

ACCESS TO JUSTICE IN A TIME OF COVID

Douglas G. Carnahan*

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?

* Douglas G. Carnahan is a retired Los Angeles Superior Court Commissioner. Before appointment to the bench, he was a civil litigator in Los Angeles and Assistant Clinical Professor of Law at USC. Since retiring from the court in 2013, he has divided his time among teaching, writing, and part-time law practice. He has taught over the years in the law schools of UCLA, USC, Loyola, Whittier, UWLA, and Northrup, and in the Department of Politics at Pomona College. Carnahan is currently on the faculty of the UCLA Extension's Paralegal Training Program and has also taught in the paralegal programs of USC and the El Camino Community College. He currently works independently as a mediator and as a part-time employee "Managing Attorney" at the Inner City Law Center, Los Angeles, a nonprofit providing pro bono legal services to those experiencing homelessness and housing discrimination. He has a B.S. in Engineering from UCLA, a J.D. from the Hastings College of the Law, and a Masters of Professional Writing from USC.

- 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.¹ 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.² Only 45% of respondents, for instance, reported confidence in the safety and ease of reporting for jury duty.³ When asked, “On a scale of 1 to 10, how comfortable do you personally feel right now . . . serving on a jury if selected?”, the average score was “5.1.”⁴ Further, poll subjects clearly felt that the implementation of protective measures would make them more comfortable in reporting physically to courthouses—these numbers were in the 70-76% range depending on the protective measure involved such as masks, social distancing, temperature checks, virus testing.⁵

Even more telling in regard to our current inquiry, polling by the National Center for State Courts (NCSC) in 2014 found that only 43% of the poll subjects then would be likely to conduct their business with the courts online.⁶ In 2020, this number rose to 64%.⁷

There is no reason to believe that these numbers are skewed in favor of any population group because they are basically theoretical. As we shall see, low-income client populations may have actual, as opposed to theoretical, inabilities to take advantage of protective and online remedies for the pandemic, but the NCSC polling is indicative of a population-wide belief that going to court is difficult and dangerous during a pandemic.

III. COURTHOUSE ACCESS BY LOW-INCOME CLIENTS

Do low-income and traditionally under-served client populations have specialized problems of access to justice that extend beyond the considerations noted generally by the NCSC?

The Federal Center for Disease Control (CDC), during the height of the pandemic, identified certain areas of physical plant operations that needed to be ameliorated to provide a safer environment for people who were forced to

1. Jesse Rutledge, Nat’l Ctr. for State Cts. et al., PowerPoint slides of *State of the State Courts in a (Post) Pandemic World at Jury Service and Accessing Court Services Remotely in a (Post) Pandemic America: Results From a New National Public Opinion Poll* webinar 5, (June 18, 2020), https://www.ncsc.org/__data/assets/pdf_file/0005/41000/COVID19-Poll-Presentation.pdf.

2. *See id.* at 6.

3. *Id.*

4. *Id.* at 7.

5. *Id.* at 8.

6. *Id.* at 11.

7. *Id.*

come to court.⁸ Of course, this phenomenon—the “requirement to come to court”—more prominently affects low-income groups, because they have limited access to technology and private transportation.⁹ In any event, the CDC identified the following areas of concern in courtroom facilities: (1) accessibility of the courthouse to public transportation, (2) safety procedures in closed spaces like elevators, (3) adequately safe and hygienic restrooms, and (4) control of public drinking fountains.¹⁰ This CDC study was completed in consultation with the federal courts, but the concerns expressed are systemic.¹¹

Still, there are impediments to access our courthouses that have been exacerbated by the pandemic, and to some extent they were there before. Commentator Richard Susskind, for Harvard’s Center on the Legal Profession (Center), finished an entire book on what he hoped would be transformations in public confidence in the courts due to access to technology when the pandemic hit.¹² Susskind comments,

Lawyers everywhere should be ashamed. There is much that we can be proud of in our law and legal institutions—our industry, commitment, impartiality, probity. But we cannot allow vanity to occlude our view of how alienated from the courts most people are. This widespread exclusion from the law was one of the premises of my book, . . . published [presciently, as it turned out] in November 2019. I called there for a transformation in our courts, largely enabled through technology. Mainly for cultural reasons, I conceded that it might take a decade to bring the changes that I recommended.¹³

Susskind turned out to be off by ten years, because many of the unsavory effects that the pandemic has had on the courts, especially affecting low-income clients, have now been used to enhance the use of courtroom technology.¹⁴

I would not want lawyer-readers to think I have omitted their own personal considerations in accessing our courthouses. As Administrative

8. See Jonathan Zenilman et al., Ctr. for Disease Control and Prevention, Court Proceedings During a Pandemic (Oct. 1, 2020) (transcript), https://www.abajournal.com/images/main_images/Federal_Court_022321.pdf.

9. See, e.g., Greg Winfree & Joe Zietsman, *COVID-19 and the Future of Transportation*, CTR. FOR ADVANCING RSCH. IN TRANSP. EMISSIONS, ENERGY, AND HEALTH 1, 5 (2020), <https://www.carteeh.org/wp-content/uploads/2020/05/Impact-of-COVID-19-on-Transportation.pdf>.

10. Zenilman et al., *supra* note 8, at 2-3.

11. See *id.*

12. See RICHARD SUSSKIND, *ONLINE COURTS AND THE FUTURE OF JUSTICE* (2019).

13. Richard Susskind, *The Future of Courts*, THE PRAC. (July/Aug. 2020), <https://thepractice.law.harvard.edu/article/the-future-of-courts/>.

14. *Id.*

Judge Jennifer Bailey of Florida's 11th Judicial Circuit stated, "The truth of the matter is, there's nothing to replace that feeling as a lawyer you get when you walk up the steps of the courthouse."¹⁵ I would not wish to denigrate this sentiment, having walked up plenty of courthouse steps in my life. But Judge Bailey also recognizes that lawyers who represent under-served populations are more fixated on the lives and wants of their clients than on their own thrills. Bailey goes on to say that "much of what gives the courtroom that heightened sense of sanctity are the rituals and the dignity with which court participants conduct themselves there."¹⁶

Many courts, including those that largely use technology, are struggling to maintain access to justice. Virtually every bar association, judges' group, and legal trade association, along with (of course) technology providers, are turning serious attention to unequal access to justice.¹⁷ Much of what they are doing and saying is directly related to serving all client populations.¹⁸

IV. "PANDEMIC-RELATED" REMOTE LITIGATION GUIDELINES

If we accept that remote appearances are the wave of the future, even beyond the pandemic, we must begin to look for how courts should establish guidelines for the use of remote litigation.

The National Center for State Courts has been a leader in analyzing this problem. The NCSC starts with an examination of the types of hearings that may be amenable to remote handling.¹⁹ Its analysis is directly relatable to the problems of low-income clients.

15. Ross Todd, *Zoom Court, in One Form or Another, is Here to Stay: 'Your Clients Want This'*, AMLAW LITIG. DAILY (Apr. 26, 2021, 7:30 AM), <https://www.law.com/litigationdaily/2021/04/26/zoom-court-in-one-form-or-another-is-here-to-stay-your-clients-want-this/>. Judge Bailey was quoted from her participation in a forum sponsored by the Online Courtroom Project and the National Institute of Trial Advocacy.

16. *Id.*

17. *See, e.g.*, Judge Kimberly C. Priest Johnson, *Virtual Open Court*, BENCHER (July/Aug. 2020), https://home.innsforcourt.org/AIC/AIC_For_Members/AIC_Bencher/AIC_Bencher_Recent_Articles/2020_JulAug_Johnson.aspx.

18. *See, e.g., id.* The Inns movement presciently identified certain technology-related areas that are now becoming regular aspects of online courtroom management: trial runs, exhibit exchanges, trouble-shooting audio and video breakdowns, and a general attitude of "patience." Lawyers representing unsophisticated clients, including those who may have English as a second language, are learning to work on instilling patience in their clients and in courtroom staff (as well as in themselves).

19. CAL. COMM'N ON ACCESS TO JUST., REMOTE HEARINGS AND ACCESS TO JUSTICE DURING COVID-19 AND BEYOND 3-4 (2020), <https://www.ncjfcj.org/wp-content/uploads/2020/06/2020-Remote-Hearings-Guide.pdf>. This Remote Hearings Guide is a publication of the National Center for State Courts in conjunction with the Conference of Chief

The NCSC's breakdown of "remote amenability" divides potential remote hearing access into three broad categories.

First, there is a category of cases consisting "of critical court services that need to be provided to self-represented litigants (SRLs) and court users generally, especially and particularly during and after the pandemic. These are matters surrounding essential areas of life, such as personal safety (domestic violence), emergency child custody matters, and proceedings that affect the health of, and access to health care for, people affected by the virus."²⁰

The second category is "proceedings that are amenable to remote hearing technology and procedures—especially for issues that affect people's ability to get on with their lives."²¹ The NCSC here references guardianships, uncontested marital dissolutions, and probate proceedings, and (possibly) default matters in civil litigation.²²

Finally, there is a category of cases specifically designed to alleviate backlogs that we are expecting when cases, such as eviction matters, that have been put on hold during the pandemic are opened up again.²³ The NCSC suggests the use of court technology to conduct mandatory settlement conferences in these cases in order to reduce backlogs.²⁴ It is difficult to see how this might apply to criminal matters, but in general, those seem to have been less affected by pandemic-caused stays.

The same report provides some specific technological and case-handling suggestions when remote hearings are triggered. These include:²⁵

- Ensuring public access.
- Ensuring technological security (i.e., preventing "Zoombombing").
- Methods for ensuring that a valid and accurate record of proceedings is kept.
- Techniques for reminding users how to make the best use of their technology (i.e., speaking to the computer camera and not to the screen).
- Securing the identity of participants if necessary.

Justices and the Conference of State Court Administrators and "lightly adapted for use" based on a report created by the California Commission on Access to Justice.

20. *Id.* at 3.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 3-4.

25. *Id.* at 15-18.

- 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”),²⁶ 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.”²⁷ This breaks down the responsibilities for remote hearings into certain defined areas for judicial attention:²⁸

- 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

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 (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.

justice during the pandemic. By applying these suggestions, courts will also be able to effectively conduct more remote hearings in the future.

V. TECHNOLOGY, PARTICULARLY AS IT AFFECTS ACCESS

How does the technology itself affect access to justice? Not everyone owns a cellphone or a computer, nor knows how to use one. Even some lawyers (and judges) are more capable than many of their colleagues in this area. How do these considerations affect access issues?

The National Center for State Courts study noted above collates a handful of technology-related issues that directly affect access to justice. In summary, these are:²⁹

- The “Digital Divide”: the question of whether users of the court system have the appropriate technology (handheld devices, laptops, desktops, etc.) and the necessary skill, to log in to remote hearings. The NCSC proposes the establishment of self-help centers to assist litigants in this.
- Costs: Many remote platforms require a fee for their use. These fees are relatively minimal at around \$15 to \$20, but they may still be an impediment to self-represented litigants unless fee waivers can be obtained. This means that the basic structure of qualification for fee waivers may have to be re-examined as a result of the pandemic.
- Problems created by platforms in dealing with persons with disabilities: Separate from the technological issues of access, it is well known that some technologies can cause dizziness and other illness. Platforms in general use, therefore, need to be attentive to this, as well as to other things like closed captioning. A federal law contains standards to follow in providing remote platforms.³⁰
- How amenable is any platform to access and effective use by first-time users?
- Can the platform accommodate self-represented litigants and non-English speaking litigants? Video technology that allows remote translation with video will probably be preferable to voice-only translation because it will provide visual clues to the user.
- Does the platform unduly burden a litigant with limited literacy?

29. CAL. COMM’N ON ACCESS TO JUST., *supra* note 19, at 5-6.

30. See Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (codified as amended in scattered sections of 47 U.S.C.).

- 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,³¹ translation services, accommodations for people with disabilities, the possible use of “asynchronous” proceedings,³² 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?³³ 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.³⁴

Technological surveys are beginning to collect data and make detailed recommendations regarding all of these issues, particularly as they affect access to justice. The “Surveillance Technology Oversight Project” (STOP) has issued a comprehensive report detailing not only the issues involved but also the efforts of various courts to address them.³⁵ The STOP report emphasizes the importance of the design of platforms to allow private communication between attorney and client, remote identity verification,

31. See, e.g., SUPERIOR CT. OF CAL., CNTY. OF L.A., LACOURTCONNECT USER GUIDE (2020), <https://www.lacourt.org/documents/LACCWhatyouneedUG.pdf>.

32. Meaning the use of technology to provide that different parts of the hearing are to be held at different times, and possibly before different judicial officers. There are obviously due process problems with this that would have to be overcome, but the possibility of a more informal set of court hearings may have the effect of reducing stress, particularly in self-represented litigants, and of increasing the ultimate efficiency of proceedings.

33. For further discussion, see Norman M. Garland, *The Constitutionality of Remote Trials*, 51 S.W. L. REV. 106 (2021).

34. See, e.g., Richard Dahl, *Virtual Court Putting Litigants at a Disadvantage?*, FINDLAW (Aug. 20, 2020, 8:24 AM), <https://www.findlaw.com/legalblogs/technologist/virtual-court-putting-litigants-at-a-disadvantage/>.

35. See Albert Fox Cahn, Esq. & Melissa Giddings, *Virtual Justice: Online Courts During COVID-19*, SURVEILLANCE TECH. OVERSIGHT PROJECT (July 23, 2020), <https://www.stopspying.org/virtual-justice>. “STOP,” the Surveillance Technology Oversight Project, is a nonprofit dedicated to fighting illegal surveillance.

secure transmission of sensitive files, and ease of use and the elimination of technology error.³⁶

The report delineates some specific platforms and their respective benefits and disadvantages and also has a detailed discussion of the “Digital Divide,”³⁷ 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.³⁸

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.³⁹ Additionally, the Michigan trial courts have issued a booklet of “standards and guidelines” for the running of “virtual courtrooms.”⁴⁰

36. *See id.* at 5-7.

37. *Id.* at 9-13 (noting that “National origin . . . affects the likelihood of home access to the internet and digital technology. According to 2013 US Census data, 84.7% of English-speaking households have access to a computer, and 75.5% of that population have some internet subscription; however, only 63.9% of limited English-speaking households have computers, and only 51.4% have some internet subscription.” (citing Alison Rogers, *Building the Superhighway for Information and Commerce: How the e-Government Can Save Money by Building Bridges Across the Digital Divide*, 22 MICH. J. RACE & L. 163, 166 (2016)).

38. *See* CAL. COMM’N ON ACCESS TO JUST., *supra* note 19, at 11-13.

39. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., EQUITY, ACCESS & JUSTICE: 2020 ANNUAL REPORT 8 (2020), https://iaals.du.edu/sites/default/files/documents/annual-reports/iaals_2020_annual_report.pdf.

40. *See Michigan Trial Courts Virtual Courtroom Standards and Guidelines*, MICH. SUP. CT. & STATE CT. ADMIN. OFFICE (Aug. 4, 2020), https://www.courts.michigan.gov/4a28cc/siteassets/covid/covid-19/vcr_stds.pdf.

At the county level, another example is the Superior Court of California, County of Riverside issuing a ten-page “Trial Setting Order,” which controls trial setting in the pandemic and addresses:⁴¹ (1) “Remote Trials Are a Necessity” and (2) “Conducting Remote Trials,” including sections on “maintaining the decorum of the court,” “pre-trial arrangements,” “public access and prohibition of recording,” “opening statements and closing arguments,” witnesses, exhibits and presentation of testimony,⁴² “technological considerations during the hearing” such as “how to join,” “chat features,” “break-out rooms,” “addressing technological difficulties,” and “jury . . . deliberations and discharge.”

There has been a good deal of cross-fertilization among courts in arriving at such orders, and access to justice appears to be at the forefront of considerations. The California Judicial Council, in approving a “remote workstream” committee’s recommendation for expanding the use of remote hearings, has extensively reviewed reports from other courts around the nation.⁴³ The workstream group went so far as to hold mock hearings to test platforms and procedures.⁴⁴

Finally, even at the individual courtroom level, bench officers have been innovative and empathetic in devising methods to deal with access issues. For instance, several judges help direct Legal Access Alameda, which runs clinics that provide remote services for low-income clients.⁴⁵ This organization coordinates over 30 clinics a month and served over 3,500 low-income clients in 2020.⁴⁶ Legal Access Alameda also promotes Alameda County’s Self-Help Center that is used by self-represented parties who need help working with courts’ procedural requirements and provides remote

41. Superior Court, County of Riverside, [Model] Amendment to Trial Setting Order ¶ 1.a (2021).

42. *Id.* at ¶ 3.h-3.i (2021). As to “Witness Oath/Affirmation,” the order states, “[i]n addition to the standard admonitions, before each witness testifies, the Court will ask the witness to affirm: (i) no one else is present in the remote room where the witness is testifying other than those, if any, authorized by the Court; (ii) that all communications with the witness during his or her examination will be on the record, other than communications with the witness and his or her attorney of record during breaks, and (iii) that the witness will not engage in any direct or indirect communications with anyone during his or her examination other than those communications made on the record.” *Id.* at ¶ 3.h.iv (2021). Such an order is no doubt well-intentioned, and may even be legally required, but obviously would put strain on less sophisticated litigants.

43. See Lauren Berg, *Calif. Judicial Council Moves to Expand Remote Court Access*, LAW360 (Sept. 25, 2020, 9:48 PM), <https://www.law360.com/articles/1314061/calif-judicial-council-moves-to-expand-remote-court-access>.

44. See *id.*

45. LEGAL ACCESS ALAMEDA, <https://www.vlsc-acba.org/> (last visited Nov. 10, 2021). For a Board of Directors list including the judges, see *Who We Are: Board of Directors*, LEGAL ACCESS ALAMEDA, <https://www.vlsc-acba.org/board-of-directors> (last visited Nov. 10, 2021).

46. LEGAL ACCESS ALAMEDA, *supra* note 45.

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

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.⁴⁸ 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.⁴⁹

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.⁵⁰

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.⁵¹ The practice of nonprofit legal service organizations (LSOs) is

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 (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.* Commissioner Satarzadeh reports general satisfaction with the program, even from a defendant whom she had to re-direct to a breakout room because he didn't realize his camera was on and was starting to change clothes in view of the gallery. I am indebted to Justice J. Gary Hastings (Ret.) of the California Court of Appeal, Second District, for insight into the programs being run by Commissioners Bishay and Satarzadeh, based on interviews he has conducted with them for his own in-progress book on the reactions of judicial officers to virtual court hearings of the gallery.

50. I would be remiss if I did not also point out that many members of the alternate dispute resolution community—administrators, mediators, and counsel—have gone out of their way during the pandemic to continue to make their services available at no- or low-cost to litigants who need the help that ADR providers and practitioners can provide. *See, e.g.*, Levi Y. Silver & Mei-Ying M. Imanaka, *COVID-19 Increases Interest in Alternative Dispute Resolution*, SOLOMON WARD SEIDENWURM & SMITH, LLP (June 3, 2020), <https://swsslaw.com/2020/06/02/covid-19-increases-interest-in-alternative-dispute-resolution/>.

51. *See, e.g.*, *Our Work*, NEIGHBORHOOD LEGAL SERVS. OF L.A. CNTY., <https://nlsa.org/who/work> (last visited Aug. 29, 2021).

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.⁵²

Under current precedent, the concept of a “right to counsel” in certain non-criminal matters has not extended very far. The 6th 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.⁵³ 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.⁵⁴

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:⁵⁵

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. We have trouble making sure clients have access to technology. We have some organization laptops that they can use if we can get them to them, but that is difficult.
3. Older lawyers may hold up the works. LSO attorneys tend to be younger and more computer-literate, so a certain amount of time is wasted with older opposing counsel (and, to some extent, with judges) who fumble with the platforms.
4. There will always be a tactical choice to be made in terms of whether to appear remotely via just audio, or whether to have your camera on. In certain hearings, the judge will probably require the camera, especially if testimony is being given, but in remote hearings on motions, it may be more effective to just have the judge concentrate on your audio and keep your camera turned off. At the same time, it is always difficult to discern

52. See *Frequently Asked Questions: Who Is Entitled to a Free Lawyer?*, A.B.A., https://www.americanbar.org/groups/legal_services/flh-home/flh-faq/ (last visited Aug. 28, 2021).

53. The major roadblock as of this writing is *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty.*, 452 U.S. 18 (1981).

54. See generally NAT’L COAL. FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/> (last visited Aug. 29, 2021) for an overview of their work.

55. For these, and other, observations, I am indebted to attorneys Jake Crammer, Zoe Dolan, and Kendra Hernandez of the Inner City Law Center, Los Angeles.

and react to what is going on in a courtroom if we cannot see the judge's face and determine how to react to him or her—sometimes the judge's face is obscured, or his/her camera is turned off for whatever reason.

5. Conversations off the record are awkward. We are having to gradually learn, and help the court in learning, how to operate breakout rooms and off-camera discussions with our clients.
6. The Digital Divide is a real thing and not only with regard to hardware. Some clients do not have access to wi-fi, for instance, even if they do have a computer.
7. It is difficult to be without the personal one-to-one contact with a client that develops in a courtroom. We have got to devise ways to maintain individualized and empathetic contact with our clients when we are not in their presence.
8. Remote work is especially good with routine appearances, such as for trial setting conferences. With full-blown hearings, all of the Digital Divide problems can, and will, arise.
9. Interpreter problems abound, although the need to have the interpreter work well with his or her language, and with a particular client, can sometimes foster concision in the speaking of witnesses and attorneys.
10. We also recognize, of course, that the ability to appear remotely has had a health benefit, and we are of course critically interested in keeping our clients safe and healthy.

In general, challenges created by remote work and by the health concerns caused by the pandemic have added to the day-to-day stresses and satisfactions of legal services work. Individual legal service attorneys and LSOs will continue to address them in novel and empathetic ways. To the extent that LSO representation on task forces and working groups can be achieved, the interests of low-income and self-represented clients will be enhanced.

VIII. REMEDIES

There have been a wide-range of remedies taken since the beginning of the COVID-19 pandemic. The participation of LSOs in planning pandemic precautions and training others is noteworthy. Some groups have taken direct action—in early 2021 a band of LSOs sued the presiding judge and the CEO of the Los Angeles Superior Court over the adequacy of COVID

protections.⁵⁶ The suit was later dismissed, but it did bring these issues to the forefront.⁵⁷ In addition, other litigant groups and individual litigants have condemned the lack of the courts' COVID protections and advocated for greater safeguards;⁵⁸ 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

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-19 Risk*, L.A. TIMES (Feb. 9, 2021, 6:26 PM), <https://www.latimes.com/california/story/2021-02-09/lawsuit-seeks-to-stop-l-a-courts-from-holding-some-civil-trials-due-to-covid-concerns>. Full disclosure requires me to state that I represented one of the plaintiff LSOs in this suit.

58. See Matt Hamilton, *Workers in L.A.'s Courts are Dying of COVID-19 as In-Person Hearings, Trials Continue*, L.A. TIMES (Feb. 5, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-02-05/covid-complicates-in-person-trials-la-courthouses>.

particularly vulnerable positions (criminal defendants, people facing eviction, those who may lose their parental rights, etc.) and who are in desperate need of counsel, will need to have their situations examined—even on a case-by-case basis—to determine that they are receiving competent, effective representation.

- **Right to counsel.** The “right to counsel” movement, already underway before the pandemic struck, should (and will) continue to be vitalized, with a view towards ensuring that low-income client populations are adequately served even in the context of remote hearings.
- **Education in remote work.** The law schools will have to begin offering courses in “effective remote representation,” or something along those lines, to address questions such as: How do you best examine a witness online? How do you ensure effective confidential communication with a client in a remote world? What are some of the ethical strictures on counsel that are created by representing someone remotely? Mandatory continuing legal education will have to take up these topics as well, particularly when it comes to representing disadvantaged clients.
- **Judicial education in behaving remotely.** Court systems and administrative offices of the courts will have to begin offering continuing judicial education in remote platforms and in how best to conduct, from the standpoint of the bench officer, remote hearings.