know, let's say for all day you may rotate teams throughout the court and we immediately began to grant extensions for court deadlines, because we had concerns, I mean as the litigants as well as their attorneys and our staff had about how contagious that COVID was? So, I would say I think as far as a comparison at least state and local government in in responding to the pandemic I think the courts very rapidly came together to share information and to give guidance, Gina.

Gina Jurva: Yeah, and that's so true. And I know there's a lot of information on the National Center for State Court website, like right away you were providing that information as best you could, and I think the challenge too was what you said. We weren't actually sure how it was transmitted, like is it, you know, are paper documents going to transmit it? I think we know now that's not happening, it's completely low risk. We also didn't have a vaccine at the time, and so there were just so much happening. And then Mark I'd like to hear your thoughts on that too. I mean, just your experience. Also mirror what Mary was saying that you know these were some of the biggest challenges right away it's safety, it's how do you keep the courts moving, so I'd love to hear your perspective.

Mark Martin: Thanks Gina, great to be a part of this panel discussion with you and Mary. Mary has kind of comprehensively shared a number of the challenges that the states dealt with and I want to share at the outset that it also reaffirmed the value of national entities like the National Center for State Courts, the resources that were available that could not have been developed at the state and local level, this really took a national effort to really assess how courts could confront an unprecedented challenge of a scope that that we had never dealt with before. So, when COVID hits, obviously the Polar Star is safety, protecting people from COVID, it's uncertain exactly how this new virus is transmitted, and all of our infrastructure is not set up for social distancing. Matter of fact, it's almost the opposite. Jurors are sitting within, you know, 20 - 24 inches of each other very closely, judges other stakeholders are very much cloistered closely in many of our courthouses. And then you have to determine when everything comes to an immediate halt, what are your emergency priorities? Where is immediate access still needed? Because as the chief judge of New York State said, courts never closed. They transitioned. They transitioned to virtual proceedings. Digital courts that could enable certain priorities to still be completed. What about domestic violence cases? There's an immediacy there. What about felony

arraignments? So, court systems had to immediately reposition, keep carrying on their critical function for the people in their respective states and how do you really ensure access to justice when millions of Americans are losing their jobs? Millions of citizens of modest means are losing their economic stability during this pandemic. So, courts never really close. They simply transition to virtual proceedings.

Gina Jurva: I'm going to use one of the statistics from our Thomson Reuters report that I mentioned earlier that we had surveyed 238 judges, court administrators, court staff and attorneys throughout state and local courts in the United States, 93% said of those courts indicated they were involved in conducting or participating in virtual hearings of some sort remote proceedings as they're known. And 89% are currently doing so still. So, I'd love to talk about just what are the challenges or what are the benefits of going online with some of these remote proceedings? And so maybe you know, Mary, tell us a little bit about what you learned there on what are the benefits, and then we can talk a little bit later about the challenges too.

Mary McQueen: Thanks Gina and as we go forward, I would say there's been a big point out that our website justmcse.org and it's very easy to find, but one of the things we wanted to do is to capture as much data as we could as we pivoted to some of these new options because we wanted to be able to say, you know, what seems to work, what doesn't, and I think sharing that across country really helped, but one of the benefits that we found very quickly is we reduced a failure to appear by over 80%. That's really amazing at the at the level that people embraced, and I'm talking about litigants, I'm talking about users that they embraced remote hearings. I think it also increased transparency of proceedings because it is easier for people to participate or to watch the proceedings. And believe it or not, it actually expanded language and physical access. A lot of the platforms that are used have language access and interpreters embedded in them and so judges weren't having to go out and arrange for interpreters and bases separately. It was embedded into the platforms. It also expanded services that were available to self-represented litigants and others, because now they had access directly to the clerk's offices to navigators and others that could help some represented litigants understand what forms they needed. We saw also where you have self-represented litigants. A lot of the challenges when they come to court is, they don't have their evidence in a format that is either admissible or even forgotten. For instance, they may bring a picture of something that other smartphone, and so being able to speak with someone before they came or interact with someone to make sure that all of their evidentiary and paperwork, I use that in a term to say, you know the forms and information they needed before they came, I would say it also reduced the burden on litigants, witnesses, jurors and attorneys. You know, just the travel time, the time off work you know parking, you know, just all of those. We found that it reduced the number of continuances because we were able to schedule hearings and I'm talking about non-evidentiary hearings a lot more coordinated, I think domestic violence victims indicated that they felt safer because they didn't have to come down the courthouse where they might encounter an abuser in the parking lot. We were able to – our public opinion poll, which we conduct every year. We basically ask users how they felt about remote use of technology and we only, you know, we tried to make sure that we controlled for age. I was telling Gina in one of our earlier conversations, I assumed that the 35 and under group would just say, well, let's just have virtual courts, but I assumed that the 65 and older group would be a little more tenuous. No, group wanted to be able to participate in court hearings virtually. We also basically improved case management, careful management because of our ability to provide more status hearings. You know, our ability to have more people involved because.

We weren't having to manage all the scheduling conflicts, so I would have to say that overall, I think that the benefits, at least with our data so far indicates is that the benefits for online remote proceedings were beyond what we had expected.

Gina Jurva: Mark I, I'd love to ask you about that too. I mean, do, you know, you and I have talked about the benefits of online proceedings and I know that you also see the benefits in them.

Mark Martin: First, totally agree with everything Mary shared, and I think we need to be candid with ourselves about the baseline, courts had not been quick to innovate in this area. We had maintained adherence to a very traditional model that it not in any way was keeping pace with where the private sector was going with digital resources. And so you know, obviously we didn't want COVID. It's been terrible, but it forced us to confront the digital divide and the need to incorporate additional remote proceedings. You know, think about a litigant with physical disabilities, and so in a virtual hearing, she can access the proceeding from her living room. Think about all of the obstacles that have been alleviated in terms of getting in the car, going down to the courthouse, finding handicapped accessible, you know, parking and entrance to the courthouse. A lot of these courthouses had had been grandfathered in, a lot of the requirements for handicapped accessibility, so, you know, you really had terrible obstacles to participation by persons with disabilities. Think about something as basic as child care, so, one of the frequent refrains, I heard from both federal and state court judges is that you know they'd be conducting a solemn court proceeding virtually, and a cat would hop in front of the camera so, you know, what, you know, on the other hand when you're thinking about child care, when the caretaker has to actually go down to the courthouse this could be half a day, this could be an entire day while the litigant sits out in the gallery waiting for her case to be called, right? On the other hand, when the proceeding can be accommodated at the home of the litigant, just imagine? All of a sudden the challenge is not child care for the entire day, but simply having someone watch the children to make sure that children do not dart out into the virtual camera or come right into the middle of the virtual proceedings. So, in terms of scaling, we have a much more maintainable, economical convenience for people who are accessing our courts. Think about the public health benefit. As Mary indicated, appellate courts immediately went virtual in March 2020, and I talked with a number of chief justices in recent days, as well as a member of the United States Supreme Court. Everybody is going back live fairly soon. Or at least so we think right the moment we think we're coming out of this situation all of a sudden delta is hitting in numerous places and some really bad numbers. So, what's the point I'm making here? Is that digital courts virtual proceedings are here to stay. That's a great thing, because this is not the only time we're going to have to protect public health. This is going to be a concern moving forward. There will be other viruses, other contagious diseases and virtual courts, makes court proceedings safer for everybody concerned. Think about the webinar today, that we're doing right now. We did not have to fly on a plane to participate. We did not have to stay at a hotel, nor did those watching. Everybody is safe. Everybody is safely distanced. Now these same benefits will now necessarily apply to virtual courts proceedings, and so we need to learn from this pandemic. We need to use virtual proceedings whenever we can. It works better. When I was on the bench one time, the fire Marshall came up and said "Your honor, why are there so many people in this courtroom?" And I said "Mr. Fire Marshall, actually the prosecutor over there is the one that invited them all here" and it was not optimal. There was eight or nine hundred people in the courtroom. There was no way those courses, those cases could have been reached that day. So virtual proceedings also allow for optimization of timing. You come on the

proceeding when it's your time, you're not languishing, sitting around, or losing your job to sit in the courtroom up until the prosecutor can get to your case.

Gina Jurva: Yeah, that's so true and just, you know, having been in the position of the prosecutor and having witnesses and oftentimes not so much, you know in not so much the law enforcement witnesses they were used to the process, right? They know how it goes when you when you show up in court that things take time, but bringing in civilian witnesses to testify. And telling them, hey, I can't tell you exactly what time you're going to go on the stand. I just need you to hang out here all day. I would feel terrible having to tell them that. So, you know, maybe this could you know help alleviate some of that as you were saying where it will, and also what Mary said earlier, the failures to appear, hopefully that will also reduce the failures to appear. I'd like to ask your question a question just about like how the environment you talked about the cat jumping on someone's lap, right? And that can be a challenge if I'm in the middle of, right now, if I was talking at a cat, jumped on my lap, it would be interesting. We're also not in court, right? Which is a more formal proceeding. So, it's it on one end I could see it being - it takes like some of the decorum of the courtroom, but at the same time do you also feel like it creates a less intimidating environment because a lot of these folks aren't used to coming to court, right? They're not used to the formality of the court, and they just kind of see it on TV. And it's intimidating is really, the word to use, so do. You think that helps alleviate some of that?

Mark Martin: Absolutely. Let's face it, when you get beyond lawyers and judges and other internal stakeholders of our system of justice coming to court, maybe a once in a lifetime event for a citizen. Maybe it's been a few years. An interesting metric that the National Center has developed is that on any given day, about 1% of the public is accessing the courthouse for one reason or another. Just imagine the cost of that, you know, aggregating that cost, so I think clearly, we want people not to be necessarily fully relaxed. We want people to understand that this is a serious proceeding, one that is important, but if they're around something that's familiar to them, just like we develop child friendly runes. And child abuse cases, so children would come to the courthouse and would not be in an environment that was just totally foreign to them and frankly intimidating. So, I think on the one hand we have to balance the need for this is a solemn proceeding, and I'll give you an example. A federal judge told me a few months ago that one of his greatest hindrances to virtual proceedings is he never knew who else might be listening to a confidential proceeding when there was a remote proceeding ongoing, so I think we have to dislike we're working on security and a myriad of settings for virtual proceedings. That's one challenge that that we'll have to deal with, and so I think we have to strike the balance. We want it to be a comfortable atmosphere for litigants, but not too comfortable.

Gina Jurva: Sure. Mary, your thoughts on, just kind of pivoting a moment here, and talking about - we talked about case management a little bit, but in terms of, you know, providing evidence so parties provide evidence, evidence sharing. Was that initially challenging to the courts to make sure that evidence is all good kind of going online, sharing it via Zoom like, what were your initial challenges there?

Mary McQueen: I think the challenges had to do with the sophistication of the platforms because some of the platforms were not developed to embed a document management system. And so that, but I think the way that the courts dealt with it was in a, you know, kind of a user design basis, which is something that I think of as Dean Martin mentioned that we probably should have done any. You know, it's helping people ensure that when they come to court, especially if they're self-represented, that you

know that they bring the they bring the evidence you know whether it's their, you know, their monthly rental bill or their, you know, their child care bill or their W2 forms. You see that, you know, and so I think that in in some ways it exacerbated what was always already a challenge, but as Chief Justice Martin mentioned that also there was an urgency to deal with it. Because it wasn't just oh, we'll go home and come back next week. No, we didn't want people exposing themselves to possibly, you know a pandemic exposure. We think that as Chief Justice McCormick, from Michigan, said "it wasn't the disruption we wanted, but it was the disruption we needed."

Gina Jurva: That's such a great that's such a great quote and it really is a time for an opportunity to change, to move forward, and that disruption was - yeah, we didn't want it, but it happened. And when we talk about it and also just for the audience, the audience knows not every courthouse, state or local was using the same type of technology, is that correct?

Mary McQueen: That's absolutely correct. And it's exacerbated because I think a lot of us know that every state is not organized the same. So, in some states like California, Oregon, Colorado, New Jersey are unified court systems, so the Chief Justice and the governance structure can pass a rule that's immediately adopted by everyone. Chief Justice Nathan in Texas likes to refer to Texas and other states as a grassroots state, where they're basically decentralized model but still funded by municipalities as well as counties and so that that does create some inability for there to be uniformity, but one of the challenges if I could just add that, Gina, of moving the technology it was the need to have uniformity across the system and the lack of that governance structure being uniform across the country was a challenge and even in a state that's unified like California, the Chief Justice only had the ability to make certain exceptions or even to kind of court deadlines by court rule. She had to go to the governor and ask for an executive order to be injured and in states where you had a good working relationship between the governor and the Chief Justice that wasn't a problem. But in other states it wasn't as seamless and even now looking forward as these executive orders are have expired there's a real question about, you know what the authority of a Chief Justice should be moving forward and whether or not those need to be considered as is possible, statutory amendments.

Mark Martin: In my state where we had a unified system as Mary characterized it, and you know, let's think about it for a moment. Why would you have emergency procedures that could only be implemented by the governor? The courts, we too, have challenges just like the extraordinary nature of COVID itself and so, one thing that we did well in North Carolina is a statute that vested the Chief Justice with broad authority to enter orders. Think about when COVID hits. People are losing their jobs. There is primacy over economic needs. There is primacy over trying to protect the family. You have some families where a family member is ill with COVID, perhaps even hospitalized. You know, as much as we want people to pay attention to the legal issues that are confronting them in life, we had to have a mechanism to relax these deadlines. You don't want substantive rights unnecessarily lost because somebody had no ability to confront the issue in a meaningful way and to file a response. So, when I was Chief Justice prior to COVID, we had several situations including hurricanes where we had to relax these deadlines and I was very excited to see Chief justices that had that authority, were in fact exercising it to make sure that substantive legal rights were not lost in the middle of this pandemic, simply because people had an immediacy of dealing with other aspects of their lives at that point in time.

Gina Jurva: And what about when we - talking about some, you know, challenges of online proceedings, and I think you know there have been a few questions that have come in about this. And we've touched on it already a bit, but the idea that not everybody has the same access to technology.

Mary McQueen: But we immediately reached out to some of the broadband providers like Verizon and Cox and AT&T to help us, especially when someone would come in let's say, even if someone on probation and probation was under the court and they wanted to appear, you know, or check in with her probation officer virtually, but they didn't have sufficient number of minutes. Or we didn't want them to be charged for those minutes and I have to say the corporation stepped up and laid those charges during that time period, but I think the digital divide was a big challenge for us and I would like to just share real quickly the response because right now we have we're moving into these implementation laboratory sites and one of the issues is the digital divide. New Jersey and Texas, two very, extremely different states. One very unified, one very decentralized, but they created loaner programs where they actually went out and bought tablets provided for Wi-Fi coverage and went to a user's home. You know, whether it was a litigant or a juror to make sure that you haven't used the device. It was set up for them to be able to use it and then another version of that was to reach out to libraries and community colleges to say can we have a room one day a week or one day a month for a virtual jury selection? Because it was much easier for someone to drive a few blocks to a library than an hour and a half to the courthouse, and we didn't want people to have to be in the same room with another 50 people during a jury selection process because of you know, public safety issues. So, I have to say that the hardware loaner programs and then the ability to work with Corporate America to provide broadband was very good, but as you and I were talking, Gina, broadband access is a real issue in this country suffering apart from COVID, so we've been trying to work with Congress to support the expansion of that. I would have to say that some courts did provide for audio options only in certain type hearings, but we found, at least in the initial responses, that over 98% of the litigants, you know, even controlling for economic background were able to join in in virtual hearings. So, it appears that you know the lack of broadband access and the lack of hardware we were able to pivot very quickly, but the question then becomes is where's the funding going to come from for that? Because one of the issues is that even you know, even with the American rescue plan funding courts aren't carved out or identified in that federal funding, and so it basically comes down to the relationship that maybe the Chief Justice and the executive have on carving out some of that money to upgrade the case management systems, virtual platforms, and then these loaner programs. But while, I think the digital divide was one of the bigger challenges, I just want to quickly mention that when we have these virtual hearings, we think that you almost had to have a technology bailiff to ensure that those who use their equipment that the judge didn't have to - I and one of a summary jury trial that they tried in Texas, you know, when the attorneys want to approach the bench and you're and you've got a virtual Brady Bunch panel we better observe them, right? You know we didn't want the judge will have to worry about how that happened. But one of the other challenges that you just mentioned and, and so while they're all out in the room you're looking at, all these jurors that are sitting in their homes or in libraries, and they get up and walk around. They talk on their cell phone and so the question was raised with how do you manage that and the response is that happens in traditional juries all the time. When they take a recess, somebody goes out to use the bathroom, we have to go out and find them and bring them back. And so, I think if these issues, just like the attorney concerns about confidence in or the federal judge that being Martin mentioned, you know you come up with procedures where you know someone has to take a Zoom camera we do at the room and I mean you know, we do hold jurors to, you know, their oaths and so in a

lot of ways, as things come up. Like I mentioned, the “Zoom bombing”, I think that that we've been able to respond to them.

Gina Jurva: Yeah, and Mark, you know you when we talk about the technology divide here, how are you seeing that in the part of the country you're in? Do you see that broadband has been an issue as Mary said? And is there a place here for maybe the American rescue plan to at least allocate funds for those challenges to upgrade technology?

Mark Martin: Well, it's clearly one of the chief obstacles, you know, we've always had this digital divide, and we've had an access divide. And so, you know, what you're looking at is, how can you create a level playing field, or at least the playing field where everybody can participate in a similar way. As Mary mentioned, courts were not necessarily the target of the American rescue plan. We're encouraging court systems to collaborate with the executive branch. Even the legislative branch and their respective jurisdictions and try to get some targeted funds to help with these infrastructure upgrades because, you know, let's face it as you we've talked about here, you know, some of these challenges are you don't have a reliable Internet connection, so all of a sudden, you're in the middle of a direct examination of a witness and all of a sudden it just drops out and that's unacceptable in a legal proceeding. So, we have to make sure that this foundation is in place if we're going to continue to maintain, and I think optimally increase the number of legal proceedings that can be done in a virtual fashion, but there are three aspects that I would really point out about, you know, can we use a virtual process for this proceeding? First is can we make sure that legal and constitutional requirements and norms can be protected in the process? Second, of course we want everybody and particularly when we're talking about access to justice, we're primarily talking about civil cases because counsel is generally provided in criminal court. So, in civil court, our goal is for everyone to have a lawyer, but unfortunately that doesn't always seem to work out that way. So, in virtual situations, how can we make sure what I call practical functionality that the litigants not only have the ability to share evidence to annotate evidence but for good lawyering to be possible in that platform. And then finally adherence to sound or best ethical practices, we have to make sure that when a virtual forum is utilized, as I mentioned earlier, are there people that cannot be seen from the other side of perhaps you have people that are a part of that proceeding or close by the camera that are not a part of that proceeding, so you have these security issues and these other ethical issues that appertain to the platform. So, you know, my one of the takeaways that I would share with people is that, you know, come up with a list of factors and apply those factors to a particular type of proceeding, and if so, we've already pointed out where from so many standpoints convenience, budgetary, et cetera, that, if a virtual platform can be used, it can be a way that can really help litigants be a part of court proceedings, but also in a way that's more convenient and works better for them in their individual lives.

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