

Utah Supreme Court's Advisory Committee on the Rules of Professional Conduct

Agenda

November 7, 2023

4:00 to 6:00 p.m.

Utah Law and Justice Center with [Zoom](#) available

Welcome; approval of minutes.	Tab 1	Cory Talbot (chair)
Discussion of Utah Supreme Court's request for input on virtual hearings	Tab 2	Beth Kennedy (staff)
Discussion of Judicial Council's Committee on Fairness and Equity's request for guidance <ul style="list-style-type: none">In 2022, the RPC Committee asked the Committee on Fairness & Equity for help in reworking rules 8.4. The RPC Committee prepared a memo summarizing the history of the issue (attached at Tab 3). The project then stalled and new members joined both committees.The Committee on Fairness & Equity would now like to restart the project and has asked the RPC Committee how they can help.	Tab 3	Beth Kennedy (staff)

Meetings are held at the Utah Law and Justice Center, usually on the first Tuesday of the month from 4 to 6 p.m.

2023 Meeting Schedule: Jan 3 • Feb 7 • Mar 7 • April 11 • May 9 • June 6 • Aug 1 • Sep 5 • Oct 3 • Nov 7 • Dec 5

<http://www.utcourts.gov/committees/RulesPC/>

Tab 1



Utah Supreme Court's Advisory Committee on the Rules of Professional Conduct

[Draft] Meeting Minutes

October 3, 2023

Utah Law and Justice Center & Zoom
4:00 pm Mountain Time

Cory Talbot, Chair

Attendees:

Cory Talbot, Chair
Jurhee Rice
Ian Quiel
Eric Weeks
Alyson McAllister
Robert Gibbons
Mark Hales
Hon. Amy Oliver
Hon. Craig Hall
Julie J. Nelson
Mark Nickel
Gary Sackett
Prof. Dane Thorley
Christine Greenwood (ex officio)
Billy Walker (ex officio)
Hon. M. Alex Natt, Recording
Secretary

Staff:

Beth Kennedy

Guests:

Excused: Ashley Gregson, Adam
Bondy, Hon. Trent Nelson, Hon. James
Gardner, Jacqueline Carlton, Austin
Riter.

1. Welcome, Approval of the September 5, 2023 meeting minutes (Chair Talbot)

Chair Talbot recognized the existence of a quorum and called the meeting to order at 4:07. The Chair asked for a Motion to approve the September 5, 2023 meeting minutes. Mr. Sackett noted that he had not been marked as “excused” for that last meeting. With that correction Mr. Hales moved for approval. Mr. Gibbons seconded. The Motion passed unanimously. The Chair welcomed new member Judge Craig Hall and each member was asked to introduce themselves.

2. Update on Supreme Court Discussions

The Chair updated the Committee about his discussions with the Supreme Court regarding Rules 1.0 (terminology); 5.4 (professional independence of a lawyer); 5.8 (referral fees) and 1.15 (safekeeping of property). After some questions from the Court, the Committee was asked to provide some background information on the referral fees issue.

3. Rule 1.2 Review of Comments (Chair Talbot)

The Committee reviewed the public comments to Rule 1.2. Mr. Sackett suggests changing “date of drafting” to “at the time of this comment’s adoption” in comment 12a. Ms. McAllister made a motion. Mr. Gibbons seconded and the Motion was adopted unanimously.

4. Rule 7.1 Review of Comments (Mr. Gibbons)

Mr. Gibbons who lead the subcommittee on this issue reviewed the public comments for the Committee at large. The Committee discussed a comment from ACLU regarding pecuniary vs. non-pecuniary representations of clients. The Committee did not believe the *In Re Primus* case requires a distinction be made to the proposed Rule as the pecuniary/non-pecuniary issue does not cure the issue in its entirety and the thirty-day window is shorter. Mr. Sackett noted that no comments were appended to the proposed Rule which he noted was unusual. Mr. Gibbons noted that the Committee had voted not to adopt a proposed comment. Mr. Sackett noted that Rule 7.3 dealing with solicitation could have been amended to deal with this issue. The history of Rule 7.3 was discussed.

5. Rule 8.4 Review of Comments (Chair Talbot)

Judge Oliver who was a subcommittee member presented the comments. The comments received objected to the Rule in its entirety. The Committee felt that insofar as the Committee had decided to have such a Rule, that the choice was binary whether to have it or not. The Committee did not feel the need to change course.

6. Rule 1.0 (Mr. Sackett)

This agenda item was tabled until the next meeting.

The Chair updated the Committee on matters in the pipeline. Mr. Walker asked if there is an 8.4(g) and Ms. Kennedy will research status as will Judge Oliver.

The next meeting of the Committee is November 7, 2023.

The meeting adjourned at 4:50 pm.

Tab 2



Supreme Court of Utah

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Salt Lake City, Utah 84114-0210
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Nicholas Stiles
Appellate Court Administrator

MEMORANDUM

To: Advisory Committees on the Rules of Criminal, Civil, Juvenile, and Appellate Procedure
CC: Boards of Judges for Juvenile, District, Appellate, and Justice Courts.
From: Utah Supreme Court
Re: Remote vs. In-person Hearings

In October 2022, the Green Phase Workgroup presented its *Report and Recommendation to the Judicial Council and Supreme Court Regarding the Ongoing Use of Virtual Meeting Technology to Conduct Court Proceedings*. The Judicial Council considered the matter extensively and in November 2022, published its *Findings and Recommendations Regarding Ongoing Use of Virtual Meeting Technology to Conduct Court Proceedings*. The report provided in relevant part, “The Judicial Council recommends the Supreme Court consider establishing a rule that allows hearing participants to request permission to appear opposite the decision of the judicial officer.”¹

The Supreme Court recently considered this charge and requests its Advisory Committees provide recommendations on the following questions as they relate to each committee respectively:

1. Should there be a rule of procedure that allows participants to request their hearing be held opposite the decision of the judicial officer?
2. Should there be a rule of procedure that provides a presumption regarding certain hearing types? (Example: non-evidentiary, status hearings, etc.)
3. Should there be a rule of procedure that provides an appeal process for challenging the decision of a judicial officer as it relates to remote vs. in-person hearings, and if so, who should consider the appeal? (Example: presiding judge)

The Supreme Court welcomes the input from the various Boards of Judges concerning these questions, and invites the Boards to attend relevant advisory committee meetings or provide input directly to the Supreme Court.

¹ Both reports are included in this document.

GREEN PHASE WORKING GROUP

REPORT AND RECOMMENDATIONS TO THE JUDICIAL COUNCIL AND SUPREME COURT REGARDING ONGOING USE OF VIRTUAL MEETING TECHNOLOGY TO CONDUCT COURT PROCEEDINGS

October 14, 2022



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REPORT AND RECOMMENDATIONS TO THE JUDICIAL COUNCIL AND SUPREME COURT REGARDING ONGOING USE OF VIRTUAL MEETING TECHNOLOGY TO CONDUCT COURT PROCEEDINGS

Executive Summary

The Judicial Council directed the Green Phase Working Group (GPWG) to study the ongoing use of virtual meeting technology to conduct court proceedings. The GPWG now submits the following report and recommendations for the Council's consideration.

- The use of virtual hearings to conduct court proceedings is accompanied by benefits and drawbacks, which must be identified, monitored, and balanced to best ensure that the courts continue striving to provide the public an open, fair, efficient, and independent system for the advancement of justice.
- A 2022 survey of Utah court users shows an overwhelming preference for the continued use of virtual hearings across court user types and age groups in district, juvenile, and justice courts.
- After careful study, the GPWG favors an approach that prioritizes judicial discretion in determining whether a hearing will be in person or virtual and allows court patrons to request to participate in a different manner.
- Recommended best practices for continued use of virtual hearings revolve around adequate notification of which hearings are intended to be conducted virtually, education and technical assistance to overcome technological and user-centric barriers, clear communication regarding decorum expectations, and continuing coordination with patrons, practitioners, the public, and other stakeholders.

Introduction

During the COVID-19 pandemic, virtual meeting technology allowed the Utah judiciary to continue striving to provide the public an open, fair, efficient, and independent system for the advancement of justice, even while public health considerations significantly restricted in-person gatherings. Judicial officers and court staff have developed proficiency in the logistics of scheduling and conducting virtual hearings, which has revealed benefits and drawbacks related to using virtual meeting technology for court proceedings.

The Judicial Council directed the Green Phase Working Group (GPWG)¹ to study the matter and develop recommendations regarding the ongoing use of virtual meeting technology to conduct court proceedings. While virtual hearings will undoubtedly continue to be an important tool for the judiciary, the tool's effectiveness varies based on the situation and the parties involved. The goal has been to ascertain how virtual meeting technology can be employed into the future to advance the judiciary's mission without sacrificing the effectiveness inherent in in-person proceedings.

This report:

1. identifies prevalent benefits and drawbacks of virtual hearings;
2. explores the effect of virtual hearings on access to justice;
3. addresses technology considerations;
4. presents aggregate court user feedback on the use of this technology; and
5. recommends best practice considerations moving forward.

Recommendations from the GPWG are noted with a blue background throughout the report and are listed again at the end of the report.

Definitions

"Virtual hearing" means a court proceeding where the judicial officer, court staff, parties, and attorneys simultaneously appear and participate through the use of virtual meeting technology from different physical locations.

"Hybrid hearing" means a court proceeding where some participants are present together in the physical courtroom while other participants simultaneously appear and participate in the proceedings through the use of virtual meeting technology from a different physical location.

"Virtual meeting technology" means a software platform that enables more than one individual to simultaneously participate in the same meeting from different physical locations.

¹ **Appendix A** contains a list of GPWG members and staff.

Benefits and Drawbacks of Virtual Hearings

Virtual hearings have been critical to the operation of the judiciary during the pandemic. The use of technology allowed the courts to overcome the all-or-nothing choice between fully restricting access to the courts or exposing patrons, court staff, and judicial officers to a little-understood, highly contagious and deadly disease. Like any new technology, the benefits of virtual hearings came with drawbacks. The judiciary has learned a great deal about the utility and efficacy of virtual hearings since they became the default in 2020. Table 1 below outlines examples of the benefits and drawbacks of virtual hearings, as experienced by judicial officers, court employees, and court users throughout the state.

BENEFITS	
Access to Courts	<ul style="list-style-type: none"> • Some people will be able to attend a hearing who otherwise would not be able to do so. • Virtual hearings accommodate people who do not have a driver license but have access to virtual meeting technology. • The judiciary can draw from a larger pool of interpreters if interpreters do not have to attend court in person. • Extended family members and friends are able to attend proceedings such as adoptions. • News media outlets are able to cover hearings more regularly and across greater geographic diversity.
Convenience	<ul style="list-style-type: none"> • Court patrons can appear in court without needing to take time from work or home responsibilities. • Virtual jury selection is less disruptive to potential jurors.
Financial Savings	<ul style="list-style-type: none"> • Court patrons are less likely to lose wages for missing work if they are able to appear remotely. • Court patrons may avoid the need to pay for childcare or travel expenses to and from the courthouse. • Litigants may avoid having to pay their attorneys to travel to court or wait at the courthouse for their case(s) to be called.
Legal Representation	<ul style="list-style-type: none"> • Practitioners may be able to represent more clients if they travel less for hearings. • Litigants can draw from a larger pool of attorneys if attorneys do not have to travel to different geographic regions of the state / county / city. • Underserved communities have greater access to pro bono representation. • Attorneys in some civil cases may be able to have better communication with their clients in a virtual setting where the client better understands that the communication will be focused and efficient.
Efficiency	<ul style="list-style-type: none"> • Court patrons may spend less time unable to fulfill other responsibilities while waiting for their hearing.

	<ul style="list-style-type: none"> • Practitioners are able to accomplish more work when spending less time traveling to hearings / sitting in a courtroom waiting for their case(s). • Virtual hearings may be a more efficient use of resources than transporting people from jails, prisons, or other secure facilities.
Safety	<ul style="list-style-type: none"> • Virtual hearings offer an increased feeling of safety for victims of crime, petitioners for protective orders and civil stalking injunctions, parties in high conflict domestic cases, volunteers and others. • There are fewer law enforcement and public safety concerns than are involved with physically transporting inmates to a courthouse.
Comfort	<ul style="list-style-type: none"> • Some court patrons find appearing remotely for proceedings more comfortable / less intimidating, allowing them to be more authentic
Judicial Preference	<ul style="list-style-type: none"> • Some judicial officers prefer virtual jury selection over in-person jury selection.
Information	<ul style="list-style-type: none"> • In some kinds of cases, courts receive additional information to use in decision-making when people who would not be able to participate in person are able to appear virtually.
DRAWBACKS	
Loss of Court Efficiency	<ul style="list-style-type: none"> • For certain hearings, conducting the hearing virtually may take longer than doing the same work in person. • Fewer opportunities for counsel to visit while in the courthouse may result in fewer cases being settled on terms acceptable to the parties. • It can be difficult to negotiate with another party through a virtual platform.
Lack of Decorum	<ul style="list-style-type: none"> • Because virtual hearings are often viewed as less formal, some participants show a lack of decorum reflected in their dress, location when appearing, other activities going on in the background, interruptions, and lack of civility.
Lack of Focus	<ul style="list-style-type: none"> • Court participants sometimes try to multitask during virtual hearings and do not give their full attention to the court proceeding.
Constraints on Other Actions	<ul style="list-style-type: none"> • It is difficult or impossible to enforce certain court orders virtually. • It is difficult to serve parties who would be served at the courthouse if the hearing were in person. • It may be difficult to get defendants to report to jail when custody is ordered through a virtual hearing.
Resource Limitations	<ul style="list-style-type: none"> • Some jails are unable to accommodate the volume or timing of virtual hearings. • Lack of necessary equipment or insufficient access to the internet may limit or prevent some people from appearing through Webex.

Communication Friction	<ul style="list-style-type: none"> • Communication between attorneys and clients may suffer during virtual hearings and requires more planning to accommodate. • There are challenges using the Language Line (interpretation resource) in virtual hearings. • Obtaining victim and restitution information from prosecutors is more challenging in a virtual setting. • News media outlets obtain the highest quality recordings (particularly of higher profile case hearings) when recorded in person. • Judicial officers, attorneys, and jurors may miss important non-verbal cues that could be seen in person.
Technical Issues	<ul style="list-style-type: none"> • Technical problems sometimes interfere with hearings and may hinder access to court. • Virtual hearings use large amounts of bandwidth. • Interpretation sometimes suffers during virtual hearings. • The quality of the record may be diminished. • There is a learning curve for new participants.
Demands on Staff	<ul style="list-style-type: none"> • Non-IT staff are often required to provide impromptu technical support. • With the current system, scheduling virtual hearings requires additional work for staff.
Legal Concerns	<ul style="list-style-type: none"> • Virtual hearings may present constitutional deficiencies for some criminal hearings. • It can be difficult to judge the credibility of witnesses or ensure that witnesses are not impermissibly relying on extrinsic sources or aided by other individuals when providing testimony (despite amending the rule to include additional language in the oath). • It can be difficult to know whether another person is in the room with a virtual participant, trying to influence that participant.

Table 1 – Benefits and Drawbacks of Virtual Hearings

Access to Justice

Access to justice has been, is, and will continue to be a primary consideration when assessing court operations, including the use of virtual meeting technology. One of the benefits of virtual hearings has been an increase in access to justice for many people.

- Some parties find that it is much easier to participate in court proceedings virtually than to appear in person. Through the use of virtual hearings, barriers such as arranging transportation, finding daycare, or taking time off from work or other life responsibilities are reduced or eliminated. For some people, these barriers are the difference between being able to access court services and having to delay, or even forgo, court involvement, some of which affects physical safety. For others, these barriers could be the difference between a default judgment and the ability to meaningfully participate in their case. In some instances, it will be the difference between participation in an occupancy hearing and becoming homeless.
- Virtual hearings can reduce barriers by allowing court patrons to feel safe by appearing in a comfortable place and in a different location than the person they fear. Though a court patron in this situation may be capable of attending an in-person hearing, such a patron may reasonably view virtual hearings as increasing their access to the courts.
- Virtual hearings provide greater access for some court patrons and practitioners with disabilities. At least one attorney explained that he is often not able to attend in-person hearings because of his disabilities. The use of virtual hearings has allowed him to significantly expand his law practice because he is able to attend many more proceedings. This provides greater access to the attorney and his clients.
- For many people, virtual hearings provide greater access to justice simply because they are more convenient. While mere convenience may not override other considerations, it is still an important factor.

There are also aspects of virtual hearings that can impede access to justice. These obstacles must be understood and considered to ensure that the judiciary provides the best opportunities for the public to access court services.

- Some court patrons lack sufficient internet access, have limited means to purchase or maintain the necessary hardware, or are not comfortable with technology generally. This can impair or completely prevent the individual from appearing or effectively advocating their position in the case.
- Even for the users most comfortable with virtual hearings, technical problems outside of the individual's control can present barriers to accessing justice. Virtual platforms obviously depend on reliable networks and sufficient bandwidth. Some court patrons may use a less-than-optimal network that disrupts the hearing, making it difficult for the court to hear them and difficult for the patrons to follow what is taking place in the hearing. The demand for internal network bandwidth by court staff and judges

sometimes exceeds supply, causing disruptions to virtual hearings and other network uses.

- Virtual hearings are also more prone to create issues with the quality of the audio recording of the court proceedings. Disruptions from other court patrons in the same hearing, bandwidth constraints and fluctuations, and sometimes limitations of the virtual platform itself have compromised the quality of the audio recordings that constitute “the record.” Recording quality concerns span the spectrum from minor annoyance in some cases to rendering the record completely useless during the transcription process. The diminishment of reliable recording quality is a clear and significant problem, particularly if issues in a case evade meaningful and complete appellate review due to a compromised recording.

The platform providers and our internal IT team have done much to improve the quality of the virtual hearing recordings and specific additional improvements are anticipated to be completed in the near future. With support from the Judicial Council, the IT and facilities teams are installing kiosks in courthouses throughout the state that provide reliable access to virtual hearings. The IT team has also been working hard to secure expanded bandwidth and provide support and training along with the necessary hardware and software.

Technology Considerations

Instituting virtual hearings in the Utah courts at the onset of the pandemic required the judiciary to purchase and roll out new technology, train judicial officers and employees, collaborate with system partners, and increase IT team support. A forward-looking and effective virtual hearings strategy will require additional and upgraded hardware and software, continual network monitoring and improvements, and significant time to fully implement.

Hardware and Software

The Utah courts have invested significant time and resources into establishing a baseline hardware and software foundation for conducting virtual hearings. These previous investments, coupled with planned upgrades, position the courts to continue using virtual and hybrid hearings into the future.

Early in the pandemic, the Utah courts determined that Webex was the virtual meeting technology platform best suited to the needs of the judiciary. The number of Webex accounts available to judicial officers and court employees has gradually increased since the beginning of the pandemic as licensing needs and available resources have allowed. The judiciary currently has approximately 1,900 Webex licenses for state and local courts. Most of the state courts' computers have been upgraded to meet the minimum standards for Webex, but some outdated computers remain in use and will need to be replaced.

Beyond the necessary software licensing and the computers to operate that software, other hardware and technology upgrades in the courtrooms statewide have been necessary to conduct efficient and effective virtual and hybrid hearings. Numerous courtroom upgrades such as rolling media carts, additional monitors to display proceedings to the parties, and video cameras have been purchased and installed to support both virtual and hybrid hearings. In the near future, additional upgrades will be installed in courtrooms to better facilitate remote appearances, the presentation of evidence, and other related functionalities. Important additional upgrades to hardware and software are planned including: enabling simultaneous interpretation; allowing Webex audio to be recorded directly to the courts' official audio recording platform "For The Record" (FTR); and cloud migration of FTR data.

Network Requirements

The increased use of virtual court hearings and meetings has at times placed a nearly overwhelming load on the courts' network capabilities and bandwidth. This voluminous data transmission burden has resulted in slow network response times for critical systems to function well. It is anticipated that these challenges will not be fully resolved until an ARPA-funded² network upgrade is completed in December 2024. This upgrade is intended to optimize system performance through the creation of discrete network connections to route network traffic for the courts' internal applications (CORIS, CARE, etc.) separately from external applications (Webex, Google services, etc.).

² "ARPA" is the American Rescue Plan Act of 2021 (H.R. 1319), enacted on March 11, 2021.

Other Technology-related Considerations and Challenges

While the advancements and expanded use of technology are critical to the successful ongoing use of virtual and hybrid hearings, there are some challenges that the courts should anticipate and prepare for:

- judicial officer and court staff training will remain a significant need;
- reliance for support from the IT team will increase and add additional pressures on a small support staff tasked with handling high support volume;
- supply chain issues for hardware and devices will likely present ongoing challenges into the foreseeable future; and
- upgrades such as Webex kiosks, permanent cameras in all courtrooms, an accessible and intuitive public portal, FTR migration to the cloud, simultaneous interpretation, and other changes will be implemented gradually through December 2024, which will require the courts to adopt some short-term solutions while coping with the necessary time to complete these critical technology upgrades.

GPWG Recommendation

Continue to invest in IT staff necessary to support virtual and hybrid hearings and to provide training to employees, judges and commissioners.

Court User Survey

During the summer of 2022, the Utah State Bar's Access to Justice Commission, in partnership with the Utah Judicial Council, conducted a limited survey of court users (primarily in the Third District) about their experiences with virtual hearings from the fall of 2021 through the spring of 2022. The results, which provide useful information for the judiciary, are found in "*Utah Survey of Court Users: The Impact of Remote Hearings on Access to Justice, June 2022.*"³

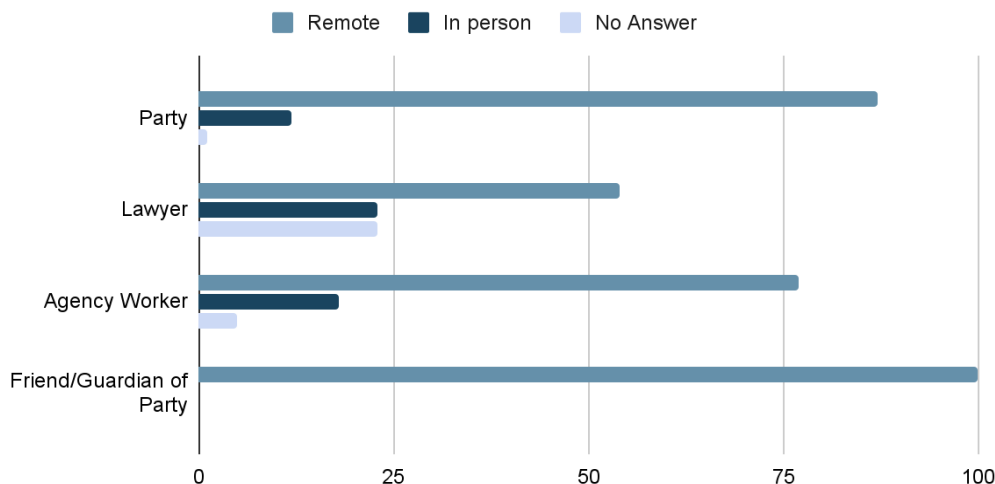
At the time the report was published, a total of 212 individuals had provided survey responses, including 116 parties, 68 lawyers, 22 government agency workers, and 5 friends/guardians of a party. These individuals participated in a variety of hearings in district court (criminal and civil), juvenile court (delinquency and child welfare), and justice court (criminal, traffic, and small claims).

The most conclusive survey result was that 75% of respondents across all types of survey participants expressed a preference for virtual hearings.⁴ Parties were the most likely group to prefer virtual hearings (87%), followed by agency workers (77%) and lawyers (54%).⁵ See Figure 1.

While the preference of court users is only one consideration among many, it is strong evidence that there is value in conducting certain court proceedings through virtual hearings.

Figure 1. Hearing Preference by Type of Participant

Source: Utah Survey of Court Users: The Impact of Remote Hearings on Access to Justice, June 2022.



³ See **Appendix B** for the Utah State Bar Access to Justice Commission full survey report.

⁴ Respondents were asked "For your court hearing or activity today, which do you prefer?" and were given two choices: "I prefer participating in person at the courthouse" and "I prefer participating remotely (by video, phone, or virtually)."

⁵ 100% of "friends / guardians of party" preferred virtual hearings, though the sample size of this group was five individuals.

Judicial Discretion vs. Patron Preference

There are many approaches the Judicial Council could adopt regarding the ongoing use of virtual hearings. In discussing various approaches, the GPWG weighed three main considerations: patron preference, consistency, and judicial discretion.

Consistency. There is value in having a consistent approach throughout the state. Court patrons know what to expect and can plan accordingly. Attorneys know whether a hearing is likely to be quick because it is virtual or whether the hearing will involve significant travel time to and from the courthouse. This is especially helpful for attorneys who practice in front of multiple judicial officers in different districts. It matters even more for non-profit legal service providers; they provide legal services across the state and have minimal administrative support to keep track of and cope with varying requirements. These agencies and other stakeholders have expressed a preference for statewide consistency.

Patron Preference. Public perception and participation are significantly impacted by the type of hearing. When attorneys, parties, and other court patrons can choose whether to access court remotely or in person, they are better able to manage their work and family obligations, schedules, finances, transportation, and personal safety. Court administration in Ohio has found that court users rank the courts higher in access and fairness when they are allowed to choose the venue because it allows them to participate in the process instead of just having the court process happen to them.

Judicial Discretion. Every hearing involves unique circumstances and people, and the judicial officer is in the best position to determine whether a virtual hearing or in-person hearing best serves the interests of justice given those unique factors. Additionally, our state comprises diverse geographic regions with unique strengths, needs, and characteristics. It is difficult to craft a single approach to determining whether hearings will be held virtually or in person that adequately serves the needs of all districts. Maximizing judicial discretion also allows judges to consider the impact virtual or in-person hearings have on their individual staff members.

The GPWG discussed and ultimately rejected an approach used by some states that establishes presumptions or mandates for every type of hearing. Though this approach establishes consistency, it almost completely ignores judicial discretion and the reality that every case is different. The GPWG also worried that complete judicial discretion discounts the feedback received from external stakeholders and leads to practices that are inconsistent for similar types of hearings.

In an effort to give appropriate weight to all three of these considerations, the GPWG recommends the following approach.

1. **Judicial discretion**

Judicial officers consider the factors discussed below in “Considerations for Judicial Officers” and other information relevant to the case, hearing, and parties and then determine whether a hearing will be in-person or virtual.

2. **Court Patron Requests**

- a. Where an in-person hearing is scheduled and a participant requests that they be allowed to participate virtually, the judicial officer must allow them to participate virtually if the participant shows good cause, which permission shall not be unreasonably withheld.
- b. Where a virtual hearing is scheduled and a participant requests that they be allowed to participate in person, the judicial officer must allow them to participate in person if the participant shows good cause, which permission shall not be unreasonably withheld.

3. **Good Cause**

A good cause standard should be established, as discussed below in “Amending Court Rules.”

4. **Court Technology**

- a. Courtroom technology must provide remote participants the same opportunity as in-person attendees to hear, view, and participate in the court proceeding.
- b. Each district should develop a digital evidence plan to standardize how digital evidence is managed within the district.

5. **Remote Attendee Obligations**

- a. A person who attends a court proceeding virtually must use a device and an internet connection that will contemporaneously transmit video and audio with sufficient quality to ensure a clear, verbatim record of the proceeding. If that technology is unavailable, the person must attend the court proceeding in person. The judicial officer may choose to require only audio transmission.
- b. Remote attendees must observe the same courtroom decorum as those attending in person, including appropriate courtroom attire, behavior, and language.
- c. Remote attendees must appear from a location that does not disrupt the court proceeding and allows the attendee to participate without distractions.
- d. Attendees must never appear in a court proceeding while operating a vehicle.
- e. Attorneys appearing remotely must be on time and not delay a court proceeding by overscheduling remote appearances.

GPWG Recommendation

Judicial officers should have discretion to determine whether a hearing will be in person or virtual. If a court patron requests to participate in a way other than the way identified by the judicial officer and demonstrates a valid reason, the judicial officer should be required to grant the request. Court rules should be adopted to implement this approach.

Considerations for Judicial Officers

Juvenile Courts

Addressing the individual needs of children and families is one of the foundational components of the Utah Juvenile Court. This approach extends to and influences decisions on appropriateness and effectiveness of conducting a hearing in-person or virtually. Maintaining judicial discretion in making these decisions is vital to preserving the defining characteristics of the juvenile court and ensuring an individualized approach to each case.

While the decisions on in-person and virtual hearings should be made based on unique circumstances of each case and each hearing, some juvenile court proceedings are more suitable to conduct virtually while other proceedings are more suitable for an in-person setting.

Virtual

The following juvenile court hearing types may be more appropriate to conduct virtually.

- Delinquency:
 - Detention Hearings
 - Expungements
 - Entire delinquency cases (*contingent on the factors listed below*)
 - Entire delinquency cases where minors are in an out-of-county placement
- Child Welfare:
 - Custody of Refugee Minor cases (CCS Petitioner)
 - Immigrant Status cases
 - Child Welfare Reviews (*contingent on the factors listed below*)
 - Child Welfare Post Termination Reviews

In Person

The following juvenile court hearing types may be more suitable to conduct in-person.

- Delinquency:
 - Trials
 - Evidentiary Hearings
 - Hearings on Motions to Suppress that include testimony
 - Competency hearings
 - Order to Show Cause/Contempt hearings
 - Criminal Information or Bind over cases that involve evidence
 - Any case where a party requests an in-person appearance
- Child Welfare:
 - Trials
 - Evidentiary hearings
 - Shelter hearings
 - Adjudication/Pretrial hearings
 - Disposition

- Permanency hearings
- Voluntary Relinquishment
- Order to Show Cause/Contempt hearings
- Any case where a party requests an in-person appearance
- Other Cases/Hearings
 - Treatment Courts
 - Petitions for Marriage
 - Judicial Bypass petitions
 - Emancipation petitions
 - Protective Orders
 - Adoption (*with an option for virtual attendance for family members out of the area*)

In making decisions on scheduling an in-person or virtual hearing, juvenile court judges should consider:

- Individual needs of youth and parents:
 - access to technology, including availability of Webex kiosks or other similar accommodations to facilitate participation in a virtual hearing;
 - transportation and travel challenges, including distance of residence from the courthouse (out of county, etc);
 - accommodation for youth enrolled in school; and
 - accommodation for working parents.
- Case Circumstances:
 - feasibility of a virtual hearing or transport for an incarcerated parent;
 - whether a case is high-profile;
 - whether a youth or parent would benefit from face-to-face interaction with the judge;
 - youth or parent lack of engagement;
 - youth is in a remote out of home placement and transport is not feasible; and
 - youth or parent display a lack of understanding of court processes or orders.
- Hearing Circumstances:
 - whether the hearing is a procedural or substantive type hearing;
 - whether evidence is being presented; and
 - whether witness testimony is required.

Juvenile court judges should additionally consider comfort level, preferences, and health accommodations of parties and teams. It may be beneficial at the time the next hearing is being scheduled to provide an opportunity for parties and participants to express their preferences regarding an in-person or virtual setting.

GPWG Recommendation

Juvenile court judges should consider the factors listed in this section when deciding whether a hearing will be in person or virtual.

Justice and District Courts

Post-pandemic, justice court judges and district court judges will continue to have the option to use in-person and virtual hearings to effectively accomplish the mission of the courts. While the state courts IT department has made significant improvements to the technology and hardware that make virtual hearings possible, the judiciary should continue to make additional investments in technology to better accommodate virtual hearings, facilitate hybrid hearings, and improve the evidence-presentation process for all hearing types in every courtroom throughout the state. Regardless of the type of hearing, an accurate audio record must be maintained.

Judicial discretion is paramount when deciding whether to hold an in-person or virtual hearing. Given the unique characteristics of each court, court location, and case, district court judges must have individual discretion to determine which hearing type will best promote the open, fair, and efficient administration of justice in each proceeding. In-person and virtual hearings offer different benefits and efficiencies, so judges will need to decide whether proceeding in person or virtually will best address the unique circumstances of each hearing.

It is also important to understand the technical limitations that impact virtual hearings. For example, some county jails have limited capacity for virtual hearings and cannot accommodate the number or length of virtual hearings a court may desire to hold.

The GPWG recommends justice court judges and district court judges consider principles of procedural fairness, factors outlined in court rule, and the following factors where relevant (listed in no particular order):

- Does an existing statute, rule, or principle of law require an in-person hearing? Can the mandatory nature of that requirement be waived by the parties (or by a single party)?
- Do all parties have sufficient access to technology for virtual hearings?
- What is the substantive or procedural importance of the hearing?
- Which type of hearing best promotes access to justice for the parties?
- Are the parties more comfortable with a virtual hearing (e.g., high-conflict domestic cases, protective order hearings, and civil stalking injunction hearings)?
- Does the type of hearing allow the parties to have access to counsel of their choice?
- Would the parties or their counsel be required to travel long distances for an in-person hearing?
- Is there a significant cost to a party for an in-person hearing (e.g., money, time, lost work, child care, cost of transportation from jail for civil proceeding, etc.)?
- Do the parties have a stated preference for a certain type of hearing? If so, how and when do parties state their hearing-type preference?

- Are the judge and court staff able to manage a virtual or hybrid courtroom effectively?
- Does the hearing make efficient use of judicial resources, facilities, and court personnel?
- Will a party be prejudiced from requiring an in-person, virtual, or hybrid hearing?
- Will the type of hearing unreasonably delay the progress of the case, increase expense, or complicate resolution of any issue?
- Will the type of hearing unreasonably limit the court's ability to assess credibility, voluntariness, or comprehension?
- Is there a fairness concern because one party has easier access to the courthouse, or greater facility with technology, and is seeking a strategic advantage?
- Does the type of hearing allow for greater access to effective interpretation services?
- Is there enough time to give notice for people to make appropriate arrangements—especially where there is a change from one hearing type to another?
- Does the type of hearing—particularly virtual and hybrid hearings—allow parties to share documents?
- In virtual and hybrid hearings, will the participants have prior or simultaneous access to documents, photos, etc., that are submitted to the courtroom?

GPWG Recommendation

Justice court judges and district court judges should consider the factors listed in this section when deciding whether a hearing will be in person or virtual.

Appellate Courts

The appellate courts have only one hearing type to consider in evaluating moving into a post-pandemic judicial environment—oral arguments. Oral arguments never have witnesses and very rarely utilize any form of evidentiary exhibits.

Likewise, procedural fairness in appellate hearings is accomplished by parties being able to clearly present their arguments and communicate with the members of the bench, and respond in rebuttal where appropriate, to opposing counsel's arguments. This of course has historically been accomplished by in-person oral arguments. Throughout the COVID-19 pandemic this was accomplished entirely via virtual hearings.

One aspect of procedural fairness that was not considered prior to the pandemic was that our appellate courts hear cases from all eight judicial districts while being housed in the Third District. This presents the question: how does this geographical arrangement impact litigants? For example, represented parties of an appeal originating in the Fifth District would possibly pay more for their appeal as their counsel is required to travel several hundred miles to Salt Lake City. Allowing for virtual appearances for these parties and attorneys, if able to be done equitably, would eliminate a procedural hurdle for the geographically distant party and increase procedural fairness.

Utah's appellate courtrooms are currently undergoing a significant technology overhaul that will allow both parties, as well as the appellate judges, to appear in person or virtually. The

technology allows one party to appear virtually while the other appears in-person, and allows one or more judges to appear remotely while the others appear in-person.

Considerations for Deciding on In-person vs. Virtual Oral Argument

- What are the locations of parties and the costs of travel? Does requiring one party to travel a significantly greater distance to the courthouse create fairness issues?
- What are the unintended impacts of having appellate courts that operate from only one courthouse in the state? Does this geographic reality impact decisions to file appeals?
- Would in-person or virtual oral argument increase the diversity of the appellate bar? Would it increase the diversity of the appellate bench?
- Which method(s) do the parties prefer for making their oral arguments?
- Which method does the appellate bench prefer for holding oral argument? Because oral argument is designed to be an opportunity for judicial officers to ask questions presented in briefing, does this preference hold more weight than the preference of the parties?
- Does the type of case matter in making the decision on remote vs. in-person?

GPWG Recommendation

Appellate court judges should consider the factors listed in this section when deciding whether a hearing will be in person or virtual.

Recommended Best Practices for Virtual Hearings

The experiences of judicial officers and court staff with virtual hearings over the past two years helped the GPWG identify best practices for the ongoing use of virtual hearings. The following pages of this report provide both court-wide recommendations and recommendations for specific groups including judges and court staff, court patrons, attorneys, and the prison and jails.

Court-wide Recommendations:

1. Each court location should update judicial officers, court staff, patrons, attorneys, and community partners (e.g., the prison and jails) on relevant Webex updates and process changes. This may include a page on the court website for updates and regular revisions to posted Webex guides.
2. Each court calendar should clearly indicate if a hearing is scheduled to be held in person or through a virtual or hybrid hearing. If the calendar setting is for a virtual or hybrid hearing, the Webex link for the hearing should be included on the calendar for the parties, public, and media to access, as appropriate (i.e., some hearings — such as adoptions — are not open to the general public or media and would therefore not have a publicly-accessible Webex link).
3. A party who shows up at the courthouse for a virtual hearing — whether due to calendaring confusion or inability to access a virtual hearing on their own — should be provided access to participate in the virtual hearing. To facilitate this access, kiosks should be available at every courthouse for patrons to participate in virtual hearings as needed.
4. To address current challenges with the courts' network bandwidth, it is recommended that court employees working at a court location avoid using the wireless network and instead connect to the wired network whenever and wherever possible.
5. Court employees working at the same court location who attend a virtual meeting should gather as a group in a single location to attend the meeting from a single device and network connection as this reduces bandwidth pressure on the courts' network.
6. The public wireless networks in each court location share a statewide connection, resulting in limited capacity to support parties, attorneys, and members of the public who may expect to use the courts' public wireless network to attend remote hearings. These court participants should connect to virtual hearings using networks other than the courts' public wireless networks at the courthouse.

Recommendations for Specific Groups – Judicial Officers & Court Staff:

JUDICIAL OFFICERS & COURT STAFF		
1	Notices: <i>Contents</i>	<p>All notices for virtual hearings should include at a minimum the following information (taking into consideration Rule 43 of the Utah Rules of Civil Procedure):</p> <ul style="list-style-type: none"> • the date and time of the hearing; • the type of hearing – virtual, hybrid, or in-person; • the purpose of the hearing; • how to join the hearing, including: <ul style="list-style-type: none"> – the Webex link (or how to access that link); – if permitted, how to call-in for the hearing; – whether participant video must be enabled; – how to access virtual hearing kiosks at a court location; • what to expect at a virtual hearing; • how to file, serve, and present evidence; • what patrons should tell their witnesses; • contact information for technical assistance (<i>see Recommendation #5</i>); • the process for submitting and presenting evidence (<i>see Recommendation #8</i>); and • how to request interpretation or accommodation (<i>see Recommendation #12</i>).
2	Notices: <i>Plain Language</i>	Notices should be easy to understand (i.e., in plain language, avoiding abbreviations or having standard abbreviations; etc.).
3	Notices: <i>Hearing Changes</i>	If a hearing is changed from in person to virtual or vice versa after notice was sent, a new timely notice should be provided to all participants.
4	Notices: <i>Self-Represented Parties</i>	If a self-represented party has provided an email address, notices should be sent by email. When possible, MyCase should be the preferred method for such communication.
5	Technical Assistance for Virtual Hearing Participants	<p>Each court location should have a technical assistance phone number that is included on every hearing notice. Ideally this number should be specific to each court location, but at a minimum should connect the participant to a qualified individual who can:</p> <ol style="list-style-type: none"> a) assist the participant to resolve technical issues; AND b) communicate immediately with the judicial officer's judicial assistant that the participant is attempting to connect to the virtual hearing but is experiencing technical issues.
6	Calendar Capacity	Virtual hearings may take longer and should be scheduled appropriately.

JUDICIAL OFFICERS & COURT STAFF		
7	Webex Greeting	Participants should be greeted by a screen in Webex to confirm for participants and the public that they are in the right virtual location. For example, the screen could display the name of the judge, the time hearings are scheduled to begin, and what to do while waiting.
8	Instructions: <i>Evidence</i>	Judicial officers and judicial assistants should provide participants with clear instructions on how to submit and present evidence to the court during a virtual hearing.
9	Instructions: <i>Expectations</i>	If possible, any specific expectations of the parties should be clearly communicated to the parties in advance (e.g., if a camera is required for the party's participation in the hearing, if parties are expected to have spoken/negotiated before the hearing or if breakout rooms will be available for that purpose, etc.). These expectations could be provided in a flier, district-level standing order, or the Judicial Council may want to create a rule.
10	Instructions: <i>Hearing Processes</i>	The judicial officer or judicial assistant should provide hearing-specific instruction on virtual hearing processes (e.g., how a party/attorney should inform the court when their case is ready to be called). "How to" materials could be created for attorneys new to virtual hearings (how to find the calendar/hearing information, tips on how to communicate with clients if they are not in the same location during the hearing, how to prepare clients, how interpretation works during hearings, communicating with opposing side in advance of the hearing, use of breakout rooms, how to present evidence, etc.)
11	Instructions: <i>Use of Webex</i>	The courts should provide clear instructions explaining how to use Webex. "How to" materials could be created for all Webex users. Materials for attorneys new to virtual hearings might include how to find the calendar/hearing information, tips on how to communicate with clients if they are not in the same location during the hearing, how to prepare clients, how interpretation works during hearings, communicating with opposing side in advance of the hearing, use of breakout rooms, how to present evidence, etc.
12	Interpretation & Accommodation	When an interpreter is needed, judicial assistants should make arrangements for simultaneous interpretation if possible (or direct the party or attorney on how to arrange for simultaneous interpretation). The process for requesting other accommodations should be clearly communicated to participants.
13	Ongoing Training	Judicial officers and judicial assistants should receive ongoing training on Webex and other necessary virtual hearing technology.

JUDICIAL OFFICERS & COURT STAFF		
14	Experience Sharing	The courts should provide regular opportunities for judicial officers, court staff, patrons, and stakeholders to share their feedback on the use of the virtual hearings.

Recommendations for Specific Groups – Court Patrons:

COURT PATRONS		
1	Decorum Expectations	<p>Participants SHOULD:</p> <ul style="list-style-type: none"> a) remember that a virtual courtroom is subject to the same standards of behavior and decorum as in-person court; b) dress appropriately for a court appearance; c) be focused on the proceedings by pre-arranging care for other obligations that may need attention during the hearing (i.e., children, pets, etc.); and d) if late for a hearing, remain in the Webex proceeding until the judicial officer has finished calling through the other scheduled hearings before alerting the judicial officer. <p>Participants SHOULD NOT:</p> <ul style="list-style-type: none"> e) speak over another party or an interpreter; f) interrupt when joining a virtual hearing that has already started (remain muted until their case is called); and g) eat, drink, smoke, or drive during the hearing.
2	Technology Expectations	<p>Participants SHOULD:</p> <ul style="list-style-type: none"> a) Location – plan on joining the virtual hearing from a suitable location that is quiet, private, and allows the participant to focus; b) Camera – have video enabled and be visible to the court when participating in a proceeding, choosing a camera angle that avoids background distractions; c) Lighting – avoid camera angles that position a window or other bright light behind the participant (this often results in poor video quality and obscures the participant’s face); d) Audio – be aware of and try to minimize background noises; e) Calling in on a non-smartphone – avoid joining a virtual hearing via a non-smartphone, as it will limit Webex functionality (e.g., the participant won’t be able to be moved into a separate virtual room to talk with an attorney); and f) Bandwidth – use a network with sufficient bandwidth for a stable connection to the virtual hearing OR use a computer kiosk at the courthouse to join a virtual proceeding.

Recommendations for Specific Groups – Attorneys:

ATTORNEYS		
1	Expectations	<p>Expectations for attorneys should be outlined and disseminated. For example, attorneys SHOULD:</p> <ul style="list-style-type: none"> a) Title & Name – ensure their Webex name displays their title followed by their full name (i.e., Defense Attorney Atticus Finch); b) Camera – have video enabled and be visible to the court when participating in a proceeding, choosing a camera angle that avoids background distractions; c) Audio – be aware of and try to minimize background noises, and use a quality microphone to help ensure an accurate record; d) Attire – dress appropriately for a court appearance; e) Simultaneous hearings – log into multiple simultaneous hearings only if the attorney can effectively manage participation in each hearing, ensuring appropriate, timely, and responsive communication with each court; and f) NEVER drive during an appearance.

Recommendations for Specific Groups – Prison & Jails:

PRISON & JAILS		
1	Stakeholder Meetings	<p>Stakeholder meetings should be held to discuss and establish best practices between the courts and the prison / jails, including:</p> <ul style="list-style-type: none"> a) communication processes to notify the correctional facility if a hearing will be in person or virtual so appropriate transportation or virtual appearance can be arranged; b) the need for each correctional facility to provide at least two Webex-equipped rooms per court calendar to facilitate attorney / client communication in a breakout room, while the court moves forward with other cases in the remaining room. c) the need for each correctional facility to have a dedicated phone that an interpreter can use to provide simultaneous interpretation during the hearing to an inmate with limited english proficiency.

Amending Court Rules

Court Rule Amendment Recommendations - Appearing in Court

A foundational principle of our pre-pandemic understanding was that appearing in court meant being physically present in the courtroom. In limited circumstances judicial officers and practitioners would utilize phone conferences, and, with exception to some in-custody first appearances taking place remotely from jails, video conferencing was seldom used across the state. As a result, most rules and practices did not contemplate the use of virtual meeting technology or—at a minimum—indicated a strong preference for in-person appearances. With the rapid advancement in courtroom technology experienced over the last several years, this strong preference for in-person appearances seems to be an increasingly outdated approach to the administration of justice.

Pursuant to the Utah Constitution, the Supreme Court is obligated “to adopt rules of procedure and evidence” and the Judicial Council is obligated “to adopt rules for the administration of the courts of the state.” Court rules are essential to the mission of the Utah judiciary to provide the people an open, fair, efficient, and independent system for the advancement of justice under the law. Throughout the pandemic the interpretation of the meaning of this mission has evolved. The Supreme Court and Judicial Council amended or suspended application of certain rules to accommodate necessary pandemic-related changes to previously established practice. In large part, court rules are still built on a pre-pandemic understanding of the needs of judicial officers, court staff, and patrons. This section will provide recommendations our rulemaking bodies should consider when creating and amending rules in a post-pandemic judiciary.

Recommendations to Supreme Court

The Green Phase Workgroup acknowledges that many of the necessary changes found in this section implicate the direct authority of the Utah Supreme Court. As presented in *Judicial Discretion v. Patron Preference*, the GPWG recommends the Supreme Court establish a “good cause” standard that hearing participants must demonstrate in requesting to appear opposite the decision of the judicial officer. The GPWG recommends the Supreme Court charge its various advisory committees with defining the “good cause” standard through rule. The Supreme Court’s advisory committees are uniquely suited for this task because of their diverse practitioner composition, and practice of incorporating stakeholder comments into their decision-making process. Finally, the GPWG recommends that the Supreme Court establish an appeal process when a hearing participant believes a judicial officer is not appropriately applying the “good cause” standard as defined in the relevant procedural rules. Because the “good cause” standard may vary between procedural rule chapters, it will likely be necessary for each procedural rule chapter to define an appeal process.

GPWG Recommendation

The Supreme Court establish a “good cause” standard that hearing participants must demonstrate in requesting to appear opposite the decision of the judicial officer. The Supreme Court should define “good cause” and establish an appeal process when a hearing participant believes a judicial officer is not appropriately applying the “good cause” standard as defined in the relevant procedural rules.

Recommendations to the Judicial Council

During the pandemic, districts accommodated email filing for self-represented litigants who were not able to file electronically because in-person filing was not an option. That practice proved helpful to many self-represented litigants. The GPWG discussed whether the courts should continue to allow email filing by self-represented litigants. Due to the significant workload email filing adds to clerical staff, the GPWG recommends that all initial filings by self-represented litigants be made in person or via US mail. The GPWG also recommends that the Judicial Council amend its rules to specifically authorize self-represented litigants to make subsequent filings (after the initial filing) in a case through email. Notwithstanding the above, the GPWG recommends that a patron seeking a civil protective order or civil stalking injunction be allowed to file their initial request via email due to the significant access and safety concerns implicated in these proceedings.

GPWG Recommendation

All initial filings by self-represented litigants should be made in person or via US mail. The Judicial Council should amend its rules to specifically authorize self-represented litigants to make subsequent filings (after the initial filing) in a case through email. Notwithstanding the above, a patron seeking a civil protective order or civil stalking injunction be allowed to file their initial request via email due to the significant access and safety concerns implicated in these proceedings.

Constitutional Considerations

Rulemaking bodies should explore the constitutional concerns surrounding the use of in-person and virtual hearings, most importantly whether in-person and virtual hearings are constitutionally equivalent. For example, Rule 26(a)(1) of the Utah Rules of Juvenile Procedure provides that minors have a right “to appear in person and to defend in person or by counsel.” Rule 17.5 of the Utah Rules of Criminal Procedure identifies certain types of hearings that can be held via contemporaneous transmission, while prohibiting others, and allowing for waiver of the prohibition with mutual agreement of the parties. Our historical analysis of when parties were entitled to in-person hearings may not be current with recent technological advances and the availability of virtual resources. The GPWG recommends that the judiciary’s rulemaking bodies balance the increasing need for opportunities to improve access to justice, while simultaneously ensuring court rules and practices do not violate principles of due process.

Initial Rule Amendments to Consider

In addition to rule-making bodies providing guidance on the new “good cause” standard, there are other procedural and administrative rules that may benefit from amendment or clarification. The GPWG has formulated a list of the rules with the most perceptible need for attention, which is included under **Appendix C** of this report.

Stakeholder Input

The GPWG distributed a draft of this report to community stakeholders and government agencies, requesting their feedback.

Community Stakeholders

The most common feedback from community stakeholders was that options for virtual participation in court proceedings should continue and that court patrons should be able to request the opportunity to participate virtually even if the judicial officer has determined that the proceeding will be in person. Stakeholders explained that even though virtual hearings have some limitations and are not the best option in all circumstances, they have significantly expanded access to justice.

Multiple stakeholders expressed appreciation for virtual hearings while also noting a need for additional technical support for virtual hearing participants. Many participants will not have experience with Webex and may experience difficulties accessing a virtual hearing and navigating through Webex. Resources with detailed explanations about how to participate in a virtual hearing and employees or volunteers dedicated to assisting virtual hearing participants would help people overcome difficulties prior to and during their virtual hearing.

Two stakeholders noted that the health concerns regarding the pandemic are still very real and very serious for some people and asked for appropriate consideration of the circumstances of those people.

Stakeholders provided many additional recommendations, which are listed below.

- Coordinate with community organizations likely to provide access to technology and support efforts to strengthen these services.
- Provide dedicated staff to assist users experiencing technical problems with a virtual hearing.
- Establish consistent policies to determine whether hearings will be virtual or in person.
- Each court should have a single, consistent link used to access virtual hearings.
- For virtual calendars involving multiple cases, establish a consistent way to notify the court that a participant is prepared for their case to be called and a way to notify a participant that their case will be called next.
- Provide greater access to breakout rooms for conversations with clients and for negotiations among parties.
- Make reasonable accommodations for patrons with disabilities.
- Allow hearing participants to participate virtually upon a finding of good cause even if the court has determined the hearing will be in person.
- Provide better instructions accessing a virtual hearing and explaining the expectations for participants. This may be a short video or an information sheet.
- Provide links for all public virtual hearings in a central location on the courts' website.

- Establish consistent procedures for entering evidence in virtual hearings.
- Ask virtual hearing participants if another person is in the room in order to determine whether someone is trying to influence the participant.
- Develop procedures for patrons to participate in virtual hearings without sacrificing privacy.
- Expand the availability of court kiosks for pro se people to use for printing, scanning, and filing documents.
- In both virtual hearings and in-person hearings, allow appropriate time for participants to process questions and communicate with the judicial officer.
- Shift the approach of courts to make judicial officers seem approachable and encourage staff to help people navigate the complexities of court.
- Consider offering extended hours to accommodate people who work during the day.

Government Agencies

The Utah Department of Corrections (UDC) expressed hope that the courts would not change policies that would result in them needing to conduct more transports. UDC noted that increasing the number of transports would impact their capacity to handle other work. The Division of Juvenile Justice and Youth Services similarly expressed a hope that detention hearings could be held virtually. They noted that for youth in a community placement in their county, their case managers would plan to request in-person hearings when they felt it was necessary.

Future Questions

The judiciary will continue to learn about the utility of virtual hearings in coming months. Periodic review of these recommendations and policies based on these recommendations is important. The judiciary should gather and analyze data, including data from court patrons and stakeholders as well as data about virtual and in-person hearings, to see how virtual hearings are serving the public and advancing the mission of the judiciary.

GPWG Recommendation

The judiciary should gather and analyze data, including data from court patrons and stakeholders as well as data about virtual and in-person hearings, to see how virtual hearings are serving the public and advancing the mission of the judiciary.

There will certainly be additional questions that arise regarding the use of virtual hearings. The GPWG is willing to consider and make recommendations on any additional issues that would be helpful to the Judicial Council and Supreme Court.

Recommendations

- Continue to invest in IT staff necessary to support virtual and hybrid hearings and to provide training to employees and judicial officers.
 - Judicial discretion vs. patron preference
1. **Judicial discretion**

Judicial officers consider the factors discussed below in “Considerations for Judicial Officers” and other information relevant to the case, hearing, and parties and then determine whether a hearing will be in-person or virtual.
 2. **Court Patron Requests**
 - a. Where an in-person hearing is scheduled and a participant requests that they be allowed to participate virtually, the judicial officer must allow them to participate virtually if the participant shows good cause, which permission shall not be unreasonably withheld.
 - b. Where a virtual hearing is scheduled and a participant requests that they be allowed to participate in person, the judicial officer must allow them to participate in person if the participant shows good cause, which permission shall not be unreasonably withheld.
 3. **Good Cause**

A good cause standard should be established, as discussed below in “Amending Court Rules.”
 4. **Court Technology**
 - a. Courtroom technology must provide remote participants the same opportunity as in-person attendees to hear, view, and participate in the court proceeding.
 - b. Each district should develop a digital evidence plan to standardize how digital evidence is managed within the district.
 5. **Remote Attendee Obligations**
 - a. A person who attends a court proceeding virtually must use a device and an internet connection that will contemporaneously transmit video and audio with sufficient quality to ensure a clear, verbatim record of the proceeding. If that technology is unavailable, the person must attend the court proceeding in person. The court may choose to require only audio transmission.
 - b. Remote attendees must observe the same courtroom decorum as those attending in person, including appropriate courtroom attire, behavior, and language.
 - c. Remote attendees must appear from a location that does not disrupt the court proceeding and allows the attendee to participate without distractions. Attendees must never appear in a court proceeding while operating a vehicle.

- Juvenile court judges should consider the following factors when deciding whether a hearing will be in person or virtually.
 - Individual needs of youth and parents:
 - access to technology, including availability of Webex kiosks or other similar accommodations to facilitate participation in a virtual hearing;
 - transportation and travel challenges, including distance of residence from the courthouse (out of county, etc);
 - accommodation for youth enrolled in school; and
 - accommodation for working parents.
 - Case Circumstances:
 - feasibility of a virtual hearing or transport for an incarcerated parent;
 - whether a case is high-profile;
 - whether a youth or parent would benefit from face-to-face interaction with the judge;
 - youth or parent lack of engagement;
 - youth is in a remote out of home placement and transport is not feasible; and
 - youth or parent display a lack of understanding of court processes or orders.
 - Hearing Circumstances:
 - whether the hearing is a procedural or substantive type hearing;
 - whether evidence is being presented; and
 - whether witness testimony is required.
 - Judges should additionally consider comfort level, preferences, and health accommodations of parties and teams.
- Justice court judges and district court judges should consider the following factors when deciding whether a hearing will be in person or virtually.
 - Does an existing statute, rule, or principle of law require an in-person hearing? Can the mandatory nature of that requirement be waived by the parties (or by a single party)?
 - Do all parties have sufficient access to technology for virtual hearings?
 - What is the substantive or procedural importance of the hearing?
 - Which type of hearing best promotes access to justice for the parties?
 - Are the parties more comfortable with a virtual hearing (e.g., high-conflict domestic cases, protective order hearings, and civil stalking injunction hearings)?
 - Does the type of hearing allow the parties to have access to counsel of their choice?
 - Would the parties or their counsel be required to travel long distances for an in-person hearing?
 - Is there a significant cost to a party for an in-person hearing (e.g., money, time, lost work, child care, cost of transportation from jail for civil proceeding, etc.)?

- Do the parties have a stated preference for a certain type of hearing? If so, how and when do parties state their hearing-type preference?
- Are the judge and court staff able to manage a virtual or hybrid courtroom effectively?
- Does the hearing make efficient use of judicial resources, facilities, and court personnel?
- Will a party be prejudiced from requiring an in-person, virtual, or hybrid hearing?
- Will the type of hearing unreasonably delay the progress of the case, increase expense, or complicate resolution of any issue?
- Will the type of hearing unreasonably limit the court's ability to assess credibility, voluntariness, or comprehension?
- Is there a fairness concern because one party has easier access to the courthouse, or greater facility with technology, and is seeking a strategic advantage?
- Does the type of hearing allow for greater access to effective interpretation services?
- Is there enough time to give notice for people to make appropriate arrangements—especially where there is a change from one hearing type to another?
- Does the type of hearing—particularly virtual and hybrid hearings—allow parties to share documents?
- In virtual and hybrid hearings, will the participants have prior or simultaneous access to documents, photos, etc., that are submitted to the courtroom?
- Appellate court judges should consider the following factors when deciding whether a hearing will be in person or virtually.
 - What are the locations of parties and the costs of travel? Does requiring one party to travel a significantly greater distance to the courthouse create fairness issues?
 - What are the unintended impacts of having appellate courts that operate from only one courthouse in the state? Does this geographic reality impact decisions to file appeals?
 - Would in-person or virtual oral argument increase the diversity of the appellate bar? Would it increase the diversity of the appellate bench?
 - Which method(s) do the parties prefer for making their oral arguments?
 - Which method does the appellate bench prefer for holding oral argument? Because oral argument is designed to be an opportunity for judicial officers to ask questions presented in briefing, does this preference hold more weight than the preference of the parties?
 - Does the type of case matter in making the decision on remote vs. in-person?
- Court-wide best practices
 - Each court location should update judicial officers, court staff, patrons, attorneys, and community partners (e.g., the prison and jails) on relevant Webex updates

and process changes. This may include a page on the court website for updates and regular revisions to posted Webex guides.

- Each court calendar should clearly indicate if a hearing is scheduled to be held in person or through a virtual or hybrid hearing. If the calendar setting is for a virtual or hybrid hearing, the Webex link for the hearing should be included on the calendar for the parties, public, and media to access, as appropriate (i.e., some hearings — such as adoptions — are not open to the general public or media and would therefore not have a publicly-accessible Webex link).
 - A party who shows up at the courthouse for a virtual hearing — whether due to calendaring confusion or inability to access a virtual hearing on their own — should be provided access to participate in the virtual hearing. To facilitate this access, kiosks should be available at every courthouse for patrons to participate in virtual hearings as needed.
 - To address current challenges with the courts’ network bandwidth, it is recommended that court employees working at a court location avoid using the wireless network and instead connect to the wired network whenever and wherever possible.
 - Court employees working at the same court location who attend a virtual meeting should gather as a group in a single location to attend the meeting from a single device and network connection as this reduces bandwidth pressure on the courts’ network.
 - The public wireless networks in each court location share a statewide connection, resulting in limited capacity to support parties, attorneys, and members of the public who may expect to use the courts’ public wireless network to attend remote hearings. These court participants should connect to virtual hearings using networks other than the courts’ public wireless networks at the courthouse.
- Best practices for judicial officers and court staff

JUDICIAL OFFICERS & COURT STAFF		
1	Notices: <i>Contents</i>	<p>All notices for virtual hearings should include at a minimum the following information (taking into consideration Rule 43 of the Utah Rules of Civil Procedure):</p> <ul style="list-style-type: none"> • the date and time of the hearing; • the type of hearing — virtual, hybrid, or in-person; • the purpose of the hearing; • how to join the hearing, including: <ul style="list-style-type: none"> – the Webex link (or how to access that link); – if permitted, how to call-in for the hearing; – whether participant video must be enabled; – how to access virtual hearing kiosks at a court location; • what to expect at a virtual hearing;

JUDICIAL OFFICERS & COURT STAFF		
		<ul style="list-style-type: none"> • how to file, serve, and present evidence; • what patrons should tell their witnesses; • contact information for technical assistance (see <i>Recommendation #5</i>); • the process for submitting and presenting evidence (see <i>Recommendation #8</i>); and • how to request interpretation or accommodation (see <i>Recommendation #12</i>).
2	Notices: <i>Plain Language</i>	Notices should be easy to understand (i.e., in plain language, avoiding abbreviations or having standard abbreviations; etc.).
3	Notices: <i>Hearing Changes</i>	If a hearing is changed from in person to virtual or vice versa after notice was sent, a new timely notice should be provided to all participants.
4	Notices: <i>Self-Represented Parties</i>	If a self-represented party has provided an email address, notices should be sent by email. When possible, MyCase should be the preferred method for such communication.
5	Technical Assistance for Virtual Hearing Participants	Each court location should have a technical assistance phone number that is included on every hearing notice. Ideally this number should be specific to each court location, but at a minimum should connect the participant to a qualified individual who can: <ul style="list-style-type: none"> a) assist the participant to resolve technical issues; AND b) communicate immediately with the judicial officer's judicial assistant that the participant is attempting to connect to the virtual hearing but is experiencing technical issues.
6	Calendar Capacity	Virtual hearings may take longer and should be scheduled appropriately.
7	Webex Greeting	Participants should be greeted by a screen in Webex to confirm for participants and the public that they are in the right virtual location. For example, the screen could display the name of the judge, the time hearings are scheduled to begin, and what to do while waiting.
8	Instructions: <i>Evidence</i>	Judicial officers and judicial assistants should provide participants with clear instructions on how to submit and present evidence to the court during a virtual hearing.

JUDICIAL OFFICERS & COURT STAFF		
9	Instructions: <i>Expectations</i>	If possible, any specific expectations of the parties should be clearly communicated to the parties in advance (e.g., if a camera is required for the party's participation in the hearing, if parties are expected to have spoken/negotiated before the hearing or if breakout rooms will be available for that purpose, etc.). These expectations could be provided in a flier, district-level standing order, or the Judicial Council may want to create a rule.
10	Instructions: <i>Hearing Processes</i>	The judicial officer or judicial assistant should provide hearing-specific instruction on virtual hearing processes (e.g., how a party/attorney should inform the court when their case is ready to be called). "How to" materials could be created for attorneys new to virtual hearings (how to find the calendar/hearing information, tips on how to communicate with clients if they are not in the same location during the hearing, how to prepare clients, how interpretation works during hearings, communicating with opposing side in advance of the hearing, use of breakout rooms, how to present evidence, etc.)
11	Instructions: <i>Use of Webex</i>	The courts should provide clear instructions explaining how to use Webex. "How to" materials could be created for all Webex users. Materials for attorneys new to virtual hearings might include how to find the calendar/hearing information, tips on how to communicate with clients if they are not in the same location during the hearing, how to prepare clients, how interpretation works during hearings, communicating with opposing side in advance of the hearing, use of breakout rooms, how to present evidence, etc.
12	Interpretation & Accommodation	When an interpreter is needed, judicial assistants should make arrangements for simultaneous interpretation if possible (or direct the party or attorney on how to arrange for simultaneous interpretation). The process for requesting other accommodations should be clearly communicated to participants.
13	Ongoing Training	Judicial officers and judicial assistants should receive ongoing training on Webex and other necessary virtual hearing technology.
14	Experience Sharing	The courts should provide regular opportunities for judicial officers, court staff, patrons, and stakeholders to share their feedback on the use of the virtual hearings.

- Best practices for court patrons

COURT PATRONS		
1	Decorum Expectations	Participants SHOULD: h) remember that a virtual courtroom is subject to the same

COURT PATRONS		
		<p>standards of behavior and decorum as in-person court;</p> <ul style="list-style-type: none"> i) dress appropriately for a court appearance; j) be focused on the proceedings by pre-arranging care for other obligations that may need attention during the hearing (i.e., children, pets, etc.); and k) if late for a hearing, remain in the Webex proceeding until the judicial officer has finished calling through the other scheduled hearings before alerting the judicial officer. <p>Participants SHOULD NOT:</p> <ul style="list-style-type: none"> l) speak over another party or an interpreter; m) interrupt when joining a virtual hearing that has already started (remain muted until their case is called); and n) eat, drink, smoke, or drive during the hearing.
2	Technology Expectations	<p>Participants SHOULD:</p> <ul style="list-style-type: none"> g) Location – plan on joining the virtual hearing from a suitable location that is quiet, private, and allows the participant to focus; h) Camera – have video enabled and be visible to the court when participating in a proceeding, choosing a camera angle that avoids background distractions; i) Lighting – avoid camera angles that position a window or other bright light behind the participant (this often results in poor video quality and obscures the participant's face); j) Audio – be aware of and try to minimize background noises; k) Calling in on a non-smartphone – avoid joining a virtual hearing via a non-smartphone, as it will limit Webex functionality (e.g., the participant won't be able to be moved into a separate virtual room to talk with an attorney); and l) Bandwidth – use a network with sufficient bandwidth for a stable connection to the virtual hearing OR use a computer kiosk at the courthouse to join a virtual proceeding.

- Best practices for attorneys

ATTORNEYS		
1	Expectations	<p>Expectations for attorneys should be outlined and disseminated. For example, attorneys SHOULD:</p> <ul style="list-style-type: none"> g) Title & Name – ensure their Webex name displays their title followed by their full name (i.e., Defense Attorney Atticus Finch); h) Camera – have video enabled and be visible to the court when participating in a proceeding, choosing a camera angle that avoids background distractions; i) Audio – be aware of and try to minimize background noises, and

ATTORNEYS		
		<p>use a quality microphone to help ensure an accurate record;</p> <p>j) Attire – dress appropriately for a court appearance;</p> <p>k) Simultaneous hearings – log into multiple simultaneous hearings only if the attorney can effectively manage participation in each hearing, ensuring appropriate, timely, and responsive communication with each court; and</p> <p>l) NEVER drive during an appearance.</p>

- Best practices for jails and prisons

PRISON & JAILS		
1	Stakeholder Meetings	<p>Stakeholder meetings should be held to discuss and establish best practices between the courts and the prison / jails, including:</p> <p>d) communication processes to notify the correctional facility if a hearing will be in person or virtual so appropriate transportation or virtual appearance can be arranged;</p> <p>e) the need for each correctional facility to provide at least two Webex-equipped rooms per court calendar to facilitate attorney / client communication in a breakout room, while the court moves forward with other cases in the remaining room.</p> <p>f) the need for each correctional facility to have a dedicated phone that an interpreter can use to provide simultaneous interpretation during the hearing to an inmate with limited english proficiency.</p>

- The Supreme Court should establish a “good cause” standard that hearing participants must demonstrate in requesting to appear opposite the decision of the judicial officer. The Supreme Court should charge its various advisory committees with defining the “good cause” standard through rule. The Supreme Court should establish an appeal process when a hearing participant believes a judicial officer is not appropriately applying the “good cause” standard as defined in the relevant procedural rules. Because the “good cause” standard may vary between procedural rule chapters, it will likely be necessary for each procedural rule chapter to define an appeal process.
- All initial filings by self-represented litigants should be made in person or via US mail. The Judicial Council should amend its rules to specifically authorize self-represented litigants to make subsequent filings (after the initial filing) in a case through email. Notwithstanding the above, a patron seeking a civil protective order or civil stalking injunction be allowed to file their initial request via email due to the significant access and safety concerns implicated in these proceedings.
- The judiciary should gather and analyze data, including data from court patrons and stakeholders as well as data about virtual and in-person hearings, to see how virtual hearings are serving the public and advancing the mission of the judiciary.

APPENDIX A

Green Phase Working Group Members

- Hon. Ryan Harris, *Utah Court of Appeals*
- Hon. Renee Jimenez, *Third District Juvenile Court*
- Hon. Michael Leavitt, *Fifth District Juvenile Court*
- Hon. Richard Mrazik, *Third District Court*
- Hon. Don Torgerson, *Seventh District Court*
- Hon. Danalee Welch-O'Donnal, *Grand County Justice Court*
- Brody Arishita, *Chief Information Officer*
- Linda Ekker, *Clerk of Court – Sixth District*
- Becky Faatau, *Judicial Assistant – Third District*
- Brett Folkman, *Trial Court Executive – First District*
- Chris Morgan, *Trial Court Executive – Sixth District*
- Joyce Pace, *Trial Court Executive – Fifth District*
- Russell Pearson, *Trial Court Executive – Eighth District*
- Nathanael Player, *Self-Help Center Director*
- Glen Proctor, *Trial Court Executive – Second District*
- Calli Stephensen, *Judicial Assistant – Fourth District*
- Shannon Treseder, *Clerk of Court – Second District*
- Pleasy Wayas, *Self-Help Center Attorney*

Green Phase Working Group Staff

- Shane Bahr, *District Court Administrator*
- Michael Drechsel, *Assistant State Court Administrator*
- Ron Gordon, *State Court Administrator*
- Meredith Mannebach, *Assistant District Court Administrator*
- Daniel Meza Rincon, *Assistant Juvenile Court Administrator*
- Jim Peters, *Justice Court Administrator*
- Neira Siaperas, *Deputy Court Administrator*
- Nick Stiles, *Appellate Court Administrator*
- Sonia Sweeney, *Juvenile Court Administrator*

APPENDIX B

Survey Report

*Utah Survey of Court Users:
The Impact of Remote Hearings
on Access to Justice, June 2022*



UTAH SURVEY OF COURT USERS: THE IMPACT OF REMOTE HEARINGS ON ACCESS TO JUSTICE

June 2022



PREPARED BY

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Appendix B - Utah Survey of Court Users

Access to Justice Commission: Court User Survey Workgroup

Justice Christine Durham, Amy Sorenson, Pamela Beatse, Nancy Sylvester, Keenan Carroll, Judge Susan Eisenman, Judge Clem Landau, David McNeill, Judge Richard Mrazik, Kim Paulding, Nathanael Player, Keri Sargent.

Acknowledgment

Members of the Court User Survey Workgroup of the Access to Justice Commission would like to thank everyone who responded to the survey. They would like to thank the Third District judicial teams and judges who are participating in this Court User Survey project including District Court Judge Richard Mrazik, Justice Court Judge Clemens Landau, and Juvenile Court Judge Susan Eisenman. They would also like to thank the National Center for State Courts, in particular Danielle Hirsch, Alisa Kim, and Zachary Zarnow, and the Utah Courts team, in particular Heidi Anderson, Todd Eaton, and Jace Kinder, who gave support and technical assistance building and distributing the survey.

KEY RESULTS



Benefits of Remote Hearings

1. Increased Job Stability
2. Economic Savings
3. Improved Access to Court
4. Personal Safety

**Professionally conducted.
Clear audio and video. Saves a
lot of time, money and travel.**



77% of participants are from
the **Third Judicial District**.

Treated with Courtesy and Respect
Court patrons and practitioners think
the court treats them professionally.



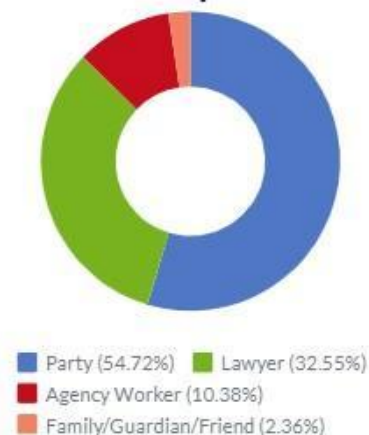
Done in Reasonable Amount of Time
Participants believe their activities are
completed in timely manner.



Quality Sound and Video
Respondents say Webex sound and
video are ample to conduct activities.



Categories of Survey Participants



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Summary

When Governor Gary Herbert declared a state of emergency to enable the State of Utah to respond to novel coronavirus disease 2019 (COVID-19) on March 6, 2020, the landscape of justice changed rapidly. Since March 13, 2020, the Utah Supreme Court and the Utah Judicial Council have issued numerous Administrative Orders governing court operations during the pandemic to protect the public from the spread of disease. During this time, and out of necessity, the Utah State Courts relied on the use of Webex to conduct remote hearings and other court business statewide. Along the way, tools and processes were initiated to allow for fully remote hearings. Some are now working on returning to in-person hearings.

In the fall of 2021, the Access to Justice Commission (“ATJ Commission”) began studying remote hearings in Utah by conducting a survey of Utah court patrons and practitioners. The ATJ Commission initially partnered with the National Center for State Courts as part of a national review. The Commission then narrowed its focus to a Utah-specific survey. The data from this survey is the basis for this report. The focus of this study was determining whether and how remote hearings resulted in access to equal justice for people in Utah.

Based on the data collected, Utah court patrons and practitioners strongly prefer remote hearings, at least for some types of court hearings and activities. Court operations over Webex are done with courtesy and in a timely manner. While there are occasional issues, Webex sound and video are highly rated. Most importantly, remote hearings have increased access to equal justice for many people. Survey respondents list benefits that include being better able to provide representation in rural Utah, not having to miss work, and not having to pay for childcare and travel as strong benefits. Based on these due process and convenience factors, Utah courts should work to include remote access moving forward.

Method

A sample of data from Utah court patrons and practitioners was collected through two different online surveys. The first was prepared by the National Center for State Courts as a Utah-specific questionnaire using Qualtrics (“NCSC Survey”).⁶ Data through the NCSC survey currently includes 101 responses, collected from September 24, 2021, through June 5, 2022, with continuing responses anticipated.

The second was developed by the Access to Justice Commission Court User Survey Workgroup using SurveyMonkey (“ATJ Survey”).⁷ Data from the ATJ survey currently includes 119 responses, collected from March 14 through June 5, 2022, with responses continuing to

⁶ National Center for State Courts Qualtrics Court User Survey *available at* https://ncsc2.iad1.qualtrics.com/jfe/form/SV_bIYBug4VwsbQhnM.

⁷ Access to Justice Commission SurveyMonkey Court User Survey *available at* <https://utahcourts.surveymonkey.com/r/CTT5WB3>.

accumulate. At present there are 220 individual records. Seven responses were excluded due to incomplete information, for a total sample of 213.

Limitations

There are limitations to the data collected through this survey of Utah court patrons and practitioners. Survey responses were primarily collected through a pilot program in the Third Judicial District. The combined responses are sufficient to draw several conclusions, but the data is less certain for some types of court use. For example, certain districts are under- or unrepresented, in part as a natural consequence of state population distribution and in part due to the constraints of the pilot study. Surveys were mostly collected by sending a link by email, reducing responses from call-in users. In addition, the survey did not collect any responses from jurors or witnesses, so it includes limited information on the efficacy of remote hearings for jury trials or complex litigation. To keep the survey small, important questions were not asked and they merit further study such as the impact of remote hearings on privacy or on victims of abuse.

Survey Participants

Surveys were sent or given to parties (plaintiffs and defendants), lawyers, agency workers, family members, and friends after they appeared in a Utah court. Agency workers include people from the Department of Child and Family Services, the Division of Juvenile Justice Services, and other court advocates. The sample population is based on respondents' ability and willingness to participate, not a scientific or fully representative sample. One district court, one justice court, and one juvenile court judicial team sent surveys to their court patrons.⁸ Starting in April, the Access to Justice Office of the Utah State Bar sent surveys to participants in the Third District immediate occupancy and debt collection calendars. The ATJ Office also sent surveys to volunteer attorneys in their programs. Links to the online surveys were provided through a variety of channels, including by email, text message, insertion in the Webex chat, and QR code.



Survey Content

The NCSC survey included 24 multipart questions and took approximately 5 minutes to complete. The ATJ survey was reduced to 19 questions that were included in the NCSC survey. The typical time spent completing this survey was 2 minutes and 2 seconds.



Both surveys included qualitative and quantitative questions about demographics, accessing remote proceedings, type and location of court use, their preferences, and other aspects of their experiences. The objective was to understand how court patrons and practitioners experienced virtual services in Utah courts. Data includes matching responses combined from surveys.

Survey Data and What It Tells Us

The 213 survey respondents combined from the NCSC and ATJ Surveys represent a population of parties (116), lawyers (69), agency workers (22), and family members and friends (5) who are diverse in their age, method of accessing the remote hearing, location, and type of court use. They represent actual court patrons and practitioners who appeared in a Utah district, justice, or juvenile court from fall 2021 to spring 2022. The NCSC Survey was slanted towards plaintiffs and defendants who comprised 90% of NCSC Survey respondents. The ATJ Survey respondents included more nonparties: 55% lawyers and 19% agency workers. Because court uses include juvenile matters, respondents included minors.

Respondents provided feedback in these key areas:

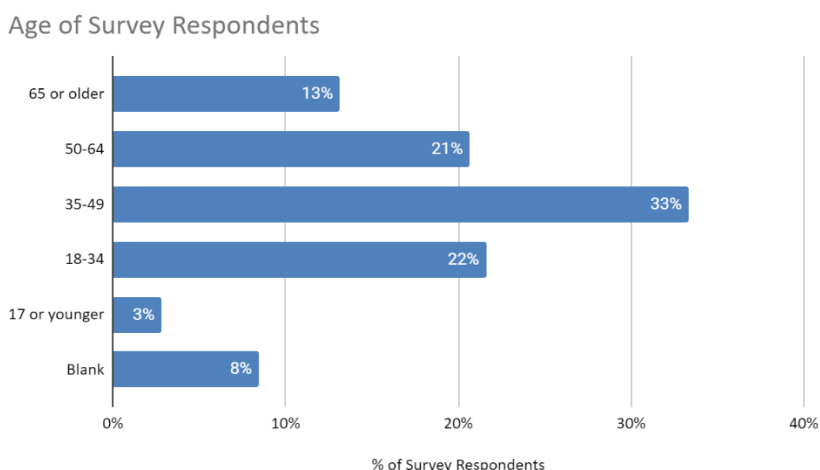
1. Stating a preference to participate in-person or remotely.
2. Evaluating whether the court team treated everyone with courtesy and respect.
3. Assessing if they got their court business done in a reasonable amount of time.
4. Rating the quality of Webex sound and video.

Age of Respondents

There were 199 respondents who self-identified their age by selecting from a range of ages. Most people were between 18 years and 49 years old (55%):

- 47 respondents aged 18 - 34 years (22%)
- 72 respondents aged 35 - 49 years (33%)

Minor children aged 17 or younger were 3% of the sample. The remainder included 21% respondents aged 50 - 64, 13% aged 65 or older and the remaining 8% did not respond to this field.



Accessing Court

Hearings or Other Activities

The combined survey provided these options for how respondents accessed court: face-to-face at the courthouse, remotely using a court kiosk, remotely using a personal computer or laptop, remotely using a cell phone, iPad, or tablet, remotely from jail, prison, or detention center, remotely from a hospital, and other. Most respondents appeared remotely either using a personal

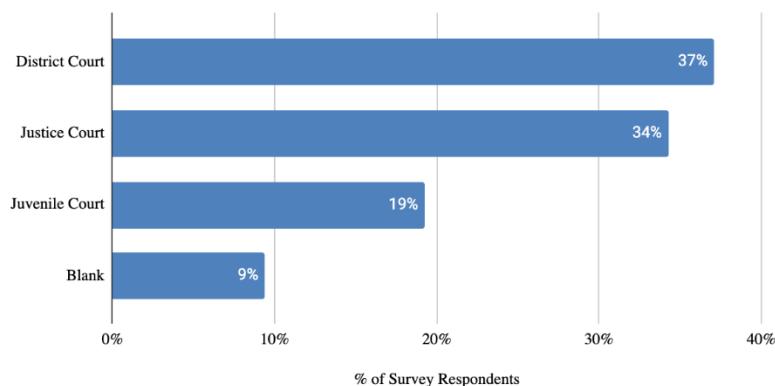
Appendix B - Utah Survey of Court Users

computer or laptop (109) or using a cell phone, iPad, or tablet (71). There were some respondents who attended in-person (9) or used a court kiosk (2).

Locations Where Respondents Attended Court

Respondents appeared in district court (37%), justice court for small claims or criminal cases (34%), and juvenile court (19%).

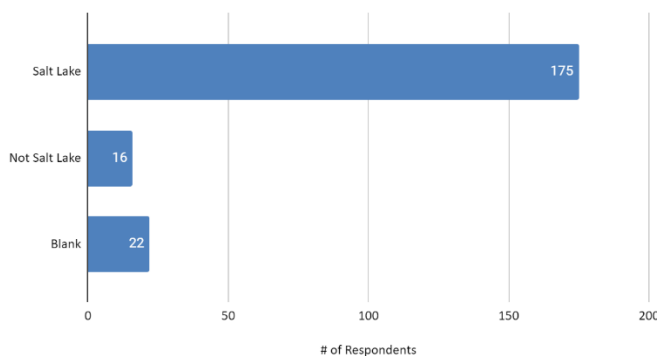
Survey Respondents Participated in District, Justice, and Juvenile Courts



The ATJ Survey asked specifically about judicial district, while the NCSC did not. The ATJ Survey included responses from the 1st, 2nd, 3rd, 4th, 5th, and 7th Districts; however, most were from the Third District (77%).

All respondents were able to self-identify by county, but most were from Salt Lake County (176 responses in Salt Lake County, 22 blank for this field, and 16 responses from outside of Salt Lake County).

Location of Survey Respondents (By County)



Types of Court Use

Patrons and practitioners used the court for a wide variety of civil and criminal legal matters, including conducting administrative business such as making a payment.

This is the breakdown:

Types of Court Use

Total

Traffic/Ticket

53

Criminal/probation

35

Civil matter	26
DCFS/Child welfare case	23
Landlord/Tenant/Eviction	12
Juvenile delinquency	11
Divorce/Custody/Support	7
Other: firearm at SLC international security check, infraction possession of marijuana, DUI, adoption, DASLC operations	5
Specialty court (Drug, Mental health, Veterans)	4
Other: Domestic Violence/Sexual Abuse	4
Small claims	3
Protective Order or Civil Stalking Injunction	3
Multi-issue hearing (criminal + civil)	2
Guardianship/Conservatorship	1
Estate/Trust	1
To make a payment	1

Open-Ended Responses

The survey asked this open-ended response question, “Please provide additional comments or suggestions about your experience today,” to allow respondents the opportunity to further comment on their experiences and give additional insights. Most people gave positive comments about their experiences but there were a few negative reactions. Overall, these open-ended responses tell a story of why there is such a strong preference for remote hearings, suggestions for continuing remotely, some of the problems, and why remote hearings remove access to justice obstacles for many.

Here are some examples of participant open responses received:

Ease: “Much easier to do virtually than find time, transportation, parking.”

Appendix B - Utah Survey of Court Users

Less Intimidating: “I felt the judge was more relaxed with the virtual court. I was much more comfortable at my work rather than standing in front of him. I felt it much easier to speak to him though I could see him and he could see me it was much calmer.”

Increased Representation: “I would not have been able to accept and represent in this case if it were not conducted remotely as it was in St. George and I am in Salt Lake.”

Better Access: “Love WebEx. Very efficient and allows for the best access to justice.”

Economic Savings: “I appreciate the flexibility and savings in gas!”

New Standard: “I think it’s nice to do the small cases remotely. The big cases could be used for the court such as criminal prosecutions since they require a lot of time Not everyone has the gas money nor the time to attend a hearing due to the demands from their job. It should be the new standard going forward after the pandemic so you guys can handle case loads faster.”

Too Lax: “The hearing was a couple of weeks ago, and I thought the time permitted for argument was excessive and the judge should have done more to require opposing counsel to conduct himself with professionalism and civility.”

No Covid Restrictions: “Court hearings should be in person, perhaps other than simple scheduling matters. No Covid restrictions should be imposed on any participants. Mask wearing should be discouraged, particularly for parties, attorneys, and judges.”

Tech Issues: “Horrible. I was never able to join the court proceedings because I never received the email with the link. I received an email a few days before, saying that an additional email would be sent to me, but I never received that email, and thus, could not join the court proceedings. This is not my fault at all.”

Need Clear Instruction: “... It may benefit a defendant to have a knowledge of each step involved in a case provided by the prosecution, including any possible deviations. Step by step knowledge of procedures would have greatly reduced the intimidation. (A ‘timeline’, printed chronological order of appointments and the purpose of each would save court staff countless hours answering the same questions that inevitably are asked and give confidence to all parties.)”

Inefficiency of In-person: “Remote hearings should be the default, except where testimony or evidence need be presented. In-person attendance is wasteful and inefficient.”

Job Stability: “Webex allows my clients to attend more hearings and still keep their jobs. It is vastly more efficient.”

Time & Money Savings: “Professionally conducted. Clear audio and video. Saves a lot of time and travel.”

Key Findings

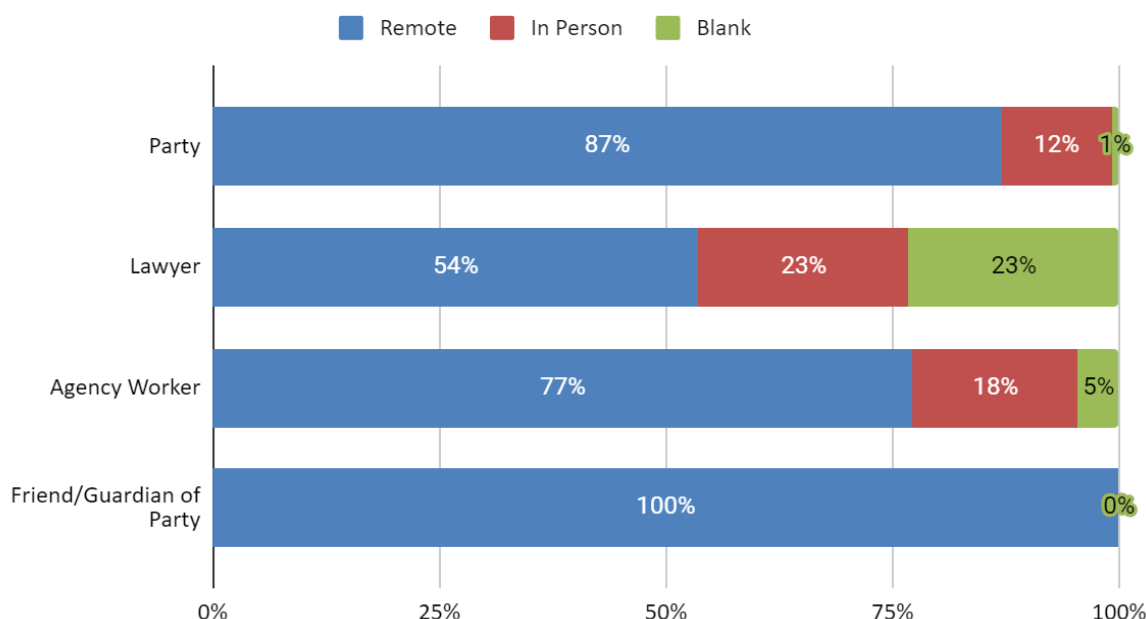
This court user survey reveals important benefits to holding remote hearings. Remote hearings have made court more accessible, whether the participant was young or old, in the metro area or more rural, in small claims or district court. Participants believe remote hearings are usually handled professionally and they feel respected. They recognize Webex provides adequate sound and video. They appreciate the convenience as well as the savings in time and money.



75% of all Utah participants prefer remote hearings
regardless of how they accessed court, their age, or location.

The most conclusive finding from the Court User Survey is that every type of participant strongly prefers remote access. Seventy-five percent of all survey respondents prefer remote hearings and only sixteen percent selected in-person (the other nine percent left this field blank). Comparing this preference by type of participant reveals interesting information. Based on this

All Types of Participants Prefer Remote Access

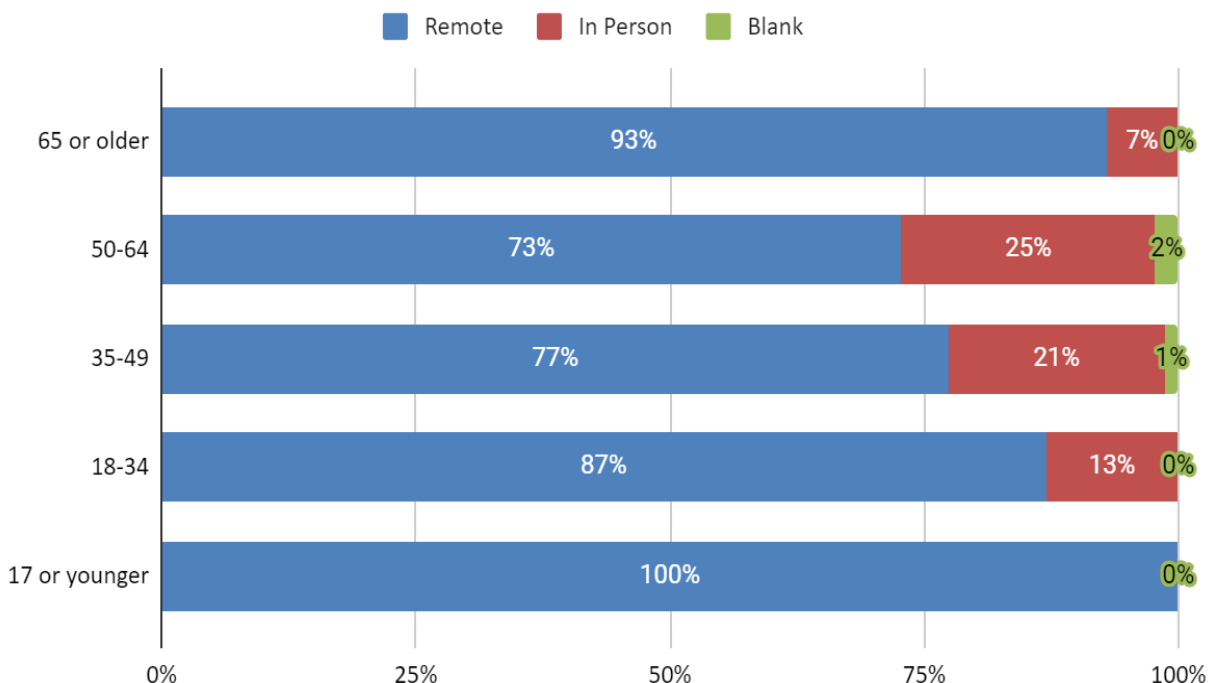


breakdown, it becomes clear that lawyers are participants who most want court to be in-person. Yet even this category shows that the majority of lawyers prefer remote access. Moreover, the people with the most to gain or lose – plaintiffs and petitioners, defendants and respondents, and their family, guardians, or friends – overwhelmingly prefer remote court hearings. This same trend can be found when considering preference of access by age.

Appendix B - Utah Survey of Court Users

The robust preference for remote access is found in every age range. As one might expect, younger users would rather appear in court remotely. In fact, 100% of participants under the age of 17 selected this option. More surprisingly, 93% of older adults 65 years or over also expressed a clear preference for attending virtually. Perhaps this is due to mobility, transportation, or other factors, but it dispels the stereotype of older people struggling with technology. Participants aged 50-64 were the most likely to select the in-person option, and still 73% of this range preferred remote hearings. Ultimately, no matter what age the participant was, they prefer to access court remotely by either computer, laptop, or phone.

People of All Ages Prefer Remote Access



Even the type of court did not impact this preference for remote access by court patrons and practitioners. In fact, 78% of district court, 84% of justice court, and 85% of juvenile court participants all expressed preference for remote hearings. This data displays the importance of asking and acting on information instead of doing what might seem easier or more intuitive.



Utah survey participants are **treated with courtesy and respect** by the court.

There is a clear showing that survey participants feel they are treated with courtesy and respect by the judicial team and the judge. In the survey, respondents were asked to rate this by strongly agreeing, agreeing, being neutral, disagreeing, or strongly disagreeing. Out of 213 responses, 84% agreed with this statement with 70% “strongly agreeing.”

Appendix B - Utah Survey of Court Users



3.

Utah survey participants get **court business done in a reasonable amount of time** whether they participate remotely or in-person.

Survey participants were asked if they were able to get their court business done in a reasonable amount of time by strongly agreeing, agreeing, being neutral, disagreeing, or strongly disagreeing. Out of 213 responses, 76% agreed with this statement with 58% “strongly agreeing.” While this is somewhat lower than their courtesy and respect rating, it is still a very positive response.



4.

The **quality of Webex sound and video are suitable** for conducting the court business of Utah survey participants.

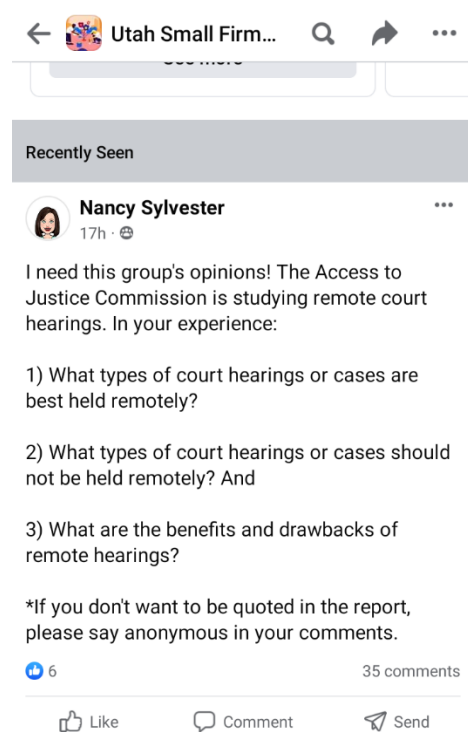
The Webex platform provides adequate sound and video quality, which allows survey respondents to participate in remote hearings. The NCSC and ATJ Surveys asked this question differently, so responses cannot be combined.⁹ However, the results show participants generally had a very positive view of Webex sound and video quality. For example, 72% of NCSC Survey respondents said they experienced no issues with being able to hear or be heard. Sound quality was rated even higher by ATJ Survey respondents: only 2 people said the sound quality was “Very Bad” and nobody selected “Bad.” This means that less than two percent negatively rated Webex sound quality. Moreover, 81.3% of NCSC Survey respondents said they experienced no issues with being able to see or be seen. Again, video was rated even higher by ATJ Survey respondents: less than one percent gave a negative rating; only 1 respondent said the quality was “Very Bad” and none selected “Bad.” This data shows most participants were satisfied that they could adequately hear and/or see during their remote hearing.

Snapshot: Dialogue from Lawyers in the Field

The data from the combined surveys provides useful information, yet it does not allow for conversation. The Court User Survey Workgroup recognized this and wanted to provide a channel for lawyers to discuss their personal experiences with remote court hearings. To collect this more qualitative information, they posted a query to the Utah Small Firm Attorney Network (USFAN), which is a Facebook group with over 900 Utah lawyers. USFAN actively discussed the merits and drawbacks of remote hearings. They also gave several suggestions on which types of hearings or cases were best suited for remote court. Other group members could respond and

⁹ The NCSC Survey asked, “Were there any issues with the sound or audio that made it difficult to hear or be heard?” and “Were there any issues with the video that made it difficult to see or be seen?” The possible responses to both were “All of the time,” “Most of the time,” “Some of the time,” or “None of the time.” The ATJ Survey asked, “If you ATTENDED BY WEBEX, rate the quality of the SOUND” and “If you ATTENDED BY WEBEX, rate the quality of the VIDEO.” The possible responses to both ATJ questions were “Very bad,” “Bad,” “Neutral,” “Good,” “Very Good,” and “Not Applicable.”

react to each comment.¹⁰ Some interesting themes, considerations, and suggestions are represented in their dialogue.



The group strongly supported the continuation of remote court for most hearings. As to which are best done remotely, many agreed evidentiary hearings, especially those involving witness testimony or complex, voluminous documents should be done in-person whenever possible. For instance, Scott Wiser received 15 “likes” for this comment, “I think Webex should be the default for everything short of trials and evidentiary hearings, and even then Webex appearances should be liberally granted for good cause” Some advocated for remote hearings being the standard even when they include live testimony. Melissa Bean explained, “I’ve been pleased with almost everything by remote access – even live testimony ... I honestly can’t think of many cases that would necessitate in-person hearings.” Yet others noted technology issues can sometimes require reconstructing the record to make sure it is clear. Many suggested a hybrid approach where the lawyer and/or the parties could choose.

Group members acknowledged there can be drawbacks to remote hearings. Common weaknesses discussed were the lack of spontaneous negotiations and problem-solving or the occasional technical glitch. There was also some back-and-forth debate on the ability of the judge to make assessments of the truthfulness and character of witnesses. Marco Brown said he believed that the judge really needs to see a witness live and in-person. There were counterexamples, e.g., “I find that having the four parties on the screen actually allows the judge to really ‘see’ a party’s tells¹¹ much easier than in court.”

A significant part of the Group’s dialogue centered on issues involving access to equal justice and fairness. Many people highlighted the benefits of remote hearings:

1. Remote hearings allow *greater access to lawyers*, especially in rural areas. Justin Caplin shared, “An attorney can take hearings in Kanab and Cedar and Beaver, Panguitch, and even more remote cities and counties without having to drive 1 to 3 hours each way.”
2. All participants receive a *cost savings in transportation and childcare*.
3. Clients have *lower legal costs*. Christopher M. Guymon explained, “Instead of charging my client for 1+ hours per hearing, I often only need to charge .2 or .3 hours, so often I

¹⁰ Some patterns and key ideas from the USFAN group are presented here, and the full Facebook dialogue, with replies and reactions, is attached as Exhibit A.

¹¹ Webster’s Dictionary defines a “tell” as an inadvertent behavior or mannerism that betrays a poker player’s true thoughts, intentions, or emotions. In this context, the commentor is likening a party’s revealing gestures, expressions, etc., to a poker player’s tell.

would say remote hearings save my clients a significant amount of money.” Jill Coil added, “It’s also allowed my attorneys to take in more clients. Now with us going back to court case load must go down which means we can’t serve as many.”

4. Remote hearings *help stabilize jobs for clients who do not have to miss work*. This is true because “A party can participate in a remote hearing from home or from the office without having to take a half day or full day off from work to drive downtown, especially when the majority of time at the courthouse is waiting for the other several cases to be called before theirs.”
5. Appearing virtually or on the phone *saves time and is more convenient* for clients and practitioners. “As a single parent and solo practitioner,” Sarah Larsen said, “I have really appreciated having most things remote” as it saves her time from not having to commute to be with her family.

Some lawyers noted that when dealing with indigent people or those who are incarcerated, additional issues need to be considered. If they do not have access to internet or a phone, it is important to have these resources available to them in a convenient and private location. Also, allowing incarcerated people to conduct “any and all civil hearings” remotely is important because “they have to pay separately for transport on civil issues,” said Brandon L. Merrill. While these anecdotal experiences and ideas are not quantitatively verified, they provide context and important qualitative information to help fill in some of the information missing from the Court User Survey.

Snapshot: A View from the Bench

Judges were not included the Court User Survey. However, Utah Judge Angela Fannesbeck shared a view “of the benefits and pitfalls of Webex or other virtual hearing platforms, and how they coincide with professional ethics and a lawyer’s responsibilities to the court and clients” in the July/August Utah Bar Journal.¹² Judge Fannesbeck acknowledges remote hearings have expanded access to equal justice for many people. She notes that for court patrons it is a less costly option that reduces the cost of legal representation, limits time away from work and removes transportation issues.¹³ Remote hearings also benefit lawyers by increasing productivity and preventing delays. Even witnesses benefit, especially if they are out-of-town or need protection.

Yet there are drawbacks to the system. Judge Fannesbeck explains that presenting evidence and properly identifying people can be challenging.¹⁴ Technology problems can make it difficult to hear or participate. She suggested there are also negative intangible consequences to virtual hearings like the informal nature of the proceedings including people wearing pajamas, revealing clothing, or appearing in public places.¹⁵ Judge Fannesbeck gives concrete ways that many of these obstacles in remote hearings can be overcome by following the guidelines and rules

¹² Judge Angela Fannesbeck, *Navigating the Half-Empty/Half-Full Dichotomy of Virtual Court Hearings*, July/August Vol. 35, No. 4 UTAH BAR JOURNAL, 13-16, p. 13 (2022).

¹³ *Id.*

¹⁴ *Id.* at 14.

¹⁵ *Id.*

provided in the Utah Code of Judicial Administration and the Supreme Court Rules of Professional Practice.¹⁶ Ultimately, she expressed that virtual hearings “have both virtue and vice that can be successfully navigated by the court, the attorneys, and the participants” as long as they each actively work together.¹⁷ This balanced and nuanced approach can maximize the advantages and minimize the shortcomings of remote hearings.

Comparison with Other State Reporting

Utah responses align with similar data collected from other states which did not have the same study limitations. For example, the DC Bar Foundation commissioned a study on the perspectives of family law litigants on remote hearings and published the report in December 2021.¹⁸ The DC report showed that “remote hearings worked well for most people. Most study participants reported being satisfied with their remote proceedings” in a diverse array of family law case types, including child custody, child support, domestic violence, and divorce.¹⁹ Specifically, the DC report found that:

- 73% appreciated not having to find and pay for transportation to/from the courthouse,
- 62% appreciated not having to take time off work or school,
- 60% appreciated not having to find childcare, and
- 72% felt safer and less threatened by the opposing party.²⁰

The Texas Office of Court Administration partnered with the National Center for State Courts to study the use of remote hearings and the impact on judicial workload.²¹ The Texas report also highlighted the benefits of remote hearings for court users including “not needing to take time off work, locate transportation, or find childcare.” and noting it can be “emotionally easier” for some parties to not be in the same room.²²

While Utah has a court environment that is distinct from these states, the similarity of these findings further validate this report: providing options and support for remote hearings improves the court experience and increases access to justice for many patrons and practitioners.

Obstacles to Participation in Remote Hearings

While remote hearings promote access to justice for many, there are obstacles to participating in remote hearings. Commonly cited examples include language barriers, accessibility, and

¹⁶ *Id.* at 15-16.

¹⁷ *Id.* at 16.

¹⁸ DC Bar Foundation, *Litigant Perspectives on Remote Hearings in Family Law Cases: A Survey Study Conducted with the DC Family Law Learning Network*, (December 2021), accessed June 12, 2022, available at https://www.dcbarfoundation.org/files/ugd/3ddb49_2c2da451535e4f9f8de6ab2baf575a54.pdf.

¹⁹ *Id.* at i.

²⁰ *Id.* at 8.

²¹ National Center for State Courts Court Consulting Division, *The Use of Remote Hearings in Texas State Courts: The Impact on Judicial Workload*, accessed June 12, 2022, available at <https://www.ncsc.org/media/ncsc/files/pdf/newsroom/TX-Remote-Hearing-Assessment-Report.pdf>.

²² *Id.* at 9.

technological challenges.²³ These obstacles have been and continue to be overcome through strategic planning and targeted resources.

Court patrons may be non-English speakers or have only a limited understanding. They also may lack full literacy or comprehension. Potential solutions include providing translation services, making court documents and instructions available in other languages, and preparing explainer videos that can be distributed online, via email, and by text message.

Court patrons and practitioners may have a recognized disability under the Americans with Disabilities Act²⁴ or experience other accessibility issues. These are often referred to as the “digital divide” meaning lack of or poor connectivity to internet or Wi-Fi signal, limited access to email, restrictions on phone minutes or data plans and other barriers to remote access.²⁵ Solutions to accommodate ADA disabilities can include offering closed captioning, keyboard accessibility, screen reader support, and having automatic transcripts available.²⁶ To bridge the digital divide, having a call-in only option for remote hearings is essential. Other solutions include court use kiosks and working with libraries and other community partners to help provide access.

Remote hearings require some level of technical proficiency in either internet or phone use. For some it can be challenging to access the necessary technology. However, similar to the above discussion on accessibility, having strong partnerships with libraries, social service providers, and other community partners can help provide needed support. Other solutions include providing explainer videos and clear instructions written in plain language. Having staff available to provide support and troubleshooting if video or sound issues occur can help correct problems that may arise.

Acknowledging there are obstacles to remote hearings is not a sufficient reason to require in-person attendance at court. Instead, this recognition can be the touchstone for change and progress. In fact, organizations like the National Center for State Courts continue to develop and release guidelines, best practices, and ways to overcome problems to effectively manage hybrid and fully remote hearings. These efforts become even more important when looking at the barriers many Utah communities face when seeking legal representation.

Barriers to Accessing Legal Representation

Deciding whether Utah State Courts will go back in-person or continue to offer remote attendance will affect all Utahns. However, it will hit some Utah communities much more than

²³ See e.g., California Commission on Access to Justice, *Remote Hearings and Access to Justice During Covid-19 and Beyond*, PPP & Cal Remote Hearings Guide - NCSC (National Center for State Courts), accessed June 12, 2022, available at

https://www.ncsc.org/_data/assets/pdf_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf.

²⁴ 42 U.S. Code § 12101 et seq.

²⁵ USLegal.com definition: “digital divide,” available at

<https://definitions.uslegal.com/d/digital-divide/#:~:text=Digital%20divide%20refers%20to%20the,technology%20and%20those%20who%20cannot.>

²⁶ California Commission on Access to Justice, *supra*.

Appendix B - Utah Survey of Court Users

others. There is a vast divide in how many lawyers are available based solely on where the person needing legal representation lives. This division plainly emerges when comparing the cases filed per attorney to the number of attorneys available in each Utah county.

Utah has 29 counties, and there are 8677 active attorneys in Utah.²⁷ In its directory, the Utah State Bar lists the county associated with each lawyer's preferred address. Legal representation deficiencies in many counties appear when this information is compared to the number of 2021 Utah district, justice, and juvenile court cases filed.

Table 1: Lawyers by County Compared to Cases Filed

Utah County	# of Active Attorneys	Cases Per Attorney (District, Justice, and Juvenile for FY2021)
Beaver	1	5,043
Garfield	2	1,487
San Juan	5	1,439
Juab	6	1,240
Emery	6	758
Kane	6	594
Piute	1	533
Box Elder	27	489
Duchesne	13	483
Carbon	21	387
Millard	14	377
Sevier	17	350
Sanpete	16	316
Tooele	53	304
Daggett	2	298
Rich	4	265
Uintah	34	262
Grand	17	254
Wayne	2	251
Iron	62	221
Weber	321	168
Morgan	11	154
Cache	166	133
Wasatch	74	120
Washington	340	117
Utah	1260	77
Davis	656	77
Summit	204	46

Table 1 shows access to legal representation by county where the red shades indicate the least access to attorneys and the blue shades signify the greatest access.

As the reds lighten and then turn to blue, the communities have an increasing ability to find a lawyer.

(See next page for blue shading)

²⁷ Active attorneys are those included in the Utah State Bar attorney database who are in good standing and listed as "AttUnder3," "AttActive," or "AttEmerit."

Utah County	# of Active Attorneys	Cases Per Attorney (District, Justice, and Juvenile for FY2021)
Salt Lake	5211	39

A person living in Salt Lake County can hire a local lawyer located near where they live and by the courthouse. A person living in Iron or Uintah County most likely can choose from several lawyers.

However, a person living in Beaver, Piute, Garfield, or San Juan will almost certainly struggle to find an attorney unless they can pay for and hire an out-of-town lawyer. Making the decision to continue offering remote hearings, at least for some people, cases, and circumstances can alleviate this disparity.

Recommendations

1. Utah courts should continue offering remote hearings. At a minimum, remote hearings are strongly preferred and more efficient for at least some hearings and types of actions.
2. Non-binary options for remote participation should be available, where some parts of the case may be held virtually or by video while other parts are in-person. This will remove barriers to making an appearance in court for both patrons and practitioners.
3. Hybrid options for appearing remotely should be used for ADA accommodations; resolving mobility issues for older adults; reducing the economic impact of in-person court caused by getting time off work; the cost of traveling to court and obtaining childcare; and promoting patron safety.
4. Clear explainers of common court procedures (like how to use Webex) should be created using plain language. These materials should be provided in written form and by video, which is then emailed and texted to court users as well as posted online. Written instructions can be translated into other languages as well.
5. Utah courts should conduct further study to determine which hearings and types of actions are best done remotely and which are better held in-person. They may consider expanding this court user survey to additional judicial teams statewide for this purpose.

APPENDIX C

Rule Amendment Proposals:

Utah Rules of Criminal Procedure
Utah Rules of Civil Procedure
Utah Rules of Juvenile Procedure
Utah Rules of Evidence
Utah Rules of Appellate Procedure
Utah Code of Judicial Administration

Rule Amendments – Utah Rules of Criminal Procedure	
<p>Rule 17 – The trial.</p> <p>Rule 17.5 – Hearings with contemporaneous transmission from a different location.</p>	<p>Need to consider Rule 17 and Rule 17.5 in full.</p> <p>At the time of this report, the Supreme Court’s Advisory Committee on the Rules of Criminal Procedure is reviewing these rules.</p>
<p>Rule 17(a) – The trial.</p>	<p>At the time of this report, the Supreme Court’s Advisory Committee on the Rules of Criminal Procedure is reviewing this rule.</p> <p>Previously suspended / amended by the Administrative Order, dated 4/11/2022, as follows:</p> <p><i>In all cases tried to the bench, a defendant may waive the right to appear in person at trial and consent to appear through video conferencing if the defendant has an effective opportunity to participate, which includes the ability to view trial participants and to meaningfully interact with counsel of record in real time. “Trial participants” is defined to include the judge and testifying witnesses. The defendant’s waiver and consent must be on the record and the court must make findings that the waiver and consent are voluntary.</i></p>
<p>Rule 17.5(b) – Hearings with contemporaneous transmission from a different location.</p>	<p>At the time of this report, the Supreme Court’s Advisory Committee on the Rules of Criminal Procedure is reviewing this rule.</p> <p>Previously suspended for infractions by the Administrative Order, dated 4/11/2022, as follows:</p> <p><i>Rule 17.5(b)...is suspended in infraction cases and to the extent it requires the prosecution’s consent in other cases. The parties’ consent is not required for a bench trial by remote transmission in an infraction case and a defendant may consent to a bench trial in other cases. Bench trials will be conducted as scheduled unless the court determines it is not reasonably practical to do so in a particular case, given the issues and anticipated evidence.</i></p>
<p>Rule 6 – Warrant of arrest or summons.</p>	<p>Need to consider subsection (e)(1)(E), and potentially subsection (e)(1)(D).</p>
<p>Rule 14 – Subpoenas.</p>	<p>Need to consider subsection (a)(8).</p>
<p>Rule 15.5 – Out of court statement and testimony of</p>	<p>Need to consider Rule 15.5 in full – how, if at all, does</p>

child victims or child witnesses of sexual or physical abuse - Conditions of admissibility.	Webex impact this?
<p>Rule 27 – Stays of sentence pending motions for new trial or appeal from courts of record.</p> <p>Rule 27A – Stays pending appeal from a court not of record - Appeals for a trial de novo.</p> <p>Rule 27B – Stays pending appeal from a court not of record - Hearings de novo, DUI, and reckless driving cases.</p>	These rules address appearances, using the term “appear as required.” Clarification may be helpful.
Rule 41 – Unsecured Bonds.	Need to consider subsection (b)(2) use of “appears in court.” Clarification may be helpful.

Rule Amendments – Utah Rules of Civil Procedure	
Rule 26.3 – Disclosure in unlawful detainer actions.	<p>Previously temporarily amended by the Administrative Order, dated 4/11/2022, as follows:</p> <p><i>In unlawful detainer cases under Title 78B, Chapter 6, Part 8, Forcible Entry and Detainer, the plaintiff shall include a completed form declaration, disclosing information relevant to federal, state, and local COVID relief law. Such declaration shall be provided with the required Rule 26.3(b)(1) disclosures.</i></p>
Rule 55 – Default.	<p>Previously temporarily amended by the Administrative Order, dated 4/11/2022, as follows:</p> <p><i>The court may not enter default judgment in unlawful detainer cases under Title 78B, Chapter 6, Part 8, Forcible Entry and Detainer, unless the plaintiff has submitted to the court a completed form declaration showing compliance with federal, state, and local COVID relief law. A sample form declaration will be available on the Utah State Courts website after review by the Judicial Council.</i></p>
Rule 7A – Motion to enforce order and for sanctions. Rule 7B – Motion to enforce order and for sanctions in domestic law matters.	Need to consider Rule 7A(c)(4) and Rule 7B(c)(4) .
Rule 28 – Person before whom depositions are held. Rule 30 – Depositions upon oral questions. Rule 31 – Depositions upon written questions.	Need to consider Rule 28 , Rule 30 , and Rule 31 in full.
Rule 32 – Use of depositions in court proceedings.	Need to consider subsection (a)(3) , which creates a potentially unnecessary distance limitation for depositions.
Rule 43 – Evidence.	Need to consider Rule 43 in full.
Rule 77 – District courts and clerks.	Need to consider Rule 77 in full.

Rule Amendments – Utah Rules of Juvenile Procedure	
Rule 7 – Warrants.	Need to consider subsection (d)(1) .
Rule 9 – Detention hearings; scheduling; hearing procedure	Rule 9 does not currently reference how one is to appear for the detention hearings. Clarification may be helpful.
Rule 13 – Shelter hearing.	Rule 13 does not currently reference how one is to appear for the shelter hearing. Clarification may be helpful.
Rule 18 – Summons; service of process; notice.	Subsections (a)(3) & (b)(3) each deal with appearances, but (b)(3) specifically says “appears in court.”
Rule 22 – Initial appearance and preliminary examination in cases under Utah Code section 80-6-503.	Rule 22 states that “the minor shall appear before the court as directed in the summons” (per Rule 18).
Rule 23A – Hearing on factors of Utah Code section 80-6-503; bind over to district court.	<p>Rule 23A(c) states:</p> <p>The court may consider any written report or other materials that relate to the minor’s mental, physical, educational, trauma, and social history. Upon request by the minor, the minor’s parent, guardian, or other interested party, the court shall require the person preparing the report, or other material, to appear and be subject to direct and cross-examination.</p>
Rule 26 – Rights of minors in delinquency proceedings.	Need to consider subsection (a)(1) , which requires a minor to appear “in person.”
Rule 34 – Pretrial hearing in non-delinquency cases.	Need to consider subsection (f) requires appearing in-person or by counsel.
Rule 29B – Hearings with remote conferencing from a different location (delinquency).	Need to consider Rule 29B in full..
Rule 37B – Hearings with remote conferencing from a different location (child welfare).	Need to consider Rule 37B in full.
Rule 50 – Presence at hearings.	Need to consider Rule 50 in full.

Rule Amendments – Utah Rules of Evidence

[Rule 615](#) – Excluding Witnesses

Rule 615 governs a party's request to exclude a witness from a proceeding while another witness is testifying.

Some practitioners have reported problems with multiple witnesses appearing from a single location making enforcement of the exclusionary rule difficult or impossible.

Rule Amendments – Utah Rules of Appellate Procedure

[Rule 29](#) – Oral Arguments

Rule 29 details how oral arguments are to be held. The rule already contemplates oral arguments being held via video conference (subsection (a)(3)), however, it does not provide a standard for approving or denying a request.

Rule Amendments – Utah Code of Judicial Administration

[Rule 2-205](#) – Expedited rulemaking procedure.

[Rule 11-105\(5\)\(B\)](#) – Supreme Court Action on Rule Modifications.

Previously suspended by the Administrative Order, dated 4/11/2022, as follows:

Rules 2-205 and 11-105(5)(B) of the Utah Rules of Judicial Administration are suspended to the extent they require a rule amendment that has been adopted on an expedited basis to be immediately published for comment and to be published for 45 days. Rule amendments will be published for public comment as directed by the body that adopts the rule, including reducing the time for public comment.

[Rule 4-404\(2\)\(B\)](#) – Jury Selection and Service.

[Rule 4-404\(6\)\(C\)\(I\)](#) – Jury Selection and Service.

Previously suspended / amended by the Administrative Order, dated 4/11/2022, as follows:

[(2)(B)] *The calculation of time for determining juror terms of availability under rule 4-404(2)(B) of the Utah Rules of Judicial Administration is suspended. The suspension will be lifted for a particular court when jury trials resume in that court.*

[(6)(C)(I)] *The summons may be by first class mail delivered to the address provided on the juror qualification form, by email to the email address provided on the [...] form, or by telephone.*

[Rule 4-503](#) – Mandatory Electronic Filing

The Judicial Council should amend this rule to accommodate email filing in some circumstances.

[Rule 2-103](#) – Open and closed meetings.

While the Judicial Council already provides notice to the public about its meetings (through the Utah Public Notices website), the Judicial Council should consider including in

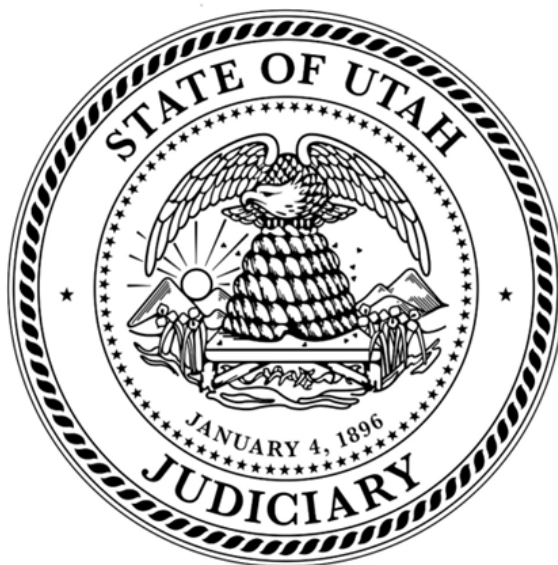
	that notice the Webex link to the meeting.
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UTAH STATE COURTS

UTAH JUDICIAL COUNCIL

FINDINGS AND RECOMMENDATIONS REGARDING ONGOING USE OF VIRTUAL MEETING TECHNOLOGY TO CONDUCT COURT PROCEEDINGS

November 10, 2022



In February 2022, the Judicial Council established the Green Phase Working Group and directed it to study and make recommendations about the ongoing use of virtual meeting technology in court proceedings. The Judicial Council acknowledges the exhaustive work of the members and staff of the Green Phase Working Group. Their work culminated in a detailed, insightful, and instructive report containing recommendations and best practices regarding the use of virtual court hearings. On October 24, 2022, the Judicial Council adopted the recommendations and best practices with a few adjustments. Below are the findings and recommendations of the Judicial Council which reflect the adjustments made during their October 24, 2022 meeting. The full text of the Green Phase Working Group report is also attached. Where there are differences between this document and the report, this document governs.

Investments in IT Staff

The Judicial Council needs to continue to invest in resources necessary to support virtual and hybrid hearings and to provide training to employees and judicial officers.

Judicial Discretion

Judicial officers should consider the factors noted below in “Considerations for Judicial Officers” and other information relevant to the case, hearing, and parties and then determine whether a hearing will be in-person or virtual.

Hearing Participants Preference

The Judicial Council recommends the Supreme Court consider establishing a rule that allows hearing participants to request permission to appear opposite the decision of the judicial officer.

Guidelines

A judicial officer, courthouse, district, or bench may establish presumptions or guidelines for holding certain types of hearings in person or virtually.

Courtroom Technology

Courtroom technology must provide remote participants the same opportunity as in-person attendees to hear, view, and participate in the court proceeding.

Each district should develop a digital evidence plan to standardize how digital evidence is managed within the district.

Remote Attendee Obligations

A person who attends a court proceeding virtually must use a device and an internet connection that will contemporaneously transmit video and audio with sufficient quality to ensure a clear, verbatim record of the proceeding. If that technology is unavailable, the person must attend the court proceeding in person. The judicial officer may choose to require only audio transmission.

Remote attendees must observe the same courtroom decorum as those attending in person, including appropriate courtroom attire, behavior, and language.

Remote attendees must appear from a location that does not disrupt the court proceeding and allows the attendee to participate without distractions. Attendees must never appear in a court proceeding while operating a vehicle.

Considerations for Judicial Officers

Juvenile Court Judges and Commissioners

Juvenile court judges and commissioners should consider the following factors when deciding whether a hearing will be held in person or virtually.

- Individual needs of youth and parents
 - access to technology, including availability of Webex kiosks or other similar accommodations to facilitate participation in a virtual hearing;
 - transportation and travel challenges, including distance of residence from the courthouse;
 - accommodation for youth enrolled in school; and
 - accommodation for working parents
- Case Circumstances
 - feasibility of a virtual hearing or transport for an incarcerated parent;
 - whether a case is high-profile;
 - whether a youth or parent would benefit from face-to-face interaction with the judge;
 - youth or parent lack of engagement;
 - whether a youth is in a remote out-of-home placement and transport is not feasible; and
 - whether a youth or parent display a lack of understanding of court processes or orders
- Hearing Circumstances
 - whether the hearing is a procedural or substantive;
 - whether evidence is being presented; and
 - whether witness testimony is required
- Comfort level, preferences, and health accommodations of parties and teams

Justice Court Judges and District Court Judges and Commissioners

Justice court judges and district court judges and commissioners should consider the following factors when deciding whether a hearing will be held in person or virtually.

- Does an existing statute, rule, or principle of law require an in-person hearing? Can the mandatory nature of that requirement be waived by the parties (or by a single party)?
- Do all parties have sufficient access to technology for virtual hearings?
- What is the substantive or procedural importance of the hearing?
- Which type of hearing best promotes access to justice for the parties?
- Are the parties more comfortable with a virtual hearing (e.g., high-conflict domestic cases, protective order hearings, and civil stalking injunction hearings)?

- Does the type of hearing allow the parties to have access to counsel of their choice?
- Would the parties or their counsel be required to travel long distances for an in-person hearing?
- Is there a significant cost to a party for an in-person hearing (e.g., money, time, lost work, child care, cost of transportation from jail for a civil proceeding, etc.)?
- Do the parties have a stated preference for a certain type of hearing?
- Are the judge and court staff able to manage a virtual or hybrid courtroom effectively?
- Does the hearing make efficient use of judicial resources, facilities, and court personnel?
- Will a party be prejudiced by requiring an in-person, virtual, or hybrid hearing?
- Will the type of hearing unreasonably delay the progress of the case, increase expense, or complicate resolution of any issue?
- Will the type of hearing unreasonably limit the court's ability to assess credibility, voluntariness, or comprehension?
- Is there a fairness concern because one party has easier access to the courthouse, or greater facility with technology, and is seeking a strategic advantage?
- Does the type of hearing allow for greater access to effective interpretation services?
- Is there enough time to give notice for people to make appropriate arrangements—especially where there is a change from one hearing type to another?
- Does the type of hearing—particularly virtual and hybrid hearings—allow parties to share documents?
- In virtual and hybrid hearings, will the participants have prior or simultaneous access to documents, photos, etc., that are submitted to the courtroom?

Appellate Court Judges

Appellate court judges should consider the following factors when deciding whether a hearing will be held in person or virtually.

- What are the locations of parties and the cost of travel? Does requiring one party to travel a significantly greater distance to the courthouse create fairness issues?
- What are the unintended impacts of having appellate courts that operate from only one courthouse in the state? Does this geographic reality impact decisions to file appeals?
- Would in-person or virtual oral arguments increase the diversity of the appellate bar? Would it increase the diversity of the appellate bench?
- Which method(s) do the parties prefer for making their oral arguments?
- Which method does the appellate bench prefer for holding oral argument? Because oral argument is designed to be an opportunity for judicial officers to ask questions presented in briefing, does this preference hold more weight than the preference of the parties?
- Does the type of case matter in making the decision?

Filings by Self-Represented Litigants

Because in-person filing was not possible during the pandemic, districts accommodated email filing by self-represented litigants who were not able to file electronically. That practice proved helpful to self-represented litigants and also added to the workload of staff. Ideally,

self-represented litigants would be able to file electronically through MyCase. However, that functionality will not be available for approximately 18 months. The Judicial Council asked its Policy, Planning, and Technology Committee to draft an amendment to the Code of Judicial Administration Rule 4-503 that establishes a statewide policy regarding email filing by self-represented litigants. That rule will govern the use of email filing until MyCase is fully functional.

The Judicial Council's Management Committee decided it is important to maintain consistency in the judiciary's approach to email filing between now and the time that an amended Rule 4-503 takes effect. As determined by the Management Committee, the interim statewide policy is self-represented litigants who are not able to file electronically may make any filing through email. This policy is effective immediately.

Data Collection

The judiciary will gather and analyze data, including data from court patrons and stakeholders as well as data about virtual and in-person hearings, to see how virtual hearings are serving the public and advancing the mission of the judiciary.

Best Practices

Court-wide best practices

Each court location should update judicial officers, court staff, patrons, attorneys, and community partners (e.g., the prison and jails) on relevant Webex updates and process changes. This may include a page on the court website for updates and regular revisions to posted Webex guides.

Each court calendar should clearly indicate if a hearing is scheduled to be held in person or through a virtual or hybrid hearing. If the calendar setting is for a virtual or hybrid hearing, the Webex link for the hearing should be included on the calendar for the parties, public, and media to access, as appropriate (i.e., some hearings — such as adoptions — are not open to the general public or media and would therefore not have a publicly-accessible Webex link). A party who shows up at the courthouse for a virtual hearing — whether due to calendaring confusion or inability to access a virtual hearing on their own — should be provided access to participate in the virtual hearing. To facilitate this access, kiosks should be available at every courthouse for patrons to participate in virtual hearings as needed.

To address current challenges with the courts' network bandwidth, it is recommended that court employees working at a court location avoid using the wireless network and instead connect to the wired network whenever and wherever possible.

Court employees working at the same court location who attend a virtual meeting should gather as a group in a single location to attend the meeting from a single device and network connection as this reduces bandwidth pressure on the courts' network.

The public wireless networks in each court location share a statewide connection, resulting in

limited capacity to support parties, attorneys, and members of the public who may expect to use the courts' public wireless network to attend remote hearings. These court participants should connect to virtual hearings using networks other than the courts' public wireless networks at the courthouse.

Best Practices for Judicial Officers and Court Staff

JUDICIAL OFFICERS & COURT STAFF		
1	Notices: <i>Contents</i>	<p>All notices for virtual hearings should include at a minimum the following information (taking into consideration Rule 43 of the Utah Rules of Civil Procedure):</p> <ul style="list-style-type: none"> • the date and time of the hearing; • the type of hearing — virtual, hybrid, or in-person; • the purpose of the hearing; • how to join the hearing, including: <ul style="list-style-type: none"> – the Webex link (or how to access that link); – if permitted, how to call-in for the hearing; – whether participant video must be enabled; – how to access virtual hearing kiosks at a court location; • what to expect at a virtual hearing; • how to file, serve, and present evidence; • what patrons should tell their witnesses; • contact information for technical assistance (<i>see Recommendation #5</i>); • the process for submitting and presenting evidence (<i>see Recommendation #8</i>); and • how to request interpretation or accommodation (<i>see Recommendation #12</i>).
2	Notices: <i>Plain Language</i>	Notices should be easy to understand (i.e., in plain language, avoiding abbreviations or having standard abbreviations; etc.).
3	Notices: <i>Hearing Changes</i>	If a hearing is changed from in person to virtual or vice versa after notice was sent, a new timely notice should be provided to all participants.
4	Notices: <i>Self-Represented Parties</i>	If a self-represented party has provided an email address, notices should be sent by email. When possible, MyCase should be the preferred method for such communication.

JUDICIAL OFFICERS & COURT STAFF		
5	Technical Assistance for Virtual Hearing Participants	Each court location should have a technical assistance phone number that is included on every hearing notice. Ideally this number should be specific to each court location, but at a minimum should connect the participant to a qualified individual who can: a) assist the participant to resolve technical issues; and b) communicate immediately with the judicial officer's judicial assistant that the participant is attempting to connect to the virtual hearing but is experiencing technical issues.
6	Calendar Capacity	Virtual hearings may take longer and should be scheduled appropriately.
7	Webex Greeting	Participants should be greeted by a screen in Webex to confirm for participants and the public that they are in the right virtual location. For example, the screen could display the name of the judge, the time hearings are scheduled to begin, and what to do while waiting.
8	Instructions: <i>Evidence</i>	Judicial officers and judicial assistants should provide participants with clear instructions on how to submit and present evidence to the court during a virtual hearing.
9	Instructions: <i>Expectations</i>	If possible, any specific expectations of the parties should be clearly communicated to the parties in advance (e.g., if a camera is required for the party's participation in the hearing, if parties are expected to have spoken/negotiated before the hearing or if breakout rooms will be available for that purpose). These expectations could be provided in a flier, district-level standing order, or rule.
10	Instructions: <i>Hearing Processes</i>	The judicial officer or judicial assistant should provide hearing-specific instruction on virtual hearing processes (e.g., how a party/attorney should inform the court when their case is ready to be called). "How to" materials could be created for attorneys new to virtual hearings (e.g., how to find the calendar/hearing information, tips on how to communicate with clients if they are not in the same location during the hearing, how to prepare clients, how interpretation works during hearings, communicating with the opposing side in advance of the hearing, use of breakout rooms, how to present evidence).
11	Instructions: <i>Use of Webex</i>	The courts should provide clear instructions explaining how to use Webex. "How to" materials could be created for all Webex users. Materials for attorneys new to virtual hearings might include how to find the calendar/hearing information, tips on how to communicate with clients if they are not in the same location during the hearing, how to prepare clients, how interpretation works during hearings, communicating with opposing side in advance of the hearing, use of breakout rooms, and how to present evidence.

JUDICIAL OFFICERS & COURT STAFF		
12	Interpretation & Accommodation	When an interpreter is needed, judicial assistants should make arrangements for simultaneous interpretation if possible (or direct the party or attorney on how to arrange for simultaneous interpretation). The process for requesting other accommodations should be clearly communicated to participants.
13	Ongoing Training	Judicial officers and judicial assistants should receive ongoing training on Webex and other necessary virtual hearing technology.
14	Experience Sharing	The courts should provide regular opportunities for judicial officers, court staff, patrons, and stakeholders to share their feedback on the use of virtual hearings.

Best Practices for Court Patrons

COURT PATRONS		
1	Decorum Expectations	<p>Participants SHOULD:</p> <ul style="list-style-type: none"> a) remember that a virtual courtroom is subject to the same standards of behavior and decorum as in-person court; b) dress appropriately for a court appearance; c) be focused on the proceedings by pre-arranging care for other obligations that may need attention during the hearing (e.g., children and pets); and d) if late for a hearing, remain in the Webex proceeding until the judicial officer has finished calling through the other scheduled hearings before alerting the judicial officer. <p>Participants SHOULD NOT:</p> <ul style="list-style-type: none"> e) speak over another party or an interpreter; f) interrupt when joining a virtual hearing that has already started (remain muted until their case is called); and g) eat, drink, smoke, or drive during the hearing.

COURT PATRONS		
2	Technology Expectations	<p>Participants SHOULD:</p> <ul style="list-style-type: none"> a) Location – plan on joining the virtual hearing from a suitable location that is quiet, private, and allows the participant to focus; b) Camera – have video enabled and be visible to the court when participating in a proceeding, choosing a camera angle that avoids background distractions; c) Lighting – avoid camera angles that position a window or other bright light behind the participant (this often results in poor video quality and obscures the participant’s face); d) Audio – be aware of and try to minimize background noises; e) Calling in on a non-smartphone – avoid joining a virtual hearing via a non-smartphone, as it will limit Webex functionality (e.g., the participant won’t be able to be moved into a separate virtual room to talk with an attorney); and f) Bandwidth – use a network with sufficient bandwidth for a stable connection to the virtual hearing OR use a computer kiosk at the courthouse to join a virtual proceeding.

Best Practices for Attorneys

ATTORNEYS		
1	Expectations	<p>Expectations for attorneys should be outlined and disseminated. For example, attorneys SHOULD:</p> <ul style="list-style-type: none"> a) Title & Name – ensure their Webex name displays their title followed by their full name (e.g., Defense Attorney Atticus Finch); b) Camera – have video enabled and be visible to the court when participating in a proceeding, choosing a camera angle that avoids background distractions; c) Audio – be aware of and try to minimize background noises, and use a quality microphone to help ensure an accurate record; d) Attire – dress appropriately for a court appearance; e) Simultaneous hearings – log into multiple simultaneous hearings only if the attorney can effectively manage participation in each hearing, ensuring appropriate, timely, and responsive communication with each court; and f) NEVER drive during an appearance.

Best practices for jails and prisons

PRISON & JAILS		
1	Stakeholder Meetings	<p>Stakeholder meetings should be held to discuss and establish best practices between the courts and the prison and jails, including:</p> <ul style="list-style-type: none">a) communication processes to notify the correctional facility if a hearing will be in person or virtual so appropriate transportation or virtual appearance can be arranged;b) the need for each correctional facility to provide at least two Webex-equipped rooms per court calendar to facilitate attorney-client communication in a breakout room, while the court moves forward with other cases in the main room; andc) the need for each correctional facility to have a dedicated phone that an interpreter can use to provide simultaneous interpretation during the hearing to an inmate with limited english proficiency.

Tab 3

Utah State Bar®

M E M O R A N D U M

TO: Utah Supreme Court Advisory Committee on the
Rules of Professional Conduct
Utah Judicial Council Standing Committee on the
Office of Fairness and Accountability

FROM: Nancy Sylvester, General Counsel, Utah State Bar
Scotti Hill, Ethics Counsel, Utah State Bar

RE: History of Rule 8.4(g) and (h) amendments and caselaw developments

DATE: August 10, 2022

In August 2016, the American Bar Association (ABA) adopted Model [Rule 8.4\(g\)](#) in response to concerns over the pervasiveness of sexual harassment and other forms of discrimination in the law. The amendment prohibits discrimination and harassment by lawyers based on a protected class (including sex, race, national origin, and sexual orientation) while engaged in “conduct related to the practice of law.” [ABA Formal Ethics Opinion 493](#), written in July 2020, aimed to explain the application of this novel rule. Interestingly, by the time the ABA Standing Committee on Ethics and Professional Responsibility adopted Rule 8.4(g) in August 2016, several jurisdictions had already crafted similar language into their state rules.¹

The year preceding the ABA Model Rule’s adoption, Utah’s Advisory Committee on the Rules of Professional (RPC) commenced discussions regarding whether repeated violations of the Standards of Professionalism and Civility (SPC) under Rule 14-301 should be professional

¹ According to a March 12, 2019, ABA article, “The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law,” Kristine A. Kubes, Cara D. David, and Mary E. Schwind, prior to the ABA adoption of Rule 8.4(g), 20 jurisdictions had already incorporated similar language prohibiting discrimination into their state rules. A total of 29 states have included antidiscrimination language into their rules, while 13 states have declined to adopt the amended rule. Note: this calculation has likely changed in the years following this source reporting. https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/

misconduct under the RPC. These discussions were topically similarly to issues addressed by ABA Model Rule 8.4.

Since 2015, the Advisory Committee has proposed numerous versions of Rule 8.4 and Rule 14-301 to the Supreme Court. The Court has published for comment five versions of Rule 8.4 and two versions of Rule 14-301.² The Court adopted just two Rule 8.4 proposals, each of which came in response to Utah Supreme Court case law.³

The Court has not yet finalized Rule 8.4 as part of the larger ABA Model Rule efforts. This is likely due at least in part to the swift, negative reaction the rule generates each time it is published. Most commenters oppose adopting language that even resembles the ABA Model Rule, opining that the language is overbroad and violates attorneys' First Amendment rights. Nonetheless, the issues identified by the ABA persist in Utah's legal profession and there is renewed interest to pass a rule. This time, that interest derives from the Utah State Courts' newly-created Office of Fairness and Accountability and Utah's LGBTQ+ Chamber of Commerce.

The following memorandum summarizes Utah's efforts to adopt amendments to Rule 8.4 and 14-301. Our hope is that this historical document will serve as a launching point for these renewed discussions and ensure that the committee does not continue to pave old paths.

I. Origin of a proposed amendment to Rule 8.4 (2015)

Discussions on Rule 8.4 began in [February 2015](#) in response to a Supreme Court request to analyze the overlap between the SPC and the RPC. The Committee studied whether Rule 8.4 should be amended to make repeated violations of the SPC professional misconduct. These discussions came in response to concerns that incivility by attorneys was having a negative impact on the legal profession, the courts, and access to justice. The Committee convened a subcommittee to research the issue.

² The Court published proposed amendments to Rule 8.4 in May 2015, June 2017, December 2018, March 2019, and most recently in June 2020. The Court published proposed amendments to Rule 14-301 in March 2019 and August 2020.

³ The [2015 amendments](#) added Comment [3a] and the [2018 amendments](#) added Comment [1a].

At the [April 27, 2015](#) RPC committee meeting, the committee proposed a new comment advising attorneys that certain violations of the SPC *could* lead to sanctions. The new comment language read as follows:

[3a] The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).⁴

The Supreme Court circulated the proposal, which garnered [three comments](#) during the comment period. All three opposed adoption. Nonetheless, the Supreme Court [adopted](#) the amendment and the comment remains in the rule today.

II. Developments from 2016-2017

The 2016 Utah Supreme Court case of [Larsen v. Utah State Bar, 2016 UT 26](#), raised important questions for the RPC committee about the knowledge requirement necessary to affirm a rule violation and also the role that rule comments play.

Larsen was a Davis County prosecutor who was assigned to a 2009 proceeding involving a woman on DUI probation. He was also assigned to a 2010 felony robbery case. On July 8, 2014, the district court entered a seven-month Order of Suspension against Larsen for violations of [Rule 3.3\(a\)\(1\)](#) (Candor toward the Tribunal) and [Rule 3.8\(d\)](#) (Special Responsibilities of a Prosecutor). As to the 2009 proceeding, the court found that Mr. Larsen recklessly misstated facts regarding a DUI probationer's fine payments. As to the 2010 case, it found that Mr. Larsen failed to show photographs of any suspect other than the defendant to robbery victims and failed to make timely disclosure of this fact to the defense. Larsen challenged both rule violations. On June 16, 2016, the Utah Supreme Court affirmed the district court's six-month Rule 3.8 suspension, but struck the Rule 3.3 thirty-day suspension. The Court

⁴ The committee added "approved by the Utah Supreme Court" as a reminder of the importance of the SPC. To make the remaining language more concise, they deleted "even actions of minor significance when considered separately" because it is covered by "a pattern of repeated violations". The committee also deleted "prejudicial to the administration of justice" as it is inherent in paragraph (d), and "through this State" because it is unnecessary. The committee was concerned that the automatic violation mandate dictated by the last clause of the last sentence may not be precisely correct. The language was changed to "may support a finding" that paragraph (d) is violated.

addressed at length the requirement that a lawyer must have “actual knowledge,” and not constructive knowledge or recklessness, to establish a Rule 3.3 violation. It found that the district court had erroneously relied upon comment [3], which appeared to override Rule 3.3(a)(1) in setting forth a “reasonably diligent inquiry” standard. The Court then analyzed the role of advisory committee notes as follows: “The Advisory Committee Notes are not law. They are not governing rules voted on and promulgated by this court. They set forth only the advisory committee’s views of our rules. And although they may provide helpful guidance, they cannot override the terms of the rules themselves.” *Id.* at ¶31.

In light of this analysis, Billy Walker, Chief Disciplinary Officer of the Office of Professional Conduct, [expressed concern](#) that the language of Rule 8.4, comment [3a], as amended on [November 1, 2015](#), was insufficient to impose liability on attorneys if it did not appear in the body of the rule.

At the [October 3, 2016](#) meeting of the RPC Committee, Robert Rice, President of the Utah State Bar, and Margaret Plane, State Delegate for Utah to the ABA’s House of Delegates, attended the meeting to speak about the ABA’s proposed change to Rule 8.4(g). Mr. Rice emphasized that amending the rule would further the Bar’s diversity and inclusion efforts. Ms. Plane noted that she was a State Delegate in the ABA’s House of Delegates at the time the rule change was debated. She noted that the model rule included a mens rea, or knowledge, requirement. Ms. Plane then provided the committee with a state-by-state survey of black letter rules on anti-discrimination. The committee discussed a few general areas of concern: whether the language was overbroad and implicated First Amendment concerns, whether the rule was unclear regarding what practices constitute the “practice of law,” whether the rule may impact affirmative action policies, the definition of “socio-economic,” the rule’s impact on extending Title VII to all lawyers, and the lawyer’s freedom to make appropriate client intake decisions. Another subcommittee was formed – comprised of Simón Cantarero, Billy Walker, Vanessa Ramos, Joni Jones, and Trent Nelson – to study the ABA Model Rule. In addition to the issues already identified, the group was also encouraged to discuss a possible conflict between Rules 8.4(g) and Rule 1.16.

During the RPC Committee’s [November 28, 2016](#), meeting, Simón Cantarero reported that the subcommittee was unable to reach conclusions about the important questions

underlying this debate. Mr. Cantarero reported that the subcommittee's discussions were ongoing and that it was not yet prepared to make a rule change recommendation to the Supreme Court. The subcommittee worried that the application of the rule could be overly broad, applying to situations where the lawyer is merely conducting the business of practicing law and could elevate attorneys to some sort of public status or quasi-state actor.

The committee also solicited feedback as to whether they had heard complaints about discriminatory behavior. Among other comments, Mr. Walker stated that he had seen substantial evidence of females being treated differently from males.

The ABA Model Rule 8.4(g) subcommittee issued and discussed its report and recommendation, as set forth in the committee's memorandum dated *January 16, 2017*, (the "[Rule 8.4\(g\) Report](#)," p.15-32 of the Agenda Materials). Several committee members expressed concerns and questions regarding the report. Specific questions or issues that were raised included the following:

- Does the proposed rule delegate rulemaking to governmental entities? For example, are Salt Lake City attorneys required to comply with Logan City's ordinances?
- Does the proposed rule force attorneys to be responsible for standards of all states and municipalities? The committee favored limiting its reach to only Utah.
- Among the factors to consider in determining the severity of the misconduct is "whether the conduct was committed in connection with the lawyer's professional activities." This language appears to suggest that connection to professional activity is not a necessary condition. If so, the rule likely reaches throughout a lawyer's private life, which many members of the committee did not favor.
- What is the preclusive effect of disciplinary proceedings? This may be relevant since there is no requirement that there be an adjudicatory finding of harassment or discrimination before disciplinary proceedings. Regarding the second sentence of Comment 3, it is unclear whether that sentence prohibits any discussion of sex, gender, race, etc. For example, would a firm be prohibited from discussing increased diversity within the firm?

- Committee members were troubled by the statement in Comment 4 that “a trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).”

As such, the committee chairman recommended that a few representatives from the committee schedule a time to discuss this issue with the Utah Supreme Court to gain further insight on how to address *Larsen* in future rulemaking. The result of that discussion was guidance that mandatory rule language should appear in the rule itself. Comments should only explain, but not add to, the black letter law.

At a [March 6, 2017](#), RPC Committee meeting, the committee recommended that the following language be inserted as Rule 8.4(g):

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status as provided in Federal and Utah State law and jurisprudence, and that reflects adversely on the lawyer’s fitness as a lawyer. This paragraph does not limit the ability of the lawyer to accept representation or decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice per rule 2.1, or limit a lawyer’s full advocacy on behalf of the client.

The committee also recommended that the following comments (new comments three, four, and five) be included among the Rule 8.4 changes:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) may undermine confidence in the legal profession and the legal system. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of this Rule. Such discrimination includes harmful conduct that manifests bias or prejudice toward others. Harassment includes sexual harassment and derogatory or demeaning conduct. Sexual conduct includes unwelcome sexual advances, requests for sexual favors, and other unwelcome conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g). Whether discriminatory or harassing conduct reflects adversely on a lawyer’s fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the conduct; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in the lawyer’s professional capacity.

[4] Lawyers may engage in conduct undertaken to discuss diversity, including discussing any benefits or challenges without violating this rule. Implementing initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically

underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

[5] A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these rules or other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers should also be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's view or activities. See Rule 1.2(b).

The revisions included the following deviations from the ABA Model Rule 8.4(g): (a) a lawyer must know his conduct is harassing, and (b) the conduct must reflect adversely on the profession. The draft sparked discussion regarding what type of conduct reflects adversely on the profession. The committee also discussed comment 3 and whether the "substantive law" sentence is necessary in light of the addition of "unlawful." Cristie Roach moved to circulate the rule in a preliminary discussion period (not a full comment period) to get a feel for attorneys' thoughts on the proposed rule and its deviations from the Model Rule. The motion passed unanimously. The subcommittee agreed to draft bullet points outlining the pros and cons of the revisions versus the Model Rule for the discussion period.

The committee voted to approve these additions and Chairman Johnson agreed to advise the Utah Supreme Court promptly of the Committee's actions. The Supreme Court declined to publish the Committee's version of Rule 8.4(g). In [June 2017](#), the Court published ABA Model Rule 8.4(g) for comment. The rule received 60 comments.

On [August 28, 2017](#), the Committee discussed the many comments to Rule 8.4(g). Steve Johnson noted that most were negative and that they generally fell into the following categories: a) vagueness/due process/overbreadth; b) freedom of speech/conscience; and c) freedom of religion, association, and the 6th amendment. The concerns prompted the Utah Supreme Court to request that the RPC committee provide clear guidance on the issues addressed in the comments.⁵

At this juncture, the committee contemplated the following options: (1) propose the Model Rule; (2) re-submit the proposed rule from the subcommittee; and (3) hold on to

⁵ This message was relayed at the August 28, 2017, RPC Committee meeting.

the rule and wait to see how the adoption of the Model Rule and similar rules in other states proceeded before recommending further action. The committee voted to revisit the originally proposed rule from March 6, 2017, along with a supporting memorandum, policy briefing, and comments.

At the [October 30, 2017](#), RPC committee meeting, Judge Trent Nelson suggested that given the Model Rule's broad implication on all areas of practice, the committee should instead focus on a more limited area, such as the employment law context, which may resolve some of the concerns many commenters have. The subcommittee said it would explore amending its proposal to address only the employment law context.

III. Developments from 2018-2019

Following the 2017 discussions, new Utah Supreme Court caselaw created the need for an additional amendment to Rule 8.4. On [December 19, 2018](#), the Utah Supreme Court approved for the addition of comment [1a] in response to [In re Discipline of Steffensen](#), 2018 UT 53, Footnote 7. The comment sought to eliminate confusion as to what sanctions may be applicable for a violation of Rule 8.4. It provides that an act of professional misconduct under Rule 8.4(b), (c), (d), (e), or (f) cannot be counted as a separate violation of Rule 8.4(a) for the purpose of determining sanctions. Conduct that violates other Rules of Professional Conduct, however, may be a violation of Rule 8.4(a) for the purpose of determining sanctions.

Meanwhile, the Rules of Professional Conduct Committee continued to study Model Rule 8.4(g). In [March 2019](#), the Utah Supreme Court published a version of Rule 8.4(g) that contained a narrower definition of the proscribed behavior, curtailing the discriminatory conduct to that which is banned by Title VII of the Civil Rights Act of 1964 and by the Utah Antidiscrimination Act. The March 2019 amendments also included a new paragraph (h), which incorporated 2015's comment [3a]. During the comment period, fifteen comments opposed the rule, two supported, and one was mixed. The Court instructed the committee to continue working on the rule amendments.

After the proposed comment period, and at the [June 17, 2019](#), RPC committee meeting, the Committee made two additional amendments. The committee amended paragraph (h) in comment 4a to read:

Paragraphs (g) and (h) do not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.

The committee also moved to amend standard 3 of Rule 14-301 to read:

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of any such participant unless such matters are directly relevant under controlling substantive law. Lawyers shall avoid hostile, demeaning, humiliating, intimidating, harassing, or discriminatory conduct with all other counsel, parties, judges, witnesses, and other participants in all proceedings. Discriminatory conduct includes all expressions of discrimination against protected classes as enumerated in the Utah Antidiscrimination Act of 1965, Utah Code section 34A-5-106(1)(a), and federal statutes, as amended from time to time.

The committee, after conversing with the Court, decided the rules required additional investigation and research.

At the [September 16, 2019](#), RPC committee meeting, the subcommittee discussed which standards from Rule 14-301 should be included in Rule 8.4. The committee discussed the problem with including particular standards while excluding others. The subcommittee recommended that court personnel and venue be added but with specificity (such as a listing of services and/or places) so that “venue” is defined and limited to those places where legal services are being provided with a specific purpose.

IV. Developments from 2020-2021

In [April](#) and [May](#) 2020, the subcommittee recommended additional language amendments to Rule 8.4 and Rule 14-301. The subcommittee proposed changing Standard 14-301 into a Rule under Rule 8.4(h), making it an extension of the Rules of Professional Conduct prohibiting discriminatory conduct. In order to reconcile the comment and rule, the subcommittee agreed and recommended a change to the word “participant” to “person” under Standard 14-301(3). The committee also approved the following revision to Rule 14-301(3):

Lawyers shall avoid hostile, demeaning humiliating or discriminatory conduct in law-related activities. Discriminatory conduct includes all discrimination against protected classes as those classes are enumerated in the Utah Antidiscrimination Act of 1965, Utah Code section 34A-5-106(1)(a), and federal statutes, as amended from time to time.

In addition, the committee sought to incorporate the following language:

Finally, the term “standard” has historically pointed to the aspirational nature of this rule. But Rule 8.4(h) now makes the provisions of this rule mandatory for all lawyers. Cross References: R. Prof. Cond. Preamble [1], [13]; R. Civ. P. 1; R. Civ. P. 65B(b)(5); R. Crim. P. 31 1(b); R. Juv. P. 1(b); R. Third District Court 10-1-306; Fed. R. Civ. P. 1; DUCivR 83-1.1(g)” and to retain standards throughout for Rule 14-301.

In [June 2020](#), the March 2019 version of Rule 8.4(g) and (h) was republished for public comment with the following amendment: comment 3 was updated to include gender identity to the list of protected classes. Nearly all the thirty comments received during the comment period were opposed to the amendments.

In [March 2021](#), the committee once again investigated the issue of constitutionality and whether the rule language was narrowly tailored to advance a compelling state interest. A subcommittee was formed to continue researching the issue. At the [June 7, 2021](#), RPC committee meeting, Mr. Walker noted a new opinion from the Colorado Supreme Court captioned, [In the Matter of Robert E. Abrams](#), 2021 CO 44, which upheld [Colorado Rule 8.4\(g\)](#). The court found the rule constitutional in a circumstance where counsel made a comment denigrating the presiding judge’s physical appearance and apparent sexual orientation. Mr. Walker circulated the opinion for committee review.

V. Developments from 2022

In a January 5 letter to the Utah Supreme Court, RPC committee Chair Simón Cantarero summarized the various oppositions and reoccurring concerns of the RPC committee regarding the efforts to address Model Rule 8.4(g):

Opponents have objected to the language and structure of the ABA Model Rule for its overbreadth and ambiguities. The same and very similar arguments have been repeated by largely the same commenters, against the most recent versions of the Utah Rule. Most comments in opposition take the view that Rules 8.4(g), (h), and 14-301 create a speech code for lawyers that extends beyond the courtroom and into private settings. They argue that the amended rules constitute a content- or viewpoint-based restriction on protected speech, suppressing politically incorrect speech while protecting or promoting politically correct speech. Opponents assert that adopting the rules would chill speech and dramatically curtail an attorney’s responsibility to vigorously and aggressively litigate a case, particularly when cross-examining witnesses, and would adversely affect their livelihood for fear of discipline for engaging an objectionable client or cause or

declining to represent a particular client when the client alleges to have been discriminated against. In addition to being an intrusive regulation of private conduct, opponents also argue that the rule changes violate the Free Exercise clause and infringe on an attorney's freedom of association protected by the First Amendment. Opponents also point out that the rules would impose legal liability on lawyers and law firms that are otherwise immune from employment laws and regulations because of their size and number of employees.

The issues to study remain the following:

- 1) In addition to being an intrusive regulation of private conduct, opponents argue that the rule changes violate the Free Exercise clause and infringe on an attorney's freedom of association protected by the First Amendment. Opponents also point out that the rules would impose legal liability on lawyers and law firms that are otherwise immune from employment laws and regulations because of their size and number of employees.
- 2) Paragraph (1)(h) as currently drafted requires that the prohibited conduct be egregious or involve a pattern of repeated violations of Rule 14-301. This is like the well-established "severe and pervasive" standard in employment law.
- 3) Paragraph (1)(h) requires "harm" to a participant in the legal process and the offensive conduct must also be "prejudicial to the administration of justice." Comment [6] provides a non-exhaustive list of the participants in the process (lawyers, clients, witnesses, judges, clerks, court reporters, translators, bailiffs, arbitrators, and mediators).
- 4) Paragraph (3) makes clear that paragraphs (1)(d), (1)(g), and (1)(h) do not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.
- 5) Paragraph (4) provides that legitimate advocacy does not violate the rule. A similar exception for "legitimate advocacy" has been added to Rule 14-301(3).

At this juncture, the Court has expressed hesitation with amending Rule 14-301 and is not prepared to adopt the committee's suggested amendments to Rule 8.4(g).

Nonetheless, the issues identified by the ABA persist in Utah's legal profession and there is renewed interest to pass a rule. This time, that interest derives from the Utah State Courts' newly-created Office of Fairness and Accountability and Utah's LGBTQ+ Chamber of Commerce. In a [letter](#) dated January 21, 2022, (p. 7-24 of the March RPC committee meeting [materials](#)), Samantha Taylor, Chairwoman for the Utah LGBTQ+ Chamber of Commerce,

proposed the immediate adoption of the ABA Model Rule. Taylor's letter also noted recent efforts by the Court's newly formed Office of Fairness and Accountability, and cited the Court Commissioner Conduct Committee's recommendation (and the Judicial Council's adoption of that recommendation) to remove of Second District Court Commissioner T.R. Morgan. The Court Commissioner Conduct Committee found that Commissioner Morgan violated [Rule 2.3](#) of the Code of Judicial Administration (UCJA Chapter 12, Canon 2) for actions meant to "denigrate or show aversion to Complainant on the basis of sex, gender, or sexual orientation, and therefore constitute[s] harassment."

On [April 5, 2022](#), Johnathan Puente, Director of the Utah State Courts' Office of Fairness and Accountability, attended the RPC committee meeting. He explained how the courts created a committee on fairness and accountability, the goal of which is to eliminate bias in the courts. He discussed the difficulty of the courts in achieving their mission when there is bias present and the need for a concerted effort by the whole legal community to eliminate bias. He noted that bias creates an access to justice issue and that several states have been requiring education on eliminating bias through MCLE. The RPC Committee decided to continue to work on these efforts. The court's new Office of Fairness and Accountability will be a resource to the RPC committee. A new subcommittee is comprised of Adam Bondy, Billy Walker, Joni Jones, Katherine Venti, Judge Trent Nelson, and Jonathan Puente. The subcommittee agreed to report back to the RPC committee by August on a recommendation (this will now be later in light of the date of this memorandum).

VI. Caselaw Developments

To date, various jurisdictions have fielded challenges to the anti-bias and discrimination language within their respective misconduct rules. An analysis of the relevant case law on jurisdictions that have adopted Rule 8.4(g) and related anti-bias language reveals that courts have continually rejected First Amendment arguments, among them for vagueness, overbreadth, and facial legitimacy. Further, this case law affirms what the ABA and University of Denver Law Professor Rebecca Aviel consider a legitimate expression of regulatory authority applied to lawyer behavior that not only survives but is outside the scope of First Amendment protections. See Aviel, Rebecca, *Rule 8.4(g) and the First Amendment: Distinguishing between*

Discrimination and Free Speech (August 30, 2018), *Georgetown Journal of Legal Ethics*, Vol. 31, No. 31, 2018).

This case law also affirms that courts have largely rejected challenges to anti-bias and discrimination language in misconduct rules that are broader in scope than the one currently under consideration in Utah. See *Attorney Grievance Commission v. Alison*, 317 Md. 523 (1989) (the court rejected the respondent lawyer's assertion of vagueness because the regulation of harassment and discriminatory conduct applied solely to lawyers and is thus warranted by case law, court rules, and "the lore of the profession.") See also *In re Snyder*, 472 U.S. 634, 645 (1985) ("Membership in the bar is a privilege burdened with conditions.' [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."); *In re Abrams*, 488 P.3d 1043 (Colo. 2021) (Finding constitutional Colorado's Rule 8.4(g); "A state's interest in regulating attorney speech is at its strongest when the regulation is necessary to preserve the integrity of the justice system or to protect clients. Moreover, the Supreme Court has explained that 'the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard' because the lawyer in that role is an officer of the court.")

At present, the recent *Greenberg v. Goodrich*, No. 20-03822, 2022 WL 874953 (E.D. Pa. Mar. 24, 2022). decision out of Pennsylvania offers the only successful – and what some might argue an irregular – facial challenge and constitutional rebuke of Rule 8.4(g).

The foregoing decisions concern state rules that vary in scope. They also concern professional misconduct that implicates other rule violations. We look at one constitutional challenge in Colorado that was unsuccessful as well as the Pennsylvania decision that was. We also examine a sample of how the various iterations of 8.4(g) have been applied across other jurisdictions. Those cases help us to understand the kind of behavior 8.4(g) aims to curtail.

A. The Supreme Court of Colorado has upheld the constitutionality of its Rule 8.4(g).

The Supreme Court of Colorado held in *In re Abrams*, 488 P.3d 1043 (Colo. 2021) that

Colorado's Rule 8.4(g) is constitutional. The conduct in question – homophobic slurs directed against a judge in a client communication – was the very behavior section (g) was designed to prevent. Colorado's Rule 8.4(g) is significantly narrower than the ABA Model Rule. In affirming the scope of paragraph (g), the Court affirmed the rule was neither vague nor overbroad, as the conduct giving rise to the violation occurred during the representation of a client and constituted a constitutionally permissible regulation of the attorney's conduct as an officer of the court.

Further, the Court held that Colorado's Rule 8.4(g) is narrowly tailored to achieve several compelling state interests and does not burden a substantial amount of constitutionally protected speech.

Colorado's Rule 8.4(g) considers attorneys who do the following to be guilty of professional misconduct:

engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.

The respondent argued that a violation of Rule 8.4(g) could only result from the determination that he harbored anti-gay bias, but the Office of Regulation Counsel argued that a violation of Rule 8.4(g) does not require proof of actual bias, because the Rule "does not regulate bigotry, it regulates behavior." *Id.* 1050, citing *People v. Abrams*, 459 P.3d 1228, 1239 (Colo. O.P.D.J. Feb. 12, 2020).

Colorado's version of 8.4(g) uses "in the representation of a client," to limit the scope of application. Unlike Model Rule 8.4(g), there is no "knows or reasonably should know" requirement in Missouri's rule regarding bias, prejudice, or harassment. Also, the ABA Model rule uses "discrimination" whereas Colorado uses "bias." And Colorado's rule addresses participants in the legal process.

B. The U.S. District Court for Pennsylvania held that Pennsylvania’s Rule 8.4(g) is unconstitutional under the First Amendment

In *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (2020), the United States District Court for the Eastern District of Pennsylvania granted a recently licensed attorney’s motion for summary judgment and an injunction against the Supreme Court of Pennsylvania’s Disciplinary Board. The injunction prohibited the Board from prosecuting Greenberg under Model Rule 8.4(g).

In its ruling, the court held that Pennsylvania’s Rule 8.4(g) unconstitutionally infringed free speech under the First Amendment because it constituted impermissible viewpoint-based discrimination. As such, the court noted the burden placed on freedom of expression was not incidental to its enforcement and it prohibited attorney’s speech too broadly to fall within acceptable limits of professional speech regulation. The court held that Rule 8.4(g) was unconstitutionally vague under the Due Process clause of the Fourteenth Amendment.

This matter stemmed from plaintiff Greenberg’s earlier facial challenge to the constitutionality of Rule 8.4(g) and its comments after he claimed fear of prosecution for speaking on controversial subjects deemed to be hateful or offensive. In a December 2020 opinion relating to earlier rule amendments, the court ruled in Greenberg’s favor, stating “the government, as a result, de facto regulates speech by threat, thereby chilling speech,” *Id.* at 23.

Pennsylvania’s 8.4(g), which is nearly identical to the ABA model rule, considers the following behavior professional misconduct:

in the practice of law, knowingly engage in conduct constituting harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these Rules.

The rule was adopted, following revision of earlier amendments, on July 26, 2021.

C. Application of the various iterations of Rule 8.4(g) across the country.

The following is a sample examination of how the various iterations of 8.4(g) have been applied across other jurisdictions. Those cases help us to understand the kind of behavior 8.4(g) aims to curtail.

1. **Maryland – application of 8.4(g) language, “prejudicial to the administration of justice” and “acting in a professional capacity”**

Two recent Maryland state court decisions addressed the issue of what behavior is “prejudicial to the administration of justice” “when acting in a professional capacity” in the context of Rule 8.4(g). The first, *Attorney Grievance Comm’n v. Vasiliades*, 475 Md. 520 (2021), acknowledged that there was professional misconduct prejudicial to the administration of justice when it analyzed racial, homophobic, and sexist comments linked to a lawyer’s firm social media account. Maryland also considered Rule 8.4(g)’s juxtaposition with the definition of the “practice of law” in *Attorney Grievance Commission v. Markey*, 469 Md. 485 (2020). The *Markey* court held that a series of offensive and discriminatory emails, exchanged by two federal lawyers while they were working in a professional capacity, to be conduct prejudicial to the administration of justice and therefore professional misconduct.

Maryland’s version of Rule 8.4(g) reads as follows:

It is professional misconduct for an attorney to knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this section;

Maryland’s version of [Rule 8.4\(g\)](#) – labeled subsection (e) – considers misconduct when discriminatory speech or conduct is “prejudicial to the administration of justice,” a decidedly broader standard than other state rules. Similar to Model Rule 8.4(g), there is a knowledge requirement in Maryland’s rule regarding bias or prejudice. Also, the ABA Model rule uses “discrimination” whereas Maryland uses “bias or prejudice.”

2. Iowa – application of 8.4(g) language, "engage in sexual harassment or other unlawful discrimination in the practice of law"

In *Iowa Supreme Court Atty. Disciplinary Bd. v. Watkins*, 944 N.W.2d 881 (2020), the Iowa Supreme Court suspended an attorney's license for not fewer than six months following a finding that he violated the state's version of Rule 8.4(g). The attorney committed professional misconduct by engaging in persistent sexual harassment in the form of gender discrimination of two female employees. Iowa's Rule 8.4(g) prohibits attorneys from engaging in sexual harassment or other unlawful discrimination in the practice of law. "Sexual harassment is broadly defined and includes conduct that may not give rise to civil liability. It includes any physical or verbal act of a sexual nature that has no legitimate place in a legal setting." *Iowa Supreme Court Atty. Disciplinary Bd. v. Newport*, 955 N.W.2d 176, 182 (2021) (cleaned up).

Iowa's Rule 8.4(g) reads as follows:

It is professional misconduct for a lawyer to engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer's direction and control to do so.

This version of 8.4(g) uses "in the practice of law" to limit the scope of application. Unlike Model Rule 8.4(g), there is no "knows or reasonably should know" requirement in Iowa's rule regarding harassment or discrimination.

3. Minnesota – application of 8.4(g) language, "harass a person on the basis of sex...in connection with...professional activities"

In *In re Kennedy*, 946 N.W.2d 568, (2020), the Minnesota Supreme Court found that attorney Duane Kennedy had violated Minnesota Rules of Professional Conduct 8.1(a), 8.4(a), 8.4(c), 8.4(d), and 8.4(g) when he engaged in a pattern of repeated sexual harassment of his female clients and lied to authorities about the behavior. Minnesota's Rule 8.4(g) reads as follows:⁶

⁶ Notably, Minnesota has also enacted an 8.4(h) that reads as follows: "It is professional misconduct for a lawyer to...commit a discriminatory act, prohibited by federal, state, or local statute or ordinance that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: (1) the seriousness of the act; (2) whether the lawyer knew that the act was prohibited by statute or ordinance; (3) whether the act was part of a pattern of prohibited conduct; and (4) whether the

It is professional misconduct for a lawyer to...harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, status with regard to public assistance, ethnicity, or marital status in connection with a lawyer's professional activities;

This version of 8.4(g) uses “in connection with a lawyer’s professional activities” to limit the scope of application. Unlike Model Rule 8.4(g), there is no “knows or reasonably should know” requirement in Minnesota’s rule regarding harassment.

4. Missouri – application of 8.4(g) language, “manifest by words or conduct, in representing a client, bias or prejudice, or engage in harassment”

In *In re Schuessler*, 578 S.W.3d 762 (2019), a prosecutor was found to have violated Missouri’s version of Rule 8.4(g) for making a racist and homophobic comment about the assault of a robbery suspect by a police detective who put a gun in the suspect’s mouth.

Missouri’s Rule 8.4(g) states that it is professional misconduct for an attorney to manifest by words or conduct, in representing a client, bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status. This Rule 4-8.4(g) does not preclude legitimate advocacy when race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or other similar factors, are issues. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 4-1.16.

This version of 8.4(g) uses “in representing a client,” to limit the scope of application. Unlike Model Rule 8.4(g), there is no “knows or reasonably should know” requirement in Missouri’s rule regarding bias, prejudice, or harassment. Also, the ABA Model rule uses “discrimination” whereas Missouri uses “bias” and “prejudice.”

5. Vermont – application of Model Rule 8.4(g)

In *In re Robinson*, 209 A.3d 570 (2019), the Supreme Court of Vermont affirmed that respondent Robinson violated Rules 1.7, 4.3, and 8.4(g) of the Vermont Rules of Professional

act was committed in connection with the lawyer's professional activities.” This is very similar to what Utah has attempted to do with its 8.4(g). It may be worthwhile for Utah to consider a similar approach to Minnesota’s: breaking out harassment from illegal discriminatory acts.

Conduct by “engaging in a sexual relationship with one client while representing her in her divorce proceedings and failing to obtain her consent to the representation in writing, failing to advise another former client/employee that she should consult an independent attorney before waiving all sexual harassment or discrimination claims against him, and creating a hostile work environment by making unwelcome sexual advances to her.” The Court considered disbarment an appropriate sanction due to the respondent’s “pattern of misconduct, the vulnerability of his victims, and the potential injury and actual harm that his conduct caused to the victims and to public perception of the legal practice.”

Vermont’s Rule 8.4(g), which is Model Rule 8.4(g) verbatim, considers it professional misconduct to

engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, sex, religion, national origin, ethnicity, ancestry, place of birth, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, or other grounds that are illegal or prohibited under federal or state law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.

D. Caselaw conclusions

As the above caselaw analysis indicates, various iterations of Rule 8.4(g) have been analyzed in court, including in Vermont, which has adopted the model rule. There have only been two challenges to 8.4(g) itself thus far. Colorado represents an unsuccessful challenge to Rule 8.4(g), while Pennsylvania represents a successful challenge that resulted in injunctive relief for an attorney’s prospective conduct. Unlike when it started the process of adopting its own Rule 8.4(g), Utah now has other examples it can look to for not just language but also caselaw analysis. Utah should pick a version of Rule 8.4(g) that has an adequate amount of caselaw developed around it.

VII. Conclusion

Utah should continue to work on developing its own version of Rule 8.4(g) that is narrowly tailored so that it falls within accepted limits of professional speech regulation while still protecting against discriminatory and harassing behavior at the hands of our licensed legal

professionals. Finding and striking such a balance will help to protect the integrity and accessibility of our justice system while rebuilding and maintaining trust in our institutions.