

# ACCESS TO JUSTICE IN A TIME OF COVID

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## I. INTRODUCTION

The COVID-19 pandemic has caused a sea of changes in the methods of lawyers who represent under-served and low-income client populations.

This Essay will examine how the pandemic has affected the work of legal service organizations. Generally, this Essay examines the approaches taken by any pro bono or appointed counsel representing those with traditionally limited access to justice.

Here are some of the things that COVID has caused us to rethink, or think about for the first time, in providing effective representation to these client groups:

How can the client gain physical access to courthouses?

What cultural and technical barriers exist to accessing court files and court hearings remotely?

How should the courts themselves be guided in assuring that the pandemic does not restrict access to justice?

What are the technological challenges—to litigants, lawyers, and court staff—created by the pandemic?

What is the best way to train lawyers, law firm staff, and court staff in dealing not only with technology but also with the effects of technology on court users?

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What have been the successes and failures of individual courts and court systems in dealing with access to justice issues during the pandemic?

What innovations and concerns have individual practitioners experienced in representing low-income clients?

What legal remedies might exist in favor of litigants who feel they are not being served by the court system during the pandemic?

My goal at the outset has been to collect, collate, and to some extent comment upon, the conundra noted above. Part II delves into some statistics focusing on issues such as confidence in the court system and comfortability in reporting physically to courthouses. Part III describes that certain members of the population face greater challenges in accessing courts, particularly during the pandemic. As the pandemic diminishes (as we hope it will), some of the effects it has had on all areas of legal practice will no doubt be diminished or eliminated. At the same time, practitioners and judicial officers who have lived through COVID thus far more or less agree that some of the changes we have seen—particularly in the area of courtroom technology—are here to stay. Because there may even be an increase in using these courtroom technologies in the years to come, Part IV suggests guidelines courts and counsel can implement while conducting remote proceedings. Yet the increased demand of virtual proceedings could lead to increased difficulty in obtaining justice for some. As Part V discusses, technology affects access to justice because of problems such as the Digital Divide. Some courts and counsel for those vulnerable populations, including attorneys working at legal service organizations, have been working with these litigants to address concerns created by remote work. The courts' and practitioners' observations are noted in Parts VI and VII, respectively. Certain groups have already taken action and tried to remedy these issues as Part VIII examines. Finally, Part IX concludes by emphasizing multiple points in the hopes of ensuring that all parties have equal access to justice during remote proceedings.

## II. STATISTICS

First, this Essay takes a brief look at some statistics. These are general in nature and based on national polling, but they indicate the areas of concern for all litigants, including those in the populations covered by this article.

Generally, during the pandemic, confidence in our state court systems has remained constant. In the eight years prior to 2020, the average percentage of poll subjects expressing confidence in the country's state court systems was about 70%, and that number has been sustained in 2020, despite

the changes caused by the pandemic .<sup>1</sup> No doubt this effect was caused by the general thought (or at least hope) that courts were doing things to alleviate stresses in the system caused by the pandemic.

At the same time, the same survey reported that when poll subjects were questioned about individual problems created in the courts by the pandemic, confidence dropped.<sup>2</sup> Only 45% of respondents, for instance, reported confidence in the safety and ease of reporting for jury duty.<sup>3</sup> When asked, “On a scal2

come to court.<sup>8</sup> Of course, this phenomenon—the “requirement to come to court”—

Judge Jennifer Bailey of Florida's 11<sup>th</sup> Judicial Circuit stated, "Th



Use of Zoom (and other platforms) waiting rooms and breakout rooms.

Appropriate waivers of personal appearances.

Methods of troubleshooting technical difficulties.

Need for ADA accommodations or other reasonable accommodation requests.

Provisions for explaining—particularly to users who are unsophisticated with technology—the actual usages of platforms in the sense of dealing with filters (“I’m not a cat”),<sup>26</sup> backgrounds, muting, etc.

Encapsulating the broader findings of its report, the NCSC has also published a “bench guide” for judges entitled “Conducting Fair and Just Remote Hearings.”<sup>27</sup> This breaks down the responsibilities for remote hearings into certain defined areas for judicial attention:<sup>28</sup>

Prehearing preparation, which involves the possible adjustment of calendaring, adequate case review before hearings, adequate training and resources to litigants, and the offering of alternative resources to litigants who may have difficulty accessing court technology such as references to public libraries, schools, community centers, etc.

Fair and effective use of the platforms, including a “technical bailiff,” attention to dashboards, attention to who is and who is not muted, the need to not ignore litigants who are appearing via telephone or a “black box” screen, effective use of the platform camera, and not allowing litigants to talk over each other.

Conduct specifically devoted to bench officers—encouraging them to take time to explain the conduct of the hearing, the basis for decisions, and requiring them to ensure that litigants have an adequate and private place from which to appear.

Therefore, the National Center for State Courts laid a foundation from which courts can implement guidelines to ensure all parties have access to

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26. See generally, Daniel Victor, ‘I’m Not a Cat,’ Says Lawyer Having Zoom Difficulties, N.Y. TIMES, <https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html> (May 6, 2021).

27. *Conducting Fair and Just Remote Hearings: A Bench Guide for Judges*, NAT’L CTR. FOR STATE CTS., [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0025/51784/Remote-Hearing-Bench-Guide.pdf](https://www.ncsc.org/__data/assets/pdf_file/0025/51784/Remote-Hearing-Bench-Guide.pdf) (last visited Aug. 28, 2021).

28. *Id.* Note that the guide summarizes the “core elements” of procedural fairness in conducting remote hearings as being made up of the values of: Voice (allowing litigants their own viewpoints), Neutrality, Respect, Trust, and Helpfulness. *Id.* In a sort of perverse way, the pandemic has thus forced the bench to re-examine its own responsibility to lawyers and litigants at all times. Beforehand, it would not be the case that all hearings were conducted according to these values, let alone remote ones.





How is documentary or demonstrative evidence presented?

How is an effective and useable record created?

In resolving these issues, the NCSC, as noted above, suggests not only particularized solutions to the above potential problems but also the designation of court staff as troubleshooters, the provision of information (such as handbooks) for use by the public,<sup>31</sup> translation services, accommodations for people with disabilities, the possible use of “asynchronous” proceedings,<sup>32</sup> and a liberal attitude, at least at first, towards non-appearances and continuances.

It is further notable that technology problems and underlying legal issues may be specific to case types. The Confrontation Clause, for instance, requires criminal defendants to be given the right to confront in “open court” the witnesses against them. Does a remote hearing satisfy this?<sup>33</sup> What if the defendant is in custody, with limited access to technology? Appropriate waivers may solve these situations, but further legal analysis will be required to lay the groundwork for what is being waived.

In general, access to courthouses—separate from remote hearings—has been restricted during the pandemic, leaving open the question of whether litigants at all levels and with all degrees of sophistication have been able to obtain the appearance of necessary witnesses for their cases.<sup>34</sup>

secure transmission of sensitive files, and ease of use and the elimination of technology error.<sup>36</sup>

The report delineates some specific platforms and their respective benefits and disadvantages and also has a detailed discussion of the “Digital Divide,”<sup>37</sup> which the project defines as both a divide of access and one of skill.

## VI. COURT SYSTEM RESPONSES

How have our courts responded to these challenges to access?

First, there has been a recognition that training of court personnel, and to some extent a re-evaluation of court systems, will be required. The NCSC report noted above calls out the need for: a look at hearing schedules (should hearings be staggered, for instance, so that litigants and counsel are not forced to wait online?), beefing up hearing notice requirements, making clear in notices that hearings will be remote, making daily dockets available online, and allowing a way for the court to respond to the questions of individual users.<sup>38</sup>

Individual court systems, and even individual bench officers, have responded to the pandemic’s effect on access to justice in various innovative and thoughtful ways. Some of this is internal to the court systems, but some of it involves the hiring of outside consultants. The Utah courts, for instance, are working with the Institute for the Advancement of the American Legal System of the University of Denver to improve the Utah courts’ ability to foster creative ways not only to use the courts but also to practice law generally.<sup>39</sup> Additionally, the Mich2ics3 1 1923533(bee)8(f)7(i)-4(880 g03C21mTm0 264.41 474.55 Tm7



assistance via live chat, telephone, video or phone appointment, or by writing the center.<sup>47</sup>

Also in Alameda County, Commissioner Bentrish Satarzadeh has taught herself how to manage a virtual platform that can be used for hearings of traffic cases in which most of the defendants are self-represented.<sup>48</sup> The commissioner uses a gallery presentation, informing litigants roughly when their cases will be heard during the calendar and allowing them, in turn, to go about their business until their case is called.<sup>49</sup>

## VII. PRACTITIONERS

The views of judicial officers and scholars have been critical in assessing the utility of remote hearings and other pandemic-related measures in assuring access to justice. But an examination of these issues could not be complete without paying some attention to the experiences and opinions of legal services attorneys themselves.<sup>50</sup>

The model of a legal services practice is generally that of a nonprofit organization, which is run by an executive director and offers no-cost legal services to litigants in defined areas of practice such as public benefits, eviction defense, landlord-tenant relations, immigration law, and veterans' rights.<sup>51</sup> The practice of nonprofit legal service organizations (LSOs) is

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47. *Self-Help*, SUPERIOR CT. OF CAL. CNTY. OF ALAMEDA, <http://www.alameda.courts.ca.gov/Pages.aspx/Services-offered-at-the-Self-Help-Center-and-Family-Law-Facilitator-s-Office> (last visited Nov. 10, 2021). For a full list of Legal Access Alameda's suggested resources, see *CLASP/LIL Referral Sheet*, LEGAL ACCESS ALAMEDA, [https://a7626593-4ad3-4acc-a8dc-1e4b5b4f2113.filesusr.com/ugd/e77345\\_844ea4ed42ce4bbf99e7d80dd1628b4b.pdf](https://a7626593-4ad3-4acc-a8dc-1e4b5b4f2113.filesusr.com/ugd/e77345_844ea4ed42ce4bbf99e7d80dd1628b4b.pdf) (last visited Nov. 10, 2021).

48. E-mail from Gary Hastings, Hon. J., Cal. Ct. App., Second Dist., (Ret.), to Douglas G. Carnahan, Comm'r, L.A. Super. Ct., (Ret.) (Tuesday, Mar. 9, 2021, 4:07 PST) (on file with author).

49. *Id.*

separate and apart from that of criminal public defender offices around the country because members of the latter are publicly paid employees specializing in criminal defense.<sup>52</sup>

Under current precedent, the concept of a “right to counsel” in certain non-criminal matters has not extended very far. The 6<sup>th</sup> Amendment underpinnings of the public defender movement have no applicability to civil law. Moreover, due process arguments that counsel is necessary in certain types of civil cases has not garnered much support.<sup>53</sup> Although, on a local level, different jurisdictions around the country are providing counsel in evictions, parental rights, and other sorts of critical cases. Thus, the right-to-counsel movement could gain momentum, which will make the role of the legal services attorney, both at in-person and remote hearings, all the more critical.<sup>54</sup>

Because of this, understanding legal services attorneys’ insights is imperative. In talking with some experienced legal services attorneys, the following types of observations about representing indigent clients in a remote world were revealed:<sup>55</sup>

1. It is hard to get into the “rhythm” of a witness examination on a remote platform. I even have trouble being clear about who is speaking.
- 2.



protections.<sup>56</sup> The suit was later dismissed, but it did bring these issues to the forefront.<sup>57</sup> In addition, other litigant groups and individual litigants have condemned the lack of the courts' COVID protections and advocated for greater safeguards;<sup>58</sup> however, as of this writing, and as the pandemic has lessened, this activity has been reduced.

Hopefully, in the future we will see more of the former remedies sought (i.e., in the areas of training and planning) than in the way of direct action. In the meantime, individual LSO attorneys and other interested parties will have a continuing opportunity to be appointed to working groups, appear on panels, write and speak, make public comments on proposed rules, provide interview subjects for studies, and, in general, do whatever is reasonable to assess and amend current policies regarding the representation of low-income client populations during the pandemic.

## IX. CONCLUSION

The pandemic has created chaos in the lives of the less advantaged among us. Lawyers, judges, legislators, and court administrators, will now, and for the foreseeable future, be tasked with ensuring that devices, such as remote court hearings, established and encouraged because of COVID, do not have a deleterious effect on the rights of the least advantaged among us. Several things leap out from a review of the literature and from practice in the LSO arena. By considering each point, courts and counsel can anticipate challenges for those in vulnerable positions and, thus, can protect the parties.

**We will stay remote.** While the pandemic itself may be lessening as a health issue (albeit in fits and starts), changes in health protocols in courthouses, and the establishment of remote hearings, are here to stay.

**The balance.** The government at all levels must be attentive to balancing the efficient operation of the courts with the constitutional rights of all litigants. Litigants who are in

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56. See Craig Clough, *LA Judge Sued Over 'Super-Spreader' Hearings Amid Virus*, LAW360 (Feb. 9, 2021, 10:41 PM), <https://www.law360.com/articles/1353906/la-judge-sued-over-super-spreader-hearings-amid-virus>.

57. See James Queally & Matt Hamilton, *Lawsuit Seeks to Limit In-Person L.A. County Civil Trials Because of COVID-*

