Futures Subcommittee; Remote Services/COVID-19 Transition:

An Interactive Discussion re: Lessons Learned from 18 Months (and counting) of Providing Legal Services in the Midst of a Global Pandemic

The Honorable Matthew Donohue, Ryan, Carty, and Connor Wall

This panel discussion will explore the lessons and practices that have emerged from the pandemic that we can take forward into our ongoing work with families. Participants will be encouraged to share their thoughts and experiences on lessons learned and where things stand with providing services to litigants. Help us vision a future for family law practice that ensures access to justice for all Oregon families.

Agenda

Welcome and Introductions	Ryan Carty
Reflections on Data: How the Pandemic has Impacted Courts	Conor Wall
Discussion on Lessons Learned and What's Next	Judge Donohue, Ryan Carty, and YOU!

Index of Materials

Date: September 1, 2020
Memo to: Chief Justice Martha Walters
SCA Nancy Cozine
JCIP FLP Director Leola McKenzie
CJO Feedback Group
From: Statewide Family Law Advisory Committee

INTRODUCTION

Chief Justice Walters charged the Statewide Family Law Advisory Committee (SFLAC), and others, to recommend modifications to court procedures in light of the Chief Justice Orders necessitated by Covid 19. These recommendations were to be designed to maintain the health and safety of litigants and court employees during the Covid epidemic, and to promote access to justice and the efficient delivery of court connected conflict resolution services, both during Covid and in the future.

The SFLAC delegated the task primarily to its Futures Subcommittee Chaired by the SFLAC vice-chair, William Howe. The other subcommittees were asked to provide recommendations and written reports were received from the Education Subcommittee and the Domestic Violence subcommittee, both chaired by Debra Dority. (NOTE: All reports are attached.)

The Futures Subcommittee divided into three workgroups:

1. Informal Conflict Resolution Workgroup – Samantha Malloy, Chair
2. Technology Workgroup – Judge Dan Murphy, Chair
3. Self-Represented Issues Workgroup – Stephen Adams and Colleen Carter-Cox , Co-chairs

Each workgroup met multiple times and issued reports that the SFLAC reviewed at a special set meeting on August 19, 2020. (See attached Exhibits) The subcommittees and workgroups assisting benefitted from the many hours and generous assistance offered by many individuals with expertise from around Oregon. Time and space do not allow for a complete listing or an appropriate expression of our extreme gratitude for their generous assistance. This report incorporates the comments of the SFLAC membership both at the August 19th meeting and the SFLAC members review of and contributions to a draft of this report.

Our recommendations are set forth below. Having in mind the extremely short deadline set by the Chief, this report contains several repetitions as we sought to quickly and thoroughly combine information provided in the workgroup reports. Also, much work remains to be done to develop standards (such as recommendations for when opting out of remote proceedings or a particular modality).

The general recommendations the SFLAC urges:

1. Judicial dispute resolution should be conceived of as a process, not a place. So remote access and hearings should not be considered a compromise accommodation but, rather, a way to improve access to justice.
2. In the area of family law, wherever possible, new rules and procedures should be generated to reduce the adversarial nature of family reorganization resulting from divorce or relationship termination. Most family law cases do not involve right and wrong, but, rather, deal with the consequences of relationship breakup. In this context, and particularly when children are involved, adversarial processes are not only unhelpful, but are harmful.

(NOTE: Due to limited time, the SFLAC was not asked to vote on each of the specific recommendations that are outlined in detail in each subcommittee/workgroup report. It is the hope that the attached exhibits/reports give guidance and information about each focus areas.)

EXECUTIVE SUMMARY:

The following is a brief outline of the common themes of the three workgroups and discussion of recommendations regarding the modalities to be used in conducting court business. "Modalities" are in-person, video using WebEx, and telephone.

COMMON THEMES:

1. STATEWIDE RULES
2. Remote access to courts should be the default except in limited areas
3. Certain matters should be decided on the pleadings such as- temporary support, interim relief
4. On all remote issues and proceedings judges must retain discretion in each case to modify in the interest of justice (Some suggest fairly strict grounds for exceptions be promulgated to promote consistency).
5. Case Type Specific Triage: mandate remote availability of:
    a. Domestic Status Conferences- (by telephone as default?)
    b. Judicial Settlement Conferences
    c. Unbundled judicial determination (see modality rules below)
    d. Enhanced use of IDRT. Allow waiver on the record in addition to in writing.
    e. Streamlined process for expedited spousal support modifications (child support as well, or refer them to administrative process?) necessitated by economic downturn, and also for expedited parenting time enforcement
    f. Court and procedural notices by multiple manners such as text and/or email (details need to be worked out such as: how to notify lawyer's office and LAs,

how to deal with phone off, battery dead, recipient on vacation or out of service)

g. Statewide remote facilitation services, including more robust access to forms and assistance in form preparation. This is a critical need.

6. Court must provide training and access to remote technology
    a. Laptops for judges, especially senior judges, pro tems and lawyers
    b. Information easily accessible electronically
    c. Technology access through facilitators
    d. Training and access for non-English speakers
    e. Court provides video trainings on WebEx, including how to use features like WebEx break out rooms- Virtual Court Resource Center. Video instructions on web important since WebEx is not as frequently used by litigants as other platforms
7. Court staffing innovations: (Exhibit #2. See pages 6 – end of workgroup 1 report)

DEFAULT MODALITIES:

1. Where possible, there should be a statewide presumptive standards regarding modality to be used to access judicial interventions, provided, however:
    a. PJ's be granted discretion to issue standing orders to modify modality. For instance, if a judicial district lacks reliable internet in certain geographic areas, the default modality in that area might be phone.
    b. Judges retain discretion in each case to modify the modality. (No consensus yet on standard to deviate because each judicial district varies on resources available to judges, staff, and litigants.)
    c. Default modality for evidentiary contested hearings is WebEx, where available to parties and lawyers, and telephone for ex parte, oral argument, and non-evidentiary or brief evidentiary hearings. With simple and accessible motions to file to change the mode of appearance.
    d. "Availability" means not just of personal device but availability at reasonably accessible location, for instance at a "Zoom" room provided in a courthouse or library.
    e. Presumption that the lowest technology available to a party or lawyer be used. For example, if a party cannot reasonably access video, then all participants shall use telephone, unless the judge allows different modalities to be used (standard for this determination not developed). Agreement that using different modalities may prejudice a party (individual on phone is less effective than on video).
    f. Further consideration is needed to resolve what "unavailability" means. Should a party or lawyer be able to defeat video use only because it is inconvenient, or he or she feels advantaged in the proceeding by defaulting to phone?
    g. Some note: Use of telephone is common practice for decades, and there is no reason to not utilize it now for the convenience of the parties.
    h. In Person: Contested traditional trials and post judgment modification trials, as well as longer evidentiary hearings when this can be accomplished safely and, if not, then remote video if necessary. Informal Domestic Relations Trials should

be encouraged and done remotely. Note: We found a stronger preference from lawyers for in- person hearings than what is expressed by self-represented litigants (SRLs).

Specific Answers to Chief's Questions Posed

1. What services, proceedings or trials can or should be provided or conducted by remote means? What are the benefits and detriments?

On the whole, most Domestic Relations matters should be conducted by remote means to promote both public safety and greater access to justice issues. We recommend that many of the new and efficient practices that are developed during the time of COVID-19 can continue into the future. These recommendations are predicated on the paradigm shift that court-based dispute resolution should be understood as a dispute resolution process, not a "place," such as in the courthouse.

Regarding specific services, proceedings and trials:

Services:

1. Remote Facilitation Services
    a. Encourage and assist jurisdictions in transitioning facilitation programs to provide remote services. Lane County was able to transition their three-person facilitation office to entirely remote services within a couple of weeks and is able to serve more people because of this transition. [NOTE: Colleen Carter Cox is the director of that office, as well as a member of SFLAC. She travelled to Alaska (a model court for remote services) as part of SFLAC research in 2018 and is available to assist with training for other judicial districts making this transition.]
    b. Expand for centralized services for those jurisdictions that lack facilitation programs or means to provide remote services. [NOTE: During COVID 19 this may be a good project or work for Plan B judges to assist with.]
    c. Train facilitators to use remote technology to both handle family law facilitation and provide litigants with information regarding remote appearances
    d. Enhance OJD technology to allow facilitators to do document review by remote means:
        i. Phone review
        ii. WebEx, GTM, or Teams for video conferencing and/or screen sharing
        iii. And to allow facilitators to text and email messaging to send resources and do appointment reminders.

2. E-filing of all pleadings, including fee waiver/deferral requests, should be accessible as soon as possible. If fee waiver/deferrals cannot be e-filed through the system at this point, another option is that each court have an email address to which such pleadings can be emailed and filed. Accepting electronic signatures of conformed signatures (/s/ name) should be available when possible as well. [NOTE: Some counties require fee deferrals in person. Why?]

3. Mediation, Judicial Settlement Conferences, Informal Domestic Relations Trials (IDRTs): Each of these options can allow parties to more quickly settle or finalize a divorce/custody matter without the need for a full-blown traditional trial. For litigants finalizing a custody or divorce matter, this offers a significant step in disentangling the parties and reduces or eliminates ongoing conflict. In particular cases involving risk to children or parties in cases involving domestic violence, substance abuse or mental health issues, resolving the pending case may be a substantial step toward protecting children and families from further injury. Since longer duration trials may likely be postponed, the use of these other ways to settle or finalize cases, particularly if they can be done safely and remotely, is significant. We urge evaluating use of judges' time who have the availability to assist remotely across geographic and judicial district lines. This is a prime time to attempt to capitalize on the availability of under-utilized judges and Plan B judges.

Proceedings:

Regarding any proceeding where the recommendation is remote instead of an in-person appearance, the SFLAC weighed the pros and cons as outlined here and makes the final recommendations as specifically listed below.

Benefits:

1. Remote hearings are safer for everyone, particularly during COVID-19 public health concerns. However, some new practices incorporated because of COVID-19 should be considered for efficiency in the long-term plan moving forward.
2. Remote access reduces the burden on court staff to manage the gathering of people in courtrooms, social distancing and mask enforcement, and the disinfecting of surfaces after a court event is over.
3. Ability to designate or share work across geographic lines (i.e. throughout the state not simply within each judicial district.)
4. Almost all DR cases have litigants who have access to the modality of a telephone that is able to receive texts and emails. Many DR case litigants have smart phones with Wi-Fi accessibility, including video conferencing. However, for those who do not, that issue is addressed in more detail below.
5. It's much easier for parties to have witnesses appear by phone (so judges get better information to make decisions).
    a. Example from Multnomah County (Judge McGuire): "'My clerk or JA emails the parties two days before the hearing to give them the phone/conference number to call, with instructions for their witnesses to call. This also helps

us internally docket better; if we know that we don't have good info for a party and, therefore, expect that they may not show up for the phone hearing, we can triple-book rather than double-book that session."

6. Litigants in domestic violence circumstances who are trying to leave a dangerous situation may be tracked by perpetrators of abuse, so not having to go to the courthouse may help keep parties and children safe.
7. High conflict parties do not need to be in the same space, which can reduce tension, distraction and animosity, allowing the parties to focus on the testimony and the proceeding while maintaining safety and relative convenience for all parties.
8. Litigants need not come to the courthouse, which may particularly benefit those with transportation, childcare concerns, disabilities, geographic limitations, etc. It also allows lawyers to handle and manage their work differently, and at times, to more efficiently represent their clients. If lawyers can bill less for court appearances then more litigants may be able to afford access to representation.
    a. Fewer people fail to show for the phone hearing, which means we're actually getting to the merits (rather than dismissing because they failed to appear in-person, followed by a round of paper filing to set aside the order for missing hearing, then paper filing to reset the hearing -- all of which formerly required multiple in-person appearances and clerk involvement to process that paper).
9. Once these "new" systems have been set up, experience has shown them, in many instances, to be very efficient (examples throughout the state in adjusting to remote dockets, such as Restraining/Protective Docket, Status Conference Dockets) This offers an obvious opportunity for growth and improvement.
10. Timely resolution of cases using remote appearances allows the court to tackle the backlog of cases and prompt handling of new case filings. Families need prompt resolution of family law matters for emotional and financial reasons.
11. Most litigants are thankful for the opportunity to move their case forward. Particularly with SRL, they may be experiencing the justice system for the first time so they don't have other court experiences to compare, so are easily adapting to new court processes.
12. Appearance by phone can often help reduce or eliminate implicit bias that litigants experience when appearing in person. (However, appearing by video conferencing results in judges viewing parties in a setting of their choice, which may trigger bias.)
13. Post-Covid world is likely to bring greater reliance on and familiarity with the technology used in remote connections making it more likely that users will expect and courts to enlarge the use of remote access.

Detriments:

1. Unavailability of phone with adequate service or Wi-Fi technology, applications and bandwidth (if video is required). Due process and equal protection must not be denied either by using remote access or failing to use it. [NOTE: Working with community partners may help address this, such as a DV/SA program with protective orders, county law libraries, DHS workers, etc., that can provide

computers or tablets. Courts should seek to secure grant funding to build technology resources.]

2. Interpreter translation is very difficult and muddled with many people talking contemporaneously when using remote technology. Also, we must have access to a technology that assists litigants with impaired hearing or sight. It would be helpful to have protocol for OJD use of interpreters to have an opportunity to speak with litigants about how the hearing will be conducted to reduce confusion. (NOTE: More on this below.)
3. If solely by phone, the inability to review documents, evidence etc. and general courtroom mechanics associated with a lengthy trial.
4. The learning curve in adoption of technology for all users (OJD and public);
5. Increased workload on court personnel to oversee and operate technology, including substantial prep time contacting the parties in advance of hearings including sending educational materials and answering questions.
6. Concerns for procedural fairness if some parties appear in person while others appear remotely;
7. Handling of exhibits before or contemporaneously with the proceedings. Judges have indicated that it is the attorneys who seem to have more difficulty with the transition to technology than SRLs/litigants. Lawyers are resistant to exchanging exhibits and clinging to the "trial by ambush" approach that has long been part of the adversarial litigation process in Oregon. Lawyers resist divulging the key "impeachment" document or evidence prior to trial; further, due to the nature of uncertainty of testimony at trial it may be hard to gauge what the necessary evidence might be needed. [NOTE: Increasing flexibility of the court to assist in relaying emailed documents between the parties on the fly has helped facilitate these issues as they arise. However, some courts resist this because of the risk of virus attack to computers.]
8. Remote hearings can make the process slower. This was a surprising discovery. For example, telephone hearings for matters that were on a "bucket" docket now take longer, in part, because information about the process, etc., must be repeated for each call, rather than repeated once for all the litigants at the start of the docket. However, judges have expressed increasing their efficiencies in this regard over the last few months. [NOTE: One solution would be to create a video and/or recording that every party must watch on YouTube or call in at a certain time or prior to their appearance to listen to the recording or the judge explaining the process. At that time, they can be given the time to either call back or to expect a call from the Court.]
9. Concerns regarding the clarity of the record. Remote appearances suffer from being "broken up/cutting out" etc. Some court reporters have indicated an inability to record from a phone call and would prefer that even phone calls be handled through WebEx for audibility of record.
10. Concerns regarding the quality of witness testimony and or credibility determinations. For example, some litigants may not be able to as easily convey their concerns, fears, etc. over the phone, while an in- person (or even video) hearing may allow a court to better grasp the depth and breadth of concerns regarding safety or trauma. Credibility determinations of parties and witnesses.

This is perhaps the most compelling issue for in-person or at a minimum video conferencing in contested evidentiary hearings.

a. Children appearing at a remote hearing are likely not able to appear "in chambers" with the privacy to speak openly with judges as parents will be nearby and managing the technology. Children presently are often within earshot of their parents during hearings now as COVID-19 restrictions results in most children remaining home from school. Whereas when the parents went to Court and the children went to school the children were separated from the conflict by both time and space. Now, they are exposed and often embroiled in the ongoing family conflict in a new way. Getting research and guidance into how specifically to address child testimony would be a worth endeavor for training and education.

11. Litigants appearing only by phone, in initial matters such as Ex Parte Protective Order, or Immediate Danger Ex Parte orders will be unable to show physical evidence, such as bruising or photographs of abuse during a phone hearing without additional instruction on how to do so. Perhaps facilitated by DV advocate or Family Court Assistance Office to be able to print a document/photo to attach with the pleadings.
12. DV/Sexual Assault survivors appearing at a remote hearing via video may unintentionally reveal their safe location to the other party.

Recommendations on Specific Proceedings:

1. Initial filing, ex parte matters: remotely. However, and importantly, parties should continue to be able to do these things in person at the courthouse if necessary, especially in counties where the court does not facilitate access to technology (i.e. counties without a system for applying for a restraining order, like at the Gateway Center in Portland) [QUERY: Do we need to revisit UTCR 5.100 regarding service of proposed orders to show cause when entitled by statute to seek the order without service in advance?]
2. Ex Parte Immediate Danger Orders: by pleading and opportunity for telephone hearings, if needed, (determined by judge) at time of issuance.
3. Interim Relief Financial (and potentially exclusive use): solely done by pleadings, such as in Linn, Benton, Marion, Clatsop and several others. (See attached Exhibit #1 re: Counties that already have SLR in place for remote decision on the pleadings.)
4. Interim Relief (custody, parenting time, interim access to property and exclusive use): solely done by pleadings with the opportunity for the judge to schedule argument if judge or party requests. (See attached Exhibit 1)
5. Civil Motions per ORCP: (special appearance, dismiss, pleading issues, protective orders, to compel, appointment of evaluators, motions to quash, etc.) on pleadings with judge or the parties able to request oral argument by remote means. Judicial discretion as to whether by phone or WebEx.
6. UCCJEA: – – Remotely, if held. ORS 109.731 states a "record must be made" often this is done through written communication.
7. Traditional trials/Contested Post Judgment Modifications: – During COVID-19 public health concerns to be conducted remotely with parties able to file a motion to request alternate means of appearance. Judicial discretion regarding manner and

method. The consensus of the group is that these hearings should be conducted in person when it can be done safely. [NOTE: OJD should prepare a short, easy access form for SRLs to be able to request alternate modality.]

8. Post Judgment Enforcement Issues (parenting time, or Contempt) remotely by video or phone.
9. Protective Orders (FAPA, Stalking Orders, SAPO, EPPDAPA) Ex parte matters (application for restraining orders, immediate danger/status quo applications): remotely, given the limited participants and the limited issues. Keeping/making restraining order applications remotely would help maintain quick access to court services for those with emergency issues. Contested hearings should be held remotely with each court determining whether the default remote appearance will be via phone or video (pros/cons of each discussed below). Requests for an alternative type of hearing (phone, video, in person) should be easy to make, such as a one-page form, and granted at the discretion of the court. For details specifically related to restraining and protective orders process and suggestions, please see detailed report of the DV Subcommittee and attached as Exhibit 6.

2. What remote means (telephone/video/other) can and should be used for each type of service, proceeding, or trial? What are the benefits and detriments? Are there obstacles to the use of particular technology? How can they be addressed?

1. OJD should consider working with community partners to provide technology, such as cheap smart phones, tablets and other devices at remote locations throughout a district in libraries, safety shelters and courthouses for use by persons who cannot afford to purchase their own technology.
2. OJD has currently approved two primary modes of communication that can be used for real time court events: telephone and WebEx video conferencing. *(Note: Lane County uses Go To Meeting.)
    i. Telephone:
        1. Benefits: most accessible by court users, including self-represented litigants and homeless parties; least expensive; least technologically challenging for users
        2. Detriments: never as satisfactory as video; possibility of mis-identified person online is greater; parties to call cannot view documents.

3. WebEx Video - the current policy of OJD is to use WebEx as the exclusive external video conferencing program based extensive testing and evaluation. It is recommended that this preference be maintained statewide where video conferencing is being used until such time as OJD determines that an alternative platform is superior or at least equivalent. This will also minimize the problem of training , as users will only need to be adept at one video system. It will eliminate confusion and promote consistency.

i. Benefits: Video allows for visual identification insuring that the named party is on the line; easier to communicate when you can see the parties; can view documents to some limited degree.

Detriments: More expensive for all participants; requires computers or smart phones with functioning camera, speakers, mic and internet access with data access and bandwidth requires higher level of technological knowledge; less available to self represented parties, financially disadvantaged parties, homeless parties. Video conferencing requires a stable and sufficiently robust bandwidth for dependable transmission. This is not available in all locations throughout the state and is not available to some people who cannot afford it.

4. To truly support remote service, efiling should be more easily accessible to the public, considering the number of people who are SRL in family law matters.
5. From a technological point of view any technology could be used for any type of proceeding and have been so used in the past. There may be an efficiency advantage to using telephone for status hearings and pretrial conferences, but it would be better to use video conferencing for evidentiary hearings.
6. As discussed above in ¶1, the courts should use remote access in due deference to the legal restrictions that may exist for assured due process and equal protection.
7. There will be folks who do not have access to any appropriate technology. The court should develop a reliable protocol for these people so that they can access their hearings. For example, a party needing to appear at a hearing may have moved from their home and had a phone shut off by the other party and may not be able to access a remote hearing? The court should be cognizant that the actions of parties regarding eliminating or reducing the available modality should not detrimentally affect the other party. It may be that these parties are offered the option to appear in person. It may also be that the court can determine what community resources exist that might be able to provide access to the necessary tech and refer people to those agencies. In theory there could be spaces in the courthouse set up with monitors/phones to allow across the board remote appearances for all parties, but there are space issues at many courthouses that likely make that impractical.

3. If you are recommending in-person appearances in a particular proceeding, why are you making that recommendation? Are there obstacles to the use of remote technology? How can they be addressed?

1. There should be statewide presumptive standards. This ensures consistent factors to consider, equivalent weight given to case-type, and provides a clear expectation for the court customer. The presumptive standards should include a list of non-exclusive factors that can rebut the presumption. PJs should have authority to adopt rebutting standards by standing order (such as where internet access is poor, or cell coverage is spotty) and individual judges should always have the authority to rebut the presumption for good cause.

2. Court should consider (especially for non-substantive hearings such as status checks and requests to rebut presumptive modality) telephone as default means of remote appearance. Almost everyone has telephone access. Video could be considered as presumptive modality on any evidentiary hearing.

3. In person hearings should only be held in cases where safety-related concerns related to COVID-19 could be maintained. With parties able to request in-person appearances, or alternate modality from the default if good cause exists. Obstacles are education and access. These obstacles can be addressed as outlined in the section b below in question 5.

4. There has been feedback from courts not having hearings in person has decreased efficiency by creating longer hearings due in part to repetition of what the judge needs to inform each party. [NOTE: This could be remedied by utilizing a virtual "waiting room" where all parties are placed at the initial connection to the hearing at the docket start time. This time can be utilized for the judge or staff to impart this information by video or audio recording or speaking to the group and then explaining how the court will proceed through the docket.]

5. Courts need to provide physical access to video. If contested hearings are to occur via video conference, one option many courts have provided to those litigants without access to WIFI and/or necessary technology is to make a room at the courthouse available with the technology necessary for a litigant to appear by video (Marion County) or to provide a litigant a smart phone they are able to borrow from the clerk's desk at the courthouse, which they can then use from their vehicle or other safe location (Clatsop). In no event should a litigant who appears at the courthouse be turned away for a proceeding without an alternative option for modality or a reset of the hearing, if necessary.

6. Use of Senior Judges: Consider changing OJD policy to provide senior judges with laptops or allow them VPN to increase and make more effective prep time while working remotely and utilize them to tackle backlog of cases where decisions on the pleadings can be made, IDRTs, settlement conferences, and remote facilitation.

7. Handling of Exhibits has been an obstacle. [NOTE: Courts have facilitated this, this example is provided from Multnomah County: Exhibits get emailed to my clerk, who sends them to each party. It's been easy for parties to view exhibits from their phones. Relating specifically to protective order hearings, this avoids the added component of risk of Respondent violating a restraining order by sending exhibits directly to Petitioner. It also avoids parties trying to give their phone to the Court to view text messages at an in-person hearing.]

8. We understand that evidentiary hearings are probably better served with in-person attendance and video being used as a backup. However, it must be considered that we have used telephonic testimony in many kinds of cases where no one objects for many decades. It is anticipated that, absent objections, remote access by witnesses and others should be used extensively, as it will make testimony less expensive and more convenient for witnesses.

9. In person appearances are recommended where required by statute which recommendations can be addressed through statutory changes. While remote proceedings should be the default in many cases, in many cases involving evidentiary hearings, judicial

discretion should be preserved to require in-person proceedings where essential to achieve justice. Adequate training in WebEx to permit the closest replication of in-person proceedings (including shared screen to highlight exhibits, especially rebuttal, video clips, etc.) and ensure witness sequestration (including how to create virtual waiting rooms through WebEx break out rooms) would be important to minimize the default to in-person proceedings

10. Some hearings/trials may have to be in person either due to the volume and type of exhibits, the special needs of the litigants, the need for multiple interpreters, or the limitations of the technology, and credibility determinations. Many of the obstacles we've outlined above have solutions we've proposed as well. However, if a party is requesting to appear in person due to the concerns raised then the Court should consider allowing an in-person appearance if it is safe and appropriate.

4. What training is necessary to make full use of remote technology?

1. Telephones generally need little or no training. Most people know how to use them.

2. WebEx requires downloading an app and then obtaining Internet access and signing in to the meeting. Persons who are very familiar with computer technology would need little or no training. People not familiar with computer technology, and especially with video conferencing platforms, would need much more training. Some people may not be trainable for this technology. It is uncertain as to whether WebEx can be used by hearing or vision impaired participants.

3. OJD should provide training in different modes: by video, by printed material, through a website. These materials should be widely available and staff should be trained on where to find it. <u>Generally- Ensuring Language Access:</u> Ensuring the videos/notices/trainings, etc. (for SRLs) are provided in multiple languages.

4. OJD should also have staff available at courthouses who can train users on how to use remote access technology at the courthouse which the user may then obtain instructional forms, webinars, YouTube videos, audio recordings, etc.

<u>For Judges:</u>

1. Consider weekly or monthly webinars to share ideas and strategies on effectively managing Family Law cases in judicial districts around the state.
2. Technology training, regarding sharing documents, exhibits, being the organizer for the event. Technology training for Senior Judges who use VPN to assist with recommended tackling of backlog.
3. Training on efficiencies for group/bulk dockets re: sharing information and keeping record clear for appellant purposes
4. Training regarding the pros and cons of various modalities particularly in the unique issues related to family law conflict (financial crisis, parent/child relationships, domestic violence, substance abuse and mental health issues) to evaluate when it may be appropriate to allow a different modality, such as in person if it can be

safely accommodated. Nearly 50% of judges have five or less years of experience on the bench, and many have had no training in family law matters.

5. Training on benefits of status conferences, streamlined case management such as IDRTs, settlement conferences, and case decisions on the pleadings.
6. Trauma-informed, implicit bias and procedural fairness. Particular attention in these trainings should focus on frustration with poor technology/WIFI, impact of where someone is located during the hearing (if by video); interruptions; attire, etc., during remote hearing. Judges and court staff may need a particularly focused training on implicit bias and procedural fairness if litigants are appearing remotely without the benefit of being advised by facilitators/advocates/attorneys about such things as how to dress; turning off phones; having child care, etc.
    a. We recommend creating and providing a trauma-informed script for judges to use with litigants to explain the process of the hearing, specifics/quirks with technology, specifics re: how to communicate with the attorney, litigant, interpreter, etc. [See proposal to create a video/recording of including this information under SRLs below].
7. Vicarious/Secondary Trauma and Compassion Fatigue: Training on protecting oneself from and working through the vicarious trauma that comes with working with those in trauma, particularly during this particularly chaotic time.

For Court Staff:

1. Interpreter training: Access to litigants to explain logistics of interpreting before the hearing. For hearings with use of Interpreters: Video/YouTube about how the proceeding will happen with the use of an interpreter (Example: https://multco.us/global/cife-importance-interpreting-everything CIFE is a tool that interpreters and providers can to use ensure an accurate and effective session with their client. This model provides parties with a common set of ground rules laid out at the beginning of each session. Either the interpreter or the provider can go through the steps of CIFE).

2. The court will need to arrange for easy access to interpreters for non-English speaking parties, as well as ensure any 'how-to' guides are available in other languages. If parties are accessing services remotely, there should be explicit instructions on how to note that the parties will need interpreters.
3. Training on basic technology troubleshooting to assist attorneys and litigants, as they will often be the first point of contact, perhaps provide scripts/memos regarding specific hearings with which they assist.
4. Training on accessing materials available on the OJD website so that all staff can be useful to the public in directing them where to find things.
5. Publications similar to the ones already created can be utilized/updated, and can be provided via email once litigants file cases, or the link can be provided on any Notice of a Court Proceeding sent to litigants/attorneys.
6. Training on handling difficult customer service issues related to COVID-19 safety driven mandates (masks, social distancing, cleaning/disinfecting), and handling the phone calls during hearing preparation.

7. Training on providing trauma-informed services and implicit bias, as well as vicarious/secondary trauma (see bullets under Judges).

<u>For SRL's</u> (see also below re: for all litigants and attorneys):

1. Creation of a webinar or YouTube video prior to a specific hearing with the link sent with Notice of hearing; and/or creation of a recording that a SRL can listen to by calling a particular number or, is played to the litigants while in a "waiting room" when they call in for their hearing or before the Court places the call. Recording could include:
    b. Basic information of the technology/platform used: WebEx, Go To Meeting, etc.
    c. Advice often given at beginning of hearing or in posting at courthouse (proper attire, don't interrupt judge, get care for kids/dogs, procedure of particular hearing, e.g. FAPA, status conference, etc.)
    d. For DV/Sexual assault survivors, instructions that remote video hearing may reveal location, phone number(?) and alternative options available (room at the courthouse? cell phone at courthouse?)
    e. One option is to have all litigants and attorneys scheduled for a particular type of hearing call in at the same time to listen to the recording and then be assigned a time to either 1. Call back for the hearing or 2. Expect a call back from the court.
        i. This allows SRLs to be available in a location with necessary WIFI or cell service, know when they will need childcare or other support, etc. rather than waiting for an entire afternoon.
2. Publications should be developed/updated to include instructions for the public on remote appearances – including what will be used, minimum tech requirements, the process for appearances/exhibits/witnesses, who to contact with issues, and options for folks unable to appear.

<u>For Attorneys, represented litigants and SRLs:</u>

1. Training via YouTube, Webinar, etc., on basic info on the platform- WebEx, GoToMeeting, etc. And OJD staff that can assist with practice lessons for litigants. [Query: Are there public non-OJD tutorials available that OJD could refer people to?]
2. Training via YouTube, webinar, etc., explaining how to request an interpreter, how an interpreter will be used during the proceeding, how the litigant can communicate with the interpreter.
3. Information provided in the notice that hearing is presumptively occurring in a designated modality remote (designate phone/video), with instructions on how to request alternate option, which will be at judge's discretion, with a simple OJD generated form for ease of use.
4. Information about and a method for communicating with attorney (especially. if using interpreter) during the hearing
5. Training for all on using/admitting evidence/exhibits and calling witnesses; whether exchange of exhibits prior to hearing is recommended and the process that is

expected [NOTE: Recognizing that some evidence/exhibits may not be exchanged prior (such as impeachment, so establish protocols for showing and exchanging exhibits mid trial.]

6. Trainings and materials on the pros/cons of utilizing Alternative Dispute Resolution [status conferences, judicial settlement conferences and Informal Domestic Relations Trials (IDRTs)] rather than waiting for or pushing for a traditional trial that may require in-person appearances. See also response to Question 10.
    a. Note that attorneys may need this training the most, as *some* are hesitant to recommend ADR to clients as their experience has always been with the adversarial model, and for fear of jeopardizing their livelihood. However, many of the same concerns we presently hear regarding ADRs were previously voiced when the Family Court Facilitator positions began, and those concerns proved to be unfounded. Everyone from SRLs, represented litigants and attorneys should understand the benefits of these options. It should also be recognized that ADR may not be appropriate in cases when significant substance abuse, mental health, or domestic violence issues are involved.

7. Family Court Assistance/Facilitators could potentially offer a remote class to help parties appear in remote hearings.

8. With respect to ex parte applications of ROs by phone, or other "bucket-type" dockets: Parties can be provided a link by the court or the local DV/SA Program to a video that will outline the process for the hearing and include information of any technology needed (preferably only phone for the ex parte hearing, but it can provide information about technology needed for the contested hearing as well, if it is to be via video). The video can also provide basic information about the proceeding and the next steps if the order is granted or denied; Such videos can facilitate hearing the matter more quickly as judges will not have to repeat this information. [NOTE: For more information, and information specific to restraining orders please refer to the Domestic Violence Subcommittee Report Exhibit 6]

5. What is necessary to ensure that unrepresented litigants can use the recommended technology?

<u>In addition to the education needs mentioned above in answer to Question 4:</u>

1. Recommend that all parties call in at time X to listen to a short message re: procedure/next steps, and be told when they will each be called or when they should call in. (Benefit of phone appearance over video appearance and pros/cons of each is discussed further below)
    a. Educational materials for SRLs (prepared at adequate reading level)
        i. Written materials sent out with hearing notices and available on OECI and OJD/individual court's website
        ii. Video instruction on OJD website

iii. Telephone helpline for those who don't have online access and/or have trouble with written materials
iv. WebEx chat room for litigants to be able to test technology prior to hearing

9. Staff Education. Staff must be familiar with technology and be able to answer questions.

10. Access.
    a. Courts should set aside a space in the courthouse for litigants who lack technology, including reliable cellular service
        i. Grant funding for tablets and phones for litigants' use
    b. Courts should work with law libraries to provide technology/internet access for the litigants who lack access
    c. Courts should work with other agencies or other community access point to provide access to technology
4. For telephone: party needs to have a functioning telephone. If they have a cell phone they need to have access to a signal sufficiently strong and consistent to allow reliable communication throughout a phone call.
5. For WebEx: party needs to have a computer, tablet, or smart phone equipped with Internet access, camera, microphone, and speaker. A party or other user must have a stable connection to the Internet. Party may need some training to use WebEx technology.
6. If the phone is being used for a video appearance the Wi-Fi connection must have sufficient bandwidth to support a consistent and reliable connection. The same is true if the user is using a laptop, tablet, computer or similar device.
7. Explanatory letters, webinars, via email or notice of court hearing (see above recommendation.
8. Easy access to interpreters.
9. SRLs must be able to efile Fee Waivers/Deferrals (or an email address provided by the court for such filings to be provided and filed.)
10. Some members noted that SRLs are having an easier time with the technology and the remote hearing process than many attorneys, as they do not have the prior experience of the way things "usually" proceed. However, there should be some particular focus on training for the use of admitting evidence/exhibits and calling witnesses for SRLs. Once a process is created, simple forms for submitting exhibits and calling witnesses should be created and easily accessible for SRLs.
11. Imperative to have good explanatory letters/emails that go to parties, as appearances are set, and to have court staff available to confirm with parties what they have access to and how to use it. This may be the first time that parties are using any sort of video technology ever, and many community members will not be familiar with how to access something like GoToMeeting.

6. What is necessary to ensure fairness in the use of the recommended technology? Can some participants be remote while others are in the courtroom? What are the benefits and detriments?

Pre COVID -19 we already allowed situations where some participants are remote and others not. These issues already do and will continue to require careful consideration. There may be situations where it is appropriate and allowed by stipulations of the parties or order of the court. Where not all parties can reasonably access the presumptive modality, the policy could be the hearing is held at the lower commonly available modality unless the court finds exceptional reasons exist for a hearing with nonuniform access to the court. The court must consider the benefits that might outweigh the detriments of allowing different modes of appearance. The court must also be aware of the forms of implicit bias that may vary, based on personal, video, and phone appearance.

There must be a way for attorneys to communicate with litigants during a hearing, and to ensure that whatever process is created, it is also possible to do so with a Court interpreter.

- Some attorneys are texting with clients, some open separate 'chat' rooms. It seems that WebEx is creating the option for breakout rooms beginning in September.

Ensure Language Access: Ensuring the videos/notices/trainings, etc. (for SRLs) are provided in multiple languages.

The unfairness presented by the vastly different access to tech for some parties outweighs the unfairness of having one party appearing in person and one remotely. If one party cannot appear remotely, they should be allowed to appear in person. Perhaps one solution if there is a disparate access to tech among the parties is to offer a set over to the party who might be negatively affected by a delay so both parties could participate in person.

One issue that should be considered is that the court will not want to be in the situation where hearings/trials are postponed indefinitely due to the parties' access to tech or ability to appear in a specific mode. In family law cases there is often a party that is significantly disadvantaged when a court case is delay (financial crisis, lack of access to a child). A party should not be disproportionately affected due to a delay on the Court's end. Nor should the court system's delay provide a mechanism for continued manipulation or abuse of an adverse party.

The inability to appear remotely should not limit a litigant's access to the court system. Access to a room in the courthouse where a litigant may be able to use the court's own technology/Wi-Fi, while it does require having another person in the courthouse, would help with the necessary distancing.

Judges, in considering all the factors, should be flexible in granting requests for alternative hearing methods.

7. As to each type of proceeding, is it necessary that it be conducted by the same means statewide (e.g., fully remote, partially remote, telephone vs. video, or in-person)? If so, why? If not, why not?

It is not necessary (or really possible) for all counties to have the same plan. Some counties contain many more rural areas where different access to technology/internet/phone service makes remote appearances more difficult. Some counties also have significantly different access to resources that can assist parties with remote appearances. For example, if you compare Lane County and Multnomah County, Lane has large parts of the county that are rural and may have very limited phone/internet access, whereas Multnomah likely has much more even access. Additionally, Multnomah has resources like the Gateway Center where parties can apply for restraining orders remotely, and Lane would need to develop that resource.

While having a statewide standard as to each type of hearing, courts must retain discretion to ensure the various access concerns outlined in this memorandum and the technological problems that may exist in each area.

Consider polling for uniformity of modalities and uniformity of instructions sheets.

There was different feedback on this issue. First, some counties may be able to provide more resources and options for litigants, so should not be held to providing fewer options. (NOTE: However, there is concern that there are already inconsistencies in access to safe proceedings for some survivors of DV and there is a concern that allowing Courts to determine their own process may exacerbate these inconsistencies. Per DV Subcommittee Report.)

There are some proceedings that should be available remotely statewide such as ex parte restraining/protective order requests, even if only some courts are able to provide the option of a separate room for a litigant to appear remotely with the use of the Court's technology.

8. How should a court adopt a procedure for utilizing remote means for designated types of proceedings? By Presiding Judge Order (PJO) or by another type of determination? Are case-by-case determinations appropriate?

SFLAC recommends that there be a statewide rule specifying a presumptive modality of WebEx with the following caveats:

1. Local PJs will retain authority to modify the modality for parties without reasonable access to the presumptive modality, including issuance of standing orders to modify the modality for districts, e.g., if a district lacks reliable internet capacity in geographic areas the default modality could be switched to phone via PJ order.
2. Default modality will be WebEx (even for phone calls) where available to parties and lawyers. "Availability" means not just of personal device but availability as reasonably accessible, for instance at a "Zoom" room provided in a courthouse or library.
3. The presumption is that the lowest technology available to a party or lawyer be used. For example, if a party cannot reasonably access video, then all participants shall use telephone, unless the judge allows different modalities to be used. The standard for this determination is recommended but not developed with

consideration of "unavailability" such that use of WebEx not be derailed by one side merely because it is inconvenient or that party/attorney has not learned how to use it versus a good faith belief that the party requesting telephonic modality because s/he feels somehow this disadvantages her/him in the proceeding).

4. A PJO with clear guidelines and a clear articulation of how to request an exception is probably the best way. This should include guidelines on when an in-person hearing may be allowed (access to tech, timeframe, etc).
5. OJD to create a standardized form wherein parties can ask for an in-person hearing if needed so that pro se parties can address this before the time of their hearing.

9. How can a court most effectively notify litigants about the manner of hearing in certain types of proceedings or in certain particular proceedings (e.g., PJO, general website notice, notices to parties, etc.)? Are there instances in which a motion should be required or permitted to seek or object to the manner of hearing?

1. Website notices and posted PJOs,
2. Notices to parties indicating where to look/call prior to hearing
3. Text messaging and/or emails re notices and follow up automated reminders (see Alaska remote systems available.)
4. There should be more than one notification method, as many folks now struggling with employment and housing issues may be more transient than usual, and residential and/or email addresses may be changing. At the very least, an indication of the type of hearing should be on the Notice of Court Proceeding (along with links to the recorded trainings suggested above in #4, and information about how to request an alternative manner of hearing- discussed directly below), and the Notice should be provided via email and USPS.

    a. One recommendation was that parties be asked to email a court clerk acknowledging receipt prior to the proceeding and, if the clerk has not received the email, reaches out again by phone, email, etc. We recognize this would be a huge commitment of time by court staff, but it may also provide more efficiency and reduce 'no shows' at the hearings.
    b. Having an OJD email address that is used for sending only with a disclaimer that it is only for sending and no initiated emails from the parties will be read could facilitate with notifications, remote facilitation and exchange of exhibits. (This is a technology issue, the committee is not familiar with.)
5. The option to seek an alternative manner of hearing should be readily available and a simple form (rather than a formal motion) should be created and easily accessible. Guidance on when to allow an alternative manner of hearing should be provided to the courts with recognition that each County must have a certain amount of discretion in granting/denying such requests.

During COVID-19 the SFLAC is recommending a presumption of remote appearance with exception on a case-by-case basis for good cause shown.

Ideally, while time and labor intensive, parties should be asked to email a court clerk acknowledging they received the information about their appearance. If they have not done so at a certain time before their hearing, court staff should reach out to them. This would be a big ask in terms of staff resources, but since remote hearings mean that parties can't just show up the day of the hearing and get information on how to appear, it would actually help keep the docket running efficiently. This is particularly important for litigants in financial crisis, DV survivors, and others who may have lost access to their mail or email due to circumstances out of their control.

*Please note education and form needs listed above.

10. Can or should trials, particularly jury trials, be postponed? If conducted, are there ways in which the trial can take place remotely in whole or in part? If postponed, are there ways to keep the case moving and to encourage resolution without the impetus of a pending trial date?

Family law matters are not jury trials. But broadening the scope of the question about family law trials:– If initial trials and post judgment modification trials are postponed there must be an infrastructure in place for court remedies and case progress. It is important to have emergency remedies available where postponement would place undue hardship on a party due to safety or financial issues. The court should develop instructions/forms for self-represented parties to be able to request that a matter be heard more promptly.

The most important point is to keep cases moving along and keep parties headed toward settlement and case resolution. It is important to focus on improving case management as outlined attached Exhibits 2 (ADR and Efficiencies Workgroup #1 report) and Exhibit 4 (Self Represented Work Group #3 Report)

1. Encourage, where appropriate, Status Conferences, Judicial Settlement Conferences and Informal Domestic Relations Trials (IDRTs) throughout the state and training on how to get them up and running. [NOTE: See above re: training for all on the pros/cons of each.]

2. Require mandatory mediation in all new and post judgment modification cases where there are child custody and parenting time-related issues.

3. Each court could empower a family law panel, comprised of a few people, such as the parties' attorneys, a judge, a mediator, and maybe a few others, to pick up the case after mediation and work aggressively to settle the case outside of court, leaving the option of trial only as a last and final resort.

- See ORS 107.103, Enacted in 2019 that allows creation of an ADR procedure for custody and parenting time modifications and enforcement proceedings.

4. Status check hearings can be utilized: telephone hearings to keep parties on track, involved in mediation, and encouraging settlement. [NOTE: Many counties already do this or have started since COVID-19. Process varies but they keep cases moving.]

5. The court should be proactive in guiding parties towards settlement, including communicating with mediation programs to gather information about cases with full agreements and contacting parties who may have agreements to arrange assistance through family law facilitation services for paperwork to resolve the case.

6. It is also important to continue access to temporary relief to provide parties structure/guidance while case is pending. The courts should consider deciding interim relief based on the pleadings for many forms of temporary relief.

7. Initiatives proposed in Exhibit 2 contemplate earlier intervention by facilitators, mediators and judicial officers to encourage stipulated agreements that currently resolve over 90% of all cases. Our goal is to incentivize earlier resolution of family law matters to increase court capacity for those limited cases that require a judicial determination to conclude the matter.

Trials should go forward as soon as possible. Families and children are suffering, both emotionally and, in many cases, financially due to lengthy postponements. For families in crisis due to an array of devastating circumstances such as financial collapse, safety issues relating to substance abuse, domestic violence, and untreated mental health issues the parties are entangled longer than necessary and the weight of having to testify about the crisis they experience may continue the trauma indefinitely. The whole family is unable to move on without the certainty that comes with a final judgment.

CONCLUSION

The SFLAC did not have the time to develop and process standards to guide courts when a deviation from the "lowest reasonably available modality available to all parties shall be used unless the court, in the interest of justice, orders otherwise, particularly because this may vary substantially between the judicial districts. We have agreed that the default should be that all parties use the same modality and that, in every case, on case by case basis, the court retains the discretion to make an exception. Examples of situations where the court might allow and exception include:

- Matters involving domestic violence or safety of a party of children in which the protection of a party or child makes an exception to prevent further injury necessary. Examples of such instances are catalogued in the report of the SFLAC Domestic Violence subcommittee that is attached.
- Other matters involving the safety of a party or a child such as when a prompt hearing is necessary to modify a parenting plan to protect a child from exposure or danger from chemical abuse or mental health issues of a parent. For instance, a parent arrested for drunk driving or evidencing mental breakdown and the moving parent seeks immediate modification of a parenting plan to protect their safety of a child.
- Financial issues requiring immediate attention such the many issues driven Covid generated income loss, such as a parent paying support offered a job that requires a move or association with others exceeding the parties agreed upon or court ordered

"bubble." Other financial issues needing immediate resolution such as a house sale to avoid foreclosure or another urgent debt or financial related matter.

- Parenting decisions needing immediate resolution such as whether to allow children to attend in person schooling or activities where the parties disagree, or children's association with other family members or friends or significant others that are severely violating Covid safety guidelines. These are arising particularly where a child or party is suffering from preexisting conditions that make risking Covid particularly dangerous.

There are endless examples that could be generated. The SFLAC is clear that the default should be that all parties use the modality available to all, the court retain jurisdiction to make exceptions on a case by case basis, but that these exception be based on individual circumstances and that there be no exceptions based on a category (such as allegations of DV, or chemical abuse or job loss). Blanket exceptions should be limited to technology availability, for example, is areas of a judicial district lacking wide availability of internet connection, that telephone might be the default.

Attached Exhibits

1. List of Counties with Supplemental Local Rules regarding Interim Relief Matters.
2. Futures Work Group #1 Alternative Dispute Resolution and Efficiencies
3. Futures Work Group #2 Technology
4. Futures Work Group #3 Self-Represented Litigants
5. Education Subcommittee Report
6. Domestic Violence Subcommittee Report

EXHIBIT 1

EXHIBIT 1

Supplementary Local Rules Regarding Interim Relief

Baker – SLR 8.055– in person

Benton– SLR 8.041– Pleadings initially (with attorney ability to request a hearing after ruling on non support related relief)

Clackamas – No SLR

Clatsop SLR 8.045– Pleadings

Columbia SLR 8.041– Pleadings plus 30 min hearing to hear argument and answer questions

Coos/Curry SLR 5.064– In Person

Crook/Jefferson SLR 8.042– In person

Deschutes SLR 8.055(6) – Pleadings for support only, in person for other relief,

Douglas SLR 8.041– On pleadings for all interim relief except temp custody and parenting time

Hood River/Wasco/Sherman/Gilliam/Wheeler – No SLR

Grant/ Harney -SLR 8.045 and 8.055 – Pleadings for support, all others in person

Jackson SLR 8.041– Pleadings for support, all others in person (may request a hearing)

Josephine SLR 8.041 – Pleadings for support, all others in person (court may schedule a hearing)

Klamath SLR 8.041 and 8.042 – Pleadings for support, all other in person (court may schedule a hearing)

Lake SLR 8.041 and 8.042 - By Court discretion to decide on pleadings or conduct a hearing.

Lane SLR 8.041 and 8.042 – Pleadings for support all others in person.

Linn SLR 8.043 and 8.045 – Pleadings for support all others in person.

Lincoln SLR 8.043 and 8.045 – Pleadings for support (unclear if in person for other relief)

Malheur SLR 8.045 – In person

Marion - I'm told by Judge Armstrong they do it on the pleading but I don't see SLR

Morrow/Umatilla SLR 8.055 – Pleadings for support all others in person

Multnomah – No SLR in person for all relief

Polk SLR 8.073 – Unclear if in person or solely on pleadings

Tillamook SLR 8.045 – All interim relief on the pleadings plus oral argument, no evidentiary hearing

Union/Wallowa SLR 8.042 – Pleadings except oral argument may be requested, and the court on its own motion may schedule an evidentiary hearing. On Custody and Parenting time a party may request a hearing after the ruling on the pleadings.

Washington SLR 8.045 – In person

Yamhill SLR 8.055 – In person

EXHIBIT 2

EXHIBIT 2

FUTURES WORK GROUP #1 – Alternative Dispute and Efficiencies

I. EXECUTIVE SUMMARY TO SPECIFIC QUESTIONS ANSWERED:

The following initiatives are recommended in response to the unique challenge to the administration of justice posed by Covid-19 public safety risks. Work Group #1 interpreted this call to include the identification and implementation of Covid-19 specific responses in the short term that have potential long term applications to improve services to Oregonians by the Courts and the Oregon Justice Department.

An underlying assumption is that there is a distinction between the primary task of the court system as a whole – to facilitate dispute resolution through an array of approaches - and the narrower purpose of trials and/or hearings – to make final decisions and enforce laws and judgments. A second assumption is that the expansion of legal interventions outside the narrower context of trials and hearings will increase the access to justice by individuals who are not prepared, able and/or inclined to participate traditional adversary models that contemplate attorney representation and judicial conclusion of disputes through trials/hearings.

Recommendations that follow focus on both increasing the roles of dispute resolution participants (facilitators, licensed paraprofessionals and mediators (both judicial and non-judicial)) and the tools available (technology, reimagined processes (including robust case management)). These recommendations assume that the Courts will provide availability to WebEx portals including training and educational materials for lawyers, parties, participants on the use of WebEx and remote procedures. Against this backdrop, the specific questions posed by the Chief Justice and assigned to Work Group 1 by SFLAC Futures Subcommittee are addressed:

1. **What services, proceedings or trials can or should be provided or conducted by remote means?** It is the recommendation of work group one that all family law services, proceedings and trials can be conducted by remote means except those following restricted by statute: e.g. domestic violence hearings (FAPA, Stalking Orders and Elder abuse). The primary benefits of remote proceedings include: the minimization of health risks; the ability to work across geographical lines to redistribute capacity; the elimination of inefficiencies imposed by travel including increased access for individuals otherwise less able to "go to court." The challenges of remote proceedings include: the learning curve in adoption of technology; decreased opportunity for the court to observe litigants (which can be largely mitigated by video capacity); increased load upon court personnel to oversee and operate technology; concerns for procedural fairness if some parties appear in person while others appear remotely; the need to ensure that technology is available to lower income consumers. These recommendations are predicated on the paradigm shift that court based dispute resolution should be understood as a process, not a "place" such as in the courthouse.

Work Group 1 recommends that there be a statewide rule specifying a presumptive modality of Web Ex with the following caveats:

- Local PJ's will retain authority to modify the modality for parties without reasonable access to the presumptive modality including issuance of standing orders to modify the modality for districts e.g. if a district lacks reliable internet capacity in geographic areas, the default modality could be switched to phone via PJ order.
- Default modality will be WebEx where available to parties and lawyers
    - "Availability" means not just of personal devise but availability as reasonably accessible, for instance at a "zoom" room provided in a courthouse or library.
    - The Presumption is that the lowest technology available to a party or lawyer be used. For example, if a party cannot reasonably access video, then all participants shall use telephone, unless the judge allows different modalities to be used (standard for this determination is recommended but not developed with consideration of "unavailability" such that use of WebEx not be derailed by one side merely because it is inconvenient or that party/attorney has not learned how to use it versus a good faith belief that the party requesting telephonic modality because s/he feels somehow disadvantages her/him in the proceeding)

3. **If you are recommending in-person appearances in a particular proceeding, why are you making that recommendation? Are there obstacles to the use of remote technology? How can they be addressed?** In person appearances are recommended where required by statute which recommendations can be addressed through statutory changes. While remote proceedings should be the default in many cases, in all cases involving evidentiary hearings, judicial discretion should be preserved to require in person proceedings where essential to achieve justice. Adequate training in Webex to permit the closest replication of in-person proceedings (including shared screen to highlight exhibits, especially rebuttal, video clips, etc.) and ensure witness sequestration (including how to create virtual waiting rooms through Webex break out rooms) would be important to minimize the default to in-person proceedings

9. **How can a court most effectively notify litigants about the manner of hearing in certain types of proceedings or in certain particular proceedings? (e.g., PJO, general website notice, notices to parties, etc.?)** Work group #1 is recommending that multiple means of notification be implemented including: general information to the public on each judicial district's website as well as notices to parties at the initial point of contact via text and email notifications including automated reminders, and, for those litigants without access to any technology, mailing. **Are there instance in which a motion should be required or permitted to seek or object to the manner of hearing?** Work group #1 is recommending a presumption of remote appearance with exception on a case by case basis for good cause shown.

10. **Can or should trials, particularly jury trials, be postponed?** Work group #1 has been focused upon family law cases which do not involve jury trials. Obviously, the court must honor the constitutionally mandated jury trial requirements for criminal proceedings. **If conducted, are there ways in which the trial can take place remotely in whole or in part?** Trials can proceed remotely via video with proper training of all users in technology to facilitate presentation of evidence (screen sharing of exhibits) and sequestration and observation of witnesses (break out rooms, adequate video links) **If postponed, are there ways to keep the case moving and to encourage resolution without the impetus of a pending trial date?** All of the initiates proposed contemplate earlier intervention by facilitators, mediators and judicial officers to encourage stipulated agreements that currently resolve over 90% of all cases. Our goal is to incentivize earlier resolution of family law matters to increase court capacity for those limited cases that require a judicial determination to conclude the matter.

II. VISION: Reimagining Court from "a place" to a "service," and by changing the emphasis from "trial" to "problem resolution" utilizing judicial and court resources early and often to limit the necessity for trial/contested hearing outcomes.

III. GOAL: Provide more legal services through the optimization of existing court personnel and resources (including within community where appropriate, licensed paraprofessionals, enhanced distribution of simplified forms and more user friendly guides) to maximize case resolution outside the context of contested hearings and trials.

IV. STRATEGY: To deploy focused initiatives as pretrial diversions from trial queue to non-litigated resolutions that are faster, less expensive and more sustainable.

V. INITIATIVES:

A. REMOTE FACILITATION BY COURT FACILITATORS: Establish centralized and accessible remote facilitation services

1. Across judicial districts (via remote tools videoconference/telephonic and asynchronous- text, email) to ensure state-wide service
2. Enhanced Training of facilitators statewide to ensure fluency in
    a. Website
    b. Forms
    c. Phone access to assist with form review
    d. Videoconference with remote litigants (see program developed by Colleen Carter Cox in Lane County)

3. Changes needed:
    a. Immediate changes that can be accomplished through a CJO Order or SLR changes:

1) Chapter 3 authorizes the district to set up the program- the new statute would be written and clarifies that services are not the unauthorized practice of law-possible extension for motions for enforcement etc. There is precedent in statutory immunization of court-connected and in courthouse facilitators.
2) Non-English speakers-CJO to:
   - broaden the procedural help through remote portals to readily access to interpreters
   - Allowed certain filings such as protective orders to be filed in a foreign language with court interpreters translating filings
3) Statewide training on use of Webex features such as break out rooms to avoid challenges that have led some districts to require telephonic appearances only which deprive judges of valuable non-verbal communication because they are unclear how to sequester witnesses. This will drive more litigants to opt for in person appearances.

b. Long term: require legislation or formal UTCR changes
1) Federal child support funds to assist
2) Make Tyler/Odyssey notes in which the courts enter case notes to create a chronology of court activity accessible either through an application to extract the data to a database or broaden access so facilitators or judges can access the notes as remote service is broadened across counties, either through integration or build the capacity to build a database.

B. CASE-TYPE SPECIFIC TRIAGE: Targeting streamlined processes to

1. Require all temporary support order to occur on the pleadings (via UTCR)-this would require additional judicial training for best practices to ensure consistency; sign-ups for judges to handle specific number per month or reserve specific timeslots:
2. Require all interim relief to be made on the pleadings-Similarly to 1., *supra,* this measure should be coupled with enhanced educational materials to ensure that self-represented individuals understand the issues and impact of interim relief upon their rights and responsibilities. Enhanced information written at a 7th grade reading comprehension level to frame the issues, explain the availability and law surrounding interim relief will assist both in the application for and compliance with interim relief orders as parties will not have the opportunity to speak with judges who often explain the meaning and context of their orders..
3. Streamlined process for spousal support modifications necessitated by job loss and economic downturn: coordinate with support enforcement (handling the child support modifications) to either
   a. broaden their remit for support -OR-

b. borrow their procedures to created judicial equivalent for spousal support modifications due to COVID-19 including mandatory documents to evidence job loss

4. Streamlined process for expedited parenting time enforcement: CJO order that makes to permissive process contemplated in ORS 107.103 effective in all counties as a directive rather than permissive.
5. Changes needed:
   a. Short Term: CJO order to require interim relief, support modifications and expedited parenting time orders be implemented on the pleadings
   b. Long Term: UTCR for statewide implementation to be administered by centrally located judges to alleviate staff shortages
   c. Craft appropriate opt-out standards where in-person evidentiary hearings are necessary to dispense justice.

C. JUDICIAL INTERVENTIONS: Sr. Judges to train and/or conduct; out of district judges, pro tem judges, referees/special masters.

1. Status conferences aka "judicial settlement conferences lite" Enhanced use in all cases (pre and post judgment), using Lane County model of brief conferences that resulted in 38% resolution within 45 days of reinstituting the conferences. These conferences would be used to:
   a. Narrow trial issues
   b. Educate the parties of likely outcomes to facilitate agreement/stipulation per with best practices/training for judges on how to help guide litigants to realistically evaluate their case and range of probable outcomes.
   c. Ensure litigants, especially the self-represented, are aware of settlement process options – mediation, settlement conferences- ideally these options will be publicized at various points of the process (i.e. at filing; at status conferences; at hearings) with materials to convey the value of the process
   d. Ensure litigants, especially the self-represented, are aware of IDRT option and set them into master calendar or, if judicial district does not have master calendar, for reserved time slots for same. Calendaring preference is justifiable as increased use of IDRT model results in more efficient docket management.
   e. Refer parties to judicial settlement conference setting them into master calendar or, if judicial district does not have master calendar, for reserved time slots for same. Strong sentiment in the workgroup is for mandatory judicial settlement conferences with appropriate opt-outs to encourage participation in conferences. For self-represented litigants, provide clear instructions on the process and information to be provided to the settlement judge to maximize efficacy of the settlement opportunity.
   f. Creates a timeframe to check in to make sure that lawyers are ready, obstacles removed- will vary by case type and time line
   g. Defaults available

h. Obstacles removed via telephonic hearings
    1) Attendance at Parent Ed Class
    2) Attendance in Mandatory mediation -mandatory not optional for all kid cases as it is in some cases such as Jackson
    3) Filed USD with attachments
    4) Filed A/L spreadsheets (UTCR form 8.0101)
    5) Create client forms with all information on Child Support Worksheet to be inputted so that parenting time award is only variable requiring judicial input

i. Identification of trial dates to create deadline to ensure movement of the cases

2. Settlement conferences – require in all cases with opt out for good cause
3. IDRTS-remove barriers to IDRT such as requirement for written consent and prepare more user friendly waivers and explanations including balanced risks of trial.
4. Unbundled judicial services – enable litigants to package single issues/simplified bifurcation without awaiting trial to remove case obstacles to create momentum for mediated outcomes and alleviate time sensitivity for better judicial triage
5. Changes needed:
    c. Immediate changes via CJO Order or SLR changes:
        1) CJO to recommend status conference within certain time frame of filing
        2) Task facilitators to call parties in advance of status conferences to provide assistance with preparation, remind them of dates
        3) Non-English speakers-CJO to:
            - broaden the procedural help through remote portals to readily access to interpreters
            - Allowed certain filings such as protective orders to be filed in a foreign language with court interpreters translating filings
        4) CJO that makes mandatory the filing of the UTCR Form 8.120.1 within ___ days for the first status conference similar to the Deschutes SLR 8.121
    d. Longer term changes that will require legislation or formal UTCR changes
        1) Make Tyler/Odyssey notes in which the courts enter case notes to create a chronology of court activity accessible either through an application to extract the data to a database or broaden access so facilitators or judges can access the notes as remote service is broadened across judicial districts. Either through integration or build the capacity to build a database for
        2) Ensure senior judge and remote judge access to Tyler/odyssey notes

D. STAFFING INNOVATIONS:

1. Remove geographic barriers to maximize people resources via a "pool" or centralized recording facility and calendaring tool to facilitate remote process
2. Establish relief teams:
    a. Plan B judges that can go to the counties and that aren't doing some of these things to train them how to do their things but to also be the go to people for the backlog of interim relief orders that are done solely on pleadings if they're able to handle short contested hearings of up to two hours you know by telephone
    b. Pro tem judges
    c. Special masters/referees
    d. Remote only working judges with capacity
    e. Bar pro bono project to assist with individuals needing to file but without access to OJD online forms
3. SCA to compile with input of local bars, mediation groups, community partners with centralized bank of mediators as a link with disclaimers that are not endorsements
4. Implement recommendations that attorneys participating in settlement conferences prepare term sheets during conference to be signed before conference adjourned including standardized waivers of trial (analogous to plea colloquies for judicial fitness issues)
5. Utilize alternative technologies for self-represented litigant judicial settlement conferences such as texts, collaboration tools
6. Offer Settlement Conferences/IDRTS in 2 hour increments-. Judge flexibility on their dockets.
7. Utilization of 107.425 as authority for enhance use parenting coordinators, investigative resources and appointment of individuals, panels or programs to assist in dispute resolution between parents, monitor compliance, etc.

E. TECHNOLOGY AND EDUCATION ISSUES:

1. Grant funding- Like Lane Circuit Drug Court, to purchase a tablets to attend the court hearing and a safe private location to handle it. Locate other funding available for more staff and staff with immunity. Create video rooms with dedicated Webex access in courthouse, libraries and other public facilities of our community partners.
2. Centralized calendaring to better utilize judicial capacity and for services for facilitators, mediators and certain court proceedings to relieve pressure on judicial assistants
3. New content in plain language for websites, brochures mailed out and automated texts mapping out
    a. alternative paths to resolution
    b. how to filing using Odyssey forms
    c. other areas? Substantive explanation for self-represented?
4. Telephone presumptive unless opt out (good cause) or evidentiary hearing in which case a standard form such as the certificate of readiness for

orders/judgment that standardizes the opt-out. This needs further development to require clear telephone or video connection, protocols and training/

5. Lack of tools- no video (though most phones are "smart" and/or grant funding or carrells in court house libraries or other community venues (similarly to the use of schools, churches etc. for polling) equipped with terminals
6. Exceptionalities – hearing, visual, other processing
7. Create a Virtual Court Resource Center to provide training and technical support for staff, judges, attorneys and court consumers – perhaps centrally housing by vendor their training materials to include: judicial training for FTR to permit hearings, conferences without staffing, Webex features including break out rooms, record proceedings. By doing this training virtually, we could utilize statewide court technology personal to establish a staffed phone on some sort of rotating schedule.
8. Text or email confirmation Enhanced use of text to automatically communicate as doctors and pharmacies including educational links
9. Better training for end users (judge, court staff, attorneys, litigants and witnesses) including how to:
    a. Screen share for evidence during proceedings
    b. Segregate attendees into break out room for settlement/mediation or witness sequestration
    c. Consider multi-modality training- written and video to minimize drain on court technology staff or group trainings

F. CLOSING THOUGHTS:

1. **Implementation:** We recommend that these changes be issued as CJO's to ensure uniformity, maximize statewide capacity, break through resistance/inertia and permit the greatest opportunity to observe the efficacy of innovations. To facilitate adaptation and identify iterations, we recommend measurement of key indicators including track resolution rates of the following:

    a. Number of cases resolved via IDRT and the time pending from filing to judgment;
    b. Number of judicial settlement conferences, resulting in stipulated judgments;
    c. Number of judicial status conferences and resolution rates and time for resolution following status conferences;
    d. Post-judgment filings to determine the impact of alternative dispute resolutions in reducing litigation;
    e. Case counts and time pending overall before and after implementation; and,

f. Outcomes as perceived by consumers (defined to include judges, attorneys, court staff, litigants and witnesses, including ease of use, accessibility, cost (not just money but time) and fairness.

2. Rule Development: Not developed are rules for which proceedings must be in person or at least video and not phone.
   a. Consensus that Motions for temporary orders/remedies as well as interim relief be made on pleadings or, if court orders, remotely.
   b. Presumption that status conferences and all scheduling matters and judicial settlement conferences be remote
   c. Proposal under consideration is that evidentiary hearings be in person or at least WebEx, though this issue needs further development.

3. **Technology Assumptions**: We should consider our assumptions regarding telephonic use as the preferred medium of communication over video by surveying each district to get consumer feedback about their experiences, perception of barriers and challenges posed by various modalities.

4. **Licensed Paraprofessionals**: We recommend increased consideration and removal of barriers to licensure of paraprofessional under consideration by the Oregon State Bar. The ability of paraprofessionals to provide information and services to self-represented parties will reduce the work of the courts who are constrained in their ability to advise individuals struggling to complete forms and understand the process. While work group 1 recognizes the benefit of full representation by bar members, the recognition that the majority of Oregonians are unable to afford and/or access traditional representation compels an acknowledgment that the limited legal services of paraprofessionals are superior to providing no legal services and information at all. This would reduce the confusion many self-represented parties encounter over evidence, filings and alleviate the ethical issues for judges and court staff to assess the extent to which intervention crosses the line of practicing law from simply facilitating resolution through administrative or educational interventions. To be clear, the optimum would be for all litigants to be represented by competent lawyers if they wished. However, given that 80% of family law litigants are self-represented, at least in some portion of their litigation, some legal advice is better than none. Offering robust forms, court connected facilitation services and licensed paraprofessionals all contribute to this goal and promote judicial efficiently and their availability results in judges having the opportunity to render decisions based on more complete and relevant information.

5. **Resources: In anticipation of possible budget cuts or diversion of funds, educational, training and resource centers/help lines should be deployed** using vendor resources wherever possible (for example, sourcing

training videos, free help lines etc.) and knowledge management software tools such as Zendesk, Freshdesk, etc. In addition, foundational grants should be sought from organizations investing in civil legal outcomes such as Pew or Open Society Foundation [1]

[1] **Dissolution by Registration:** Some members of Work Group 1 also recommended exploration of "dissolution by registration" in which an adjudicatory role is not necessary either because cases involve no collateral matters of inherent state interest (i.e. support, custody/parenting time) or can be "divisible" when and if enforcement issues arise. Just as contracts carry legal weight independent of any judicial role until interpretation/enforcement becomes necessary, dissolution could be accomplished through registration until such time as enforcement problems arise. This model, in which initiatives are underway in various Commonwealth and European Union countries, would permit clerical registrations analogous to the dissolution of registered domestic partnership.

EXHIBIT 3

EXHIBIT 3

Work Group #2 Technology

MEMO TO BILL HOWE, CHAIR
FUTURES SUBCOMMITTEE, SFLAC
From: Senior Judge Daniel R. Murphy, Chair, Technology Workgroup
Draft 3 -- 08/03/2020 – Final Draft
Report of the Technology Subcommittee in Response to the Chief Justice' Questions
The Futures Committee of the SFLAC created this subcommittee to address the technology issues related to recommendations for an OJD response to Covid 19 related problems. This is the report of that subcommittee.
Below are the Questions from the Chief Justice with provision for technology related responses:

9. What services, proceedings or trials can or should be provided or conducted by remote means? What are the benefits and detriments?
    a. In responding to this question, the workgroup agreed that it would be preferable to have statewide presumptive standard regarding the use of technology related to our adaptations considering the Covid 19 pandemic. See also ¶6 infra.
    b. The workgroup also agreed that the statewide preference should be to use remote conferencing whenever possible for these reasons:
        i. Remote access allows participation by people who might not be able to physically reach the courthouse.
        ii. Remote access minimizes exposure to the Covid 19 virus.
        iii. Remote access reduces the burden on court staff to manage the gathering of people in courtrooms and the disinfecting of surfaces after a court event is over.
        iv. Remote access in some cases will make court more accessible to poor users when they cannot afford to travel to the courthouse, but in other circumstances may impair their access and participation when they cannot afford the technology needed to connect – therefore courts need to be able to use discretion in the use of remote technology to accommodate those who either can or cannot use the technology.
        v. The workgroup is also cognizant of what a post-Covid world is likely to bring including greater reliance on and familiarity with the technology used in remote connections making it more likely that users will expect and courts may well anticipate greater use of remote access than was common prior to the pandemic.
    c. It will be critical to consider and accommodate the participation of foreign language interpreters and other types of interpreters for non-English speakers as well as those with impaired sight and hearing as part of any remote access system. The use of video access will be preferable when possible to allow for sign language translation.

d. The SFLAC should make recommendations to the Chief Justice as to which remote access usage should be recommended for which types of hearings and trials considering applicable statutory law, constitutional law, and case law. Due process and equal protection should not be denied either by using remote access or failing to use it.
e. The workgroup agreed that the lowest level of technology for remote access available to all users should be used. I.e. if a user has only a telephone then the hearing should be conducted only by telephone – it is believed that having some users connected by telephone, some by video and some in person creates at least the appearance if not the actual existence of unequal access. Not being able to see participants for example can make it more difficult for them to gain attention, ask questions, etc. However it is also anticipated that there will be conflicts in needs and consequences: for example a blind user may need a video connection to use a sign language interpreter while another user without technology for video conferencing may need to use a telephone. Courts need to have sufficient discretion to address these conflicting needs and circumstances.
f. OJD should consider working with other agencies and entities to provide technology such as cheap smart phones, tablets and other devices at remote locations throughout a district in libraries, safety shelters, and courthouses for use by persons who cannot afford to purchase their own technology.
g. OJD has two primary modes of communication that can be used for real time court events: telephone and WebEx video conferencing.
    i. **Telephone**:
        1. **Benefits**: most accessible by court users including ~~pro set~~ unrepresented parties and homeless parties; least expensive; least technologically challenging for users
        2. **Detriments**: never as satisfactory to not be able to see person we are talking to; possibility of mis-identified person online is greater; parties to call cannot view documents.
    ii. **WebEx Video:**
        1. **Benefits:** Can see participants and more likely to ensure that the named party is on the line; easier to communicate when you can see the parties; can view documents to some limited degree.
        2. **Detriments:** More expensive for all participants; requires computers or smart phones with functioning camera, speaker ~~and~~ mic and internet access; requires higher level of technological knowledge; less available to pro se parties, poor parties, homeless parties. Video conferencing also requires a stable and sufficiently robust bandwidth for dependable transmission. This is not available in all locations throughout the state and is not available to some people who are poor.

3. **WebEx Preference:** the current policy of OJD is to use WebEx as the exclusive external video conferencing program based on some extensive testing and evaluation. It is recommended that this preference be maintained statewide where video conferencing is being used until such time as OJD determines that an alternative technology is superior or at least equivalent. This will also minimize the problem of training and user ability as users will only need to be adept at one video system.

10. What remote means (telephone/video/other) can and should be used for each type of service, proceeding, or trial? What are the benefits and detriments? Are there obstacles to the use of particular technology? How can they be addressed?
    a. From a technological point of view any technology could be used for any type of proceeding and have been so used in the past. There may be an efficiency advantage to using telephone for status hearings and pretrial conferences but would be better to use video conferencing for evidentiary hearings.
    b. As discussed above in ¶1 the courts should use remote access in due deference to the legal restrictions that may exist for assured due process and equal protection.

11. If you are recommending in-person appearances in a particular proceeding, why are you making that recommendation? Are there obstacles to the use of remote technology? How can they be addressed?
    a. Although likely beyond the role of this workgroup we understand that evidentiary hearings are probably better served with in-person attendance and video being used as a backup. Some questions about whether we can use video conferencing for jury trials at all. Some constitutional problems with not having personal attendance. Conversely it must be considered that we have used telephonic testimony in many kinds of cases where no one objects for many decades. It is anticipated that absent objections remote access by witnesses and others should be used extensively as it will make testimony less expensive and inconvenient for witnesses.
    b. A bigger challenge is juries – can they participate remotely? We are aware of one jury trial that was done experimentally in Utah with remote juror participation, but this needs more study and evaluation.

12. What training is necessary to make full use of remote technology?
    a. Telephones generally need little or no training. Most people know how to use them.
    b. WebEx requires downloading an app and then obtaining internet access and signing in to the meeting. Persons who are very familiar with computer

technology would need little training and perhaps none. People not familiar with computer technology and especially with video conferencing platforms would need much more training. Some people may not be trainable for this technology. Uncertain as to whether WebEx can be used by deaf or blind participants.

c. OJD should provide training in different modes: by video, by printed material, through a website. These materials should be widely available. OJD should also have staff available at courthouses who can train users on how to use remote access technology at the courthouse which the user may then use from their home or office.

13. What is necessary to ensure that unrepresented litigants can use the recommended technology?
    a. For telephone: party needs to have a functioning telephone.
    b. If the have a cell phone they need to have access to a signal sufficiently strong and consistent to allow reliable communication throughout a phone call.
    c. For WebEx: party needs to have a computer, tablet, or smart phone equipped with internet access, camera, mic, and speaker. A party or other user must have a stable connection to the internet. Party may need some training to use WebEx technology.
    d. If the phone is being used for a video appearance the Wi-Fi connection must have sufficient bandwidth to support a consistent and reliable connection. The same is true if the user is using a laptop, tablet, computer, or similar device.

14. What is necessary to ensure fairness in the use of the recommended technology? Can some participants be remote while others are in the courtroom? What are the benefits and detriments?
    a. Fairness can best be attained by seeking to provide the same standards of technology usage statewide.
        i. All users should be having access by the same level of technology; if one user can only use a telephone than everyone should be on telephone, etc.
        ii. Technology must accommodate interpreter services;
        iii. Some differences may be necessary considering local conditions including distance from the courthouse and outlying areas of the judicial district.
        iv. Courts must be allowed some local discretion to respond to local needs and circumstances but courts should strive to apply the standards approved by the Chief Justice on a state wide basis as much as possible.

15. As to each type of proceeding, is it necessary that it be conducted by the same means statewide (*e.g.*, fully remote, partially remote, telephone v. video, or in-person)? If so, why? If not, why not?

a. The availability of technology including internet access may vary depending on where in the state one is located.
b. While having a statewide standard as to each type of hearing courts must retain discretion to ensure the various access concerns outlined in this memorandum and the technological problems that may exist in each area.

16. How should a court adopt a procedure for utilizing remote means for designated types of proceedings? By Presiding Judge Order (PJO) or by another type of determination? Are case-by-case determinations appropriate?
    a. This question is outside the charge of the Technology Subcommittee.

17. How can a court most effectively notify litigants about the manner of hearing in certain types of proceedings or in certain particular proceedings? (e.g., PJO, general website notice, notices to parties, etc.?) Is there instance in which a motion should be required or permitted to seek or object to the manner of hearing?
    a. This question is outside the charge of the Technology Subcommittee.

18. Can or should trials, particularly jury trials, be postponed? If conducted, are there ways in which the trial can take place remotely in whole or in part? If postponed, are there ways to keep the case moving and to encourage resolution without the impetus of a pending trial date?
    a. This question is outside the charge of the Technology workgroup.

EXHIBIT 4

Exhibit 4

Workgroup 3: Self-Represented Persons and Remote Court Procedure

Co-chairs: Colleen Carter-Cox, Stephen Adams
Other members: Hon. Karrie McIntyre, Eric McClendon, John Grant, Natalie Knowlton, Hon. Maureen McKnight, Christine Zenthoefer

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I. ANALYSIS. The workgroup identified four important themes to apply to our responses to the assigned questions from Chief Justice's letter (questions 3, 5, 6, 9 and 10):

1. Fairness.
    a. A litigant's access to services may vary based on access to equipment. Some may have unreliable or no internet access or inadequate technology. This imbalance may place one party at a disadvantage (ie. phone v video capability).
    b. A litigant's ability to "attend" remote hearings may depend on technology
    c. Comprehension of technology may impact a litigant's ability to present information and/or put one party at a disadvantage

2. Education.
    a. Education materials for litigants about remote appearances and services is crucial.
        i. How to use technology
        ii. Court procedures and policies
        iii. Virtual "courtroom" decorum
    b. Staff Education

3. Communication.
    a. Improve/update court's use of technology regarding communication
    b. Remove language barriers

4. Reframing. The group discussed the "new normal" and the way we approach the decisions we will make about remote court procedures and court policies and procedures. We should look past COVID-19 to define the "new normal;" the normal for years in family law is the self-represented litigant. Many of the rules and procedures of the court that were initially established have not kept of with the changing dynamic of today's family and the typical court customer. Employees and internal customers of the court, risk looking through the lens of how the pandemic is creating so much change; however, for the litigants filing cases now, this is the first experience with the court, so they don't know any different. These new parameters may present different challenges, but not necessarily more challenge. We can use

this as a rare opportunity to rethink our procedures and operations based on the current customer.

II. STRATEGIC PLAN.

Our **vision** is to analyze the changes forced by the current crisis and apply the above themes to determine the policies and procedures that should continue to best improve access to justice and help families reach resolutions.

Our **goals** are to provide specific services tailored to the needs and abilities of our customers consistent with Oregon Law.

Our **strategies** include staff and customer education, use of all affordable technologies needed by our "default" customer (who in this current day is not a lawyer-represented client, but a self-represented litigant.

Our **tactics** must focus on services and access needed by our most-challenged customers, such as persons with limited access to technology or fluency in written or spoken English:

8. The Court should consider whether telephone be the default manner of appearance because nearly everyone has a phone, especially for procedural, non-substantive hearings such as trial readiness and status checks.
    a. OJD should work with law libraries and/or other agencies or community points of access to provide access to technology/internet for the litigants who lack access
    b. Courts should set aside a space in the courthouse for litigants who lack technology, including reliable cellular service, to make remote appearance
    c. OJD should ensure that each jurisdiction has appropriate technology to conduct quality remote hearings

9. The Court should consider issues for litigants such as disability, access to technology/internet, and language barriers when making decisions about allowing personal appearances.
    a. OJD should create a specific form for a party to request an in-person hearing outlining the specific reasons
    b. Relax rules about submitting witness lists or exhibits in English allowing interpreters to site translate in hearings

10. The Courts must provide information and education about remote appearances and expand technology regarding communication with litigants. Attention to reading level and simplification of legalese is critical.
    a. Staff education.
        i. Court staff must be able to answer litigants' questions about remote technology.

b. Information for litigants. Information must be available through multiple avenues. It is important to have online video and instruction (website and OECI and include instruction in paper notices mailed to litigants). The Courts could consider having a helpline for litigants who are unable to access online information and have trouble with technology. It is equally important to educate litigants about decorum in remote proceedings.
c. Expand notices to meet litigants' needs. Most litigants use mobile phones and communicate by text. The Court should employ text messaging to provide parties with notices re hearings and links to educational resources. The Court should be mindful about the format that notices/educational materials are provided, ie. PDFs on cell phones are often hard to read.

11. Case management. Courts should be proactive in methods to keep cases moving and encourage resolution without trial.
    a. Courts can communicate with mediation programs to proactively contact parties who have reached full agreements to arrange help through family law facilitator for final paperwork.
    b. Temporary Orders/remedies must be available.
        i. Require all temporary support orders to be made on the pleadings
            1. UTCR
            2. Statewide judge training for consistency
            3. Judges handle xx per week
        ii. Require all interim relief to be made on the pleadings, unless otherwise required by statute
            1. UTCR
            2. Statewide judge training
            3. Judges handle xx per week
    c. Require Domestic Status Conferences (DRSC) in all domestic relations matters by telephonic appearance
        i. Cases are kept moving
        ii. Parties stay on track with parent ed and mediation
        iii. Parties stay on track with filing necessary documents/discovery requests
        iv. Parties encouraged to participate in settlement conferences or IDRT (encourage more jurisdictions to utilize)
        v. Require PJ to report how their district is establishing DRSC and allow Plan B judges to work in counties where they aren't doing it.
    d. Judicial Training.
        i. IDRT. Require training for judges. Change rule to allow waiver on the record rather than just in writing.

ii. Require a designated judge from each judicial district to "attend" virtual training on Domestic Relations Status Conferences, Settlement Conference ideas, and IDRT.

e. ADR. ORS 107.103 allows ADR conference procedure for custody and parenting time modification and enforcement before court hearing. Conference office may be OJD employee, mediator or lawyer.

12. Remote Facilitation.
    a. Encourage and assist jurisdictions in transitioning facilitation programs to provide remote services
    b. Expand for centralized services for those jurisdictions that don't have programs or means to provide remote services
    c. Train facilitators in remote technology to both incorporate into family law facilitation and provide litigants with information re remote appearances
    d. Facilitate technology to allow document review by remote means
        i. Phone review
        ii. WebEx, GTM, or Teams for video conferencing and/or screen sharing
    e. Text and email messaging for facilitators to send resources and do appointment reminders.

N.B.: OJD should keep in mind the balance between the security/propriety decision to use WebEx and the fact that this product is not commonly used by most customers. This may create a hindrance for customers and inadvertently create a barrier between the customer and the courts thus inconsistent with our mission.

III. RESPONSES (to Chief Justice's letter, questions #3, 5, 6, 9, and 10).

3. If you are recommending in-person appearances in a particular proceeding, why are you making that recommendation? Are there obstacles to the use of remote technology? How can they be addressed?

a. There should be statewide presumptive standards. This ensures consistent measure of factors to consider, equivalent weight given to case-type, and provides a clear expectation for the court customer. The presumptive standards should include a list of non-exclusive factors that can rebut the presumption. PJs should be able to adopt rebutting standards by standing order (such as where internet access is poor, or cell coverage is spotty) and individual judges should always have the authority to rebut the presumption for good cause.
    i. Court should consider (especially for non-substantive hearings such as status checks and requests to rebut presumptive modality) telephone as default means of remote appearance.
        1. Most everyone has telephone access
    ii. Alternatively, video could be considered as presumptive modality on any evidentiary hearing
    iii. In person hearings should only be held in cases where a Judge finds an exceptional reason exists.

b. Obstacles are education and access. These obstacles can be addressed as outlined in the section b below in question 5.
c. There has been feedback from courts not having hearings in person has decreased efficiency by creating longer hearings due in part to repetition of what the judge needs to inform each party. This could be remedied by utilizing a virtual "waiting room" where all parties are placed at the initial connection to the hearing at the docket start time. This time can be utilized for the judge or staff to impart this information by video or audio recording or speaking to the group and then explaining how the court will proceed through the docket.
d. Court's need to provide physical access to video (see 5c below, Access)
e. Consider changing OJD policy to provide senior judges with laptops or allow them VPN in increase prep time while working remotely.

5. What is necessary to ensure that unrepresented litigants can use the recommended technology?

b. Educational materials for SRLs (prepared at adequate reading level)
    i. Written materials sent out with hearing notices and available on OECI and OJD/individual court's website
    ii. Video instruction on OJD website
    iii. Telephone helpline for those who don't have online access and/or have trouble with written materials
    iv. WebEx chat room for litigants to be able to test technology prior to hearing
c. Staff Education. Staff must be familiar with technology and be able to answer questions.
d. Access.
    i. Courts should set aside a space in the courthouse for litigants who lack technology, including reliable cellular service
        i. Grant funding for tablets and phones for litigants' use
    ii. Courts should work with law libraries to provide technology/internet access for the litigants who lack access
    iii. Court's should work with other agencies or community access point to provide access to technology
        i. Ie. DHS or schools (ie. in Kansas a court is using a local theater)

6. What is necessary to ensure fairness in the use of the recommended technology? Can some participants be remote while others are in the courtroom? What are the benefits and detriments? We already allow situations where some participants are remote and others, not. These issues already do and will continue to require careful consideration. There may be situations where it is appropriate and allowed by stipulations of the parties or order of the court. Where not all parties can reasonably access the presumptive modality, the policy could be the hearing is held at the lower commonly-available modality unless the court finds exceptional reasons exist for a hearing with

nonuniform access to the court. The court must consider the benefits that might outweigh the detriments of allowing different modes of appearance. The court must also be aware of the forms of implicit bias that may vary based on personal, video, and phone appearance.

a. Possible Benefits
    i. Access
    ii. Public Health
    iii. Personal safety/comfort of a party
b. Possible Detriments
    i. Evidenced based hearings, presenting exhibits
    ii. Advantage to a party

9. How can a court most effectively notify litigants about the manner of hearing in certain types of proceedings or in certain particular proceedings (e.g., PJO, general website notice, notices to parties, etc.)?

b. Website notices and posted PJOs,
c. Notices to parties with where to look/call prior to hearing,
d. Text messaging re notices

Are there instance in which a motion should be required or permitted to seek or object to the manner of hearing? Yes, a party should be able to request remote/in person based on special needs, lack of access to remote technology, or other issue that impacts procedural fairness. OJD should create a specific form for a party to request an in-person hearing outlining the specific reasons. There should also be a process and form to object to a party's request for situations in which a party may be solely making a request to create an advantage/disadvantage.

10. Can or should trials, particularly jury trials, be postponed? If conducted, are there ways in which the trial can take place remotely in whole or in part? If postponed, are there ways to keep the case moving and to encourage resolution without the impetus of a pending trial? If family law trials are postponed there must be an infrastructure in place for court remedies and case progress as outlined in second part of the answer. It is important to have emergency remedies available where postponement would place undue hardship on a party due to safety or financial issues. The court should develop instructions/forms for self-represented parties to be able to request that a matter be heard more promptly.

The most important point here is to keep cases moving along and keep parties headed toward settlement and case resolution. It is important to focus on improving case management as outlined above in Section II (4) of the strategic plan. Status check hearings can be utilized- telephone hearings to keep parties on track, involved in mediation, and encouraging settlement. The Court should be proactive in guiding parties towards settlement including communicating with mediation programs to gather information about cases with full agreements and contacting parties who may have agreements to arrange assistance through family law facilitation services for paperwork to resolve the case (see section II (5) above). It is also important to continue access to temporary relief to provide

parties structure/guidance while case is pending. The courts should consider deciding interim relief based on the pleadings for many forms of temporary relief.

EXHIBIT 5

EXHIBIT 5

August 2020

SFLAC Education Subcommittee- Remote Services Recommendations.

The SFLAC Education Subcommittee respectfully provides the following recommendations in response to Chief Justice Walters' request for input on remote proceedings. Much of the input below focuses on specific input from the perspective of the Education Subcommittee, whose focus has historically been to give Judges and Court staff a better understanding of the public and the needs of the community, as well as provide trainings to the legal community through the SFLAC Conference and the Family Court Facilitator Trainings. As such, much of our focus was on Questions 4, 5 and 10. However, members of this subcommittee also provided general input on the Chief's questions as well.

1. What services, proceedings or trials can or should be provided or conducted by remote means? What are the benefits and detriments?

2. What remote means (telephone/video/other) can and should be used for each type of service, proceeding, or trial? What are the benefits and detriments? Are there obstacles to the use of particular technology? How can they be addressed?

3. If you are recommending in-person appearances in a particular proceeding, why are you making that recommendation? Are there obstacles to the use of remote technology? How can they be addressed?

4. What training is necessary to make full use of remote technology?
Instructional forms, webinars, YouTube videos, audio recordings, etc. for the below groups:
<u>For Judges:</u>

- Trauma-informed, implicit bias and procedural fairness. Particular attention in these trainings should focus on frustration with poor technology/wifi, impact of where someone is located during the hearing (if by video); interruptions; attire, etc. during remote hearing.
    - We recommend creating and providing a trauma-informed script for Judges to use with litigants to explain the process of the hearing, specifics/quirks with technology, specifics re: how to communicate with the attorney, litigant, interpreter, etc. [See proposal to create a video/recording of including this information under SRLs below].
- Vicarious/Secondary Trauma and Compassion Fatigue- training on protecting oneself from and working through the vicarious trauma that comes with working with those in trauma, particularly during this particularly chaotic time.

<u>For Court Staff:</u>

- Training on providing trauma-informed services and implicit bias, as well as vicarious/secondary trauma (see first & third bullets under Judges).

- Training on basic technology troubleshooting to assist attorneys and litigants as they will often be the first point of contact

For SRL's (see also below re: for all litigants and attys):

- Creation of a webinar or YouTube video prior to a hearing with the link sent with Notice of hearing; &/or creation of a recording that a SRL can listen to by calling a particular number or while in a "waiting room" when they call in for their hearing. Recording could include:
    - Basic information of the technology/platform used: WebEx, GoToMeeting, etc.
    - Advice often given at beginning of hearing or in posting at courthouse (proper attire, don't interrupt Judge, get care for kids/dogs, procedure of particular hearing- e.g. FAPA, Status Conference, etc.)
    - For DV survivors - instructions that remote video hearing may reveal location, phone number(?) and alternative options available (room at the courthouse? Cell phone at courthouse?)
    - One option is to have all litigants and attorneys scheduled for a particular type of hearing call in at the same time to listen to the recording and then be assigned a time to either 1. Call back for the hearing or 2. Expect a call back from the court.
        - This allows SRLs to be available in a location with necessary WIFI or cell service, know when they will need childcare or other support, etc. rather than waiting for an entire afternoon.

For Attorneys, represented litigants and SRLs:

- Training via YouTube, Webinar, etc. on basic info on the platform- WebEx, GoToMeeting, etc.
- Info (in notice) that hearing is presumptively remote (designate phone/video), with instructions on how to request alternate option, which will be at Judge's discretion
- Information about communicating with attorney (esp. if using interpreter) during the hearing
    - For hearings with use of **Interpreters**: Video/YouTube about how the proceeding will happen with the use of an interpreter (Example: https://multco.us/global/cife-importance-interpreting-everything CIFE is a tool that Interpreters and providers can use ensure an accurate and effective session with their client. This model provides parties with a common set of ground rules laid out at the beginning of each session. Either the interpreter or the provider can go through the steps of CIFE).
- Training for all on using/admitting evidence/exhibits and calling witnesses; whether exchange of exhibits prior to hearing is recommended and the process that is expected {recognition that some evidence/exhibits should not be exchanged prior}
- Trainings and materials on the pros/cons of utilizing Alternative Dispute Resolution [Status Conferences, Judicial Settlement Conferences and perhaps Informal Domestic Relations Trials (IDRTs)] rather than waiting for or pushing for a Trial that may require in-person appearances. See also response to Question 10.

- Note that attorneys may need this training the most, as *some* are hesitant to recommend ADR to clients as their experience has always been with the adversarial model, and for fear of jeopardizing their livelihood. However, many of the same concerns we presently hear regarding ADRs were previously voiced when the Family Court Facilitator positions began, and those concerns were unfounded. Everyone from SRLs, represented litigants and attorneys should understand the benefits of these options. It should also be recognized that ADR may not be appropriate in cases where there is not a level playing field- such as when domestic violence is involved, so materials and trainings related to ADR should include all considerations.

<u>Generally- Ensuring Language Access:</u> Ensuring the videos/notices/trainings, etc. (for SRLs) are provided in multiple languages

5. What is necessary to ensure that unrepresented litigants can use the recommended technology?

- Explanatory letters; webinars; via email or notice of court hearing (see above recommendations)
- Easy access to interpreters
- SRLs must be able to efile Fee Waivers/Deferrals (or an email address provided by the court for such filings to be provided and filed)
- Some Judges have indicated that SRLs are having an easier time with the technology and the remote hearing process than many attorneys, as they do not have the experience of the way things "usually" proceed. However, there should be some particular focus on training for the use of admitting evidence/exhibits and calling witnesses for SRLs. Once a process is created, simple forms for submitting exhibits and calling witnesses should be created and easily accessible for SRLs.

6. What is necessary to ensure fairness in the use of the recommended technology? Can some participants be remote while others are in the courtroom? What are the benefits and detriments?

- There must be a way for attorneys to communicate with litigants during a hearing, and to ensure that whatever process is created, it is also possible to do so with a Court interpreter.
    - Some attorneys are texting with clients, some open separate 'chat' rooms; It seems that WebEx is creating the option for breakout rooms beginning in September.
- Efiling Fee Waivers/Deferrals must be available (or an email address provided by the court for such filings to be provided and filed)
- Ensure Language Access: Ensuring the videos/notices/trainings, etc. (for SRLs) are provided in multiple languages

7. As to each type of proceeding, is it necessary that it be conducted by the same means statewide (e.g., fully remote, partially remote, telephone vs. video, or in-person)? If so, why?
If not, why not?

- Consider polling for uniformity of platforms and uniformity of instructions sheets.

8. How should a court adopt a procedure for utilizing remote means for designated types of proceedings? By Presiding Judge Order (PJO) or by another type of determination? Are case-by-case determinations appropriate?

9. How can a court most effectively notify litigants about the manner of hearing in certain types of proceedings or in certain particular proceedings (e.g., PJO, general website notice, notices to parties, etc.)? Are there instance in which a motion should be required or permitted to seek or object to the manner of hearing?

- There should be more than one notification method, as many folks now struggling with employment and housing may be more transient than usual, and residential and/or email addresses may be changing. At the very least, an indication of the type of hearing should be on the Notice of Court Proceeding (along with links to the recorded trainings suggested above in #4, and information about how to request an alternative manner of hearing- discussed directly below), and the Notice should be provided via email and USPS.
    - One recommendation was that parties be asked to email a court clerk acknowledging receipt prior to the proceeding and, if the clerk has not received the email, reaches out again by phone, email, etc. We recognize this would be a huge commitment of time by court staff, but it may also provide more efficiency and reduce 'no shows' at the hearings.
- The option to seek an alternative manner of hearing should be readily available and a simple form (rather than a formal motion) should be created and easily accessible; Guidance on when to allow an alternative manner of hearing should be provided to the courts with recognition that each County must have a certain amount of discretion in granting/denying such requests.

10. Can or should trials, particularly jury trials, be postponed? If conducted, are there ways in which the trial can take place remotely in whole or in part? If postponed, are there ways to keep the case moving and to encourage resolution without the impetus of a pending trial date?

- Encourage, where appropriate, Status Conferences, Judicial Settlement Conferences and perhaps Informal Domestic Relations Trials (IDRTs) throughout the state and training on how to get them up and running; See above re: training for all on the pros/cons of each.
- Each court could empower a family law panel, comprised of a few people such as the parties' attorneys, a judge, a mediator, and maybe a few others, to pick up the case after mediation and work aggressively to settle the case outside of court, leaving the option of trial only as a last and final resort.

- See 2019's SB 385 Section 2: Allows creation of an ADR procedure for custody and parenting time modifications and enforcement proceedings.

EXHIBIT 6

EXHIBIT 6

August 2020

SFLAC DV Subcommittee- Remote Services Recommendations.

The SFLAC Domestic Violence Subcommittee respectfully provides the following recommendations in response to Chief Justice Walters' request for input on remote proceedings. Much of the input below relates to the recommendation that all protection/restraining order matters- both ex parte issuance of the order (§I.) and contested hearings (§II.)- be available remotely (unless otherwise requested or at the discretion of the Court). An outline of how such proceedings are already being successfully held is directly below, with discussion of benefits/detriments of this process below that. Input on the Chief Justice's specific questions follows (§III.).

REMOTE RESTRAING ORDER* PROCEEDINGS PROCESS:
*Note: this recommendation applies to all protection orders/restraining orders including FAPA, EPPDAPA, SAPO, SPO, and ERPO. As indicated below, only FAPA pleadings are presently available or filing through Guide & File, but fillable PDFs of each of the other protection orders have been created.

This outlines the process being used in Multnomah County with the assistance of local DV/SA programs Volunteers of America and The Gateway Center. Similar processes are being used in Clatsop and Washington County, and likely others.

I. <u>Initial Issuance of the Order/ex parte Hearing:</u>

- **FORMS** filed via Guide & File (FAPA) or filed via email from DV/SA Program:
    - If FAPA: Petitioner sets up Guide & File account, fills out the forms* and emails log-in information to DV/SA program. DV/SA program opens the Petitioner's Guide & File and compiles all necessary documents into a single document, which they then email to the local court via the specific email provided by the Court. Court files/processes paperwork to the Judge.
        - *(it may be possible for Petitioner to efile the pleadings through Guide & File).
    - If not FAPA: Petitioner fills out the fillable PDF and emails it to the local DV/SA program, [*DV/SA Program replies to Petitioner with a standard message regarding what will happen next -i.e. we will file by emailing the court, the judge will call you between # and #, you'll receive the orders back by email at approx. time, etc.)*]. DV/SA program emails pleadings to the local court via a specific email provided by the Court. Court files/processes paperwork to the Judge.
- **EX PARTE HEARING**- The court reviews the application pleadings and calls the petitioner for the ex parte appearance (or DV/SA program instructs petitioner to call in for appearance at specific time). Some Courts use Teams or other technology to call Petitioner; some Courts require Petitioner to call the court. *Recommendation* that all

Petitioners call in at time X to listen to a short message re: procedure/next steps, and be told when they will each be called or when they should call in. (Benefit of phone appearance over video appearance and pros/cons of each is discussed further below)

- **ORDER**- Signed order (or denial) comes via email to the petitioner (or back to the DV/SA Program to them provide to Petitioner). Order is also provided to Sheriff's office for civil service (by Court or DV/SA Program, depending on agreement).

BENEFITS of remote (phone) proceedings issuance of ROs:

- Safer for everyone during COVID-19 re: health
- Petitioners trying to leave a dangerous situation may being tracked by perpetrators of abuse, so not having to go to the courthouse may help keep a that person safe.
- Petitioners need not come to the Courthouse, which will particularly benefit those with transportation or child care concerns, or who live several hours from the nearest courthouse.
- Once the system is set up, it is very efficient, particularly at getting Petitioners a signed order by email and getting the orders to the Sheriff's office for civil service.
- Though some have expressed concern with determining credibility, when parties are present, the Judge is only able to see a person's eyes due to the mask anyway, so the benefit may not be as great as some think.

DETRIMENTS of remote (phone) proceedings for issuance of ROs:

- Availability of phone service (or wifi/technology if video is required), though working with a DV/SA program may alleviate any such concerns; Judges have indicated that it is the attorneys who seem to have more difficulty with technology than SRLs/litigants
    - If contested hearings are to occur via video conference, one option many courts have provided to those litigants without access to WIFI and/or necessary technology is to make a room at the courthouse available with the technology necessary for a litigant to appear by video (Marion County) or to provide a litigant a smart phone they are able to borrow from the clerk's desk at the courthouse, which they can then use from their vehicle or other safe location (Clatsop). In no event should a litigant who appears at the courthouse be turned away for an RO proceeding without an alternative option or a reset of the hearing, if necessary.
- The process can be slower. Judge McGuire (Multnomah County) indicates that it takes longer in part because information about the process, etc., must be repeated for each call, rather than repeated once for all the applicants of that day. However, she indicates that she has become very efficient, being able to get through approximately 15 in 2 hours now.
    - One solution would be to create a video and/or recording that each applicant must watch on YouTube or call in at a certain time to listen to the recording or the Judge explain the process. At that time, they can be given the time to either call back, or to expect a call from the Court.
- Concern that some parties may not be able to as easily convey their concerns, abuse, fear, etc. over the phone, while an in person (or even video) hearing may allow a court to better grasp the trauma for credibility determinations.

- Petitioners will be unable to show physical evidence, such as bruising or photographs of abuse during a phone hearing without additional instruction on how to do so.
- Determining credibility- though see related comments in benefits

II. Contested Hearings:

Contested Hearings should be held remotely, with each court determining whether the default remote appearance will be via phone or video (pros/cons of each discussed below). Requests for an alternative type of hearing (phone, video, in person) should be easy to make, such as a one-page form, and granted freely at the discretion of the court.

BENEFITS of Remote Contested Hearings:

- Safer for everyone during COVID-19 re: health.
  - Judges will not have to enforce distancing and mask requirements while also conducting a hearing
- Petitioner does not have to be in the same courtroom as Respondent.
- It's much easier for parties to have their witnesses appear by phone (so Judges get better information to make decisions).
  - From Judge McGuire (Multnomah) 'My clerk or JA emails the parties two days before the hearing to give them the phone/conf number to call, with instructions for their witnesses to call. This also helps us internally docket better; if we know that we don't have good info for a party and therefore expect that they may not show up for the phone hearing, we can triple-book rather than double-book that session.'
- Use of exhibits between SRLs may be easier:
  - From Judge McGuire: Exhibits get emailed to my clerk, so we send them to each party. It's been easy for parties to view exhibits from their phones, and this avoids Respondent violating the RO by sending exhibits directly to Petitioner. It also avoids parties trying to give their phone to the Court to view text messages at an in-person hearing.
- Fewer people fail to show for the phone hearing, which means we're actually getting to the merits (rather than dismissing because they failed to appear in-person, followed by a round of paper filing to set aside the order for missing hearing, then paper filing to reset the hearing -- all of which formerly required multiple in-person appearances and clerk involvement to process that paper). [McGuire]
- Though some have expressed concern with determining credibility, if Judges require masks during testimony then credibility may be harder to assess than if a witness appears remotely without a mask, particularly via video. It is also easier to hear testimony over the phone without a mask.

DETRIMENTS of Remote Contested Hearings:

- Availability of phone service (or wifi/technology if video is required), though working with a DV/SA program may alleviate any such concerns; Judges have

indicated that it is the attorneys who seem to have more difficulty with technology than SRLs/litigants.
    - If contested hearings are to occur via video conference, one option many courts have provided to those litigants without access to WIFI and/or necessary technology is to make a room at the courthouse available with the technology necessary for a litigant to appear by video (Marion County) or to provide a litigant a smart phone they are able to borrow from the clerk's desk at the courthouse, which they can then use from their vehicle or other safe location (Clatsop). In no event should a litigant who appears at the courthouse be turned away for an RO proceeding without an alternative option or a reset of the hearing, if necessary.
- Concerns with determining credibility (though see comments above re: in person hearings requiring masks obscure most of a person's face while video hearings have no such barrier)
- Concerns with sharing of exhibits remotely (see Judge McGuire's solution above)
- DV/Sexual Assault survivors appearing at a remote hearing via video may unintentionally reveal their safe location to the other party.
    - One solution is to be sure a video/audio recording (youtube video or recording they must call in to the courthouse to hear) or any notices sent to the parties indicate that appearing remotely may reveal their location. [More on the potential notice/video below]
- Judges and court staff may need a particularly focused training on implicit bias and procedural fairness if litigants are appearing remotely without the benefit of being advised by advocates and signs/guidance available at the courthouse (such as how to dress; turning off phones; having child care, etc.)

III. <u>Input on Specific Questions:</u>

1. What services, proceedings or trials can or should be provided or conducted by remote means? What are the benefits and detriments?

- (See above for proposal for **Ex Parte Applications for ROs and Contested RO hearings** to be conducted by remote means and the benefits and detriments)
- **Efiling** of all pleadings, including fee waiver/deferral requests, should be accessible as soon as possible. If fee waiver/deferrals cannot be efiled through the system at this point, another option is that each court have an email address to which such pleadings can be emailed and filed. Accepting electronic signatures of conformed signatures (/s/ name) should be available when possible as well.
- **Family Court Facilitators Offices**: many already providing services remotely; benefits are vast in helping particularly SRLs to file and/or move their cases along; detriments are only that such services may not be accessible to those with limited access to technology/wifi
- **Mediation, Judicial Settlement Conferences, Informal Domestic Relations Trials (IDRTs) in divorce/custody matters (not restraining orders):** Each of these options can allow parties to more quickly settle or finalize a divorce/custody

matter without the need for a full-blown Trial. For survivors of domestic violence, finalizing a custody or divorce matter is a significant step in disentangling the parties and thereby protecting a survivor from further abuse. Since large trials will be postponed, the use of these other ways to settle or finalize cases, particularly if they can be done safely and remotely, is significant.

2. What remote means (telephone/video/other) can and should be used for each type of service, proceeding, or trial? What are the benefits and detriments? Are there obstacles to the use of particular technology? How can they be addressed?

- Remote hearings by phone are recommended for ex parte applications for restraining orders (subject to the discretion of the Court for a particular case); Remote hearings by phone or video are recommended for contested restraining order hearings. See above for benefits detriments to each. Some discussion of obstacles and solutions are above and discussed here as well:
- One obstacle with respect to video hearings are spotty or limited access to WIFI/technology. This is particularly concerning for DV survivors who may have recently fled or have had their phone/technology controlled by their abuser. One solution is to provide a separate room at the courthouse (available in Marion County) where a litigant can appear at a hearing 'remotely' or a smart phone available for a litigant to borrow from the clerk (as in Clatsop County) so the litigant can appear remotely from outside the courthouse. When it comes to ROs, having a procedure that includes local DV/SA programs may allow those programs to provide these resources to a Petitioner. Illinois Valley Safe House Alliance [IVSHA] and Siuslaw Outreach Services, for example, have experience with long distance access to court proceedings and may have relevant information on what works well.
- Another obstacle is the additional burden this will place on Court staff, as they will be the first contact for attorneys and litigants struggling with technology, sharing exhibits, etc. Therefore training for court staff on some of the basics of the technology is important. In addition, training for attorneys, litigants and the public via videos on the OJD website or YouTube can advise each group on what they need to know re: appearing remotely, technology needs, sharing exhibits, what to expect during a particular hearing/proceeding, as well as some of the basic information that litigants often receive simply from being in the courthouse. More on training below.

3. If you are recommending in-person appearances in a particular proceeding, why are you making that recommendation? Are there obstacles to the use of remote technology? How can they be addressed?

- Certainly some hearings/trials may been to be in person either due to the volume and type of exhibits, the needs of the litigants, the need for multiple interpreters, or the limitations of the technology. Many of the obstacles we've outlined above have solutions we've proposed as well. However, with respect to domestic violence survivors, if a survivor is requesting to appear in person due to a concern with fully conveying a traumatic experience by phone, then the Court should consider

allowing such an appearance if it is safe and appropriate. Training on providing trauma-informed services is an important aspect of ensuring access to justice in both remote and in-person trainings.

4. What training is necessary to make full use of remote technology?

- With respect to ex parte applications of ROs by phone- Petitioners can be provided a link by the court or the local DV/SA Program to a video that will outline the process of obtaining the RO and include information of any technology needed (preferably only phone for the ex parte hearing, but it can provide information about technology needed for the contested hearing as well, if it is to be via video). The video can also provide basic information about the proceeding- next steps if the order is granted or denied; don't interrupt the Judge; ensure you have child care so you will not be interrupted; if attending by video, be sure your location is unidentifiable if you are in a confidential location, etc. [https://www.techsafety.org/ provides a lot of great information on tech safety for survivors of DV/SA]. This video or another video can also explain how to request an interpreter, how an interpreter will be used during the proceeding, how the litigant can communicate with the interpreter.
    - Such videos can ensure that Judges can hear the matter more quickly as they will not have to repeat this information. One Judge indicated that such a video/recording could be played at the same time for all RO applications of the day, then the Court can assign each applicant/Petitioner a time to call into the Court for their matter to be heard or receive a range of time they can expect a call from the Court (2p.m. to 3 p.m.), allowing litigants to better ensure they are in a good location for a call.
- Court staff will need to be trained on the technology and providing the most basic guidance/troubleshooting to attorneys and litigants struggling with technology
- Publications similar to the ones already created can be utilized/updated, and can be provided via email once litigants file their ROs, or the link can be provided on any Notice of a Court Proceeding sent to litigants/attorneys.
- For many of the reasons already explored, it is important for Judges and Court staff to receive training in Procedural Fairness, Implicit Bias, providing Trauma-Informed Services (TIS) and, related to TIS, understanding and combating Vicarious Trauma/Secondary Trauma/Compassion Fatigue (given how much trauma court staff and Judges are exposed to).

5. What is necessary to ensure that unrepresented litigants can use the recommended technology?

- See #4 for the suggestion of using short YouTube videos and publications that provide basic information on the technology needed, the process for admitting evidence/exhibits and calling witnessed, etc. It is also important that SRLs be provided information on how to request an alternative to a particular type of proceeding (see #9). This information must be available in many languages to ensure true access to justice.

- We must make sure that litigants with Limited English Proficiency not only have access to materials in their language, but also have information on how to ensure an interpreter is available during a hearing and how they can communicate with them during any hearing.

6. What is necessary to ensure fairness in the use of the recommended technology? Can some participants be remote while others are in the courtroom? What are the benefits and detriments?

- The inability to appear remotely should not limit a litigant's access to the court system, particularly with respect to ROs. Again, access to a room in the courthouse where a litigant may be able to use the court's own technology/WIFI, while it does require having another person in the courthouse, would help with the necessary distancing.
- Judges, in considering all the factors, should be flexible in granting requests for alternative hearing methods when possible

7. As to each type of proceeding, is it necessary that it be conducted by the same means statewide (e.g., fully remote, partially remote, telephone vs. video, or in-person)? If so, why?
If not, why not?

- There was different feedback on this issue. First, some counties may be able to provide more resource and options for litigants, so should not be held to providing less options. However, there is concern that there are already inconsistencies in access to safe proceedings for some survivors of DV and there is a concern that allowing Courts to determine their own process may exacerbate these inconsistencies.
- There are some proceedings that should be available remotely statewide, even if only some courts are able to provide the option of a separate room for a litigant to appear remotely with the use of the Court's technology.

8. How should a court adopt a procedure for utilizing remote means for designated types of proceedings? By Presiding Judge Order (PJO) or by another type of determination? Are case-by-case determinations appropriate?

- A PJO with clear guidelines, while giving Judges discretion in certain cases. The PJO should provide a floor (not a ceiling)- the bare minimum of what is expected to provide access to justice, while a particular case may allow for even more expansive opportunities.

9. How can a court most effectively notify litigants about the manner of hearing in certain types of proceedings or in certain particular proceedings (e.g., PJO, general website notice, notices to parties, etc.)? Are there instance in which a motion should be required or permitted to seek or object to the manner of hearing?

- Expanding the notices to parties, particularly with links to additional materials such as the recordings (video or audio) discussed above

- A form to request an alternative hearing format- one that is easily completed and easily accessible for all litigants- should be all that is required *at this time* to object to or request an alternate hearing format. A Motion should not be required at this time.

10. Can or should trials, particularly jury trials, be postponed? If conducted, are there ways in which the trial can take place remotely in whole or in part? If postponed, are there ways to keep the case moving and to encourage resolution without the impetus of a pending trial date?

- See the response to Question 1: Mediation, Judicial Settlement Conferences, IDRTs, and similar proceedings should be available as much as possible during this time to facilitate the resolution of a case. However, each of these options provides pros/cons, many unique to survivors of domestic violence. Therefore, information about the pros/cons of each should be created and readily available to all attorneys and litigants. For example, the Deschutes County DV/SA Program created a document for DV Survivors to consider when choosing between traditional trials and IDRTs. Similar materials can be created for each of these options (or one large resource that includes each option) and the pros/cons of waiting instead for an in-person Traditional Trial.

Domestic Relations Case Instructions
for Self-Represented Litigants
During COVID-19

Written Materials and Other Exhibits

******If you wish to present any paperwork, voicemails, text messages, Facebook or other exhibits to the judge, you must also provide a copy to the opposing party. ******

Both parties should submit all exhibits personally or by mail to the judge's staff three days before trial.

Uniform Support Affidavit and Related Financial Information

The Uniform Support Affidavit is a required document in all cases involving custody, parenting time, spousal support, or child support. Please completely fill out the affidavit included in your paperwork or access the affidavit online through the court's website and return it to the Court three days prior to trial. You must also provide your four most recent paystubs and your most recently filed tax returns, if you have them.

Date Set for Trial

If you settle your case before the date set for trial, you must immediately notify the Court and provide the Court with a Stipulated Judgment or a Motion for Dismissal. If you need help with the paperwork, please contact the Marion County Circuit Court Family Law Division at 503-373-4349.

If you want to request a postponement of your trial, you may ask the Court for a continuance in writing at the above address. The Court rarely allows a continuance. If your request is denied, you are required to appear for trial. If your trial is postponed, your new trial date will be sent to you in the mail.

Request for Information or "Discovery"

In many domestic relations cases, it is important that the Court review a significant amount of financial information. Trading copies of documents containing such financial information back and forth between the parties is called the "Discovery" process. Discovery information may include documents such as:

- Tax returns
- Pay stubs

- Credit card bills
- Pension or other investment information
- Bank records
- Child care records
- School records
- Insurance records
- Medical bills
- Other relevant financial information

Fees – Trial Only

The person who brought this matter before the court is required to pay the $131.00 trial fee 7 days prior to your trial date. These fees are **ONLY** for open and pending matters and **DO NOT** apply to Motions for Modifications. You may pay the fee at the accounting department window on the first floor of the courthouse. If the fee is not paid by the deadline, your trial may be cancelled or your case dismissed.

Interpreters

If requested, at least one week prior to trial, the court will provide a certified interpreter during the trial. If you are requesting an interpreter for yourself or a witness, please contact the judge's staff at the phone number above.

Accommodations under the ADA

If you are requesting ADA accommodations, please contact the judge's staff at the phone number above.

Trial Procedure During COVID-19

All domestic relations trials or hearings will be held by phone conference during COVID-19. The Court will call all parties at the phone number provided to the Court at the time set for trial. If you have changed phone numbers, you must notify the Court. If you wish to have a witness or multiple witnesses testify, their phone number(s) must be provided to the Court prior to trial. If a witness is not available when called, the trial will proceed without that witness' testimony.

All persons appearing by phone **MUST NOT** use a speaker phone. The use of speaker phones causes interference.

Unless a party objects, all exhibits from each party will be admitted as evidence at the beginning of the trial.

The judge may ask you questions. If you do not understand the question, tell the judge you do not understand the question. Do not answer a question unless you understand what is being asked.

Neither party may interrupt the Court, the other party, or a witness. You must talk only when it is your turn. Everyone will get their chance to speak.

Both parties must stay calm and tell the truth. The inability to control your demeanor and act appropriately during the trial or hearing could be detrimental to your side of the case.

Thank you in advance for your cooperation as we move through these most difficult times.

Appearing Via WebEx

Due to the COVID-19 Pandemic, many hearings in the Oregon Courts are held by remote means. The Oregon Judicial Department now uses WebEx for many audio and video appearances before the Court.

Instructions

You must follow the instructions set out below to access WebEx Meetings. This platform will allow you to participate in your trial or hearing using WebEx.

The WebEx Meetings application can be downloaded on all kinds of devices, such as personal computers, laptops, some tablets, and cell phones. To download WebEx:

- Search your device or application store for "Cisco WebEx Meetings" and install the application that appears with this icon: 
- Open the WebEx application
- Click "Accept" to the Terms of Service and Privacy Statement.
- If prompted, click "ok" for WebEx to detect and connect to nearby video systems and to detect motion for switching to Audio Only Mode.
- *For Android phones:* Allow access **only** for microphone and camera, you can deny all other access prompts. This will not prohibit you from using WebEx or participating in your scheduled meeting.
- *For iPhones:* If prompted, allow WebEx to access both your camera and microphone.
- *For Personal Computers, laptops, and tablets:* If prompted, you will need to download any required plug-ins.

Once you have downloaded the WebEx Meeting application you will be able to click the 'join meeting' link that was emailed to you in your invitation by the Court. If you are unable to locate it, please check your 'spam' or 'junk' folder. If you are still unable to find it, please contact the office of the judge assigned to your case.

Rules of the Court When appearing through WebEx

- Appear from a quiet environment. Excess noise will interfere with the Court proceeding and recording.

- During the hearing you will need to remain seated. Do not roam about your surroundings or perform other tasks.

- If available, please use headphones. Headphones with microphones are preferred.

- If you are not speaking your microphone should be muted.

- Remain free from distractions.

- Litigants should not be in a room with anyone else.

- Witnesses may only be in the same room as the litigant when the witness is testifying. Witnesses must not be in the room with the litigant before or after the witness testifies.

- Dress appropriately. This is a Court proceeding.

- Do not chew gum or eat.

- Do not talk when someone else is talking. Every person will get their chance to speak.

- Follow all other instructions given by the judge.

Study of Virtual Child Welfare Hearings
Impressions from Judicial Interviews

June 2021

The COVID-19 pandemic required courts to quickly adapt their operations to mitigate the spread of the virus. For many child welfare courts, this meant launching virtual hearings and finding new ways for families, attorneys, and advocates to communicate safely with the court and with each other. The National Center for State Courts (NCSC) with funding from Annie E. Casey and Casey Family Programs is studying the experience of families and court professionals in virtual child welfare hearings to identify promising practices of effective and efficient virtual hearings.

As part of this effort, NCSC staff interviewed judges who oversee child welfare cases. The goals of the interviews were to learn about judges' experiences conducting virtual hearings, their opinions on the benefits and challenges of virtual hearings, and their perceptions of how families and court professionals navigated the transition. This document summarizes themes from those interviews. Participation in the study was voluntary, so themes are not generalizable to all child welfare courts; however, they do provide insight into the new territory of virtual child welfare hearings.

Judicial Interviews

NCSC staff interviewed 18 judicial officers in 5 states. Their years of experience hearing child welfare cases range from less than one year – meaning their experience as a jurist was mostly or entirely virtual, to 29 years. They represent both high volume urban courts and rural jurisdictions that often cover multiple counties. Some judges hear child welfare cases exclusively, and others hear additional juvenile case types, such as delinquency or specialty courts, or support a general docket of family, civil, and criminal cases.

Noticeable Increase in Parent Participation

Almost all of the judges interviewed believed that parents attended virtual hearings more frequently than in-person hearings. They attributed this increase in attendance to the convenience of not having to travel or find parking, not having to take time off from work, and to the less intimidating atmosphere of the virtual courtroom. One judge explained, "Car trouble was much more of a barrier [to attending hearings] than technology." Additionally, in several jurisdictions, incarcerated parents are able to participate in hearings more often due to increased remote connections to jails and prisons and elimination of transportation barriers. While it may be more convenient for a parent to participate virtually from home, work, or the community, some judges expressed concern about whether parents have the privacy needed to be fully present and engaged in the hearing.

Most of the judges in the study reported that young people appeared at hearings infrequently before the transition to virtual hearings, and that did not appear to change after the transition. A few judges noticed a slight increase in participation of young people in virtual hearings, particularly since they could take a few minutes away from class instead of missing most of the school day to attend court. Others observed fewer young people in hearings during the pandemic. Almost all judges remarked that young people who appeared virtually were familiar with the technology and few, if any, had problems with it.

Most Judges Prefer Video, But Few Require It

Most of the judges who participated in the study were presiding exclusively over virtual hearings using a web-based platform at the time of the interviews; however, some were also conducting hybrid hearings with parties appearing in-person in the courtroom while others appeared virtually. Almost all judges stated they prefer video participation; however, they varied widely in the extent to which they encouraged or required video participation. Some incorporated written instructions into their hearing notices, including guidelines for virtual courtroom etiquette. Although every judge interviewed participates in their own virtual hearings by video, a few said that some of their colleagues chose to keep their cameras off during virtual proceedings.

While every judge cited instances of parents lacking the equipment or internet connectivity necessary to join virtual hearings, reports of chronic technological issues were rare. Judges noted that it was common for some parties or attorneys to appear only by audio, either connecting to the platform with their camera turned off or calling in by phone, but the frequency of audio-only participation varied across jurisdictions. One judge estimated that 98% of parents participated by phone only, while other judges' estimates were much lower.

Virtual Hearings Support Time-Certain Scheduling

Many judges commented that the shift to virtual hearings forced them to schedule hearings to occur at specific times (time-certain calendaring) instead of setting all cases for one morning or afternoon time slot. This is especially true in jurisdictions that use a unique link for each hearing, rather than one link for all cases in a specified time period. Time-certain calendaring is a long-standing best practice recommendation for dependency courts that has been historically difficult for many courts to achieve. One judge noted, "We used to have 15 cases set at one time (in the courthouse)," but now [with virtual hearings] each hearing is set for a specific time and duration.

Differing Opinions on Expectations of Virtual Courtroom Behavior

Some of the traditionally formal aspects of courtrooms are difficult to translate to an online hearing, and several of the judges lamented the loss of decorum that accompanied the transition to virtual hearings. Sepcifically, some expressed the concern that the virtual environment dampens the gravity of the situation. Some judges developed guidelines for virtual courtroom decorum that are either announced at the beginning of hearings or sent to parties in writing with the hearing notice. One judge insisted, "This is just as if we were in the physical courtroom. All the same rules apply." Other judges were inclined to give leeway to participants, acknowledging the stress of the situation and relaxing some of the traditional aspects of courtroom appearances. A judge stated, “I had to weigh – is it more important to maintain formality, or for them to hear what I’m saying and stay engaged?”

Two Views of Virtual Testimony

Trials involving documentary evidence and witness testimony present logistical challenges in the virtual environment. Judges pointed out that it is more difficult to assess witness credibility, recognize witness coaching, or detect use of notes in virtual hearings than in-person. Others, however, found advantages to virtual trials, including the ability to see witnesses’ faces up close on camera and observe how other participants react to testimony. One judge remarked, "On a personal level, I've noticed that I don't have a good poker face."

Virtual Hearings May Allow Court Professionals More Time for Casework

Most attorneys and caseworkers appear in court frequently, and judges observed that those who experienced technological issues at the beginning of the transition to virtual hearings were able to solve the issues relatively quickly. For others, the transition was relatively seamless. Judges noted that the

pandemic required caseworkers to become technologically savvy, because much of their work outside of the courtroom transitioned to remote, including arranging and supervising online family time and other virtual services for parents and children.

Several judges noted that virtual hearings benefited court professionals, such as attorneys, caseworkers, and court appointed special advocates (CASA), by reducing travel time and time spent in the courthouse waiting for hearings to begin. Judges observed that virtual hearings allowed attorneys to appear in courts in multiple counties on the same day, eliminating travel time for the attorney and alleviating some case scheduling challenges. Judges generally found that attorneys were as well or even better prepared for virtual hearings than for in-person hearings. Some observed that attorneys who used to wait until the day of hearing to confer with clients and other counsel in the courthouse were reaching out to clients and colleagues before the hearing date. Similarly, judges noted that caseworkers and CASA seemed to be as well or better prepared for virtual hearings than they had been for in-person hearings, despite the challenges of adapting their responsibilities of face-to-face visits and arranging services to social distancing requirements.

Opportunity to Include More Social Supports in Hearings

Eliminating travel and wait time has also allowed greater participation of individuals who support parents and children in child welfare cases. For example, several judges remarked that foster parents and kinship caregivers appear more frequently in virtual hearings than in-person hearings. Likewise, relatives and friends who may be of assistance to the family, but who live outside the jurisdiction or would have trouble getting to the courthouse, can now easily participate in hearings. This appeared to be especially helpful for things like adoption celebrations; one judge said that she can now tell the young person to “invite 500 people." For some, virtual hearings also present the opportunity to easily include therapists, medical professionals, and other service providers who previously were unlikely or unable to spend several hours in the courthouse. One judge noted that these consultations with professionals have led to more in-depth discussion during review hearings.

Judges are Considering the Value of Virtual Hearings for the Future

For many judges interviewed, virtual hearings represent the "new normal." They cannot see a future in which parties and attorneys are required to come to the courthouse for all child welfare hearings, even when it is safe to do so. As one judge summed up the transition to virtual court, “I think that it's pushed us along the technology curve faster….and that's probably a good thing. There are a lot of benefits that we are going to be able to glean from this. Anybody who has a challenge or barrier getting to court – this will help them.”

Some, however, look forward to resuming in-person hearings. To them, the formality of the courtroom reflects the serious nature of these cases, and they believe the important personal connection between the judge and families is difficult to achieve virtually. One judge's preliminary assessment: "I don't see the benefits [to virtual hearings]. These are life-changing events in the courthouse and to not treat that as an important event is not good for society."

Although the judges differed on the extent to which virtual hearing should continue, they were unanimous in wanting virtual hearings to be an option for at least some types of child welfare hearings after social distancing requirements are lifted. Moreover, all judicial officers were interested in feedback about virtual hearings from parents, youth, caregivers, and professionals and considering the input of stakeholders to inform future practice.

"I think that it's pushed us along the technology curve faster….and that's probably a good thing. There are a lot of benefits that we're going to be able to glean from this. Anybody who has a challenge or barrier getting to court – this will help them."

This document was prepared by the National Center for State Courts with funding from the Annie E. Casey Foundation and Casey Family Programs. Points of view or opinions expressed in this report are those of the authors and do not necessarily represent the position, opinions, or policies of the Annie E. Casey Foundation or Casey Family Programs.

MICHIGAN TRIAL COURTS: LESSONS LEARNED FROM THE PANDEMIC OF 2020-2021

Findings, Best Practices, and Recommendations

State Court Administrative Office

Lessons Learned Committee

June 29, 2021

The Michigan Supreme Court and the State Court Administrative Office would like to thank the Lessons Learned Committee, the various courts, and stakeholders for their invaluable assistance in contributing to the compilation of information and preparing these findings and recommendations.

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The Committee prepared this report based on information compiled from the review of local administrative orders, policies, and information generated from interviews and/or surveys conducted by the Committee, the State Court Administrative Office, and the State Bar of Michigan of:

- Michigan Supreme Court Security & Emergency Management
- American Board of Trial Advocates – Michigan
- Michigan Defense Trial Counsel
- Prosecuting Attorneys Association of Michigan
- Criminal Defense Attorneys of Michigan
- Michigan Sheriffs' Association
- Tribal State Federal Judicial Forum
- Attorneys throughout the state
- Judges, magistrates, referees, court administrators, clerks, registers, friends of the court, probation staff, mediation clerks, prosecutors, and public defenders from a diverse selection of courts from counties, including Berrien, Calhoun, Cass, Cheboygan, Chippewa, Genesee, Gogebic, Iron, Kent, Lapeer, Lenawee, Mason, Marquette, Mecosta, Oakland, Saginaw, St. Clair, Tuscola, Van Buren, and Wayne.

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Introduction

The Michigan Supreme Court (Court) aptly stated, "Michigan has never faced a challenge like COVID-19."[1] Our judicial system managed the shutdown of court buildings, coordination of essential workers, redistribution of resources to maintain services, and development of virtual courtrooms, while implementing ever-evolving standards to maintain the safety of the public and court staff, and reducing the risk of spreading the virus. While the court system might fairly be perceived as tradition laden, our courts, nonetheless, adapted quickly to the pandemic by incorporating technology and modified procedures that in January 2020 would have been considered impossible. As of April 2021, Michigan trial courts had logged more than 3 million hours of Zoom® hearings and are considered one of the leaders in the country.

The Lessons Learned Committee was formed in May of 2020 and charged with assessing the experiences of our justice system during the pandemic, from implementing emergency procedures following the issuance of the Governor's Executive Order and the Court's Administrative Orders, to the efforts undertaken to continue operations for an indefinite period with judges and court staff working remotely, to the modification of hearing procedures to accommodate a virtual courtroom. The Committee considered what court users reported they struggled with throughout the pandemic; what worked and what didn't work well; and recommendations for the future of the courts based on our shared experience.

Sophocles said, "I have no desire to suffer twice, in reality and then in hindsight." This report is not intended to inflict more suffering, but to critically assess the work the courts performed during the pandemic, the difficulties experienced during the transition to a remote workforce and virtual courtroom, and what the judicial system should consider to manage our courts more efficiently in the future.

Many counties, and the circuit, district, and probate courts located within those counties, encountered both common and unique experiences. This report does not attempt to recount or quantify every disclosure, but highlights the common experiences that are representative of what shaped our justice system in this pandemic. Every court tried its best, and many courts collaborated with other courts and stakeholders to help direct and lead a path through the challenges. Although many of the issues and struggles that arose during the pandemic overlap different operations of the courts, this report focuses on the following:

- emergency preparedness and response,
- continuity of operations and planning for return to full capacity,
- the virtual courtroom and remote proceedings, and
- a review of criminal procedure issues arising as the courts begin to tackle the backlog of criminal cases.

The COVID-19 Emergency: Preparedness and Response

Judge James Alexander, Oakland County Circuit Court (now retired), best summarized the Michigan trial courts' level of preparedness for the pandemic and initial shutdown orders: "Anyone who tells you they were prepared for this is either lying or living in Oz!" Of the courts

[1] Michigan Supreme Court, Return to Full Capacity: COVID-19 Guidelines for Michigan's Judiciary

surveyed, only 24 percent had a documented emergency plan or continuity of operations plan in place prior to the pandemic. Those plans did not anticipate a complete shutdown of services; rather, they prescribed the continuation of operations with reduced level of services either in a different location or by combining all court operations at a central location. The idea of remote operations with nearly all personnel working from home had not previously been considered by any court in the state.

Interestingly, prior to the pandemic some courts had consulted with their local health department regarding the impact of an infectious disease/epidemic outbreak on the justice system and others were experimenting with Zoom® for certain limited hearings.[2] However, these courts admit their actions were initiated not in anticipation of the shut-down, but as a result of their desire to evaluate and assess all aspects of their court operations. In that regard, they were "lucky" to be in a better position than most courts to quickly pivot into a virtual courtroom environment because of their entrepreneurial approach to solutions.

Of those courts with an emergency plan in place prior to March 2020, 83 percent identified essential workers, and those workers had been fully briefed and informed of the emergency plan. Beyond the identification of essential workers, the preparedness for and implementation of emergency protocols were primarily managed day-to-day to address immediate needs. The more coordinated a court's operations were among administration, judges, magistrates, referees, clerks, registers, staff, prosecutors, public defenders, city/county operations, sheriffs, jails, friends of the court (FOC), bar associations, Michigan Department of Health and Human Services (MDHHS), local health departments, and other key stakeholders, the more nimble and responsive the court – and the more positive the experience for those using and relying on the courts.

The Difficulties Experienced by Courts Implementing Emergency Protocols

On March 10, 2020, Governor Whitmer declared a state of emergency to address the COVID-19 pandemic.[3] On March 15, 2020, the Court authorized trial courts to "implement emergency measures to reduce the risk of transmission of the virus and provide the greatest protection possible to those who work and have business in our courts."[4] By April 1, 2020, Michigan had confirmed 9,334 cases of COVID-19 and 337 deaths, with thousands presumed infected but not tested. By May 2020, the confirmed cases within the state rose to 42,356, resulting in 3,866 deaths from the disease.[5] During this rapid spread of the disease, the metro-Detroit area was the epicenter in Michigan, and rural areas such as Northern Michigan, the Thumb, and the Upper Peninsula had minimal, if any, reported cases. The trial courts were left trying to decipher what

[2] SCAO had secured Zoom® licenses in May of 2019 and began working with courts to expand the use of virtual proceedings to compliment the Polycom® videoconferencing system or serve as a substitute. SCAO was ahead of the curve in 2019 in moving to expand remote hearing capabilities. The use of Polycom units in several Michigan courts over the past decade played an important role in the transition to remote hearings in many jurisdictions. The majority of the Polycom units were funded by the state (SCAO and MDOC).

[3] Executive Order 2020-4.

[4] MSC Administrative Order No. 2020-1.

[5] Executive Order 2020-151.

"emergency measures" should be implemented for their location and how to manage personnel, budgets, and the docket.

Trial courts were immediately faced with whether to adjourn matters and for how long, and how to quickly and efficiently communicate adjournments to litigants, attorneys, and jails. Additionally, courts began to assess their capacity to conduct videoconferencing hearings, whether and how that capacity could be expanded, and what employees were necessary to manage the video sessions of the court.

The Court's March 15, 2020 administrative order[6] provided trial courts with the authority to:

- Adjourn any civil matters and any criminal matters where the defendant is not in custody; where a criminal defendant is in custody, trial courts should expand the use of videoconferencing when the defendant consents;
- Maximize the use of technology in civil cases to enable and/or require parties to participate remotely and waive any fees currently charged to allow parties to participate in remotely;
- Reduce the number of cases set to be heard at any given time to limit the number of people gathered in entranceways, lobbies, corridors, or courtrooms;
- Maximize the use of technology to facilitate electronic filing and service to reduce the need for in-person filing and service;
- Waive strict adherence to any adjournment rules or policies and administrative and procedural time requirements, wherever possible;
- Coordinate with local probation departments to allow discretion in monitoring probationers' ability to comply with conditions without the need for amended orders of probation;
- Take any other reasonable measures to avoid exposing participants in court proceedings, court employees, and the general public to the COVID-19 virus;
- Take into careful consideration public health factors arising out of the present state of emergency: a) in making pretrial release decisions, including in determining any conditions of release, b) in determining any conditions of probation; and
- If a chief judge or the court's funding unit decided to close the court building to the public, then the court must provide the State Court Administrative Office (SCAO) with the court's plan to continue critical services.[7]

Shortly thereafter, the Court directed trial courts "to the extent possible and consistent with constitutional and statutory rights" to conduct hearings remotely or adjourn all non-emergency or out-of-custody criminal matters to April 3, 2020.[8] Also, the courts were directed to limit access to the courtrooms and other spaces to no more than 10 people, including staff, and to practice social distancing.[9] At that time, it was not clear how long the pandemic would last, but the trial courts faced a prolonged period of uncertainty.

[6] MSC Administrative Order No. 2020-1, March 15, 2020

[7] Id.

[8] MSC Administrative Order No. 2020-2, March 18, 2020.

[9] MSC Administrative Order No. 2020-2, March 18, 2020.

Identifying Essential Services AND Essential Workers

The Court's March 18, 2020 administrative order helped courts identify those hearings that were considered essential and those that could be adjourned. The Court continued to update administrative orders and by May 2020, SCAO developed a Remote Participation Chart.

Initially, most courts adjourned all hearings except emergency matters (i.e., personal protection orders, in-custody criminal proceedings, certain child protective hearings, domestic relations matters involving ex parte requests, involuntary mental health treatment, emergency matters involving guardians). During this initial period of adjournments, many courts directed "non-essential" workers to remain home pending further instruction while the courts attempted to identify what services were essential, how to provide those services, and the personnel necessary to provide the services.

The courts identified essential hearings that could be conducted remotely and those requiring in-person hearings. The ability to make these decisions quickly and efficiently was dependent upon whether a court had prior capacity to work remotely and to accept pleadings online or by e-mail/ fax. If a court had remote capacity, then it was able to use those employees familiar with remote hearings to manage the hearings. Likewise, if a court was able to accept pleadings online through the OnBase program or by e-mail filings, it had the option to close most, if not all, in-person filing in the clerk's office, thereby reducing the number of employees needed in the building. Courts that did not have electronic capacity were left to coordinate a filing system based on few employees while limiting the public access to the courts, which slowed the process of filing and managing the docket system. Additionally, clerks' and registers' offices were required to coordinate filings and hearing schedules with the judges' offices, but those offices were – for many – trying to manage remote hearings for the first time; all of which significantly slowed the process.

The courts struggled to identify and coordinate essential workers. As noted, of the small percentage of courts that had an emergency plan in place in March 2020, 83 percent of those identified essential workers. Unfortunately, many courts quickly learned they were neither structured for nor equipped to have employees work remotely. Trial courts faced the immediacy of having to take actions without adequate support staff, technology, and fully vetting the practicality of the procedures to be utilized.

A remote hearing requires not only court staff, judges, magistrates, and referees to be familiar with remote hearing procedures, but also those involved in the hearing, including litigants, prosecutors, public defenders, retained attorneys, probation officers, and witnesses. Self-represented litigants, already unfamiliar with the standard procedures of the court, grappled with the process of remote connection to the court. The courts had to develop protocols and tutorials to educate the users of the court's remote platform; a role the courts had not typically served pre-pandemic. The courts were not initially equipped to do these tasks and improvised "on the fly."[10]

[10] In the summer of 2020, SCAO developed a toolkit document entitled Guidance on Conducting Remote Hearings with Self-Represented Litigants. The toolkit included practice tips learned from various courts around the state, along with resources shared from other sources.

Various courts – including those from small to large counties – discovered their IT departments would not support the Zoom® format, notwithstanding that SCAO had secured licenses for the platforms. The difficulties in managing the remote technology are addressed later in this report.

Even though the courts wanted to offer remote hearings, the essential workers were often not equipped with the hardware to connect to the court network remotely, and even if they could connect, their Internet connections were weak, especially in rural areas. In some courts, the judges loaned personal laptops or tablets to employees so that the employees could work from home while they waited for the county funding source to approve acquisition of equipment necessary to support employee remote connectivity to the court system.

Even when judges and staff had personal computers at home or in the office, the computers typically were not equipped with microphones and/or cameras. The courts had to secure resources to purchase the equipment necessary to work remotely and conduct remote proceedings. The courts faced budget constraints or reluctance of a funding unit to approve expenditures because the funding unit did not understand the need for remote access. Several courts negotiated discounts with local box stores to purchase 10 or more camera/microphone sets every 10 to 20 days to equip personnel.

At the same time, courts attempted to coordinate emergency planning with stakeholder groups, including prosecutors, public defenders, sheriffs, jails, probation offices, FOC, DHHS, mental health providers, and county boards of commissioners. These efforts were almost immediately hampered for two reasons:

1) The stakeholder groups were making the same emergency decisions for themselves and were not readily available; and,
2) In those counties where relationships were strained due to lack of communication or other intragovernmental conflicts, the communication lines were not well defined or open.

Courts struggled to prioritize criminal cases for in-person hearings and the amount of staff necessary to manage the hearings. In some counties, hearings were delayed because prosecutors and public defenders could not agree on procedures.

Some courts initially identified one or two "emergency" judges to handle essential cases within the courthouse. However, the plan proved unmanageable in the mid-sized to larger counties because the case volume was too large in both civil and criminal dockets. Judges were required to hear the essential cases to maintain the dockets, and to consider remote virtual hearings by Zoom® or Polycom®. Probate judges remained with their primary docket, focused on essential hearings, and adjourned most hearings until the later part of April or early May 2020.

When courts identified necessary judges and essential hearings, hearings were often delayed because the processing of pleadings was slowed in the county clerk's office. Courts accepting online filing of pleadings could process the records more quickly than courts that only permitted in-person or mail filings. Also, clerks' offices were working with reduced staff and limiting the number of persons who could enter the office to file documents; these procedures slowed the typical processing time and made it difficult to coordinate with judicial staff the time required to permit processing of the pleadings before scheduling hearings. These delays, while annoying to standard hearings, resulted in critical delays in emergency hearings such as personal protection orders, child protective hearings, guardianships, and child custody emergencies.

The courts were not immune from the political divisions experienced throughout the country regarding the nature of the pandemic and its health risk. Whether a court shut-down or remained open could, in some measure, depend on where the court was located and whether a funding source directed a shut-down. Courts in much of the Upper Peninsula and some regions of the upper Lower Peninsula continued to operate, but limited the number of people who could enter the court to file pleadings, review files, pay fines, or appear in court. Courts in more urban areas initially shut down all operations except for emergency hearings. This status lasted between two to four weeks.

Some courts were directed to shut down by their county funding source. In these instances, the county identified the essential operations to be maintained within the county and didn't recognize the need for the courts to be open. Courts were required to explain to the county boards or managers that the courts were the third branch of government and that the Michigan Supreme Court expected emergency and essential hearings to proceed even if personnel were working from home.

The need to communicate with and secure approval from the local funding unit to permit operations and approve designated essential employees slowed the court process. Importantly, many local governmental units had not experienced nor anticipated governmental functions operated from remote locations, and could not easily comprehend services continuing without personnel located inside the brick and mortar locations commonly identified for governmental services. In some counties, the funding units would not initially approve wages unless the employees were working at the courthouse.

There were numerous examples across the state where a circuit court was not conducting in-person hearings except when required under the Court's administrative orders, but the district court (or vice versa) would hold in-person hearings for many categories of cases. The courts were not consistent within their county in managing hearings. These discrepancies were primarily caused by a failure to coordinate the needs of all stakeholders within the county and how to effectively address those needs, and this caused confusion for attorneys over which courts were conducting in-person hearings and which were primarily relying on remote virtual hearings.

Those courts with strong and collaborative relationships with their funding unit managed these staffing and resource issues more quickly and efficiently.

Courts coordinated with the jails and prisons to transfer inmates for essential hearings. While this function had relatively few complications pre-pandemic, the transfer to/from and housing of inmates in the courts while waiting for a hearing was complicated by the need for personal protection, social distancing, and quarantines. Additionally, the Sheriffs' Association noted uncertainty with respect to the rules for transporting, quarantining inmates, managing inmates at the courthouses, and whether there would be limited inmates permitted in the court each day. These issues were addressed at the local level.

Inmates were required to have personal protection, and the need to practice social distancing limited the number of inmates that could be transported, which, in turn, limited the number of hearings that could be conducted at a court. The courts and county sheriffs had difficulty in the first few weeks, and in some instances months, coordinating an efficient schedule. In a joint statement released on March 26, 2020,[11] by Michigan Supreme Court Chief Justice Bridget M. McCormack and Michigan Sheriffs' Association Executive Director Sheriff Matt Saxton, judges

[11] Michigan Courts News Release, March 26, 2020

and sheriffs across the state were acknowledged for working together to safely reduce jail populations while focusing on keeping the communities safe.

Jails reduced the number of transport guards and staff working each shift and this burdened the system by slowing the process to transport inmates to hearings or return inmates to the jail. The logistics were further complicated by the vast difference of resources and location of jails in each county. Many counties do not have centrally located jails, and travel time to and from the court reduced the number of inmates that could be transported each day while still maintaining safety practices. This reduced the time available for essential hearings in the court.

Courts worked diligently to reduce workers in the courthouse and limit possible exposure to the virus, but it was quickly discovered that the sheriffs transporting inmates had been working a full shift inside the jail and created risks to the court staff for possible exposure to the virus. The courts and sheriffs worked through the logistics to ensure proper transport and safe operations, but this delayed criminal proceedings.

Wayne County was initially crippled in coordinating criminal hearings because of inflexibility of the jails to work with the court plan. The Wayne County Sheriff and the jails were legitimately concerned about the spread of the virus that was rampant in the Detroit metropolitan area, and acted to protect the sheriffs and inmates. The court and the Sheriff's Association worked to resolve the difficulties and overcome communication impediments, but the process took several months.

The courts and jails have long used the Polycom® video conferencing system to conduct criminal arraignments and other appearances that do not require in-person hearings. Polycom® was used as much as possible in the early stages of the shut-down to accommodate more hearings. But the jails had limited space for inmates to connect to Polycom®, and the use of Polycom® extended the length of the hearings because defense counsel – who could not meet with the client in-person before the hearing – required access to the Polycom® system prior to and during the hearing to confidentially confer with the client.

Both the district and probate courts serve a large constituency that do not have ready access to technology necessary to access a website to learn about emergency procedures, or to print, scan, or e-mail pleadings, notices, and documents. The courts recognized early that they needed to provide walk-in service, but were hampered by other shared courts within the same courthouse shutting down or significantly reducing public services.

The nature of probate court hearings created issues regarding safety for the litigants. For example, a hearing to appoint a guardian and/or conservator for a developmentally disabled adult requires the adult ward to be present for the hearing. Often, these adults are subject to medical conditions that can increase the risk of the adult contracting a virus. While courts could conduct the hearing by Zoom®, the family and other caregivers were often limited in the use of the technology. The court was left with either adjourning hearings and/or developing training materials to assist the constituents to access the court's remote hearing technology.

Probate courts, like many other courts, that were not prepared for virtual hearings were more liberal in the use of telephone hearings for non-evidentiary hearings, motions, and scheduling conferences. While this permitted essential hearings to proceed in many instances, the judicial officer and staff had to be in court to conduct the telephone hearing. It was difficult to manage the proper staff ratio to maintain operations and safety.

Probate courts were required to coordinate with local hospitals, mental health facilities, DHHS, guardians, sheriffs, and banking institutions. Courts were using Polycom® for mental health hearings and other limited hearings, but it was difficult to expand the users of the Polycom® system without training and training of users was difficult because of limited access. Counties that created tutorial sheets for stakeholders and posted the tutorials to a website experienced fewer delays in coordinating hearing attendance.

Managing under the Michigan Supreme Court's Administrative Orders

The Michigan Supreme Court and the State Court Administrative Office were tasked with the nearly impossible: guide the trials courts through an immediate shutdown of operations while maintaining access to justice through remote proceedings.

As noted, the initial shut-down orders created uncertainty for the courts. Courts across the state immediately began to address questions and details such as how long the shutdown would last; how long hearings and trials should be adjourned; how the court should handle deadlines previously set in a proceeding but expiring during the shutdown; whether statutory filing deadlines would be extended; and whether court efforts to substantially comply with various mandated procedures under statute or Michigan Court Rules would be considered acceptable to SCAO and the Court as protecting procedural rights of parties during the shut-down.

The Court quickly ordered that in all deadlines applicable to the commencement of all civil and probate case-types, including but not limited to the deadline for the initial filing of a pleading under MCR 2.110 or motions raising a defense or objection to an initial pleading under MCR 2.116, and any statutory prerequisites to the filing of such a pleading or motion, any day that falls during the state of emergency declared by the Governor should not be included for purposes of calculating the time for filing in accordance with such deadlines.[12] Additionally, the Court extended the expiration of summonses and dates to file post-judgment motions filed in trials; allowed for litigants to seek a fee waiver by electronic process; and permitted all service of process under MCR 2.107(C) to be performed using electronic means.[13]

Jury trials in both civil and criminal cases were delayed until June 2020, subject to further order. While some courts have re-opened under a phase of operations that permits jury trials, many courts are not able to conduct jury trials because of the re-opening phase they are caught in due to county infection and hospitalization rates. The courts are keenly aware these delays create significant backlog of the criminal dockets, potentially affecting the rights of criminal defendants, and expand the back-up of the court's docket.[14] Section 5 of this report explores criminal procedure issues.

The district courts, primarily, and other civil courts were provided new case procedures for handling landlord-tenant disputes, including prioritizing of cases. These orders, in part, considered the impact on landlord-tenant responsibilities and payment under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Public Law No.116-136, that imposed

[12] MSC Administrative Order No. 2020-3, March 18, 2020; amended by MSC Administrative Order No. 2020-08, May 1, 2020.

[13] Id.

[14] This report does not attempt to address the issues regarding conducting remote jury trials. The Supreme Court and SCAO issued a report in July 2020 entitled Michigan Trial Courts Remote Jury Trial Standards and Recommendations.

a moratorium on the filing of summary proceeding actions to recover possession of premises for nonpayment of rent that meet certain parameters. The procedures created questions and docket management issues, but many of the courts worked together to share insights and practices.

The expiration dates for personal protection orders were extended to July 2020. Respondents were permitted to object to the extension by a motion to modify or terminate. Although many courts posted the extension rules on their website under COVID-19 protocols and others mailed notices to respondents if there were valid addresses, the effort to uniformly advise the respondents outside of general news reports was inconsistent.[15] Courts questioned whether they could provide leniency to a respondent who believed a personal protection order had expired, had not received notice of the extension, and contacted the protected party to discuss relationship or family matters – in violation of the extended order – but without threat or violence. With this particular issue not specifically addressed in the administrative orders, courts were left to their discretion, consistent with managing a personal protection hearing prior to COVID-19.

The extension of deadlines created a burden on court staff to manage the deadline schedule to avoid unnecessary notices to dismiss cases for non-service, management of electronic requests for fee waivers and status of summons, and management of files once the executive orders would be lifted. This all done while court staff was reduced and/or working remotely.

Beginning in April 2020, and continuing to present, the Court and SCAO have provided sample order templates and responses to frequently asked questions to assist courts in fashioning local administrative orders or policies to manage the local courts consistent with the Court's administrative orders. Many courts found these helpful and, importantly, they provided guidance to local funding units to understand the need to maintain access to the courts even though court staff and judicial officers were working remotely. Some courts believed the Court's administrative orders were a "one size fits all" approach without engaging sufficient feedback from the various trial courts. Nevertheless, the courts also acknowledge that SCAO regional administrators and staff were extremely helpful in responding to specific questions and needs.

Most courts issued local administrative orders or policies within the first two months following the Governor's Executive Orders and the Michigan Supreme Court's administrative orders in March and early April 2020. The courts that were most successful in informing users of the orders and policies posted them on the court's website, social media, and e-mailed to local bar associations, stakeholder groups and local media. These courts routinely updated the orders/policies after substantive updates from the Court and SCAO; the courts averaged between three to six updated local administrative orders and polices over an eight-month period, when many years a court might issue one, at most. However, many courts did not initially communicate these orders and policies in a proactive manner and did not coordinate with stakeholder groups resulting in confusion and uncertainty.

Impact of Budget Issues on Trial Courts Responding to COVID-19

The trial courts and their funding units immediately faced the challenging prospect of budgeting for the costs associated with purchasing personal protection equipment (PPE); sanitation

[15] Some courts considered mailing notices of the extensions, but long term this was an additional cost that was not justified given the rising budget constraints caused by other COVID-19 expenses.

materials, and overtime to maintain a clean courthouse during and after business hours; signage for directing traffic safely into and through the courts; plastic shield protection for personnel required to be exposed to the public; and technology and equipment to permit personnel to work remotely and for the court to conduct remote hearings. The Michigan Tribal Courts faced similar budget restraints following tribal decisions to suspend or cut budgets, and courts were closed or limited access to by appointment only to safely operate the courts.

SCAO had to become immediately familiar with laws regarding employee furloughs, the CARES Act, and government loans to assist funding payroll and purchase of personal protection equipment and other technology/equipment to manage remote operations under FEMA and other government programs. SCAO regional administrators provided courts updates and resources to review to address budget issues, and are commended for the break-neck speed of learning, assessing, and developing plans to manage the courts.

The courts could not predict the length of time the Governor's stay-at-home order would remain in place and when Michigan would "return to normal." At the beginning of the pandemic, many Michiganders hoped the shut-down would be no longer than one to three months, and some funding units were initially cautious to authorize expenditures for safety and technology, hoping to manage the shut-down on a limited budget. Those courts were caught flat-footed, but were quickly brought along by the assistance of SCAO and consultation with surrounding counties when it was clear the pandemic would be for the long haul.

The courts, particularly in small- to medium-sized counties, were required to expend a great deal of time educating their funding units regarding the need for the courts to remain open through remote hearings. The difficulty and delays this process caused the courts was a common refrain.

The greatest budgetary concerns expressed by the courts included costs for technology equipment (laptops, tablets, cameras, microphones, printers, etc.); software applications; personal protection equipment and cleaning supplies; overtime and staff expenses; increased postage and envelopes/paper; and declining revenue.

The courts must use this pandemic to advocate for their funding units to support the courts' efforts to adopt an electronic filing system and a more robust paperless system supported by online interaction for users of the court, and to maintain infrastructure and equipment to continue remote hearing access through Zoom®.

Managing the Filing of Pleadings and Communication to Stakeholders

The commencement of all actions in court and the procedures undertaken during the pendency of the action require a party to file a pleading in the court. The circuit court and district court clerks and the probate court registers manage the filing system. Typically, the pleadings are accepted by mail or in-person filing. In recent years, SCAO and the courts have begun a transition to online or e-mail filing, but only a minority of the courts use the system.

Courts using MiFILE or the OnBase Internet-based filing system could close the clerk's physical office and accept pleadings filed online. Approximately 95 percent of the court respondents to surveys indicated that court clerks or judges would accept pleadings filed by e-mail provided the original pleadings were mailed to the clerk's office. However, courts also noted that the practice was not consistent throughout the courthouse and that many judges opted not to accept e-mail pleadings. Many courts utilized a drop-box system outside of the court for those who could not

access the Internet. While closing of the clerk's office limited the number of people in the courthouse and enhanced safety protocols, it also increased delays with the filing system and preparing for remote hearings.

Most courts maintained a skeletal crew in the courthouse. As a result, there were severe delays in processing both in-person and electronic court filings.

The lack of uniformity in how courts accepted filings and the inability of many courts to accept electronic filing created confusion with the users of the court. The attorneys reported that the pandemic accentuated the lack of a reliable and uniform e-filing system like the PACER system used in the federal courts.

Courts in the northern Lower Peninsula and Upper Peninsula were able, for the most part, to keep their clerk and register offices open because of lower rates of the virus. However, the offices maintained social distancing, used personal protective equipment, and reduced the number of employees working in the office to "an essential level." The courts created work pods or teams of limited numbers that rotated or staggered the work days in the office; this helped coordination of work flow while maintaining social distancing.

Courts, like many private companies, could not easily secure personal protection equipment at the start of the pandemic. Smaller to mid-size courts were often without internal maintenance staff to post social distance markers and signs directing court visitors; these factors delayed opening the clerk's office and other public services. If the court did not have the personal protection equipment, it further delayed opening unless staff had secured their own masks.

Best Practices in Managing the Emergency Response to COVID-19

The courts that best managed the emergency response to COVID-19 had previously developed an emergency plan, identified and trained essential employees regarding the emergency plan, and had a positive working relationship with the court's funding source, together with a collaborative relationship with court stakeholders that permitted open communication and dialogue.

Courts equipped to use electronic filing or utilized e-mail/fax filing experienced an easier transition to limited in-person court access and remote hearings. Of the courts surveyed, 70 percent accommodated some form of e-mail or fax filing, 20 percent utilized e-filing such as OnBase, and 90 percent continued to use limited public access for filing, including a drop box, scheduled appointments, or limited hours. Once a court instituted electronic filing, the length of delays declined in managing the schedule for remote hearings.

Courts reported that the top three procedures that increased efficiency and/or were widely applauded by the court's stakeholders were accommodating electronic or e-mail filing (100 percent of survey responses), availability of drop-boxes outside the court or other public locations accessible to users of the court (90 percent), and creating detailed instructions sent with notices or other court mailings regarding procedures for remote hearings, contact information for each judicial office to address questions, and training for staff to respond to frequently asked questions including Zoom® hearings (64 percent).

Kent and Wayne counties conducted Zoom® bench-bar conferences to review court policies and Zoom® procedures.

The demands of coordinating the shut-down of the courts required cooperation between the courts and the stakeholders. The courts that managed these relationships well undertook the following common steps:

(1) Immediately scheduled a meeting with stakeholders, including court administrators, chief judges, presiding judges, magistrates, referees, clerks, registers, staff, IT, ADR clerks, prosecutors, public defenders, city/county operations, sheriffs, jails, FOC, local bar associations, DHHS, and local health department representatives.

(2) Developed an emergency plan or updated the existing emergency plan. Posted on the website the contact information of key personnel to answer questions on the operations of the court.

(3) Communicated the court's emergency procedures through local administrative order or policy on the court's website and distributed the policies to key users of the court, including prosecutors, public defenders, FOC, sheriff/jails, and local bar associations, including specified practice sections of the bar. Any updates were immediately posted to the website and distributed to the stakeholders. The counties of Kent, Berrien, Cass, Jackson, and Van Buren all have followed some form of this practice.

(4) Developed training protocols for staff on new emergency procedures.

(5) Developed a tutorial or guidance for attorneys and parties to access and use the remote hearing procedures. Berrien and Van Buren counties produced a video on how to enter the court, safety protocols, and what to expect inside the court. The video was posted to the court's website and released to news media. These two counties also posted their essential operations plan and guidelines for virtual hearings.

(6) Maintained consistent and uniform application of the procedures by all judges. The most common complaint by users of the court has been the inconsistency of judges within a county to follow the county's posted policies on remote hearings, e-mail filing, Zoom® procedures, and adjournments.

(7) Utilized visiting judges or virtual judges.

Recommendations:

(1) Emergency Plan Court Rule: The Committee recommends that the Michigan Supreme Court adopt a court rule under Michigan Court Rules, Subchapter 8, and General Administrative Orders, requiring each court to develop an emergency operations and continuity of operations plan within one year of adoption of the rule. The courts should review and update the plan, as necessary, every three years. Each court should be encouraged to work with their stakeholders to develop the plan and conduct the three-year review. The plan would be based, in part, on the lessons learned during the 2020-2021 pandemic.

(2) Unified Case Management and Electronic Filing System: The Committee recommends that the Michigan judicial system modernize and further develop a unified case management and electronic filing system that is accessible to all courts.

(3) Infrastructure Advocacy: The Committee recommends that SCAO and the judges' associations coordinate a plan to advocate for the adoption of legislative appropriations to modernize the state's broadband and technology infrastructure. The users of the court will expect seamless access to the courts by remote connection, and the experience from the pandemic is that large areas of the state lack strong and stable connectivity. This is a matter of access to justice.

(4) SCAO Training to Strengthen and Enhance the Relationship between the County Court System and the County Funding Unit: The Committee recommends that SCAO and MJI develop a training program that shares the methods and means to develop a strong, mutually collaborative working relationship between the county courts and their funding units.

Continuity of Operations and Planning for Return to Full Capacity

The Michigan trial courts transitioned from emergency shut-down to managing remote hearings and/or limited in-person hearings over a period of two months. Certainly, the courts did not master or fully adapt pre-pandemic procedures during this period, but they delivered essential services and slowly began to expand the operations of the courts. The magnitude of the changes necessary to remotely manage court operations became clearer in the first two months, but the courts, while at times overwhelmed, remained focused on delivery of services.

During implementation of virtual courtrooms, the courts also maintained safety for essential personnel and the limited public allowed access to the courthouse, accommodated staff child care needs, managed quarantines, facilitated expansion of online or remote alternative dispute resolution ("ADR"), worked with IT to address technology needs, and continued to manage the docket.

Coordinating Personnel Schedules and Training

In May 2020, SCAO developed guidelines for return to full capacity.[16] Courts have continued to use these guidelines to manage safety precautions within the court, including sanitation, protective equipment and social distancing, notification, isolation and contract tracing procedures, and coordination with local health department officials and SCAO regional administrators to open safely to the next approved phase of court access. Again, more urban and densely populated areas of the state have struggled to maintain open phases, while rural areas have been able to safely open through various phases of the guidelines.

Before considering return to some measure of full capacity, courts had to develop a plan to provide coordination between essential workers at the court and those non-essential workers working remotely. Most courts allowed workers to work in pods and rotate time between the

[16] Return to Full Capacity: COVID-19 Guidelines for Michigan Judiciary (updated May 2021) issued following MSC Administrative Order No. 2020-08 dated May 6, 2020, expanding the use of remote proceedings. The Return to Full Capacity Guidelines have been consistently updated since being issued.

court and home. When possible, this eased the ability of employees to schedule child care and virtual school for children, and increased work-share and knowledge of procedures at the court.

Ability to Manage Court Staff Working Remotely

Courts reported that in the early months of the pandemic 38 percent of non-essential workers were not able to work from home. This negatively impacted the courts' ability to coordinate work distribution, schedules, and training. Issues cited for the difficulty included lack of equipment, poor equipment and/or connectivity at the court and/or the employees home, inadequate IT support for remote work, inadequate training, and childcare/school obligations.

The courts were more negatively impacted because they had limited personnel to spare and rotate schedules. This created a domino effect, resulting in delays in scheduling and hearing management. Probate and district courts that needed to keep the court open for constituents who could not otherwise communicate online or remotely had a difficult time managing staffing needs. Fortunately, the courts that could be open through each phase did not experience the level of traffic that was common prior to the pandemic; people limited their trips to the courts and this continued until the fall of 2020. This gave courts more time to work through procedures without significant negative consequences, even when delays were experienced in scheduling hearings and managing the docket.

Three months after the shut-down, 75 percent of the courts reported having sufficient equipment for all employees to work remotely, 58 percent had strong connectivity through the Internet or VPN, and 42 percent had been able to fully train all employees on remote work.

It was not unusual to have employees using their own equipment (laptops, home computers, tablets, and smartphones) to access the court systems before the court provided compatible equipment. Additionally, courts without a paperless system had to rely on file sharing and copying pertinent documents to allow for key work from home. This delayed procedures and communications with parties, lawyers, probation, prosecutors and defenders, agencies, and other third parties.

The more dedicated a court staff was to identifying needs and solutions consistent with the operation plan, the more quickly the obstacles to remote work were resolved. As noted in the section on emergency operation, the more quickly courts identified stakeholder groups to identify needs and plan how best to address those needs, the more efficient was the expansion to remote work.

Some courts had not been using electronic signature software to permit judicial officers to sign orders and other necessary documents prior to the pandemic, but most implemented this software after the shut-down. The courts also provided tablets to judicial officers and staff to allow review electronic documents for signature if they did not otherwise have a laptop. The electronic signature process allowed for swift issuance of orders and notices necessary to maintain the docket.

Courts that struggled in dedicating a plan to expand remote work often reported that the judges within the county were inconsistent in following proposed solutions or, in the early months, conducted very few remote hearings. Lack of consistency by a court in developing and implementing an operation plan remains the most consistent complaint of users and stakeholders of the courts.

Procedures Established to Maintain Essential Functions and Expand Remote Proceedings

Most courts established procedures to coordinate work for those on site and those working remotely to identify the most important matters to be addressed and prioritize actions to be taken to move the docket. The procedures listed here were generally utilized by the courts in a manner and style best suited for each court.

Courts process mail each day that includes pleadings, reports, recommendations, warrants, notices, and general correspondence. The clerk's and register's office prioritized the most important mail and how to route the mail to ensure further action. The offices worked with various departments within the court system to identify priorities, including court administrators, chief judges, magistrates, referees, mediation clerks, prosecutors, public defenders, probation, and FOC.

Pursuant to MSC Administrative Order No. 2020-1, courts that did not have an electronic filing system were encouraged to use fax or e-mail for electronic filing. Under MCR 2.406, courts had the authority to permit court filings by fax. Courts that established e-mail filing after the shut-down have either established a designated e-mail address within the clerk's or register's office, or individual judges decided whether to accept e-mail filings through a judicial clerk. Most courts posted the procedure for fax or e-mail filing on their website and through the local bar associations.

Various courts have assigned a dedicated individual from the clerk's office, register's office, or administrator's office, or a judicial law clerk to monitor and report on all new Michigan Supreme Court administrative orders or amendments and SCAO guidelines or communications regarding managing the courts. The court's stakeholder planning team or leadership team would determine what, if any, action was required and how to communicate the update or new action.

Courts utilized docket-run reports to identify cases requiring a "next action date" to begin rescheduling adjournments. Various courts have utilized visiting judges or virtual judges from other counties under assignment from SCAO to relieve docket delays.

Remote access has expanded opportunities for judges, referees, and magistrates to conduct proceedings from locations outside of the courthouse and maintain high standards of public service. Judicial officers have been able to remotely preside over emergency hearings or address critical issues within the courthouse even when on vacation or on leave. Some officers have been able to conduct full-day hearings while at a cottage or visiting family, combining work and vacation. Remote access has been used to provide different options to address time-sensitive issues even when court leadership is not in the courthouse; these options should be explored further by the judiciary to create efficiencies and benefits.

RECOMMENDATIONS

(1) Creation of a Judicial Council Planning Committee: The Committee recommends amendment of the Chief Judge Rule under MCR 8.110 to permit the chief judge to appoint a judicial council planning committee to meet at least one time per year to review court operations, technology, and recommend revised procedures to enhance the efficiency and consistency of court operations. The

judicial council would work with designated court stakeholder groups to solicit feedback regarding court operations and proposed improvements.

(2) **Best Practices Technology Symposium:** The Committee recommends that SCAO and MJI develop a symposium for all county IT departments and court administrators to share best practices regarding court technology, software applications, and operations. The symposium would be held at least once per year and would be coordinated with the Michigan Judicial Council's proposed strategic plan for technology.

(3) **Use of Virtual Visiting Judges:** The Committee recommends that the Michigan Supreme Court adopt a rule that permits a visiting judge to appear by Zoom®. SCAO is testing the efficacy of allowing a judge experiencing a lighter docket to be assigned to hear cases by Zoom® as a visiting judge for a county experiencing a backlog of specified case matter. Retired judges, even those no longer living in Michigan, would be permitted to serve as a visiting judge by Zoom®. The courts have become proficient with Zoom® and this proficiency should be leveraged to benefit the entire court system.

(4) **Self-Care of Judicial Officers and Court Staff:** While this report does not specifically address the issues of stress and self-care in the court system, the Committee recommends that SCAO and MJI commit to a five-year plan to address self-care in the courts. The pandemic has taught us that management of court operations is demanding and generates stress. Moreover, the nature of the work performed by trial courts creates potential for judicial officers and staff to be exposed to secondary trauma. The committee is aware that self-care breakout sessions have been offered in the past, but believes a dedicated five-year program to address self-care within the courts would benefit the delivery of justice. The judges' associations could collaborate in formation of the program and share material.

(5) **Remote Site Judicial Service:** The Committee recommends that the Michigan Supreme Court amend MSC Administrative Order 2012-7 (currently suspended by MSC Administrative Order No. 2020-19) and applicable statutory provisions to permit judicial officers to conduct court hearings and business from a site outside of the courthouse. The judicial officer would be required to manage their regular docket and judicial meetings by Zoom®. Standards and guidelines would be developed to govern remote-site judicial service. The courts have become proficient with Zoom® and this proficiency should be leveraged to enhance the method and means of public service.

The Virtual Courtroom and Remote Proceedings

Michigan Supreme Court Chief Justice Bridget M. McCormack has said the pandemic "is not the disruption courts wanted, but it is the disruption courts needed." Prior to the pandemic, with few exceptions, anyone involved in a civil or criminal case had to physically "go to court" to be

heard. The pandemic required trial courts to embrace technology and improvise to maintain access to justice.

Before the pandemic, a minority of trial courts had initiated use of online formats such as electronic filing, dispute resolution, and video and teleconference hearings. In 2019, SCAO secured licenses to use Zoom® videoconferencing and planned to slowly integrate the technology statewide beginning with trial courts receptive to adopting technology solutions. Neither SCAO nor the most revered fortune teller could have predicted the true value of this fortuitous decision because Zoom® allowed trial courts to continue operations remotely during the pandemic. Trial courts cannot reflexively return to pre-pandemic procedures established prior to the Internet, e-mail, laptops, and videoconferencing, but must use this opportunity to adapt to technology, in the same manner as the marketplace, to create long-term improvements to access to justice.

Interview any trial court judicial officer or staff about their experience conducting Zoom® hearings and you will not want for material. There are countless stories of frustration over technology and connectivity, disbelief regarding the lack of decorum shown by some participants (even lawyers), and humorous anecdotes. But universally, if not begrudgingly by some, the trial courts acknowledge Zoom® provides for efficient and effective access to the courts for most hearings except extended evidentiary hearings and trials. This section will explore the difficulties experienced using Zoom®, best practices to maximize the Zoom® experience, and recommendations for the ongoing use of Zoom®.

Videoconferencing Equipment and Remote Proceedings

Participants in a videoconference must have adequate equipment to transmit and receive audio and video, and maintain a stable connection to Wi-Fi/Internet.[17] The most common complaint about Zoom® proceedings, depositions, or mediations is the instability of a participant's connection to the meeting, resulting in frozen screens or garbled sound. In recorded proceedings, these issues can seriously delay or require adjournment of a hearing.

Proceedings experiencing the highest level of interruption involve participants located in rural or urban areas with inadequate broadband and Wi-Fi connection, and participants using a mobile telephone or tablet connected by a mobile device data plan rather than a Wi-Fi link. Trial courts estimated that in the first six months of the pandemic more than 60 percent of remote hearings experienced some connectivity interruption. The connectivity issue has improved as more users of the remote systems have incorporated better equipment or improved Wi-Fi or broadband strength.

Various communities and courts offer free access to high-speed Wi-Fi to allow participants to join Zoom® proceedings. The city of Holland provides access from its civic center parking lot. Although some judges have denied litigants or attorneys to participate in a hearing from their car, often the car provides the quietest environment for the participant; judges should not quickly dismiss a participant from participating while in a car until it is determined the car is sufficiently

[17] This report does not consider the requirements and standards for recording court proceedings. Audio and video recording standards are addressed under MCR 8.109(B) and the operating standards published by SCAO in Michigan Trial Court Standards for Courtroom Technology (4/20).

quiet and without likely disruption like an office or conference room.[18] The Washtenaw County Circuit Court offers a Zoom® hearing room for participants to access a device and hearing. The judicial clerk contacts the participant by e-mail or text and directs the participant to enter the building; this limits the number of persons in the building and provides those without access to Internet or a device the means to participate in the remote hearing.

Inadequate camera and microphone equipment can diminish the quality of the video and audio. While laptops and tablets can provide for mobile access, the cameras and microphones often only meet minimal standards. This can cause video to blur and the volume to decrease if the participant turns their head away from the microphone. Some courts encourage participants, especially lawyers and witnesses involved in lengthy remote evidentiary hearings, to use a headset or a standing microphone that has a higher standard of reception.

RECOMMENDATIONS

(1) Development of Minimum Equipment Standards: The Committee recommends that SCAO consult with Zoom® to develop minimum equipment standards to maximize the connection to Zoom® and performance of the audio and video equipment, including recommended microphone and camera standards. Any standards should be used as guidelines and attorneys should be encouraged to comply. However, many litigants, and in particular self-represented litigants, may not have the means to meet the guidelines. The guidelines should not become a means to deny access to justice.

(2) Modernization of Broadband: The Committee recommends that SCAO, the judges' associations, and the State Bar of Michigan coordinate a plan to advocate for the adoption of legislative appropriations to modernize the state's broadband and technology infrastructure. Users of the court will expect seamless access to the courts by remote connection and the experience from the pandemic is that large areas of the state lack strong and stable connectivity. This is a matter of access to justice.

Remote Hearings and Proceedings

The use of videoconference hearings by Zoom® or Polycom® was necessary to continue the operations of the justice system. While Zoom® is practical for the pandemic environment, it is an application the courts should continue long after we "return to normal." Of nearly 1,500 attorneys surveyed, 82 percent stated they want Zoom® hearings to continue after the pandemic. The attorneys ranked, in order of preference, the hearings they believed were best suited for Zoom® as follows: non-evidentiary hearings (status and scheduling conferences, pretrials, motions); traffic violations; civil infractions; summary proceedings; guardianships/ conservatorships; criminal pleas and sentencing; and, short domestic relations evidentiary

[18] It need not be said that participants should not participate in a hearing while driving. If a participant is logging into a hearing from a moving vehicle, the judge should consider allowing the participant a brief period to safely park the car or adjourn the hearing. And, yes, the trial courts have reported incidents of attorneys and litigants entering a Zoom® hearing while operating a moving vehicle.

hearings including *pro confesso* hearings. Moreover, these attorneys reported their clients appreciated Zoom® for the convenience and time savings from not having to travel to the court, park, and personally attend a hearing. Clients also expressed they were less intimidated by the process on Zoom® without losing respect for the procedure and decorum. The attorneys were less enthusiastic about evidentiary hearings involving multiple days, witnesses, and exhibits.[19]

The attorneys expressed appreciation for the courts' willingness to use Zoom® for motions, settlement conferences, scheduling conferences, status conferences, and limited evidentiary hearings. Incorporating Zoom® into the court process minimizes travel time, expense, and scheduling conflicts. The attorneys stated their clients anticipate Zoom® will be continued in the court system because it is a cost effective and efficient tool.

Trial courts reported Zoom® preferences similar to the attorneys. Circuit courts considered the following hearings the most beneficial for the Zoom® format: status and scheduling conferences, pretrials, motions, pleas and sentencing (provided the defendant consents to the hearing), PPO hearings (excluding those hearings where the respondent could be sentenced to jail), child protective and juvenile delinquency hearings (excluding removal hearings, parental termination, and juvenile trials), *pro confesso* hearings, and most domestic relations hearings that do not involve multiple days, witnesses, and exhibits.

District courts reported that Zoom® was preferred for pretrial and status conferences, traffic violations, civil infractions, probable cause hearings, landlord-tenant and summary proceedings, and pleas. Probate courts reported a broader acceptance of Zoom® because many hearings can be conducted within a day, such as estate petition and motion hearings, mental health hearings (except jury trials), and guardianship and conservatorship. At least one probate court reported conducting a jury trial by Zoom®.

Friends of the court also reported a general acceptance and efficiency associated with remote hearings and meetings. The majority of FOC offices expressed the convenience for parents to engage in meetings with the FOC investigator by Zoom®, reducing travel time and time from work without reducing the effectiveness of the meetings compared to in-person meetings. FOC has had to prepare instructions for parents to share documents prior to the meeting. FOC reports that parents have generally been supportive of remote meetings and hearings, although acknowledged an initial learning curve. FOC has also utilized Zoom® for mediation and dispute resolution with positive results

An unexpected finding from the use of Zoom® is that minors appearing before the court are more receptive to the hearing and less intimidated or anxious. Family division judges reported that in interviews to determine the reasonable preference of a minor child in a custody matter under MCL 722.23(i) and in juvenile delinquency proceedings, the minor children appeared more relaxed and open in their discussion with the judge or referee. While this finding is anecdotal, a significant number of judges suggested the remote hearing eliminates the intimidation or fear of appearing in court in a predominately adult setting. The video nature of the Zoom® proceedings may provide an experience the minor children are more comfortable with given their familiarity with video games and other digital interactions. SCAO should consider collaborating with a state college or university to study this development.

[19] This Committee did not explore the use of virtual jury trials. SCAO has published the Michigan Trial Courts Remote Jury Trial Standards and Recommendations.

Understandably, in the initial months following the shut-down order the courts struggled to streamline procedures for communication with parties, attorneys, and other users of the court regarding scheduling remote hearings and procedures relating to those hearings. The courts had not clearly identified how or with whom users were to communicate within a judicial office. The courts were hampered by staff working from home and rotating shifts through the week.

Attorneys reported that, while some courts had provided training to staff regarding frequently asked questions such as on scheduling issues, adjournments, Zoom® protocol, and e-mail filing, other courts were less consistent in their responses to inquiries. The attorneys acknowledged that judicial staff and the clerk's and register's offices were conscientious, and trying to resolve questions and provide clarity. Ultimately, over time these communication issues were resolved by most courts.

Whether a motion was heard early in the pandemic differed from court to court. Attorneys reported that some courts adjourned all motion hearings and issued written opinions under MCR 2.119(E)(3), while others conducted the hearings by Zoom®. The reason for either choice was not clear and attorneys believed their clients' interests were best served through the Zoom® hearing.

As noted above, the most consistent complaint from court users, including attorneys, has been the inconsistency of the judicial offices within the same county when conducting remote hearings. Of the attorneys surveyed, 66 percent identified the lack of consistency between judicial offices as the second most significant difficulty they experienced in their practice during the pandemic. The most significant difficulty was the effort to remain current with the Court's updated administrative orders and other court directives (67 percent). These responses only underscore how difficult the legal landscape was in the first six months of the pandemic.

Examples of inconsistent management of the docket include:

(1) Some judges quickly adopted Zoom®, while other judges in the same county were slow to adopt the format and only used Zoom® for limited hearings;

(2) Some judges accepted pleadings by e-mail provided an original was filed with the clerk and the fee paid in accordance with the administrative orders, while others refused this convenience;

(3) Some judges used the "cattle call" approach to motion day, while other judges staggered the motion calendar by assigned times or grouped a limited number of motions in a scheduled block; and

(4) Some judicial offices provided notice of hearings with detailed Zoom® and other offices provided limited information.

Attorneys reported that participating in a "cattle call" Zoom® motion day is a terrible experience for both the attorney and the client. Parties can sit for an hour or more in a waiting room with little to no contact from the court, and attorneys often run into conflicts with other courts while waiting for the appearance. Attorneys and clients prefer a scheduled motion day by set motion times or block times of 60 to 90 minutes, with a limited number of motions assigned to the block. Attorneys reported that judges who follow these scheduling procedures routinely completed the hearings on time with limited waiting.

Settlement conferences conducted by Zoom® provide flexibility for the participants' schedules, elimination of travel, and cost savings. However, the courts must ensure the clients participating

and any third-party representatives, such as insurance carriers and trust fiduciaries, have full authority to settle the case in the same manner they would have had had they appeared in person.

Attorneys encouraged the courts to use Zoom® to manage high-conflict cases or for cases that are discovery intensive and suggested that courts can schedule periodic status conferences through Zoom® with limited impact on schedules and travel.

Zoom® hearings will reduce the cost of litigation by reducing the billable hours normally associated with travel, waiting in court for hearings or completing settlement conferences, etc. This cost saving will be a benefit to the public that pays for legal services, as well as to members of the public who otherwise could not afford legal services and would be forced to handle a matter in *pro per*. Moreover, Zoom® hearings (especially when scheduled for a specific time or window of time) have the additional benefit of allowing attorneys to more easily manage their calendar without the potential of being stuck in court all day.

Use of Zoom® in trials and lengthy evidentiary hearings creates greater flexibility to coordinate appearances by experts or other witnesses who would need to travel to court for an in-person hearing. This flexibility may avoid the need for adjournments or rescheduling.

Mediation clerks and FOCs reported that ADR has been successful on Zoom®. Courts should continue the use of ADR on Zoom® similar to court settlement conferences.

Best Practices for Zoom® Hearings

Best practices for Zoom® hearings include, but are not limited to, the following:

(1) Notice of the hearing should include Zoom® login information, a contact from the judicial office to answer questions or concerns, and instructions for the participants to login and identify themselves on the screen by name, case name and case number before entering the Zoom® hearing. This allows for court staff to easily identify participants for hearings, especially on motion calls, and allows for easy assignment of the participants into a breakout room, if used. Kent County incorporates these instructions into a SCAO notice form.

(2) The waiting room can be used as a staging area for motion day if the judicial staff provides e-mail communication with the participants. Oakland County places litigants and attorneys into the breakout room while the prior hearing is pending and the judicial staff can inquire of the participants if there are any agreements reached or issues to resolve, and confirm connectivity.

(3) Courts must make breakout rooms available for attorneys and clients to have confidential communications. This is essential in criminal proceedings, and confidentiality cannot be sacrificed simply because a defendant is appearing by Zoom® from inside a jail or prison.

(4) When the courts are closed to the public under the phased approach to return to full capacity, the courts must make the hearing available through the YouTube channel unless the proceeding is closed or access would otherwise be limited by statute or rule.

(5) Hearings where exhibits shall be introduced should be controlled by a scheduling order created based on a status conference with the attorneys/parties. The status

conference should outline the method of disclosing and exchanging exhibits, the schedule for motions *in limine*, and the requirement for parties to agree on the admissibility of exhibits, as possible, prior to the hearing to minimize time spent on foundational procedure. Exhibits shall be provided to the court and witnesses prior to the hearing in a format agreed upon.

(6) The court may also refer to the SCAO publication, Michigan Trial Courts Virtual Courtroom Standards and Guidelines, 2020.

(7) Both the courts and attorneys have expressed concerns about a witness appearing by Zoom® and the potential risk that someone is communicating with the witness from "the wings" or by text or other digital method. The Zoom® hearing is a court proceeding and the judge controls the courtroom. Judges may request a witness to use the videorecorder to show the court the entire room, and inquire about anyone located in the room and whether the witness has access to any documents involving the case. Courts should refer to SCAO's Remote Hearing Witness Instructions. Courts can supplement the standards and distribute the standards to interested parties and keep them posted on the website.

(8) Courts must also manage self-represented litigants on Zoom®. A good resource is SCAO Guidance on Conducting Remote Hearings with Self-Represented Litigants.

(9) Courts should use the Zoom® interpreter tool in all matters requiring an interpreter, except for criminal plea hearings. The interpreter tool allows for the interpreter to speak to the foreign language witness without the interpretation being heard by others on the Zoom® hearing. The tool allows for real-time interpretation as if in open court. However, the recording device cannot record the interpretation, which is required in criminal plea hearings. The Zoom® tutorial provides instructions on how to schedule a hearing using the interpreter tool.

Zoom® is a tool and not a means to replace in-person litigation. But used effectively, Zoom® can create flexibility for the court docket, increase access to the courts, and minimize legal costs.

RECOMMENDATIONS

(1) **Non-Evidentiary Civil and Criminal Hearings**: The Committee recommends amending the court rules to create a presumption that attorneys, parties, and participants will appear by Zoom® for non-evidentiary civil and criminal hearings, including warrant requests, arraignments, probable cause conferences, calendar conferences, final conferences, sentencings, probation violation hearings, status conferences, settlement conferences, ADR proceedings, FOC proceedings, and *pro confesso* hearings, unless good cause is shown why Zoom® should not be used, or in a criminal case where the defendant asserts the right to be physically present in the courtroom.

(2) **Proposed Amendment of MCR 2.407:** The Committee recommends that MCR 2.407, Videoconferencing be amended to specify the use of Zoom® and establish a preference for participants to appear by Zoom®. The preference may be overcome by reasonable factors including the nature of the proceeding, the evidence to be presented, and the availability of the participant support. It should remain within

the court's discretion to deny the application to appear by videoconferencing. This would apply to those court rules that permit the use of videoconferencing, including MCR 3.210(A)(4), 3.215(D)(3), 3.705, 3.708, 3.804, 3.904, 4.101, 4.202, 4.303, 4.401, 5.140, 6.006, and 6.901, subject to any statute or rules that would preclude the use of videoconferencing.

(3) Use of Zoom® for Meetings in NA Cases: The Committee recommends that a lawyer guardian ad litem in an NA case be permitted, upon written request, to use Zoom® for meetings with clients located outside of the county unless good cause is shown. However, the lawyer guardian ad litem must meet with the out-of-county clients in person prior to adjudication, permanency planning hearings, and termination hearings.

(4) Request to Appear via Zoom® to Ensure Access to Justice: The Committee recommends that litigants who obtain a waiver of fees under MCR 2.002 be given a preference when requesting to appear by Zoom® to ensure access to justice. The ability to appear through videoconferencing may save costs and provide flexibility to avoid lost time from work. However, if the litigant's videoconferencing technology and/or equipment is not able to provide proper connectivity and audio and/or video recording, the court may require the litigant to appear in person until a remedy can be found.

(5) Consistency among Courts within a County Judicial System: The Committee recommends that SCAO empanel a committee to study "best practices" of standard procedures courts should establish to provide fair and efficient justice. The findings of the committee would be submitted to each county to determine how best to implement the procedures. The Committee recognizes that Michigan's judicial system is not a unified court system. Nevertheless, the clear implication from the opinions expressed by attorneys and other stakeholders of the judicial system is that the lack of consistency among judges within a county judicial system to follow established or recommended procedures undermines confidence in the judicial system.

Additional Procedural Concerns Regarding Zoom® Hearings Involving Criminal Defendants

The pandemic has delayed a multitude of criminal jury trials and other proceedings because many courts are not able to conduct trials under the phased re-opening plans. Criminal defendants may have consented to adjournments, but there remain additional procedural issues that courts must consider for whether to proceed with a Zoom® trial. This report does not offer a solution, but raises the questions; the local courts must be the final arbiter based on the facts and circumstances.

Right to Public Proceedings

The First and Sixth Amendments to the United States Constitution guarantee public proceedings. When courts conduct hearings via videoconferencing technology like Zoom®, steps must be taken to ensure public access, including access to the court's YouTube channel. To the extent

that online proceedings are public, the Committee encourages courts to ensure the equipment used and connections to the Internet meet technical standards to minimize technical problems and access to the technology issues that may impede the public's ability to view the proceedings.

Right to be Present

Appearing via video does not satisfy the right to be present absent a valid waiver. And "[v]irtual appearance is not a suitable substitute for physical presence."[20] Courts must make every reasonable effort to ensure a defendant's agreement to waive personal appearance and appear remotely – often from jail – is voluntary.

Courts must maintain the primary responsibility for ensuring that out-of-custody defendants have notice of how to participate in upcoming court hearings. Courts may not shift the duty of ensuring a defendant's Zoom® appearance to defense counsel.

Right to Confrontation and Compulsory Process

Virtual courts present a danger to the right to confront and cross-examine witnesses under the Sixth Amendment. Virtual confrontation may have an impact on the witness, making it more likely that the witness will give false testimony. It may also impact the ability to cross-examine and the factfinder's ability to assess the testimony. See, *People v Jemison*, 505 Mich 352, 363-367 (2020) (allowing an expert witness to testify by two-way, interactive video violated the defendant's Confrontational Clause rights).

Important witnesses may be unavailable because they do not have access to the necessary technology or Internet services. What does compulsory process look like in an online court scenario?

Right to Counsel

Virtual courts can impede attorney-client communication, interfere with the attorney-client relationship, and jeopardize a defendant's right to participate and assist in his own defense. As noted earlier, the virtual courtroom must provide access to confidential communications such as the Zoom® breakout room. Moreover, the court must provide ample time for criminal hearings at every stage of the proceedings to allow for confidential communication between attorney and client. If an attorney informs the court that the virtual process is impeding the right to communicate because of inability to exchange documents or evidence during the attorney-client breakout sessions, the court must act to protect the right and seek compliance in a non-virtual setting.

The right to counsel includes the right to the *effective* assistance of counsel.[21] Virtual courts and the choice to proceed virtually under circumstances where in-person activity is limited raise

[20] *People v Heller*, 316 Mich App 314, 318 (2016).

21 *Strickland v Washington, 466 U.S. 668 (1984)*.

effective assistance of counsel concerns, including but not limited to, the duty to conduct an independent and adequate investigation and the duty to protect client confidentiality.

Equal Protection and Due Process: As noted above, virtual courts may create wealth-based hurdles – those who lack access to sufficient technology may have different and less meaningful access to justice than people with means.[22] The courts must assure meaningful access to the virtual courtroom, including dedicating a room in the courthouse to safely permit use of videoconferencing technology.

DUE PROCESS CONSIDERATIONS

Right to Impartial Jury: There is consensus among judges, prosecutors, and defense attorneys that criminal jury trials must take place in person. While this report did not address the issues of a virtual jury process, courts are reminded that in criminal proceedings the use of a virtual courtroom could result in the exclusion of distinctive groups of jurors (fair cross-section or systemic exclusion), violating the Sixth Amendment, as well as rights to due process and equal protection.

Right to Speedy Trial: There is tension between the Sixth Amendment right to speedy trial and other Constitutional rights implicated by online courts. Defendants should not be forced to waive guaranteed Constitutional rights to ensure a speedy trial. Moreover, as trial courts commence previously adjourned hearings, either virtually or in-person, courts must continue to prioritize adjudicating in-custody defendants before out-of-custody defendants. Both the courts and attorneys surveyed reported that 85 percent of the courts implemented plans to prioritize in-custody proceedings.

RECOMMENDATIONS

(1) Discourage Practice of "Cattle Call" Appearances: The Committee recommends that SCAO discourage judges from using the cattle call approach in criminal matters and instead rely on a staggered docket by using assigned times or a similar docket management mechanism. As is true in civil cases, parties can sit for several hours and attorneys often run into conflicts with other courts while waiting for a "cattle call" appearance on a particular docket.

(2) Require Prioritizing of Hearings for In-Custody Defendants: As criminal courts return to full capacity and resume previously adjourned hearings, either virtually or in-person, the Committee recommends that SCAO require courts to prioritize adjudicating in-custody defendants before out-of-custody defendants, and that preference be given to those defendants who have been in custody for the longest amount of time.

(3) Minimum Standards for Equipment and Internet Connection: To the extent that online proceedings are public, the Committee recommends that courts ensure the equipment used and connections to Internet meet technical standards to minimize technical problems and access to the technology issues that may impede the public's ability to view the proceedings.

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22 *Griffin v Illinois, 351 U.S. 12 (1956)*; *Ake v Oklahoma, 470 U.S. 68 (1985)*.

(4) **Mandate Notices in Criminal Matters**: Similar to the best practices for Zoom® hearings in civil cases, SCAO should mandate that in criminal matters, courts provide notice of the date, time, and purpose of the hearing, along with the following details:

a. Zoom® login information;

b. Contact information for a staff member to answer questions or concerns; and

c. Instructions for the participants to login and identify themselves on the screen by name, case name, and case number before entering the Zoom® hearing. This allows for court staff to easily identify participants for hearings, especially on motion calls, and allows for easy assignment of the participants into a breakout room, if used. Kent County incorporates these instructions into a SCAO notice form.

(5) **Provide an In-person Alternative for Jailed Defendants:** The Committee recommends that SCAO require courts to provide an in-person alternative for defendants who are in jail and do not agree to participate in the hearing by way of Zoom® technology.

(6) **Annual Zoom® and YouTube Training for Court Staff:** To protect the right to counsel, due process, and public access in criminal cases, the Committee recommends that SCAO require court staff to be trained annually on the best practices for operating by Zoom®, and Zoom® and YouTube technology; also that there be mandatory compliance with SCAO's current Recommendations on Using Zoom® & Public Access for Court Proceedings. This mandate should include a requirement that courts allow out-of-custody defendants or witnesses to participate by telephone or another reasonable alternative where they otherwise lack access to a stable Internet connection.

(7) **Amend Court Rules to Create a Presumption the Certain Parties Will Appear Remotely for Certain Hearings:** The Committee recommends amending the court rules to create a presumption that, except where the defendant asserts the right to be physically present in the courtroom, attorneys, parties, and participants in criminal cases will appear remotely using two-way interactive video technology or other remote participation tools for non-evidentiary criminal hearings, including warrant requests, arraignments on the information under MCR 6.113 (unless waived), probable cause conferences, emergency motions regarding bond, calendar conferences, final conferences, plea hearings, sentencings, extradition hearings, and probation violation hearings under MCR 6.445(B). With regard to matters involving forensic evaluations of juveniles or adults for competence to stand trial, competence to waive Miranda rights, and criminal responsibility, courts shall permit the use of video technology. The evaluator shall note in the forensic opinion whether the use of video technology impeded an impartial and accurate clinical assessment, and, if so, notify the court that an in-person evaluation must be scheduled.