**AMERICAN BAR ASSOCIATION**

**STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to use a considered and measured approach in adopting, utilizing or continuing virtual or remote court proceedings established as a result of the COVID-19 pandemic, prioritizing 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 federal, state, local, territorial, and tribal governments to form appropriate committees to establish or review virtual or remote court proceedings and make recommendations for procedures, alterations of procedures and best practices. Such committees should include representatives of all constituencies involved in or impacted by the type of court/proceeding to be reviewed, including, as appropriate, representatives of legal aid organizations, public defense providers, non-represented litigants, organizations or programs that provide assistance to non-represented litigants, victims representatives, prosecutors or other government agency representatives, private practitioners, judges, court administrators and clerks, the Access to Justice Commissions, pretrial services, probation and parole agencies, and jail administrators.

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to ensure that virtual or remote court proceedings guarantee equal access and meet standards of fundamental fairness. Such proceedings must 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. To do this, jurisdictions should:

1. Consider the ability of all participants to access and fully participate in the proceedings, including:
   1. Ensuring that participation options for virtual or remote court proceedings are free for participants and observers;
   2. Providing options concerning participation and permitting participants to select the means of participation best suited to them without prejudice;
   3. Allowing participants to alter their chosen means of participation for each proceeding;
   4. Providing necessary supports for those who, for financial, technological or other reasons, may not be able to fully participate without assistance; and
   5. Ensuring that methods of participation reduce, to the fullest extent possible, any prejudice that might result from the circumstances of participation;
2. Enable and encourage full attorney-client relationships, including permitting private consultation both before and during court proceedings; and
3. Establish procedures for ensuring public access and/or privacy of the proceedings, as appropriate for the case and hearing type.

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to study the impacts of virtual or remote court procedures and take steps to halt, alter, or adapt virtual or remote court procedures if such study demonstrates prejudicial effect or disparate impact on outcomes.

**REPORT**

During the COVID-19 pandemic, courts have endeavored find ways to operate safely, while also ensuring 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. 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 has held “more than 8,500 separate proceedings . . . involving 113,000 participants and just over 1,300 judges.”[[1]](#footnote-1) 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.[[2]](#footnote-2) At present only eight state court systems have announced plans to reopen.[[3]](#footnote-3)

Many of the virtual or remote court procedures currently in use were established quickly. As they are being implemented, numerous questions have arisen over how to conduct virtual or remote court fairly, including:

* How to create procedures that ensure equal access for all participants?
* How to 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 to share documents in real time with proceeding participants and ensure, for example, the timely and effective transmission of court orders and notices?
* How to ensure that attorneys have a full and contemporaneous opportunity to consult privately with clients during proceedings?
* How to provide open 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?

It has become increasingly likely that these procedures will be in use, at least in part,[[4]](#footnote-4) for some time to come. As courts seek to implement or expand the use of emergency procedures for virtual or remote court, it is important not to lose sight of the important questions raised by these procedures. This Resolution seeks to encourage each jurisdiction employing virtual or remote court: (1) to establish committees to review procedures; (2) to take steps ensure equal access and fundamental fairness; and (3) to study the impact of these procedures for possible prejudicial effect or disparate impact on outcomes.

**Virtual and Remote Court Procedures**

Our objective, in the short term, is to carefully expand virtual access, keeping in mind the special challenges faced by the self-represented and those lacking the technology to participate in a virtual forum. In the long term, of course, we want to return to normal operations whenever that becomes possible and appropriate.

* New York Chief Justice Janet DiFiore[[5]](#footnote-5)

*Access to Courts*

Virtual and remote court procedures not only provide a method of safely holding critical hearings during the COVID-19 pandemic, but may also serve as a way 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.[[6]](#footnote-6)

However, virtual and remote court procedures, if mandated, also raise the possibility of restricting access or causing prejudice to one party. Many individuals lack the technology, connectivity or skills necessary to effectively participate in such proceedings without assistance. When designing and evaluating virtual and remote court procedures, it is important to keep in mind these potential participants and their struggles.

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.[[7]](#footnote-7) 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.[[8]](#footnote-8) 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[[9]](#footnote-9) use prepaid calling plans that may run out or go inactive during periods of personal economic stress.[[10]](#footnote-10)

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.[[11]](#footnote-11) This percentage rises to almost 30% for adults with less than a high school education.[[12]](#footnote-12) Adults from households earning less than $30,000 a year are also far more likely to not use the internet.[[13]](#footnote-13) Another Pew study noted that about one quarter of rural adults report that “access to high-speed internet is a major problem in their local community.”[[14]](#footnote-14) Even in suburban and urban areas, substantial numbers of adults (13% and 9% respectively) report major problems with internet access.[[15]](#footnote-15) 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.[[16]](#footnote-16)

Access is not made equal by simply providing the technology and instructions. Even when an individual can obtain access to internet to participate in virtual proceedings, the conditions of their home or surroundings may unwittingly create prejudice or bias. 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 rather than assists a litigant.[[17]](#footnote-17)

Creating equal access to virtual and remote court proceedings may require having both phone and internet options for virtual or remote court, as well as establishing free access points, perhaps at social service organizations, for individuals to attend proceedings and obtain assistance, if needed, in how to participate. 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. 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.[[18]](#footnote-18)

When considering access, it is not merely participation that must be considered, but also 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 complexity. Participants should similarly be given options with regard to 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 should be confirmed regularly, and where feasible, duplicative options should be used to account for potential changes in circumstances and uncertainty.

*Attorney-Client Relationships*

In establishing or reviewing virtual or remote court procedures, special attention should be paid to effectuating the attorney-client relationship. 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 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. Every possible effort should be made to do so, and particular attention should be paid to providing support and assistance for vulnerable litigants, 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 cannot easily be invited 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 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, rather than asking if consultation is required or expecting the litigant to request such consultation if needed.

*Public Access and Privacy Concerns*

The Sixth Amendment to the U.S. Constitution guarantees a defendant a right to a public trial.[[19]](#footnote-19) The U.S. Supreme Court has held that the press and public have a right under the First Amendment to attend trials,[[20]](#footnote-20) as well as other court proceedings.[[21]](#footnote-21) At the same time, the right of public access to a courtroom does not extend to recording the proceedings.

The debate over cameras in courtrooms has waged 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 defense to create two levels of argument–one on the law and one for the public. While many courts allow recordings, many other courts still forbid such recordings.[[22]](#footnote-22) Broadcasting courts proceedings over the internet, however, subjects all such proceedings to recording. While a request can be made not to record,[[23]](#footnote-23) the broadcaster cannot effectively bar such recordings.

Public access is not only a means for disinterested observers or academics to watch court proceedings, but it is also the means by which family members and loved ones can attend. Yet the manner in which some courts share virtual or remote proceedings is confusing and often deficient. In most jurisdictions, if remote or virtual court is streamed live at all, it is streamed or broadcast, not via the court website, where one might access dockets with a list of cases to be heard, but via a YouTube or Facebook Live Feed. Often no notice of hearings is provided. In watching or listening to a streamed or broadcast hearing, no header is provided concerning the case or even the type of docket. In in-person criminal proceedings, the judge, prosecutor, defense attorney and accused are identifiable both 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. Improved procedures might provide for advanced notice of virtual or remote hearings, along with dockets and links to the feed or broadcast to be posted on the court webpage. Additionally, encouraging individuals to introduce themselves and/or label their feed with their correct name and position/title, would improve public access significantly.

At the same time, the right of the public and press to witness 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 are typically closed to limit the future consequences for the minor.[[24]](#footnote-24) 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.[[25]](#footnote-25) 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.

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

Procedures for holding virtual and remote court proceedings must take into account the complex considerations of participant access, public access/privacy, and attorney/client relationships. To establish or review such procedures, as soon as practicable, each jurisdiction should establish a committee or committees to solicit feedback on and review virtual or remote court procedures. 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.”[[26]](#footnote-26) This is likewise happening in some states in the U.S., such as in North Carolina where Chief Justice Cheri Beasley established a Task Force to “recommend directives and policy changes” to court operations.[[27]](#footnote-27)

Separate committees may be necessary to review types of courts and/or court proceedings. For example, “criminal proceedings may present different issues such as the right to confrontation and exchange of signed paperwork during the hearing. Jury trials bring a unique challenge with the involvement of jurors.”[[28]](#footnote-28)

In establishing committee(s) to review virtual or remote court procedures, special care should be taken to include representation and seek feedback from all groups who participate in the procedures[[29]](#footnote-29). In civil cases, this includes not only judges and attorneys, but also court staff, litigant representation, Access to Justice Commission representation, and possibly the juror administration officials. Committees addressing criminal court virtual and remote proceedings, should include not only judges, public defenders, prosecutors, and private attorneys, but also jail staff, pretrial services, probation and parole services, victims or victims’ representatives, and possibly juror administration officials.

**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 virtual and remote court procedures could cause. Very little is known about the impact of viewing individuals through a screen, as opposed to in-person. The few studies that have looked at the impact or remote video on court proceedings suggest that that there could be significant impacts on outcome.

In 1998, 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.[[30]](#footnote-30) The study concluded that “defendants were significantly disadvantaged by the videoconferenced bail proceedings.”[[31]](#footnote-31) Specifically, “[t]he average bond amount for the offenses that shifted to televised hearings increased by an average of 51%.”[[32]](#footnote-32) 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 process negatively impacting the ability or willingness of the defendant to speak up during a hearing, or the negative impact of the proceeding on attorney-client communication.[[33]](#footnote-33)

An observational study of teleconferenced immigration hearings found such hearings “a poor substitute for in-person hearings.”[[34]](#footnote-34) 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[[35]](#footnote-35). The conferences were also plagued by technical difficulties, with almost half of observed cases experiencing one or more problems.[[36]](#footnote-36) The study called for a “moratorium on videoconferencing in removal cases until it can be improved.”[[37]](#footnote-37) A different study of the use of teleconferencing in immigration proceedings determined that remote hearings impacted outcome, lessening the likelihood asylum would be granted.[[38]](#footnote-38)

As virtual and remote court procedures are more widely implemented, the need for additional research on the impact of their use becomes more acute.[[39]](#footnote-39) Jurisdictions should, where feasible, conduct such research or, at a minimum, cooperate with researchers who wish to study the impact of these procedures on outcomes. Jurisdictions should also review any research when published and halt, adapt or otherwise alter procedures when disparate or harmful impacts are discovered.

**Considerations for Review:**

The proposed Resolution highlights certain important criteria that should be considered by jurisdictions in 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 to be conducted, the participants involved, and whether participants are represented by counsel. Virtual and remote proceedings, to the extent possible, should be used for essential hearings, such as hearings where one or both parties would be negatively impacted by delay. Essential hearings would include initial appearances for detained individuals, petitions for protective orders, initial hearings in child removal cases, and emergency requests for release based on COVID-19 concerns. Virtual and remote proceedings should also proceed where the litigants chose to use the procedures after being fully informed of the manner of the proceeding and the technological requirements for participation.

The Resolution further urges jurisdictions to:

1. Consider the ability of all participants to access and fully participate in the proceedings, including:
   1. Ensuring that participation options for virtual or remote court proceedings are free for participants and observers;
   2. Providing options concerning participation and permitting participants to select the means of participation best suited to them without prejudice;
   3. Allowing participants to alter the means of participation for each proceeding to allow for changes in circumstances;
   4. Providing necessary supports for those who, for financial, technological or other reason, may not be able to fully participate without assistance; and
   5. Ensuring that methods of participation reduce, to the fullest extent possible, any prejudice that might result from the circumstances of participation;
2. Enable and encourage full attorney-client relationships, including permitting private consultation both before and during court proceedings; and
3. Establish procedures for ensuring public access and/or privacy of the proceedings, as appropriate for the case and proceeding type.

Jurisdictions are also urged to encourage and support the study of virtual and remote court proceedings to determine whether such proceedings produce bias or disparate impact, and, if so, to halt or alter such proceedings.

**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 are considering doing so, and still others are considering further expansions of their platforms. Such innovation is necessary to maintain safety during the pandemic, but the evaluation of these platforms to ensure that they protect litigants’ rights and ensure fundamental fairness is equally important. It is incumbent on jurisdictions to conduct this analysis and, as necessary, alter their remote or virtual court procedures to ensure full access by participants, encourage and enable attorney-client communications, and appropriately balance public access with privacy concerns. It is also important that jurisdictions encourage and support further in-depth study of the impacts of these procedures to determine if they, unwittingly, produce bias or disparate impacts.

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). The Resolution calls upon jurisdictions to create commissions to evaluate and revise virtual and remote court proceedings implemented during the COVID-19 crisis and provides a set of criteria to be considered during that review.
2. Approval by Submitting Entity.

May 5, 2020

1. Has this or a similar resolution been submitted to the House or Board previously? No.
2. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?.

There are numerous ABA policies concerning the accessibility of the courts, the use of technology in the courts, and the evaluation of court procedures. This resolution adds to and enhances these policies and presents no conflict. See, e.g., 91A115, 95M106, 95M301, 96M114, 02M112, 04A103B, 08A10D, 11M10A, 14A105A.

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

N/A

1. Status of Legislation.

N/A

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

Numerous jurisdictions are looking for guidance on how to establish and evaluate 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.

1. 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.

1. Disclosure of Interest.

N/A

1. 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

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

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

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**EXECUTIVE SUMMARY**

1. Summary of the Resolution

The Resolution calls upon jurisdictions to create commissions to evaluate and revise virtual and remote court proceedings implemented during the COVID-19 crisis and provides a set of criteria to be considered during that review.

2. Summary of the Issue that the Resolution Addresses

During the COVID-19 pandemic, courts have endeavored find ways to operate safely, while also ensuring 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 be taken to fully consider the impact of these procedures on access – both for participants and the public, privacy and attorney-client relationships.

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

The proposed Resolution 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

No dissenting views have been articulated yet The Resolution was crafted based on discussions with numerous other groups including individuals working with the COVID-19 Task Force and the Section on Civil Rights and Social Justice. However, due to time constraints, the actual language is being distributed to most groups in conjunction with this submission. SCLAID anticipates receiving significant comments and making changes to both the Resolution and Report in response to these comments.

1. Erik De la Garza, *Texas Courts Zoom Forward with Virtual Hearings,* Courthouse News Service (April 24, 2020). [↑](#footnote-ref-1)
2. *Id.* As of May 4, 2020, the National Center for State Courts website on Virtual Hearings listed five states as having statewide orders requiring courts to close and mandating virtual court proceedings: Delaware, Connecticut, New Jersey, New Mexico and Alaska. An additional fourteen 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 May 4, 2020), available at <https://www.ncsc.org/>. [↑](#footnote-ref-2)
3. National Center for State Courts, Statewide Plans to Resume Court Operations Chart (visited May 4, 2020), available at <https://www.ncsc.org/>. Listing and linking to plans from Montana, Wisconsin, Texas, Arkansas, Tennessee, South Carolina, Florida and Pennsylvania. [↑](#footnote-ref-3)
4. 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>. The Report notes that some court 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. [↑](#footnote-ref-4)
5. Erik De la Garza, *Texas Courts Zoom Forward with Virtual Hearings,* Courthouse News Service (April 24, 2020). [↑](#footnote-ref-5)
6. 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. [↑](#footnote-ref-6)
7. 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. [↑](#footnote-ref-7)
8. Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, November 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.”). [↑](#footnote-ref-8)
9. 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/>. [↑](#footnote-ref-9)
10. 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, April 30, 2010, available at <https://www.nielsen.com/us/en/insights/article/2010/whats-driving-the-growth-of-pre-paid-cell-phones/>. [↑](#footnote-ref-10)
11. Monica Anderson, et. al., *10% of Americans don’t use the internet. Who are they?*, April 22, 2019, available at https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/. [↑](#footnote-ref-11)
12. *Id.* [↑](#footnote-ref-12)
13. *Id.* [↑](#footnote-ref-13)
14. 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/>. [↑](#footnote-ref-14)
15. *Id.* [↑](#footnote-ref-15)
16. Pew Research, Internet/Broadband Face Sheet, June 12, 2019, available at <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>. [↑](#footnote-ref-16)
17. 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*, March 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](https://www.txcourts.gov/media/1446244/judicialbackground.jpg); 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/>. [↑](#footnote-ref-17)
18. 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/zoomsrlbestpractices.pdf>. [↑](#footnote-ref-18)
19. 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.”). [↑](#footnote-ref-19)
20. Richmond Newspapers, Inc. v. Virginia (1980) [↑](#footnote-ref-20)
21. El Vocero de Puerto Rico v. Puerto Rico (1993). [↑](#footnote-ref-21)
22. See National Center for State Courts, Cameras in the Court – Resource Guide, March 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). [↑](#footnote-ref-22)
23. Texas has encouraged judges to make this request and post a watermark on the broadcast that says Do Not Record. See [↑](#footnote-ref-23)
24. 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). [↑](#footnote-ref-24)
25. See, e.g*.*, *State v. Ucero*, 450 A.2d 809 (RI 1982). [↑](#footnote-ref-25)
26. 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/>. [↑](#footnote-ref-26)
27. 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>. [↑](#footnote-ref-27)
28. JTC Quick Rapid Response Bulletin, *Strategic Issues to Consider when Starting Virtual Hearings,* April 7, 2020, available at <https://www.ncjfcj.org/wp-content/uploads/2020/04/COSA-NSCSC-and-NACM-JTC-Response-Bulletin-Strategic-Issues-to-Consider-When-Starting-Virtual-Hearings-.pdf>. [↑](#footnote-ref-28)
29. 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/> [↑](#footnote-ref-29)
30. Shari Seidman Diamond, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. of Crim. L.& Criminology 869 (2010). [↑](#footnote-ref-30)
31. *Id.* at 898. [↑](#footnote-ref-31)
32. *Id.* at 897. [↑](#footnote-ref-32)
33. *Id.* at 898-99. [↑](#footnote-ref-33)
34. 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>. [↑](#footnote-ref-34)
35. *Id.* [↑](#footnote-ref-35)
36. *Id.* at 6-7. [↑](#footnote-ref-36)
37. *Id.* at 8. [↑](#footnote-ref-37)
38. Frank M. Walsh & Edward M. Walsh, Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings, 22 GEO. IMMIGR. L.J. 259, 271 (2008). [↑](#footnote-ref-38)
39. 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>. [↑](#footnote-ref-39)