



# VIRAL IN A PANDEMIC

Lawyercat and the Future of Remote Proceedings

ROY FERGUSON

*A techno-savvy judge offers food for thought gleaned from the 3,000 remote proceedings he's overseen.*

Two years ago, the idea of trial by television seemed laughable. Not so funny meow, is it? On March 1, 2020, lawyers went about the practice of law as usual. Courthouses were bustling; jury trials were ongoing. Just two weeks later, courthouses across the United States were shuttered in response to the COVID-19 outbreak. States ordered public lockdowns, and lawyers worked from home. Rather than also shutting down the justice system, many states opted to move court proceedings online, using video conferencing software.

At first, judges and lawyers overwhelmingly opposed the shift online and instead shut down their dockets in (mostly) silent protest. However, as infections continued to rise, and with no viable option, courts began grudgingly moving their operations online. Since then, millions of court proceedings—including trials—have taken place remotely by live video conference. Hence, “trial by television.”

## To some senior lawyers, this new technology sounded like voodoo.

This sudden and mandatory shift to remote court proceedings triggered an unexpected wave of retirements in the legal profession. Unexpected, yes. But not surprising.

Resistance to technological advancement is nothing new in the legal profession. Senior lawyers (age 62 years or older, by ABA standards) have weathered incredible changes to the daily practice of law during their careers. Today’s legal profession bears little resemblance to that of 1970. In just 50 years, the legal profession went from *Perry Mason* to Lawyercat.

Let’s take a quick walk down memory lane.

### AH, THOSE WERE THE DAYS

By today’s standards, the legal profession of 1970 was woefully archaic. Live shorthand dictation, typing pools, carbon triplicates, Liquid Paper, clunky Xerox copiers, and courier delivery were the norm. (Remember the days when your support staff had to retype an entire document because you found a single typo? To young lawyers today, that concept is inconceivable.)

When a few years later the fax machine became a commonplace business tool, many attorneys refused to use them, preferring the feel of crisp, heavy letter stock to the slick, flimsy scrolling fax paper that turned your hands black and faded seemingly overnight. Then, in

the early 1980s, personal computers hit the commercial market, and the profession would never be the same.

Quickly, dot matrix printers replaced typewriters. Word processing software was quicker and cheaper than carbons and typewriters. Yet even in the mid-1990s, many lawyers still refused to use a computer. Typing was “for secretaries, not lawyers.” While these new technological alternatives were better, they weren’t immediately universally accepted.

Computerized caselaw, which had existed in a limited (and very expensive) form since the early 1970s, slowly increased in popularity among larger law firms. And with the release of Windows 3.1 in the early 1990s, computerized caselaw was suddenly within reach for smaller law firms as well. By then, subscriptions to Lexis and Westlaw were significantly cheaper than keeping a physical law library up to date. Soon law students were trained to research both in the stacks and on the computer.

Once again, despite the vast increase in productiv-

ity provided by these computerized research platforms, many lawyers resisted the shift. They grew up researching “in the dungeon,” and that was the way it was going to stay! (In fact, one of my first jobs in the field was working in a firm’s law library, swapping pages in secondary sources and inserting pocket parts—in the mid-90s!) Experienced lawyers found staring at a screen to be repugnant.

Then came the world wide web...email...cell phones. Each technological advancement ultimately proved beneficial to the practice of law but carried a steep learning curve and associated frustrations. And then came a technological leap that caused a significant exodus of older lawyers: electronic filing, or efilng.

Prior to the implementation of efilng, lawyers engaged in a race to the courthouse to hand paper documents across the clerk’s counter—as it had always been. So when mandatory efilng hit Texas in 2013, some attorneys decided they’d rather retire than try to learn an entirely new system.

To some senior lawyers, this new technology sounded like voodoo. Clicking a button on a keyboard and then trusting that the documents had magically been received and put into the file by the clerk? Madness! And it for the first time required—*required*—use of a computer to



practice law.

But as shocking as all of these changes were, those technological advancements seem insignificant in comparison to the recent change that struck fear into the hearts of lawyers everywhere—the move to Zoom. Or as many senior attorneys pronounce it:

**ZOOM**

### MAINTAINING DIGNITY REMOTELY

Less than a week after in-person court proceedings were shut down in Texas, I launched the 394<sup>th</sup> District Court's YouTube channel, to which I'd stream virtual hearings for the foreseeable future. I was confident in and quickly comfortable with the software and platform. It seemed I'd been preparing for this moment all my life.

Unlike many lawyers my age, I've used computers since I was a child. My father, a petroleum engineer, trained me in elementary school on punch-card computers and taught me to program on an Apple IIe when I was 12 years old. I spent my youth building and upgrading computers—for fun.

So although I'm more than 50 years old, I'm not often deterred or intimidated by new technology. But this comfort level didn't shield me from concern about over-seeing the Zoom process itself. I knew many lawyers would struggle to adapt. People would be participating from home, work, vacation, or even moving vehicles. Litigants could be asleep, intoxicated, or worse. I feared that, without the majesty of the physical courtroom, informality would destroy the solemnity of the proceedings.

Determined not to make Texas courts a laughing-stock, I took steps to ensure that the dignity of the bench was maintained. I'd wear a robe and require litigants and lawyers to wear traditional courtroom attire. And I'd display the same professional demeanor as in the courthouse.

For the most part, it worked. We held more than 1,000 virtual hearings and six virtual jury proceedings over the next year without major mishap and all under the watchful eye of the world, on YouTube. But lurking behind those uneventful virtual proceedings hid the omnipresent threat of the unexpected.

The unfamiliarity, coupled with the extremely public nature of the proceedings, made many senior attorneys uncomfortable. No one wants to be embarrassed, especially not after spending decades building a stellar professional reputation. After all those years in the courtroom, most seasoned litigators learn to avoid, and

feel generally able to handle, the unexpected. At some point, you've pretty much seen it all, and you're ready for what may come.

But this confidence doesn't necessarily carry over into the virtual world. As we've seen repeatedly over the last year—from nude litigants to witnesses in surgery to “Zoom bombing”—with remote hearings you've *never* seen it all.

And more importantly, lawyers must be sufficiently familiar with computers, software, and peripherals (such as cameras, microphones, and speakers) to not only participate but also to help their less-sophisticated clients and witnesses do the same. This is a daunting task for even the tech-savviest of people. For some senior attorneys, this required the help of younger, computer-savvy support staff.

But sometimes even that isn't enough. Case in point: Lawyercat.

On Feb. 9, 2021, a senior attorney entered my virtual courtroom as a fluffy white kitten.

Now when I say he was a fluffy white kitten, I don't mean to say he was wearing a kitten mask or holding up a kitten sign.

Nay, nay.

Where his face should have been was a blinking, talking cat that mirrored his facial expressions and movements. After 30 seconds of futile efforts to remove the feline face, flustered but determined, he resolutely announced he was prepared to go forward with the hearing. And in a moment of exasperation and panic, he



helplessly uttered the now-famous words: “I’m here live. I’m... I’m not a cat.”

I knew this lawyer well. Despite his relative technological ineptitude, he regularly appeared in my virtual hearings with the help of his legal assistant. Unfortunately, his legal assistant had a young daughter who played with her mom’s laptop the night before the hearing and, unbeknownst to everyone, activated the cat video filter. Try as they might, they couldn’t remove it the next day without my assistance—and by then the damage was done.

wildfire. It was shared by AP, Reuters, Fox News, CNN, ABC, CBS, and other major news networks. I instantly realized I needed to frame the narrative before it was too late and released a second statement:

“These fun moments are a by-product of the legal profession’s dedication to ensuring that the justice system continues to function in these tough times. Everyone involved handled it with dignity, and the filtered lawyer showed incredible grace. True professionalism all around! [...] It is crucial that

## “I’m here live. I’m... I’m not a cat.”

### AN INSTANT VIRAL SENSATION

I believe judges have a duty to use their brief time on the bench to educate others and improve the quality of justice. I use social media to accomplish that goal, posting tips about remote hearings and legal practice. So when the hearing ended, I took to Twitter to post a warning about this previously unseen glitch.

The hearing took place shortly after 11 a.m. on Feb. 9—mere moments after the second Trump impeachment trial began. The world was focused on the impeachment (or so I thought), and I doubted my few Twitter followers, almost all of whom were attorneys, would even notice a tweet from me about Zoom hearings. I simply thought it was a fun and memorable way to teach an important lesson about avoiding Zoom mishaps.

Yet I hesitated because I knew it could also be spun to mock Texas lawyers—the last thing I wanted. I also didn’t want myself or the attorney to be the focus of the post. So I clipped the video so that neither my face nor that of the lawyer appeared on screen. At 12:06 p.m., I released the 48-second video snippet as an educational tweet, turned away from the computer, and ate my lunch. Little did I know I’d just released what would become the most viral video in history.

The video went viral within *seconds*. My phone heated up in my pocket and started to burn my leg. When I pulled it out to see whether it was malfunctioning, I saw thousands of emails, texts, and social media notifications. Within 30 minutes, the video had been shared and retweeted thousands of times; hundreds of thousands of people had seen it.

The video was blazing across social media like a

this not be used to mock the lawyers, but instead to exemplify the legal community’s dedication to the cause of justice.” @JudgeFergusonTX

All told, more than 1.7 billion people saw the video in the first 48 hours. More people saw Lawyercat than tuned in to the Trump impeachment trial. While the impeachment was a lead story on news broadcasts in the United States, Lawyercat was shown on local news networks all over the world. This innocuous courtroom moment became a worldwide phenomenon that redefined the term *viral video*.

The previous top viral video reached 100 million views in six days. *Lawyercat topped that number in*



*under six hours.* In fact, within six days, Lawyercat was seen by more than 2.1 billion people. All told, the lawyer appeared as a kitten for less than a minute, but in those few seconds, the legend of Lawyercat was born. All, arguably, at the expense of a senior attorney.

### IT'S NEARLY ALL GOOD

Now that we're planning for the post-pandemic future, states have begun to analyze the impacts of remote hearings on the justice system and the practice of law. The results are surprising and overwhelming.

Remote court proceedings greatly expand and improve access to justice. Contrary to fearful prognostications, pro se participation is up, failures to appear are down, and jury response rates and diversity of participation are at historically high levels.

In Texas, public satisfaction with remote proceedings is 94 percent—far above historical satisfaction rates of in-person proceedings. By eliminating wasted fees and associated expenses of lawyer travel and courthouse wait times, more people can afford legal representation. And the streamlined practice allows lawyers to take on more clients over a broader geographic area.

No one is suggesting that remote hearings are perfect or even preferable in all situations. But it's clear that remote hearings are here to stay in some shape or form, which means lawyers must once again—as they have so many times before—adapt and evolve.

This ominous realization is leading many senior lawyers to question their place in the profession. I personally know of several lawyers who retired rather than accept the move to Zoom. One angrily declared, “I didn't become a lawyer to stare at a television screen all day.” In a recent poll, roughly 20 percent of judges reported that they plan to leave the bench within a year as a result of the pandemic.

In encouraging you to stay active, or at least not to retire out of discomfort with remote hearings, allow me to leave you with some words of encouragement and food for thought gleaned from the thousands of remote proceedings I've held in the last 18 months:

- Pandemic or not, the incorporation of virtual proceedings was an inevitable step along the technological advancement of the legal profession.
- Your courtroom skills do translate into the virtual setting. The things that made you great in 2019 still make you great in 2021.
- Judges and court staff are now adept at holding virtual hearings that yield high-quality justice.

- Young lawyers entering the profession will have “grown up” using video conferencing software. Virtual hearings will be part of the profession their entire careers; they'll know nothing else. Associate attorneys will be great assets to senior partners.
- Young lawyers need mentors. Think back to your first years out of law school and consider the older lawyers you emulated. These young lawyers need what you had—supervising partners and worthy opponents to show them the right way, the best way, the *ethical* way to seek justice. In fact, I suggest that we need that now more than ever before.

Lawyercat ultimately had a happy ending. Yes, the lawyer in question was embarrassed in the time. Who wouldn't be? But rather than shrink from the spotlight and retire from the profession, he embraced his newfound fame. He's given dozens of media interviews, appeared on talk shows, landed a commercial for a popular alcoholic beverage, and been memorialized as both an action figure and a bobble head doll. He's seizing the moment and loving every minute of it.

His experience and the world's reaction to Lawyercat taught us an important lesson: We're all in the same boat. Over the past 18 months I've spoken with lawyers and judges around the world. They overwhelmingly feel the same way about the sudden shift to virtual court proceedings—nervous, uncertain, and frightened of the unknown. That's why that silly little video of technical glitch in a mundane court proceeding was relatable to more than 2 billion people.

This new digital world can be intimidating, even downright frightening. While today it's Lawyercat who's famous for a momentary technological snafu, we know that tomorrow it could be any one of us. The pandemic may have interrupted daily life, but it didn't stop lawyers from serving their clients, and neither should this.

Don't worry about not being...purr-fect...in remote hearings. Together—with your help—we'll get through this transition, and the profession will be better for it. **E**

---

**ROY FERGUSON** (@judgefergusonTX) presides over the 394<sup>th</sup> District Court—the largest judicial district in Texas—and serves by assignment on the 8<sup>th</sup> District Court of Appeals. He's active in State Bar of Texas leadership, having served on the governing boards of the *GPSolo*, Judicial, and Computer & Technology Sections and on the Texas Supreme Court's Judicial Committee on Information Technology. He has conducted roughly 3,000 virtual hearings via Zoom and presided over 12 fully virtual jury proceedings during the pandemic.