

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC21-990

IN RE: AMENDMENTS TO FLORIDA  
RULES OF CIVIL PROCEDURE, FLORIDA  
RULES OF GENERAL PRACTICE AND  
JUDICIAL ADMINISTRATION, FLORIDA  
RULES OF CRIMINAL PROCEDURE,  
FLORIDA RULES OF TRAFFIC COURT,  
FLORIDA SMALL CLAIMS RULES, AND  
FLORIDA RULES OF APPELLATE PROCEDURE

**AMENDED COMMENTS OF THE**

**SELF-REPRESENTED LITIGATION NETWORK (SRLN)**

SRLN is a national collaborative network of nearly 3,000 justice system professionals from the judicial, government, technological, academic, research, philanthropic, nonprofit and for-profit sectors who are working to advance best practices to make the courts better for self-represented litigants (SRLs). SRLN leadership has developed a deep understanding of and appreciation for the work done by justice leaders in Florida, having served as a consultant to The Florida Bar Foundation and the Florida Commission on Access to Civil Justice, and in the course of those

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consultancies has worked closely with the Florida Bar, the Florida Office of State Court Administration, and the Florida Civil Legal Aid Association. These comments do not represent the opinion of any one participant within the network, rather they reflect the current best practices and principles in access to justice throughout the United States.

## **Introduction**

Courts were designed by and for lawyers, yet today, depending on case type and location, 65% - 100% of the parties are representing themselves, and while no definitive count exists for Florida, snapshot studies by local courts reflect a similar profile of self-represented litigants within the Florida courts. Recently, when the Florida Supreme Court transferred the work of the Florida Commission on Access to Civil Justice, it acknowledged the importance of “focus[ing] on improvements that can be made within the State Courts System to assist self-represented litigants and support the judicial branch in ensuring effective access to justice for all.”<sup>1</sup>

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<sup>1</sup> Florida Supreme Court Press Release, *Access to Civil Justice Commission Transition Brings Focus to Self-Represented Litigant*

SRLN leadership advises courts, legal aid programs, and bar associations throughout the country on process, program, and policy strategies that will improve operational efficiency for courts within this new reality while also ensuring due process and equal protection for the public. SRLN recognizes technology as a hugely powerful tool in advancing justice, and since its inception in 2005, SRLN has championed the effective use of technology, which necessarily includes off-ramps and human supports for those who are burdened by the digital divide, have a disability that frustrates the use of technology being made available, speak a language other than what is used in the technology tools, or are experiencing conditions or situations such that technology is not a viable or equitable pathway to the courts. SRLN submits these comments to serve as valuable guidance for the court as it develops a framework for safe, accessible, effective, and secure integration of technology in court proceedings.

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*Mission* (September 20, 2021) available at <https://www.floridasupremecourt.org/News-Media/Court-News/Access-to-Civil-Justice-Commission-Transition-Brings-Focus-to-Self-Represented-Litigant-Mission>.

The Petition in support of the amendments notes in numerous places that the analysis is based on the anecdotal experience of members of the committee. Therefore, we conclude that various external resources and data were unavailable during the committee's deliberations. In an effort to be most helpful to the court in its ongoing work, these comments provide resources and data that, when taken into consideration, point to a number of surely unintended consequences such as denying public access to the courts, undermining due process, equal protection, and court neutrality, increasing the administrative burden on judges, clerks, and lawyers, and exposing lawyers and the public to cyber security risks. However, these harms can be mitigated or eliminated through refinement of the proposed changes, and in some instances, further study.

Integrating technology into court operations presents a once in a generation opportunity to streamline, simplify, and modernize the justice system, yet re-aligning a centuries old system designed by and for lawyers working in an analog environment is a complex and challenging undertaking that, to be successful, calls for a multi-stakeholder, iterative, and evidence based approach. Fortunately

models and best practices are available to guide these activities, which admittedly are new to the justice system. But new challenges require new approaches, and SRLN believes courts are in a good position to take full advantage of the approaches available today.

After sharing background resources on best practices for integration of technology in court proceedings, these comments are organized around four themes: 1) public access to the courts; 2) due process, equal protection, and neutrality; 3) administrative burdens on Judges, Clerks, and lawyers; and 4) cyber security risks for the public and lawyers. The comments conclude with recommendations to aid the court in its decision making.

## **Best Practices for Integration of Technology in Court Proceedings**

During the course of the pandemic, the Conference of Chief Justices and Conference of State Court Administrators, and leading national organizations such as the National Center for State Courts

(NCSC)<sup>2</sup>, the American Bar Association (ABA)<sup>3</sup>, the National Legal Aid and Defender Association (NLADA)<sup>4</sup>, and the Center for Court Innovation (CCI)<sup>5</sup> have developed best practices guidance to aid courts in creating hybrid environments that optimize technology and ensure constitutional protections are not eroded and substantive law not undermined. Common themes among these resources call for courts to be mindful of the following as they adopt new procedures that integrate technology:

- upholding a party's right to advocate for them self within our adversarial system;
- engaging all stakeholder groups impacted, recognizing self-represented litigants as the largest user group;
- segmenting case types and stages of the proceedings, and then conducting a close analysis from the perspectives of the

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<sup>2</sup> See NCSC's Pandemic resources generally at <https://www.ncsc.org/newsroom/public-health-emergency>, which include technology guidance and resolutions to guide technology, simplification, and self-help services.

<sup>3</sup> ABA Resolution and lengthy memo providing guidance on remote at <https://www.ncsc.org/newsroom/public-health-emergency>.

<sup>4</sup> NLADA research on ODR at <https://www.nlada.org/sites/default/files/NLADA%20Pew%20ODR%20Report%20Ensuring%20Equity%20in%20Efficiency.pdf>.

<sup>5</sup> CCI Sixth Amendment Initiative at <https://www.courtinnovation.org/sixth-amendment>.

different stakeholder groups of how constitutional and substantive rights are impacted;

- adopting an iterative approach that relies on data, analysis, and tailored research;
- ensuring parties have access to the needed technology, and when they don't, provide alternative access;
- complying with the Americans with Disabilities Act, both in terms of the technology being used, and building the non-technological offramps when the appropriate accommodation cannot be provided via technology;
- ensuring alternative access for those who speak a language other than what the technology provides.

As the court considers the current proposal, we urge it to explore how each of these concerns has been addressed in the current proposal, and not to shy away from the need for additional evidence, research, options, or deliberation of how to implement just and even-handed rules. It is worth noting that the committee deliberated without any public hearings or other public input. Widely accepted best practices of today call for public engagement and user testing. Given the potential for wide ranging substantive

impact flowing from these changes, it may be most prudent to implement more limited temporary changes that enable the Florida Courts to optimize the general use of technology, but do not foreclose ultimately creating more nuanced final rules that take full advantage of these newly discovered resources and data.

### **Public Access to the Courts**

Article I, § 21 of the Florida Constitution provides an explicit right of access to the courts and declares “the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”

The proposed rule changes that would require service by email and compel remote appearances close the courts for those without access to technology, including but not limited to those who:

- lack access to the internet entirely;
- lack a device that connects to the internet;
- lack necessary connectivity speeds to make the internet functional;
- lack the financial means to afford a device;
- lack the financial means to afford sufficient data plans;

- lack the language skills or physical or cognitive abilities necessary to interface with the court’s technology without human support and/or other accommodations.

The Petition notes that it is the belief of the committee that the majority of Floridians have access to the internet and related devices, and that any cost for these technologies is de minimis and therefore to be shouldered by the parties. The Petition cites no evidence for these assertions, and therefore we conclude the federal and private data were not available to them at the time of deliberations, and provide it herein.

The data does indeed support the hypothesis that the majority of Floridians have excellent connectivity; however, the data also unequivocally demonstrates that nearly three million Floridians do not have access to the necessary technology and that this burden of digital exclusion falls disproportionately on Black and Brown households, as well as the elderly.

Reliable sources of data on digital access include the Federal Communications Commission (FCC), which provides a yearly report on broadband availability and speed,<sup>6</sup> as well as the American

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<sup>6</sup> See <https://www.fcc.gov/economics-analytics/industry-analysis-division>.

Community Survey (ACS), which provides data on “computer” ownership and type of internet subscription access<sup>7</sup>, and the National Telecommunications and Information Administration (NTIA), which uses several different public and private data sources to show information on broadband availability within the United States.<sup>8</sup> Layers in the NTIA map were created using data sourced from the American Community Survey collected by the U.S. Census, Ookla, Measurement Lab (M-Lab), Microsoft and the Federal Communications Commission (FCC).

These best in class sources provide the Court and its partners specific, segmented data that can guide the design of supportive offramps and services for those who cannot access the court through digital means.

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<sup>7</sup> See <https://www.census.gov/acs/www/about/why-we-ask-each-question/computer/> which sets out the questions of the survey and defines computer as desktop, laptop, smartphone, tablet or other portable wireless computer, some other type of computer. Snapshot of ACS survey questions are in Appendix B. See also <https://www.arcgis.com/home/item.html?id=4f43b3bb1e274795b14e5da42dea95d5>.

<sup>8</sup> See <https://broadbandusa.maps.arcgis.com/apps/webappviewer/index.html?id=ba2dcd585f5e43cba41b7c1ebf2a43d0>.

When reported in the aggregate at the county level by the FCC, Florida communities appear to have excellent access, and the majority of Floridians should indeed be able to use technology effectively to access court proceedings, resources, and utilize online options. However, a less positive picture emerges at the tract level<sup>9</sup> and an even more grim, yet focused picture at the block level.<sup>10</sup>

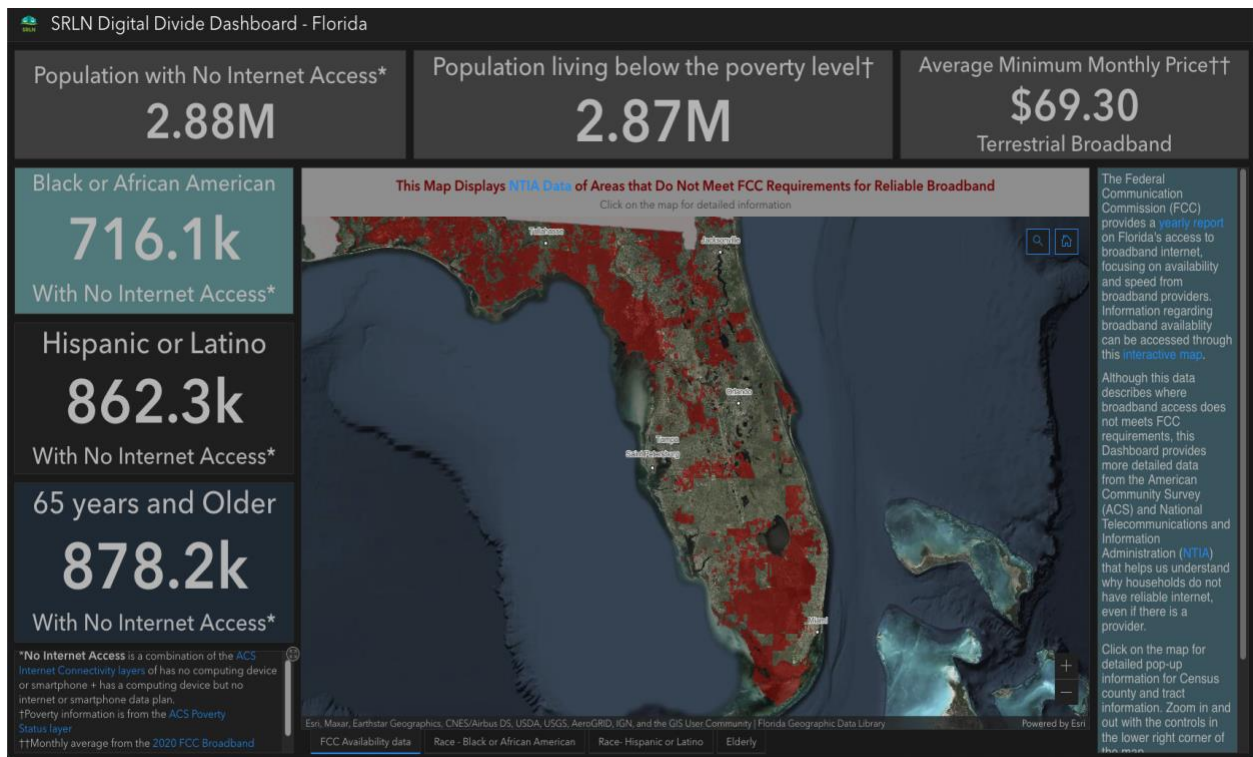
The following image from the NTIA combined data shows the areas of Florida that do not meet FCC Requirements for reliable broadband.<sup>11</sup>

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<sup>9</sup> Tract is a permanent statistical subdivision of a county with between 1,200 - 8,000 inhabitants. See <http://www.census.gov>.

<sup>10</sup> Blocks are the smallest level of geography for which data is available and are described as statistical areas bounded by visible features such as roads, streams, and railroad tracks and non-visible boundaries such as property lines, city, township, school district, county limits and short line-of-sight extensions of roads. See <http://www.census.gov>.

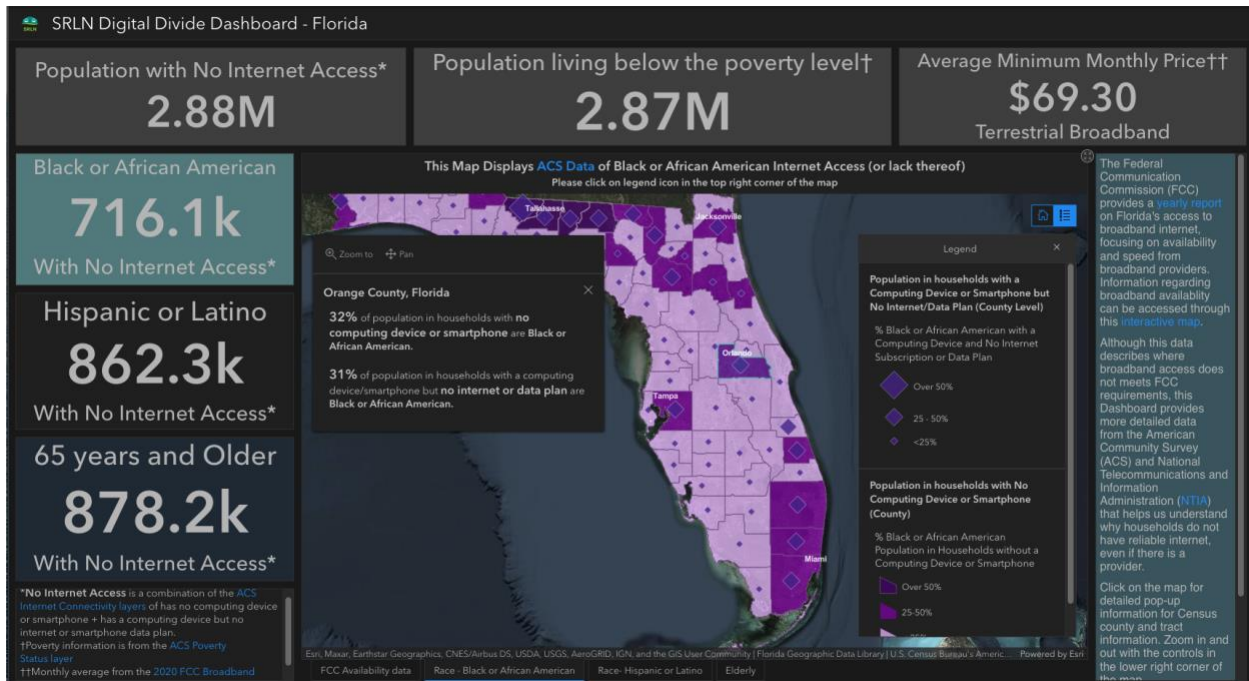
<sup>11</sup> This screenshot is taken from SRLN's interactive Digital Divide Dashboard available at <https://www.arcgis.com/apps/dashboards/6e1792b001a9439184be086677df184b>. In the right column of this dashboard is a link to an interactive map layer application with the relevant layers for Florida from the FCC, ACS, and NTIA data.



The next image displays ACS data on the internet and computer access of Black Floridians. If you visit the interactive map at

<https://www.arcgis.com/apps/dashboards/6e1792b001a9439184be086677df184b>, you can zoom in and see more detail and even higher percentages of people lacking access at the tract and block levels. The darker the purple, the less access there is. If you visit

the interactive map, you can click on the tabs to see the impact on Hispanic or Latino people, and the elderly.



The data establishes that nearly three million Floridians do not have internet access (whether wired and/or access to a device), and yet these Floridians are entitled to access to the courts. The constitution does not say access for most people, but rather for every person. The court can ensure access for every person despite the digital divide by creating rules that allow for and seamlessly

integrate necessary offramps<sup>12</sup>, without prejudice, for those who are digitally excluded.

The available data also does not support the committee's anecdotal conclusion that the cost of access is de minimis. In the upper right-hand of the dashboard, we report that the average monthly cost of terrestrial broadband is \$69.30. Visit the interactive maps to see more data on this. There is no publicly available data on the cost of data plans for smartphones. This cost for terrestrial broadband also does not include the cost of a computing device, whether computer, smartphone or tablet.

Therefore, the portion of the proposed rule that places the burden of the cost of technology on the parties should be stricken.

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<sup>12</sup> For example, offramps can include the following: opt-in for technology upon filing, thereby ensuring that the people without technology are not burdened with an additional procedural step or stigmatization of asking not to use technology; court based self-help centers; community partnerships with trusted intermediaries who are trained on resources and processes so that those without technology can, within their neighborhoods and from non-profit and government agencies with whom they already interact, get the benefit of and are informed about the court self-help resources and court forms, which are available only on-line and mostly in English; community partnerships with entities that can offer access hubs to support those who opt-in for technology but lack skill, bandwidth speeds, data packages, or experience language or ADA barriers, or those who agree to use technology for non-evidentiary matters, or those, who opted-in, but in the course of the case their technology fails or is eliminated.

## **Due Process, Equal Protection, and Neutrality**

Due process, equal protection, and neutrality are cornerstones of justice. As technology is integrated into the courts, special attention must be given to these questions. Indeed, the first principle of the CCJ/COSCA Guiding Principles for Post Pandemic Technology is “[E]nsure principles of due process, procedural fairness, transparency, and equal access are satisfied when adopting new technologies.”<sup>13</sup> In *Turner v. Rogers*<sup>14</sup>, the U.S. Supreme Court found that, in the absence of counsel, due process for self-represented litigants requires courts to provide “alternative procedural safeguards.” Applying the *Turner* notion of “alternative procedural safeguards” to technology integration calls on courts to recognize that self-represented litigants may need alternative procedures and not simply the default procedures for lawyers. Great care must be taken to ensure that new procedures created to support technology do not disenfranchise those without technology.

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<sup>13</sup> Guiding Principles for Post-Pandemic Court Technology (CCJ/COSCA July 16, 2020) at [https://www.ncsc.org/\\_data/assets/pdf\\_file/0014/42332/Guiding-Principles-for-Court-Technology.pdf](https://www.ncsc.org/_data/assets/pdf_file/0014/42332/Guiding-Principles-for-Court-Technology.pdf).

<sup>14</sup> *Turner v. Rogers*, et al., 564 U.S. 431 (2011).

Integrating technology creates new disparities between parties. In addition to access to a device connected to the internet, access includes a number of additional considerations such as speed and stability of the connection, the cost of the data being consumed, skill and experience in using a platform, access to a suitable location to participate, and the aesthetics of appearance on a screen;<sup>15</sup> Judges often indicate that “how someone looks and speaks” are important aspects of their credibility determination when assessing testimony. A self-represented litigant with an unstable connection, bad lighting, worrying their data plan is going to run out, and children roaming about will simply not present as well as the individual who can be in court or broadcasting from a lawyer’s office. In addition, the research is mounting that in certain proceedings, particularly criminal, parties are significantly prejudiced by remote hearings, receiving longer sentences, higher

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<sup>15</sup> Within weeks of the onset of the pandemic and the professional world moving online, articles abounded on ways to improve one’s online appearance. See for example <https://www.inc.com/jason-aten/5-ways-to-look-your-best-on-your-next-zoom-meeting.html>. Low and moderate income individuals are unlikely to be able to invest in special lighting, cameras, mics, backgrounds and the like to improve their appearance, yet professionals rely heavily upon these add-ons to improve their online presence.

bail amounts and the like.<sup>16</sup> Research on the impact of remote in civil proceedings is not yet available, but given the early results from the criminal side, it is fair to expect that in certain evidentiary matters, compulsory remote is putting a party at a disadvantage.

Similarly, mandatory email service gives those with constant immediate access to their email an unfair advantage over those who must borrow another person's or organization's computer to check their email.<sup>17</sup> Access to the borrowed computer may only be possible once a week, by appointment, or turn on whether the party can find transportation to the borrowed device. The proposed

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<sup>16</sup> See generally the Center for Court Innovation's Sixth Amendment Initiative at <https://www.courtinnovation.org/sixth-amendment>, as well as an evolving research bibliography at <https://www.courtinnovation.org/sites/default/files/media/document/2021/Review%20of%20Literature%20and%20Other%20Resources%20BJA%206th%20Amendment.pdf>.

<sup>17</sup> Mandatory email service also raises serious questions about injecting commercial vendors of email and internet providers into the constitutionally mandated step of service. Under current rules, the U.S. Postal Service, a government body free and available to all, provides the "highway" for service, the lynchpin of due process. Mandatory email service shifts this fundamental constitutional act to the "highways" of commercial vendors that require customers to pay for the service, have no obligation to maintain service, and are subject to regular and wide-ranging cyber-attacks. Should individuals want to take on this risk, that could be permissible. But compulsory use of email and internet eliminates an individual's right to choose the level of risk and puts a fundamental constitutional right in the hands of commercial vendors.

changes start the response clock at the time the email is sent, which means the technologically advantaged will have more time to respond, and the technologically disadvantaged may not even be able to access the filing until after the response time has run.

The court cannot correct this disparity, but it can avoid inappropriately and unjustly forcing this disparity upon people. Compulsory remote appearances and email service favor the technologically advantaged (whether individuals or institutional actors such as prosecutors, credit card companies, hospitals, and landlords) and were the court to adopt the rule as written, from the perspective of the technologically disadvantaged self-represented litigant, it is no longer a neutral forum. Court rules ought not undermine the courts neutrality, nor should rules erode public trust and confidence in the institution and the rule of law. Court rules ought to, among other things, ensure a fair playing field so each party has a full hearing of the merits of their case.

The American justice system is an adversarial one in which the parties have the right and responsibility to advocate for their positions, whether a legal strategy around which facts and witnesses to put before the judge, or procedural strategy such as a motion to invoke the formal rules in a small claims action, certain

motions to change venue, or making a demand for a jury trial. Indeed, the Florida Rules of Professional Conduct note in the preamble, “[a]s an advocate, a lawyer zealously asserts his client’s position under the rules of the adversary system.”<sup>18</sup> Rule 4.1.2 Objectives and Scope of Representation delves further into the nature of the attorney-client relationship, with a first principle that a lawyer must abide by a client’s decisions. And in the comments to the rule notes that a “lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.” For self-represented parties, they are responsible for all decisions in deciding how to manage their case, and a court rule ought not strip them of that full authority.<sup>19</sup>

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<sup>18</sup> Florida Rules of Professional Conduct available at [https://www-media.floridabar.org/uploads/2021/07/CH-4-2022\\_01-JUL-RRTFB-7-23-2021-4.pdf](https://www-media.floridabar.org/uploads/2021/07/CH-4-2022_01-JUL-RRTFB-7-23-2021-4.pdf).

<sup>19</sup> It is sometimes argued that rules that apply to lawyers should apply to self-represented litigants (SRLs), but the most important distinguishing characteristic between lawyers and SRLs is that SRLs are parties to the case, whereas lawyers are not. Therefore, a rule that constrains a lawyer is a professional management rule, but a rule that unfairly constrains an SRL abrogates his or her legal rights and ability to have their matter fully heard.

A growing body of research and experience during the pandemic is establishing that remote appearances can and do have a substantive impact, and can create an advantage of one party over another. This evidence suggests that remote appearances in substantive hearings or a trial can be used as a strategic choice by the parties. The court is overstepping its role and undermining its position of neutrality when it automatically compels one type of appearance over another. A judge would not review discovery and tell parties which evidence or witnesses to bring to trial or order a jury on behalf of parties. Rather, a judge considers evidence brought by the parties, rules on appropriate objections, and issues decisions. Making remote compulsory or leaving the decision entirely in the discretion of the court creates circumstances in which the court arguably becomes an active participant in the proceeding by 1) making a strategic choice on behalf of the parties, and 2) assisting and favoring the technologically advantaged.

However, this caution regarding neutrality does not mean technology cannot be integrated into operations and that there can be no remote hearings or e-filing, what it means is that the rules need to ensure the parties can drive the decision of how technology is used in their case. It is after all, their case, not the court's case.

Voicing similar concerns in August 2020, the American Bar Association adopted a resolution to limit compulsory use of virtual and remote court procedures to essential proceedings. This Resolution sought to limit the compulsory use of virtual and remote court procedures to essential proceedings, while permitting the use of such procedures whenever litigants provided **informed consent** and were further provided the option of an in-person hearing whenever such a hearing was safely possible. The Resolution further encouraged each jurisdiction employing virtual or remote court: (1) to establish committees to conduct evidence-based reviews of virtual and remote court procedures; (2) to guarantee equal access, due process and fundamental fairness; (3) to provide additional funding to improve access to virtual or remote court proceedings; (4) to ensure that the public, including the media, is provided access to court proceedings unless an appropriate exception applies, in which case the privacy of the proceeding should be protected; (5) to provide training on virtual and remote procedures; and (6) to study the impacts of these procedures for possible prejudicial effect or disparate impact on outcomes. The full Resolution is attached in Appendix A.

## **Administrative Burden on Judges, Clerks, and Lawyers**

Care should be taken to avoid setting a default rule that will require additional administrative burdens on Judges, Clerks, lawyers, and the public. As currently drafted, the proposed amendments set remote appearances and email service as the default rule, and invite additional motion practice by those who are digitally excluded. According to the data described above, upwards of three million Floridians, most of whom are people of color or the elderly, comprise the digitally excluded, and are likely to be self-represented parties. Therefore, it is reasonable to expect that they will need the most support and assistance in requesting and navigating the process to secure exemptions. It is not unreasonable to expect they will file numerous spurious motions attempting to seek an exemption because the proposal does not lay out any standardized simple process and therefore each court - or even judge (given that the proposal vests so much discretion in each judge, also creating an enormous hurdle with respect to an appellate standard of review) - will make their own rules. This is the very opposite of a statewide rule, but rather a rule likely to have the unintended consequence of incentivizing each judge to come up

with their own approach. Without a consistent approach, public trust and confidence in the courts erodes and there is no meaningful way to deploy reliable self-help resources because the answer of what to do when and how, as well as likelihood of success, will depend on the Judge and the case. This framework incentivizes each party to seek one-on-one help from the court for each and every case, thereby significantly increasing the work of the clerks, judicial assistants, and Judges. If self-represented litigants do not have simple, standardized procedures to follow, they must ask questions, and this results in more work for Judges, clerks, and opposing counsel.

The proposal as written with respect to email service creates an explosion of new work by creating an open-door policy for parties to email their questions - if it is challenging to corral self-represented litigants into regular motion practice, the rule as written has, for the not legally trained, arguably changed “motion practice” to “email practice,” which is completed in the press of a button. This avalanche of new communications between parties and the court will create confusion and delay in the management of cases, putting a significantly greater burden on the clerks who must process filings, and judges who must make sense of everything that

has been filed. Self-represented parties who do not have the stamina or ability to file motions will simply be excluded from the court altogether. In those cases where one side is represented by a lawyer, the rule as written will likely put lawyers in the position of managing excessive “email practice.”

However, there is an elegant solution that would further the courts goals of simplification, effective triage, and technology integration and also comport with due process and equal protection and ensure informed consent. The rule could provide for an opt-in process upon filing. Specifically, there are three distinct decisions: 1) remote appearances for non-evidentiary matters, 2) remote appearances for evidentiary matters, and 3) email service (although per the discussion below around cybersecurity, email service as a policy is not advisable).

Each of these buckets has different considerations, and therefore it is reasonable for a party to agree to one, some, or none. An opt-in process also allows for education about the risks and benefits, and expectations of a party should they opt-in. This entry point could also set out the rules of how to change one’s selection based on a change of circumstance. Sorting users at the front end will eliminate the need for chaotic motion/email practice during the

case, and identify early in the case which users will need additional supports to exercise their constitutional right of access to the courts, thereby allowing the court and its partners to develop appropriate information and referral systems to get that support. A rule setting a statewide standardized opt-in process would also start to build a solid standardized statewide foundation for universal e-filing. Of course, any practice needs to be studied for its impact as well, and the court prepared to modify the rule based on the results of research. This is especially so for the scenario where a party opts in to remote appearance for evidentiary proceedings.

### **Cyber Security Risks for the Public and Lawyers**

As courts develop new rules to integrate technology, cyber security issues must be a central consideration. This is a fast moving and evolving area. On September 15, 2021 The Joint Technology Committee of the Conference of State Court Administrators, National Center for State Courts, and the National Association of Court Managers released comprehensive new guidance entitled *Cybersecurity Basics for Courts*,<sup>20</sup> and so it is

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<sup>20</sup> *Cybersecurity Basics for Courts* (Joint Technology Committee 2021) available at

understood this guidance, like the data discussed above, was not available to the committee during its deliberations. The report introduces the state of cybersecurity in courts as follows:

The number, scope, and breadth of organizations experiencing cybersecurity incidents in the past few years is vast and unsettling. Attacks against courts are on the rise, and the methods of attack continue to become more sophisticated. The reality is that regardless of preventive measures, most organizations will deal with some form of cybersecurity incident. Accepting that courts will face cybersecurity incidents is essential.

Cybersecurity often comes at a cost, not only in terms of dollars, but also convenience and performance. Properly balancing cybersecurity and convenience can be a challenge for management when looking at what security measure to invest and implement. As recent cyber-attacks demonstrate, **convenience should not be a reason to circumvent sound security practices and policies.**<sup>21</sup> (emphasis added)

The proposed rule changes would set email as the default form of service, and the rationale is that it is convenient, precisely what the new guidance cautions against. And while tempting, an approach based on convenience is exposing the court, parties, and

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[https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0037/68887/JTC-2021-05-Cybersecurity-QR\\_Final-Clean.pdf](https://www.ncsc.org/__data/assets/pdf_file/0037/68887/JTC-2021-05-Cybersecurity-QR_Final-Clean.pdf).

<sup>21</sup> Id. at 3.

lawyers to a wide range of extremely serious and permanently harmful cyber security risks.

Email messages are generally sent over untrusted networks-external networks that are outside the organization's security boundary. When these messages lack appropriate security safeguards, they are like postcards that can be read, copied, and modified at any point along these paths, and malware, viruses, ransomware, spam and phishing, social engineering, and more can be inserted and attached. Securing an e-mail system is the responsibility of an organization's IT department and email administrator, however in this case, given the court is considering compelling those outside of the court such as parties and lawyers to use email, it has the obligation to consider how its rules could impact the security of law firms and individuals in addition to the court's security.<sup>22</sup> Anyone responsible for the confidentiality, integrity, security and availability of the information sent via email

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<sup>22</sup> Id. at Appendix A of *Cybersecurity Basics for Courts* for details on how cyberattacks are carried out. A general google search about the dangers associated with unencrypted email will also yield an extensive amount of information and guidance.

should be aware of the threats facing email systems and understand the basic techniques for securing these systems.

Self-represented parties using free email services will not have security protocols or IT departments, and there will be no way for them to protect themselves from attacks, or as subjects of spoofing, unwittingly appear to be the source of an attack on opposing counsel or the court. If service is by email, what happens if parties do not want to open an email or attachment because it looks suspicious, or can they even tell if it is suspicious?

In addition to email security issues, the transmission of personally identifiable information (PII) over unencrypted communications exposes parties to serious risk and could arguably create obligations on counsel to protect the information of opposing parties.<sup>23</sup> Generally, personally identifiable information is any information about an individual, including (1) any information that can be used to distinguish or trace an individual's identity, such as

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<sup>23</sup> See for example information provided to Berkeley Lab employees at <https://commons.lbl.gov/display/cpp/Risks+to+PII#test--710944848>. See also SEC Actions Up the Ante for Cybersecurity Disclosures (Bloomberg Law September 14, 2021) at <https://news.bloomberglaw.com/private-equity/sec-actions-up-the-ante-for-cybersecurity-disclosures>.

name, social security number, date and place of birth, mother's maiden name, or biometric records; and (2) any other information that is linked or linkable to an individual, such as medical, educational, financial, and employment information. Some information considered PII is available in public sources, such as telephone books and public websites. However, even non-PII, like first and last names, telephone numbers, and email addresses, can become PII when combined with additional information that could be used to identify an individual. The loss of, or unauthorized access to PII can result in substantial harm, fraud, embarrassment, and inconvenience to individuals as well as identity theft. Therefore, it is a best practice to minimize the collection of PII, and if an entity is in possession of PII (and under the email service rule, law firms would be in possession of opposing party's PII) they must take steps to protect it. And of course, it cannot be protected via an unencrypted email system.

Were the court to adopt the mandatory email service rule as proposed, it would be exposing the public and the bar to significant cyber security threats (both in terms of attacks to their computer systems and theft of and misuse of PII), which is certainly an

unintended consequence of these efforts to improve convenience. If parties wish to assume the risk of encrypted email communications, that is their choice, although it is wholly unadvisable. Given the risks and the widespread recognition across all branches of government that unencrypted communications and exposed PII should be avoided at all costs, the rule as proposed with respect to email should not be adopted and instead refashioned in response to emerging guidance on cyber security.

## **Conclusion**

The leadership of the Florida Courts is courageously forging a new path as it develops rules and policies to best integrate technology, and their leadership is commendable. However, the proposed changes as written have a number of serious unintended consequences that strongly support further study, especially with respect to remote appearances in evidentiary proceedings. With respect to non-evidentiary appearances, a modified approach to allow for opt-in selection and the deployment of necessary supports for those who cannot use technology appear to be an excellent opportunity to combine technology, triage, simplification, and build out the self-help centers recommended in the Florida Commission

on Civil Justice’s 2020 report, *Voices in the Civil Justice System: Learning from Self-Represented Litigants and their Trusted Intermediaries*. Finally, with respect to the email provisions, the data and the research overwhelmingly support the conclusion that the risks far outweigh the rewards and that it is not prudent at this time to abolish service by mail and set unencrypted email as the default for service.

Technology integration is a complicated and pressing issue nationally, and we applaud Florida on its leadership in this area, and look forward to the evolving conversation, which in the future must necessarily also include the public, who as self-represented litigants, are the largest user group in the courts. We also join in supporting the comments of the Florida Civil Legal Aid Association, Disability Rights Florida, and the National Legal Aid and Defender Association.

SELF-REPRESENTED LITIGATION NETWORK

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing notice and attached Appendices were filed with the Clerk of Court on September 30, 2021, via the Florida Courts E-Filing Portal, which will serve a notice of electronic filing to those listed below:

/s/Katherine Alteneder

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**AMERICAN BAR ASSOCIATION**  
**ADOPTED BY THE HOUSE OF DELEGATES**

**AUGUST 3-4, 2020**

**RESOLUTION**

RESOLVED, That the American Bar Association applauds the work of federal, state, local, territorial and tribal courts and the members of federal, state, local territorial and tribal bars for their thoughtful and innovative approaches to administer the justice system and protect the interests of litigants during the COVID-19 pandemic;

FURTHER RESOLVED, That the American Bar Association supports a considered and measured approach in adopting and utilizing virtual or remote court proceedings established as a result of the COVID-19 pandemic, prioritizing use of such procedures for essential proceedings and those cases in which litigants consent to the use of virtual or remote processes;

FURTHER RESOLVED, That the American Bar Association urges regular review of any decision to detain an individual pending a final proceeding made during a period of mandatory use of virtual or remote court proceedings;

FURTHER RESOLVED, That the American Bar Association urges that any authorization of mandatory use of virtual and remote court proceedings during the COVID-19 pandemic continue for as short a time as possible and in no event longer than the duration of the declaration of emergency issued in the jurisdiction;

FURTHER RESOLVED, That the American Bar Association urges that use of virtual or remote court proceedings be permitted when litigants have consented to the use of such procedures, including being offered a delay until a safe, in-person proceeding can be held;

FURTHER RESOLVED, That the American Bar Association urges that no person consenting to the use of virtual or remote court proceedings be required to sign a blanket waiver of rights or waive the right to have the procedure or outcome of the proceeding be subject to appellate or post-conviction review;

FURTHER RESOLVED, That the American Bar Association urges the formation of committees to conduct evidence-based reviews of the use of virtual or remote court proceedings and make recommendations for procedures, revisions of procedures and

best practices to ensure that they are guaranteeing all applicable constitutional rights and ensure that attorneys can comply with their professional ethical obligations. Such committees should include representatives of all constituencies involved in or affected by the type of court or proceeding under consideration;

FURTHER RESOLVED, That the American Bar Association urges that all virtual or remote court proceedings be tailored to the needs of participants and take into account the type of case and proceeding to be conducted, the participants involved, and whether participants are likely to be represented by counsel, by:

- (1) Considering the ability of all participants to access and fully participate in the proceedings, including:
  - a. Ensuring that participation options for virtual or remote court proceedings are free for participants and observers;
  - b. Providing options concerning participation and permitting participants to select the means of participation best suited to them without prejudice;
  - c. Allowing participants to alter their chosen means of participation for each proceeding;
  - d. Providing necessary support for those who, for financial, technological, language access, disability, or other reasons, may not be able to fully participate without assistance;
  - e. Ensuring that methods of participation reduce, to the fullest extent possible, any prejudice that might result from the circumstances of participation;
  - f. Providing contingencies for possible technological or access problems during the proceeding;
  - g. Guaranteeing that participants are not pressured or obligated to waive constitutional rights;
- (2) Providing training on applicable procedures, including training on possible areas of technological bias;
- (3) Providing additional funding to assist courts, legal aid and public defense providers, prosecutors, and social service providers to expand and improve access to virtual and remote court proceedings, particularly for those who may require financial, technological, language access, or other specialized assistance;
- (4) Protecting full attorney-client relationships, including providing access for private consultation both before and during court proceedings and guaranteeing the confidentiality of such communications; and
- (5) Enabling and encouraging access to other litigation assistance programs and self-help programs previously available;

FURTHER RESOLVED, That the American Bar Association urges that advance notice be provided to the public of all virtual or remote proceedings and that full and meaningful public access to such proceedings be guaranteed, while also protecting the privacy of those proceedings legally exempted from public access; and

FURTHER RESOLVED, That the American Bar Association urges that virtual and remote court procedures be studied for purposes of developing best practices and determining possible biases, and that, if such studies suggest prejudicial effects or disparate impacts on particular litigants or case outcomes, steps should be taken to halt, alter, or revise virtual or remote court procedures.



## REPORT

During the COVID-19 pandemic, courts have endeavored to find ways to operate safely, while also ensuring that essential court proceedings continue. These efforts have been incredibly admirable, particularly amid the set of changeable crisis circumstances faced and they are deserving of acknowledgment.

In many jurisdictions, this has involved quickly setting up remote or virtual courts, using meeting technologies such as Zoom or Go to Meeting. Because of the pandemic, the remote or virtual court procedures often have been crafted without time for consultation and input from the various constituencies that would normally be consulted prior to a change in court procedures, such as attorneys, clerks, social service providers, litigant support groups, victims groups, etc. In Texas, for example, on Thursday, March 19, 2020, the Office of Court Administration advised judges that they had acquired 600 Zoom licenses to permit courts to go online starting Tuesday, March 24, 2020. In the first month of operation, Texas held “more than 8,500 separate proceedings . . . involving 113,000 participants and just over 1,300 judges.”<sup>1</sup> According to the National Center for State Courts, at least 40 states have issued some guidance on holding virtual or remote hearings, but the approaches vary widely.<sup>2</sup> As of July 27, 2020, only fifteen state court systems have announced plans to reopen.<sup>3</sup>

As they have been implemented, numerous questions have arisen over how to conduct virtual or remote court as fairly as possible, including:

- When should appearance at a virtual or remote proceeding be mandatory vs. optional?
- How can we create procedures that ensure equal access for all participants? How can we create procedures that guarantee criminal defendants all applicable constitutional rights?
- How can we create procedures that ensure that attorneys can comply with their professional ethical obligations?
- How can we ensure that the circumstances of participation (video vs. telephone, background, and lighting) do not unfairly prejudice the proceeding in favor of or against a participant?
- How can we share documents and evidence in real time with proceeding participants?

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<sup>1</sup> Erik De la Garza, *Texas Courts Zoom Forward with Virtual Hearings*, Courthouse News Service (April 24, 2020).

<sup>2</sup> *Id.* As of July 27, 2020, the National Center for State Courts website on Virtual Hearings listed five states (Delaware, Connecticut, New Jersey, New Mexico and Alaska) and Puerto Rico as having statewide orders requiring courts to close and mandating virtual court proceedings. An additional fifteen states have statewide orders urging the use of virtual hearings, including Wisconsin, California, Texas, Illinois and New York. National Center for State Courts, Virtual Courts Chart (visited July 27, 2020), available at <https://www.ncsc.org/newsroom/public-health-emergency>.

<sup>3</sup> National Center for State Courts, Statewide Plans to Resume Court Operations Chart (visited July 27, 2020), available at <https://www.ncsc.org/newsroom/public-health-emergency> (listing and linking to plans from Montana, Wisconsin, Texas, Arkansas, Tennessee, South Carolina, Florida and Pennsylvania).

- How can we ensure the timely and effective transmission of court orders and notices?
- How can we ensure that attorneys have a full and contemporaneous opportunity to consult privately with clients during proceedings?
- How can we provide public and media access to courts held virtually/remotely? Once available, should such proceedings be subject to recording and available after the live event? If so, for how long?

As the pandemic has become the new normal, it has become obvious that these procedures will be in use, at least in part, for some time to come. As courts implement or expand the use of emergency procedures for virtual or remote court, it is important not to lose sight of the questions raised by these procedures and to take the earliest possible opportunity for consultation, input and feedback of the myriad justice system actors.<sup>4</sup>

This Resolution urges a considered and measured approach to the compulsory use of virtual and remote court procedures, while permitting the use of such procedures whenever litigants provide consent and are further provided the option of an in-person hearing whenever such a hearing is safely<sup>5</sup> possible. The Resolution further encourages each jurisdiction employing virtual or remote court: (1) to establish committees to conduct evidence-based reviews of virtual and remote court procedures; (2) to guarantee equal access, due process, effective assistance of counsel, and fundamental fairness; (3) to provide additional funding to improve access to virtual or remote court proceedings; (4) to ensure that the public, including the media, is provided access to court proceedings unless an appropriate exception applies, in which case the privacy of the proceeding should be protected; (5) to provide training on virtual and remote procedures; and (6) to study the impacts of these procedures for possible prejudicial effect or disparate impact on outcomes.

### **Concerns Related to Virtual and Remote Court Proceedings**

Virtual and remote court proceedings raise concerns about the impact of telepresence, equal access to the proceedings, attorney-client relationships and access to assistance programs, and public access and privacy concerns. This Report addresses each of these concerns in turn before proposing policy recommendations on the use of virtual and remote courts, as well as appropriate review of such use.

#### *Impact of Telepresence*

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<sup>4</sup> This Resolution does not take a position on whether the use of virtual or remote court proceedings are legal or constitutional. For an overview of past rulings on the use of virtual or remote court proceedings in various types of hearings, see Mike L. Bridenback, *Study of State Trial Courts Use of Remote Technology*, National Association of Presiding Judges and Court Executive Officers, April 2016, available at <http://napco4courtleaders.org/wp-content/uploads/2016/08/Emerging-Court-Technologies-9-27-Bridenback.pdf>. Some courts have found video and remote court procedures inadequate for bail proceedings, for some plea hearings, for evidentiary hearings and for trials. *Id.* at 4-7.

<sup>5</sup> The Resolution does not take a position on when in-person court proceedings should resume. Given the public health nature of this crisis, the determination of whether in-person court proceedings can be safely held should be made in conjunction with the public health and medical experts in each jurisdiction.

Watching someone on a screen does not have the same impact as seeing the individual in-person. “Virtual hearings inevitably skew the perceptions and behavior of the involved parties by either removing or over-emphasizing non-verbal cues, failing to properly simulate normal eye contact, or exaggerating features.”<sup>6</sup> A recent report by the Surveillance Technology Oversight Project recently noted that these problems “can obstruct the fact-finding process and prevent accurate assessments [of] credibility and demeanor.”<sup>7</sup> The few studies conducted of use of videoconferencing in courts show that these issues can have significant impacts on outcome.

In 1999, Cook County, Illinois (Chicago) began holding most bail hearings in felony cases using a closed-circuit television procedure. The defendant remained at the detention center for the bail hearing. A study of the impact of this procedural change was conducted by a research team from Northwestern University led by Shari Seidman Diamond.<sup>8</sup> The study concluded that “defendants were significantly disadvantaged by the videoconferenced bail proceedings.”<sup>9</sup> Specifically, “[t]he average bond amount for the offenses that shifted to televised hearings increased by an average of 51%.”<sup>10</sup> The researchers noted that the disparity may have been, in part, caused by the quality of the technology, the lack of “eye contact” caused by watching the screen rather than the camera, the reduced ability or willingness of the defendant to speak up during a hearing, or the negative impact of the proceeding on attorney-client communication.<sup>11</sup>

An observational study of teleconferenced immigration hearings conducted in 2004-2005 found such hearings “a poor substitute for in-person hearings.”<sup>12</sup> The study found that the use of videoconferences reduced the ability or opportunity of immigrants to speak or ask questions and lessened their ability to communicate with their attorneys.<sup>13</sup> The conferences were also plagued by technical difficulties, with almost half of observed cases experiencing one or more problems.<sup>14</sup> The study called for a “moratorium on

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<sup>6</sup> Albert Fox Cahn and Melissa Giddings, *Virtual Justice: Online Courts During COVID-19*, Surveillance Technology Oversight Project (July 23, 2020), at 10, available at <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f1b23e97ab8874a35236b67/1595614187464/Final+white+paper+pdf.pdf>; see also Alfred Ng, *Going to court online is supposed to be safer. For many, it's actually much worse*, CNET (July 23, 2020), available at <https://www.cnet.com/news/why-virtual-courts-put-defendants-at-a-disadvantage/>.

<sup>7</sup> *Id.*; see also Anne Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 Tul. L. Rev. 1089 (2004) (noting that videoconferencing may have a negative impact on the way the defendant is perceived as well as the way in which the defendant experiences the criminal justice system), available at <https://digitalcommons.law.villanova.edu/wps/art15>.

<sup>8</sup> Shari Seidman Diamond, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. of Crim. L. & Criminology 869 (2010).

<sup>9</sup> *Id.* at 898.

<sup>10</sup> *Id.* at 897.

<sup>11</sup> *Id.* at 898-99.

<sup>12</sup> The Legal Assistance Foundation of Metropolitan Chicago and the Chicago Appleseed Fund for Justice, *Videoconferencing in Removal Hearings: A Case Study of the Chicago Immigration Court* (Aug. 2, 2005), at 5, available at [http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport\\_080205.pdf](http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 6-7.

videoconferencing in removal cases until it can be improved.”<sup>15</sup> A different study of the use of teleconferencing in immigration proceedings determined that remote hearings impacted outcome, lessening the likelihood asylum would be granted.<sup>16</sup>

### *Access to Courts*

In many essential and time-sensitive civil proceedings, such as family court proceedings, litigants are not represented by counsel. Depending on case type and location, between 65% and 100% of litigants in civil cases are self-represented, which translates into an estimated 30 million self-represented litigants per year going through the civil courts.<sup>17</sup> Similarly, in the lowest level criminal cases, in which the potential punishment is limited to a fine, most individuals are not represented. In criminal cases, approximately 80% of all defendants qualify for public defense services, generally indicating that their family income is at or near the poverty line.<sup>18</sup> Income matters because many of the procedures for virtual or remote court require the participant to have internet or a phone line. Legal aid providers and public defenders report that even telephonic hearings can be problematic. Very few people have land line phones and many clients who have cell phones<sup>19</sup> use prepaid calling plans that may run out or go inactive during periods of personal economic stress.<sup>20</sup>

While internet access continues to improve, a substantial number of individuals and communities still lack access. According to a Pew study released in 2019, 10% of American adults do not use the internet.<sup>21</sup> This percentage rises to almost 30% for adults with less than a high school education.<sup>22</sup> Adults from households earning less than \$30,000 a year are also far less likely to use the internet in comparison to higher earning counterparts.<sup>23</sup> Another Pew study noted that about one quarter of adults in rural areas

<sup>15</sup> *Id.* at 8.

<sup>16</sup> Frank M. Walsh & Edward M. Walsh, Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings, 22 *Geo. Immgr. L.J.* 259, 271 (2008).

<sup>17</sup> Self-Represented Litigant Network Brief, *How many SRL's? (SRLN 2019)*, available at <https://www.srln.org/node/548/srln-brief-how-many-srls-srln-2019>. It is noteworthy that the vast majority of the litigants who receive help from legal aid are self-represented, with approximately 95% of the cases handled by LSC grantees closing with brief service or advice and counsel.

<sup>18</sup> Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* (Nov. 2000), available at <https://www.bjs.gov/content/pub/pdf/dccc.pdf> (“At felony case termination, court-appointed counsel represented 82% of State defendants in the 75 largest counties.”).

<sup>19</sup> Cell phone use is widespread. According to a Pew Study, 96% of adults use a cell phone and 81% of use a smartphone. For a substantial number (37%), the smartphone is their primary way of accessing the internet. *Mobile Technology and Home Broadband*, Pew Research (June 13, 2019), available at <https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/>.

<sup>20</sup> Use of prepaid cell phones is very common. In 2013, about 1 in 3 cell phone users used a prepaid cell phone. See Marc Lifsher, *More Cellphone Users Switch to Prepaid Plans*, *PHYS* (Feb. 22, 2013), available at <https://phys.org/news/2013-02-cellphone-users-prepaid.html>. See also Bruce Wilkinson, *What's Driving the Growth of Pre-Paid Cell Phones*, Nielsen (Apr. 30, 2010), available at <https://www.nielsen.com/us/en/insights/article/2010/whats-driving-the-growth-of-pre-paid-cell-phones/>.

<sup>21</sup> Monica Anderson, et al., *10% of Americans don't use the internet. Who are they?* (Apr. 22, 2019), available at <https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

report that “access to high-speed internet is a major problem in their local community.”<sup>24</sup> Even in suburban and urban areas, substantial numbers of adults (13% and 9% respectively) report major problems with internet access.<sup>25</sup> The percentage of adults using broadband at home also differs by race, with almost 80% of white adults reporting home broadband access, compared to 66% of black adults and 61% of Hispanic adults.<sup>26</sup>

Access is not made equal by simply providing the technology and instructions. Even when an individual is able to obtain access to internet to participate in virtual proceedings, the conditions of their home or surroundings may unwittingly create prejudice or bias.<sup>27</sup> Legal aid providers and public defenders have expressed concern that, unlike in courtrooms, where they can discuss and even assist their clients with appropriate clothing and other aspects of presentation, they cannot go to their homes and ensure that the space is clear and quiet, and that the client has appropriate lighting, etc. before the start of a video proceeding. A cluttered or dirty home, a noisy or crowded space, or even a particular poster or book could leave an impression that harms a litigant.<sup>28</sup>

Creating equal access to virtual and remote court proceedings may require having both phone and internet options, as well as establishing free access points, perhaps at social service organizations, for individuals to attend proceedings and obtain assistance, if needed. What those options are and how they are established may differ by jurisdiction. Participants should be permitted to choose the option that works best for them in consultation with their attorney, if represented. Participants should be given a choice for each hearing or proceeding, as circumstances may change. For example, a litigant might prefer a telephonic option from home for a set hearing, but if the hearing is part of a larger docket call, may prefer to go to a portal at a social service agency so as not to waste prepaid minutes. Similarly, the ability to use a portal might be critical to ensure the safe participation of an individual alleging domestic abuse and seeking a protective order. If

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<sup>24</sup> Monica Anderson, *About a quarter of rural Americans say access to high-speed internet is a major problem* (Sept, 10, 2018), available at <https://www.pewresearch.org/fact-tank/2018/09/10/about-a-quarter-of-rural-americans-say-access-to-high-speed-internet-is-a-major-problem/>.

<sup>25</sup> *Id.*

<sup>26</sup> Pew Research, *Internet/Broadband Face Sheet* (June 12, 2019), available at <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>.

<sup>27</sup> This concern goes well beyond the potential for prejudice based on appearance, extending to concerns that participants may be subject to pressures or coaching during participation. For example, a domestic violence victim may feel extreme pressure not to participate in a hearing or to lie if he/she is required to appear from a home shared with the alleged abuser.

<sup>28</sup> It is noteworthy that in almost every Best Practices list for conducting online meetings or events, the list notes that lighting and background are critical to how you are perceived. See, e.g. Career Partners International, *6 Best Practices for Virtual Meetings* (Mar. 27, 2020), available at <https://www.cpiworld.com/6-best-practices-virtual-meetings/> (noting that “what’s behind you really matters,” as do lighting, camera angle and distracting noises). The Texas Courts COVID page provides Best Practice recommendations for judges. Some of the tips include: “Position the camera at your eye level or slightly above eye level; Be mindful of what is behind you, choose a solid neutral wall if possible - or use our [Judicial Virtual Background](#); Check the lighting. Light from a window behind you might blind the camera, making you look dark. Light above you in the center of a room might also cast shadows. Ideally, position a lamp, or sit facing a window, where light is directly on your face. Also be aware that your monitor casts light that can make you look blue.” See Texas Judicial Branch, *Tips for Successful Hearing*, available at <https://www.txcourts.gov/programs-services/electronic-hearings-with-zoom/>.

able to subsequently obtain safe, separate housing, appearing from home may be safer and easier thereafter.<sup>29</sup> Flexibility is critical. The COVID-19 pandemic is likely to create economic instability for the foreseeable future, and thus jurisdictions must assume that circumstances for litigants will also remain in flux.<sup>30</sup>

Different access options alone may also not be sufficient to permit participation, particularly for those individuals with disabilities or language access issues. For example, hearing impaired clients may require real time court transcription or captioning to participate. In some courtrooms prior to the pandemic, this service was provided for free via CART.<sup>31</sup> Zoom and other platforms for online or remote hearings may be deficient for these participants. Some platforms also are more compatible with the assistance readers used by visually impaired participants. Similarly, those with language access issues may need a supplementary system for real-time translation or for the court to ensure a translator is available for the online or remote proceeding.<sup>32</sup>

When considering access, participation is one factor. Another is distribution of necessary orders and other paperwork. Zoom and other meeting-based platforms do not easily allow someone to upload a document to participants, and yet the contemporaneous sharing of written agreements, orders, and other documents can be critical to ensuring that everyone in attendance at a hearing leaves with the same understanding of what has been agreed to or ordered. Many courts are using a secondary platform, such as Dropbox or a court-specific portal, to exchange or distribute documents, but this adds a layer of technological complexity. It also does not address access for the visually impaired or the public. Participants should similarly be given options regarding how to receive documents and be able to select the options that work best for them. In addition to documents, the process for distributing notices to litigants should be confirmed regularly, and where feasible, duplicative options should be used to account for potential changes in circumstances and uncertainty.

### *Attorney-Client Relationships and Access to Legal Assistance*

At in-person court proceedings, attorneys typically meet with the client immediately prior to the proceeding, often near the courtroom, to address last minute considerations. If a

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<sup>29</sup> Remote appearance may also improve the conditions of appearance for those who find in person appearance in court stressful or traumatic.

<sup>30</sup> The Texas Access to Justice Commission created a primer for judges on best practices for conducting Zoom hearings with self-represented litigants. After noting that some self-represented litigants use phone plans and may have limited minutes that preclude even telephone participation in Zoom hearings, the document candidly admits, “We do not have a solution for this problem, and welcome your ideas.” See Texas Access to Justice Commission, *Best Practices for Courts in Zoom Hearings Involving Self Represented Litigants*, available at <https://www.txcourts.gov/media/1446335/zoomsrilbestpractices.pdf>.

<sup>31</sup> CART stands for Communication Access Real-Time Translation. For more information, see American Judges Foundation and National Court Reporters Foundation, *Communication Access Real-Time Translation (CART) in the Courtroom: Model Guidelines* (Sept 2002), available at <https://www.ncra.org/docs/default-source/uploadedfiles/governmentrelations/cart-in-the-courtroom-model-guidelines.pdf>.

<sup>32</sup> Some jurisdictions are endeavoring to address these issues. See, e.g., The California Commission on Access to Justice, *Remote Hearings and Access to Justice During COVID-19 and Beyond* (May 18, 2020), available at <https://calatj.egnyte.com/dl/dpk9zAsQxd/>.

client has a question or concern during the court proceeding, the client can consult with the attorney at counsel table or, if necessary, request a brief recess for a more private and thorough consultation. Replicating this level of communication and consultation in virtual or remote court proceedings is difficult.<sup>33</sup> Every possible effort should be made to do so, and particular attention should be paid to providing support and assistance for vulnerable litigants or witnesses, such as children.

Courts have attempted to ensure full attorney-client communication during virtual or remote court proceedings, but often these efforts are complicated by the same issues of technical experience and access addressed above. Texas courts, which use Zoom for most court hearings, encourage the use of breakout rooms for attorney-client communications. Observing these hearings, however, it was common to see judges disconnect participants instead of relocating them to breakout rooms and/or to see witness participants erroneously decline invitations to breakout rooms and then court administrators and/or judges having challenges inviting them to the breakout room again. In one instance, an attorney suggested that the other participants, including the judge, prosecutor, and court personnel, simply mute themselves during her conference with her client, either not realizing or not caring that this would still permit them, and the online observers, to hear that conference. During some criminal hearings involving in-custody defendants, the deputy at the jail kept declining rather than accepting invitations to breakout rooms, making it impossible for in-custody defendants to confer with their attorneys. While we can expect judges, attorneys and jail personnel to improve in their use of this technology, in each case, it is often a new experience for litigants, meaning that problems with technology and various work arounds and alternative options will continue to be necessary.

Perhaps more importantly, for in-custody defendants, the breakout room mechanism creates privacy from the judge, prosecutor, and on-line observers, but does not create privacy from the multiple deputies and other personnel in the hearing room at the jail. As virtual or remote court proceedings are examined or established, special attention must be paid to ensuring that litigants can have full and confidential access to their attorney for consultation and explanation, even if this delays the proceedings. The technological methods of doing this as simply as possible may differ by procedure and platform utilized. In undertaking to form or evaluate consultation capabilities, jurisdictions are encouraged not to rely on a request for such consultation from litigants. Far too often, if the judge asks a litigant if he or she understands, the litigant will reply “yes” automatically when, if given the opportunity to ask questions of counsel, the individual would ask several questions. Therefore, it may be advisable for the judge or presiding authority to plan or require short breaks throughout proceedings to allow for such consultation,<sup>34</sup> rather than asking if consultation is required or expecting the litigant to request such consultation if needed.

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<sup>33</sup> Eric T. Bellone, *Private Attorney- Client Communications and the Effect of Videoconferencing in the Courtroom*, 8 J. Int'l Comm. L. & Tech. 24 (2013) (finding generally that negatives of videoconferencing on the attorney-client relationship far outweigh benefits).

<sup>34</sup> The mechanism for consultation need not be complex. Oftentimes, it is sufficient to permit a lawyer and client to leave the virtual courtroom or courtroom call, talk to each other privately by phone, and then rejoin the call. Such consultations should be readily available and encouraged.

It is unlikely that any virtual procedure can effectively mimic the communication opportunities provided by in-person hearings. Whatever procedures are put in place, significant training should be provided, and made mandatory if feasible, to ensure that judges, court administrators and attorneys are facile at using the mechanisms that permit confidential attorney-client conversations, as well as the exchange of documents and enable them to assist litigants and other participants in using these procedures. Such training should pay special attention to the particular challenges faces by criminal defendants, self-represented litigants and litigants with disabilities.

It is also important that courts ensure that litigants are informed about and have access to the legal and non-legal resources that were accessible before virtual and remote proceedings were introduced. For example, civil litigants often do not have access to free legal counsel, but do have access to lawyer-of-the-day programs or other legal assistance programs, which provide assistance in answering questions about proceedings, preparing forms, etc. Often these programs are located in courthouses and litigants are referred by court personnel. Courts should diligently inform litigants participating in virtual or remote proceedings about these programs and how to access them. If necessary, courts should postpone proceedings to permit a litigant to obtain assistance.

### *Public Access and Privacy Concerns*

The Sixth Amendment to the U.S. Constitution guarantees a defendant the right to a public trial.<sup>35</sup> The U.S. Supreme Court has held that the press and public have a right under the First Amendment to attend trials,<sup>36</sup> as well as other court proceedings.<sup>37</sup> Public access is also the means by which family members and loved ones of litigants, defendants or other participants can attend the proceedings.<sup>38</sup> Public access is fundamental to protecting the integrity of the judicial system and maintaining the trust of the public, and courts should therefore take meaningful steps to protect the constitutional rights at stake, including the right of access, with narrow limitations on such access imposed only for the compelling reasons that would typically justify closure. The temptation to close a courtroom for administrative convenience or through lack of effort to establish means of remote or virtual access must not be condoned.

As courts have moved online, many have not prioritized public access. Some do not have public access at all. When a public feed is available, the manner in which they share virtual or remote proceedings is often confusing and deficient. There is usually no public

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<sup>35</sup> See, e.g., Fed. R. Crim. P. 53 (“Except as otherwise provided by statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.”).

<sup>36</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (closing the courtroom during a fourth criminal trial following three mistrials violated the First Amendment right of the media and public to attend the trial).

<sup>37</sup> *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993)(public has right to attend preliminary hearing).

<sup>38</sup> The right to a public trial entitles a criminal defendant “at the very least . . . to have his friends, relatives and counsel present, no matter with what offense he may be charged.” *In re Oliver*, 333 U.S. 257, 272 (1948). Exclusion of family members from the courtroom has been held to violate the Sixth Amendment. See, e.g., *United States v. Rivera*, No 10-50426, (9<sup>th</sup> Cir. June 22, 2012).

notice that informs observers of which hearings will be streamed when and where, what type of proceeding is to be heard and who the litigants are.

In jurisdictions providing public access, that access is typically via a YouTube or Facebook Live Feed, rather than the court website. In watching or listening to a streamed or broadcast hearing, no header is provided concerning the case, the personnel, or even the type of docket. In in-person criminal proceedings, the judge, prosecutor, defense attorney and accused are identifiable by where they stand or sit in the courtroom. Most online platforms do not similarly allow a party to lock a view into place, and there is therefore no discernable way to distinguish attorneys from the court personnel or from the litigants.

Establishing the electronic means of allowing remote access is only the first step; courts must make meaningful efforts to ensure that the time and virtual location of hearings are known to the public through each court's website. Technically allowing for access while leaving the public and other participants in the dark about how to connect to the audio or video feed is not sufficient. The daily docket information for each court system should be centralized on one page on the court's website with links to the hearings and instructions on how to connect. Additionally, encouraging individuals to introduce themselves and/or label their feed with their correct name and position/title, would improve public understanding of hearings significantly.

At the same time, the right of the public and press to attend court proceedings is not absolute. In some proceedings, the right of a particular litigant or witness to privacy or continued anonymity trumps the right of public access. For example, juvenile court proceedings in some states are closed to limit the future consequences for the minor.<sup>39</sup> A judge may also close a proceeding that would otherwise be open to the public to protect the identity of an undercover officer or a child witness.<sup>40</sup> Protecting the privacy of these court proceedings that should remain private is as important as ensuring public access to those that should be made public. Virtual and remote court procedures must therefore both ensure privacy in appropriate cases, something difficult to guarantee on many of the online platforms, and ensure public and media access in the majority of cases to which there is a right of access.

Moreover, the right of public access to a courtroom does not extend to recording the proceedings. The debate over cameras in courtrooms has been going on for decades, with proponents arguing that broadcasting permits the public to understand the justice system, and opponents arguing that cameras may distract participants and require the counsel to create two levels of argument—one on the law and one for the public. While

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<sup>39</sup> See, e.g., Rasmussen, Kristen, *Access to Juvenile Justice*, The Reporters Committee for Freedom of the Press, at 4-5, available at <https://www.rcfp.org/wp-content/uploads/imported/SJAJJ.pdf>. The right of access to juvenile proceedings, where it exists, is usually statutory and not based on the First Amendment. See, e.g., *San Bernardino County Dep't of Pub. Social Seres. v. Superior Court*, 283 Cal. Rptr. 332, 338-39 (Cal. Ct. App. 1991) (The First Amendment right of access does not extend to juvenile delinquency hearings).

<sup>40</sup> See, e.g., *State v. Ucerio*, 450 A.2d 809 (RI 1982).

many courts allow recordings, many other courts still forbid such recordings.<sup>41</sup> Allowing remote access to court proceedings over the internet, however, subjects all such proceedings to possible recording. While a judge can instruct that no one record the proceedings,<sup>42</sup> the judge cannot technologically bar such recordings.<sup>43</sup>

### **Mandatory vs. Permissive Use of Virtual or Remote Court Proceedings:**

Virtual and remote court procedures, when optional, not only provide a method of safely holding critical hearings during the COVID-19 pandemic but may also serve to expand convenient access to courts in appropriate instances. Attending court in person is often difficult. It commonly requires individuals to take a full day off work, arrange childcare and travel to and from the courthouse, which may be some distance from their residence, and may or may not be accessible by public transportation. Many times, the individual arrives at court only to wait a considerable time for his or her case to be called and then participates in only a brief hearing resulting in the setting of another hearing date. For example, in a low-level criminal case, a status hearing commonly involves only a short exchange regarding discovery, status of plea negotiations and when the case will be ready for trial. Similarly, a status conference in a child neglect case may be a relatively short conversation noting that nothing has changed and that the continuation of the current plan and placement remains appropriate. In such cases, the ability to attend a hearing by phone or video conference may provide greater efficiency, as well as cause far less disruption and expense for the parties involved. For this reason, remote court procedures have been used in some rural communities for a long time.<sup>44</sup>

However, virtual and remote court procedures, if mandated, raise important concerns about restricting access and causing prejudice or impacting outcomes. Given these concerns, courts should be cautious in mandating use of virtual and remote court proceedings during the public health emergency caused by COVID-19, prioritizing essential proceedings. Essential proceedings should be narrowly defined to include preliminary proceedings that have the potential to result in the detention or release of an individual from custody and other critical civil proceedings such as temporary orders of protection, interim child custody or child welfare orders or other temporary injunctions or

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<sup>41</sup> See National Center for State Courts, *Cameras in the Court – Resource Guide* (Mar 20, 2019), available at <https://www.ncsc.org/Topics/Media/Cameras-in-the-Court/Resource-Guide.aspx> (noting that most states permit exceptions regardless of which predominant rule they have adopted).

<sup>42</sup> Texas has encouraged judges to make this request and post a watermark on the broadcast that says Do Not Record. The instructions for judges in Texas also provide information on how to delete the YouTube recording following the proceeding. See Texas Instructions on Creating a Court YouTube Channel, available at [https://81db691e-8a8c-4e25-add9-60f4845e34f7.filesusr.com/ugd/64fb99\\_eb8a7a1d2fd04e1e8d4d542990b7a945.pdf](https://81db691e-8a8c-4e25-add9-60f4845e34f7.filesusr.com/ugd/64fb99_eb8a7a1d2fd04e1e8d4d542990b7a945.pdf).

<sup>43</sup> Jurisdictions and judges have alternative means of dissuading individuals from recording proceedings. For example, participants who record hearings after instruction not to record could be held in contempt.

<sup>44</sup> See, e.g., Alaska R. Civ. P. 99 – Telephonic Participation in Civil Cases, available at <https://casetext.com/rule/alaska-court-rules/alaska-rules-of-civil-procedure/part-xiii-general-provisions/rule-99-telephonic-participation-in-civil-cases>. (“The court may allow one or more parties, counsel, witnesses or the judge to participate telephonically in any hearing or deposition for good cause and in the absence of substantial prejudice to opposing parties.”). See also, Alaska Superior Court, Form on Telephonic Appearance, available at <https://public.courts.alaska.gov/web/forms/docs/tf-710.pdf>.

orders concerning the safety or placement of an individual, as well as hearings on petitions necessary to protect constitutional rights. Any order mandating the use of virtual or remote court procedures also should remain in operation as short a time as possible and should not continue beyond the length of the jurisdiction's public health emergency.<sup>45</sup> Further, any decision made during a mandatory virtual court proceedings to detain an individual should be subject to regular review or reconsideration.

In certain types of proceedings, virtual and remote court appearance may be antithetical to due process, and such determinations should be respected. For example, in criminal cases, the right of confrontation requires in-person trials.<sup>46</sup> Similarly, based on a comprehensive review of immigration proceedings, including the existing studies concerning the negative impact of video appearance on outcomes for noncitizens in such proceedings, the ABA House of Delegates adopted a Resolution providing that such video appearances in immigration cases should be "limited to procedural matters" and permitted only after the noncitizen gives informed consent.<sup>47</sup> Nothing in this Resolution is intended to conflict with or override such specific recommendations with regard to particular kinds of hearings.

At the same time, because virtual or remote court proceedings have the potential to ease and expand access to the courts, and indeed may be the only access available during this pandemic, optional use of these procedures, governed by consent, should be as widely available as possible. Before a litigant consents to the use of a virtual or remote court procedure, the litigant should understand the possible impact of using the procedures and agree go forward. Further, litigants should be offered either the option of a safe, in-person proceeding or a delay until a safe, in-person proceedings can be held. Finally, no individual consenting to utilize a virtual or remote court procedure should be required to sign a blanket waiver of rights or waive the right to appeal or otherwise challenge the fairness of the procedure used or the outcome.

### **Establishing and Reviewing Virtual or Remote Court Procedures:**

Procedures for holding virtual and remote court proceedings should, to the fullest extent possible, take into account the complex considerations of possible prejudice, participant access, public access/privacy, and attorney-client relationships. To this end, as soon as practicable, each jurisdiction should establish a committee or committees to solicit feedback on and conduct an evidence-based review of virtual or remote court procedures.

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<sup>45</sup> This is consistent with several of the state-based declarations mandating use of virtual or remote court proceedings for essential hearings during the pandemic. By contrast, section 15002 of the Coronavirus Aid, Relief, and Economic Security Act, or CARES, Act, enacted on March 27, 2020, provided that, upon a finding of emergency conditions by the Judicial Conference and authorization by the chief judge of the federal district court, video conferencing can be used with the consent of a defendant after consultation with counsel for certain types of proceedings including detention hearings, initial appearances, arraignments, probation and supervised release revocation proceedings, guilty pleas and sentencings.

<sup>46</sup> The right to confront witnesses is "[o]ne of the fundamental guarantees of life and liberty . . . long deemed [] essential for the due protection of life and liberty." *Union. v. Pointer v. Texas*, 380 U.S. 400 (1965) (overruling *West v. Louisiana*, 194 U.S. 258 (1904)).

<sup>47</sup> Resolution 10M114B, available at [https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2010/2010\\_my\\_114b.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2010/2010_my_114b.pdf).

Some courts are already taking steps to create such review committees. In England, for example, recognizing that COVID-19 “resulted in significant changes in the operation of the civil justice system, particularly the swift expansion of the use of remote hearings,” the Civil Justice Council established a committee to solicit feedback on remote hearing procedures and “identify areas where additional work may be needed.”<sup>48</sup> Several courts in the United States have likewise recognized the importance of a comprehensive review and already formed such a committee or committees. For example, in North Carolina, Chief Justice Cheri Beasley established a Task Force to “recommend directives and policy changes” to court operations.<sup>49</sup> Separate committees may be necessary to review types of courts and/or court proceedings.

In establishing committee(s) to review virtual or remote court procedures, special care should be taken to include representation and feedback from all groups who participate in the procedures or are impacted by such procedures.<sup>50</sup> In civil cases, this includes not only judges and attorneys, but also court staff, litigant representation, including representation from legal aid organizations, Access to Justice Commission representation, media representatives and possibly the juror administration officials. Committees addressing criminal court virtual and remote proceedings, should include not

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<sup>48</sup> Courts and Tribunals Judiciary, *Rapid Consultation: The impact of COVID-19 measures on the civil justice system*, May 1, 2020, available at <https://www.judiciary.uk/announcements/rapid-consultation-the-impact-of-covid-19-measures-on-the-civil-justice-system/>.

<sup>49</sup> Press Release, *Chief Justice Beasley Forms COVID-19 Task Force*, April 30, 2020, available at <https://www.nccourts.gov/news/tag/press-release/chief-justice-beasley-forms-covid-19-task-force>.

Wisconsin similarly formed a Task Force. See *Task Force to look at safe operations in state courts during COVID-19 pandemic*, April 29, 2020, available at [https://madison.com/wsj/news/local/crime-and-courts/task-force-to-look-at-safe-operations-in-state-courts-during-covid-19-pandemic/article\\_074c4636-537c-5e95-8252-aea7fabf6e61.html](https://madison.com/wsj/news/local/crime-and-courts/task-force-to-look-at-safe-operations-in-state-courts-during-covid-19-pandemic/article_074c4636-537c-5e95-8252-aea7fabf6e61.html).

<sup>50</sup> The committee established in England has solicited feedback from all those who have been involved in proceedings to date, specifically requesting feedback on the following questions:

- What is working well about the current arrangements?
- What is not working well about current arrangements?
- Which types of cases are most suited to which type of hearings and why?
- How does the experience of remote hearings vary depending on the platform that is used?
- What technology is needed to make remote hearings successful?
- What difference does party location make to the experience of the hearing?
- How do remote hearings impact on the ability of representatives to communicate with their clients?
- How do professional court users and litigants feel about remote hearings?
- How do litigants in person experience hearings that are conducted remotely?
- How do remote hearings impact on perceptions of the justice system by those who are users of it?
- How is practice varying across different geographical regions?
- What has been the impact of current arrangements on open justice?
- What other observations would you make about the impact of COVID-19 on the operation of the civil justice system?

Courts and Tribunals Judiciary, *Rapid Consultation: The impact of COVID-19 measures on the civil justice system*, May 1, 2020, available at <https://www.judiciary.uk/announcements/rapid-consultation-the-impact-of-covid-19-measures-on-the-civil-justice-system/>

only judges, public defenders, prosecutors, and private attorneys, but also jail staff, pretrial services, probation and parole services, victims or victims' advocates, and media representatives. Such committees should also seek input broadly from participants, observers and other interested groups to ensure the consideration of all comments, concerns or issues raised by these procedures.

### **Considerations for Review:**

The proposed Resolution highlights certain important criteria that should be considered by the committees evaluating virtual and remote court procedures to guarantee equal access and fundamental fairness. Chief among these considerations is that virtual or remote proceedings should be tailored to the needs of participants and take into account the type of case and proceeding, the participants involved, and whether participants are represented by counsel.

Specifically, the Resolution further urges jurisdictions to:

- a. Ensure that participation options for virtual or remote court proceedings are free for participants and observers;
- b. Provide options concerning participation and permit participants to select the means of participation best suited to them without prejudice;
- c. Allow participants to alter their chosen means of participation for each proceeding;
- d. Provide necessary support for those who, for financial, technological, language access, disability, or other reasons, may not be able to fully participate without assistance;
- e. Ensure that methods of participation reduce, to the fullest extent possible, any prejudice that might result from the circumstances of participation;
- f. Provide contingencies for possible technological or access problems during the proceeding;
- g. Guarantee that participants are not pressured or obligated to waive constitutional rights;

The Resolution urges that jurisdictions provide training on their virtual and remote court proceedings, including training on possible areas of technological bias. The Resolution also urges that, in recognition of the costs of establishing and improving access to virtual and remote court proceedings, jurisdictions provide additional funding to courts, other justice system participants and social service providers for this purpose.

Finally, the Resolution urges that virtual and remote court proceedings protect attorney-client relationships, including providing access for private consultation both before and during court proceedings and guaranteeing the confidentiality of such communications, as well as assist unrepresented litigants by enabling and encouraging access to other litigation assistance programs and self-help programs previously available.

### **Public Access and Private Proceedings:**

The Resolution urges jurisdictions to provide advance notice to the public of all virtual or remote proceedings and ensure full and meaningful public access to such proceedings, unless the proceeding is legally exempted from public access, in which case the privacy of the proceeding should be protected.

### **Encouraging Study of the Impacts of Virtual or Remote Court Procedures:**

In addition to addressing concerns identified by the diverse participants in courts, jurisdictions should be concerned about the potential unseen and inadvertent harms that might arise from virtual and remote court procedures. As noted above, very little is known about the impact of viewing individuals through a screen,<sup>51</sup> as opposed to in-person, but those studies that do exist show an impact on decision-making, and possible harm to some litigants.<sup>52</sup> These studies raise serious concerns that virtual and remote court procedures might impact outcomes, including potentially increasing pre-trial detention and other incarceration or exacerbating racial, ethnic and economic disparities. It is incumbent on the jurisdictions using these procedures to conduct research on the impact of their use.<sup>53</sup> Similarly, studies should be conducted to determine whether permitting virtual or remote participation in courts increases access. Does it reduce failure-to-appear rates and default judgments? If possible, litigant satisfaction should also be examined. Some such studies are already underway. Several studies on how new virtual platforms such as Zoom hearings may impact court proceedings are already underway.<sup>54</sup>

Jurisdictions should, where feasible, conduct such research or, at a minimum, cooperate with researchers who wish to study the impact of these procedures. Jurisdictions should also review any research when published and adapt, revise or discontinue procedures as warranted, particularly if disparate or harmful impacts are suggested.

### **Conclusion:**

The COVID-19 pandemic has forced courts to adapt quickly. Many courts have responded by moving to remote or virtual court proceedings for essential hearings. Others

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<sup>51</sup> See, e.g., Shannon Havener, Thesis: *Effects of Videoconferencing on Perception in the Courtroom*, Arizona State University (2014), available at [https://repository.asu.edu/attachments/135164/content/Havener\\_asu\\_0010N\\_13889.pdf](https://repository.asu.edu/attachments/135164/content/Havener_asu_0010N_13889.pdf).

<sup>52</sup> See, e.g., Shari Seidman Diamond, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. of Crim. L. & Criminology 869 (2010); The Legal Assistance Foundation of Metropolitan Chicago and the Chicago Appleseed Fund for Justice, *Videoconferencing in Removal Hearings: A Case Study of the Chicago Immigration Court* (Aug. 2, 2005).

<sup>53</sup> The RAND Corporation recently conducted a review of existing research on remote and virtual proceedings, convening an Advisory Workshop and publishing a set of recommendations regarding needed research. Camille Gourdet, et al., *Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology*. RAND Corporation, 2020. [https://www.rand.org/pubs/research\\_reports/RR3222.html](https://www.rand.org/pubs/research_reports/RR3222.html).

<sup>54</sup> Michael Waters, *Video-Chat Juries and the Future of Criminal Justice*, Wired (May 21, 2020), available at <https://www.wired.com/story/video-chat-juries-and-the-future-of-criminal-justice/> (detailing studies on remote proceedings underway in Florida, Michigan, Texas, Missouri, Arizona, and the United Kingdom).

are considering doing so, and still others are considering further expansions of their platforms. Such innovation is necessary to maintain safety during the pandemic while continuing essential court proceedings. Further, such proceedings, when voluntary, may provide means of increasing access.

Evaluation of these platforms to ensure that they protect litigants' rights and ensure fundamental fairness is critical. It is incumbent upon jurisdictions to conduct this analysis in an evidence-based manner, including encouraging study of the procedures and soliciting input and feedback from users and key constituencies. If necessary, jurisdictions should be willing to alter their remote or virtual court procedures to improve access, encourage and enable attorney-client communications and other forms of assistance, and appropriately balance public access with privacy concerns.

Respectfully submitted,

Theodore Howard

Chair, Standing Committee on Legal Aid and Indigent Defendants

**GENERAL INFORMATION FORM**

Submitting Entity: Standing Committee on Legal Aid and Indigent Defendants

Submitted By: Theodore Howard, Chair

1. Summary of Resolution(s).

This Resolution seeks to limit the compulsory use of virtual and remote court procedures to essential proceedings, while permitting the use of such procedures whenever litigants provide informed consent and are further provided the option of an in-person hearing whenever such a hearing is safely possible. The Resolution further encourages each jurisdiction employing virtual or remote court: (1) to establish committees to conduct evidence-based reviews of virtual and remote court procedures; (2) to guarantee equal access, due process and fundamental fairness; (3) to provide additional funding to improve access to virtual or remote court proceedings; (4) to ensure that the public, including the media, is provided access to court proceedings unless an appropriate exception applies, in which case the privacy of the proceeding should be protected; (5) to provide training on virtual and remote procedures; and (6) to study the impacts of these procedures for possible prejudicial effect or disparate impact on outcomes.

2. Approval by Submitting Entity.

Revision approved July 31, 2020

3. Has this or a similar resolution been submitted to the House or Board previously?  
No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

There is a policy regarding appearance by video in Immigration proceedings. 10M114B provides that video appearance should be limited to procedural matters and utilized only with the informed consent of the noncitizen. As addressed in the Report, nothing in this Resolution is intended to conflict with this existing policy.

There are numerous ABA policies concerning the accessibility of the courts, the use of technology in the courts, and the evaluation of court procedures as they impact those with barriers to access. See, e.g., 91A115 (Recommendations for improving access for the elderly and persons with disabilities), 95M106 (Urging experimentation to broadcast court proceedings, including by video), 95M301 (Affirming access to the justice system irrespective of financial status), 96M114 (Urging safeguards in court rules and legislation to avoid deprivation of access to justice due to economic status), 02M112 (Promoting accessibility to the courts for persons with disabilities), 04A103B (Addressing electronic discovery rules), 11M10A (Supporting improvements to the

federal courts' CM/ECF systems), 14A105A (Opposing the delay to the right to a civil jury due to financial circumstances).

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

6. Status of Legislation.

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

Numerous jurisdictions are looking for guidance on when and how to use and evaluate virtual and remote court proceedings during the COVID-19 crisis. This Resolution and Report would be distributed to key constituencies to provide guidance with staff support available to help access additional, more detailed materials such as the studies and resources cited in the Report. The Resolution would also be posted on SCLAID's COVID-19 Resources webpage.

8. Cost to the Association.

Adoption of this proposed resolution would result in only minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

9. Disclosure of Interest.

N/A

10. Referrals. By copy of this form, the Report with Recommendation will be referred to the following entities:

Center for Public Interest Law  
 Center for Innovation  
 Commission on Immigration  
 Commission on Disability Rights  
 Forum on Communications Law  
 Judicial Division  
 Section on Civil Rights and Social Justice  
 Section of Criminal Justice  
 Section on Dispute Resolution  
 Section on Family Law  
 Section on Litigation  
 Section of State and Local Government Law  
 Solo, Small Firm and General Practice Division

11. Contact Name and Address Information (Contacts prior to meeting).

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This Resolution seeks to limit the compulsory use of virtual and remote court procedures to essential proceedings, while permitting the use of such procedures whenever litigants provide informed consent and are further provided the option of an in-person hearing whenever such a hearing is safely possible. The Resolution further encourages each jurisdiction employing virtual or remote court: (1) to establish committees to conduct evidence-based reviews of virtual and remote court procedures; (2) to guarantee equal access, due process and fundamental fairness; (3) to provide additional funding to improve access to virtual or remote court proceedings; (4) to ensure that the public, including the media, is provided access to court proceedings unless an appropriate exception applies, in which case the privacy of the proceeding should be protected; (5) to provide training on virtual and remote procedures; and (6) to study the impacts of these procedures for possible prejudicial effect or disparate impact on outcomes.

### 2. Summary of the Issue that the Resolution Addresses

During the COVID-19 pandemic, courts have endeavored to find ways to operate safely and ensure that essential proceedings continue. In many jurisdictions, this has involved quickly setting up remote or virtual courts, using meeting technologies such as Zoom or Go to Meeting. Because these procedures were established in response to a crisis, time could not initially be taken to form a committee to review the proposed procedures, solicit input from key constituencies or fully consider the impact of these procedures on issues of access, privacy and attorney-client relationships.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

This Resolution seeks to set out limitations on the mandatory use of virtual and remote court procedures, including limiting mandatory use to essential proceedings, establishing a sunset provisions for mandatory use, and ensuring regular review of detention decisions made during a virtual proceeding. At the same time this Resolution urges wide use of virtual and remote court proceedings when litigants provide informed consent.

This Resolution also urges jurisdictions to create committee(s), including all key stakeholders, to review existing or planned virtual or remote court procedures and provides a set of criteria for evaluation. The criteria prioritizes ensuring equal and full access for all participants, maintaining a robust attorney-client relationship, and ensuring public access or privacy of proceedings as appropriate for the type of hearing. The Resolution further calls on jurisdictions to study or support the studying of procedures for possible bias or disparate impact and make adjustments accordingly.

#### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

The Judicial Division has expressed concerns that this Resolution did not sufficiently acknowledge that courts had done considerable work to keep courts operational, did not request funding to help expand access to virtual or online courts, and incorrectly directed the provisions to all aspects of government instead of courts. In response to their comments, we have revised the Report to more fully acknowledge the work done by the courts to keep the courts open for essential procedures during the public health emergency caused by COVID-19. Additionally, we have included a provision urging additional funding for both the courts and other justice system participants to assist in improving access to virtual and remote court proceedings. On the third point, SCLAID believes that all aspects of government, not merely courts, should play a role in ensuring access and therefore the Resolution is appropriately directed. We have forwarded the revision to the Judicial Division for consideration, but are not certain whether they will support the revision.

Appendix B

Computer and Internet Access Questions from American Community Survey  
<https://www.census.gov/acs/www/about/why-we-ask-each-question/computer/>

**9 At this house, apartment, or mobile home – do you or any member of this household own or use any of the following types of computers?**

	Yes	No
a. Desktop or laptop	<input type="checkbox"/>	<input type="checkbox"/>
b. Smartphone	<input type="checkbox"/>	<input type="checkbox"/>
c. Tablet or other portable wireless computer	<input type="checkbox"/>	<input type="checkbox"/>
d. Some other type of computer <i>Specify</i> ↴	<input type="checkbox"/>	<input type="checkbox"/>

**10 At this house, apartment, or mobile home – do you or any member of this household have access to the Internet?**

Yes, by paying a cell phone company or Internet service provider

Yes, without paying a cell phone company or Internet service provider → *SKIP to question 12*

No access to the Internet at this house, apartment, or mobile home → *SKIP to question 12*

**11 Do you or any member of this household have access to the Internet using a –**

	Yes	No
a. cellular data plan for a smartphone or other mobile device?	<input type="checkbox"/>	<input type="checkbox"/>
b. broadband (high speed) Internet service such as cable, fiber optic, or DSL service installed in this household?	<input type="checkbox"/>	<input type="checkbox"/>
c. satellite Internet service installed in this household?	<input type="checkbox"/>	<input type="checkbox"/>
d. dial-up Internet service installed in this household?	<input type="checkbox"/>	<input type="checkbox"/>
e. some other service? <i>Specify service</i> ↴	<input type="checkbox"/>	<input type="checkbox"/>