



Utah Supreme Court Rules of Evidence Committee

Meeting Agenda

Chris Hogle, Chair

Location: [WebEx Meeting:](#)

Date: October 10, 2023

Time: 5:15 p.m. - 7:15 p.m. MST

Action: Welcome and approve April 11, 2023 Minutes	Tab 1	Chris Hogle
Action: Welcome new Committee members David P. Billings (eff. 7/1/23), Benjamin Miller (eff. 8/23/23), and Rachel Sykes (eff. 8/23/23), recognize reappointed members Tony Graf (eff. 7/1/23), Judge Linda M. Jones (2d emeritus term, eff. 7/1/23), and Judge David Williams (eff. 7/1/23), and introductions by all members		Chris Hogle
Update: URE 101, 412, 615, and 1101 proposed amendments approved by SC for public comment on 5/17/23; went out and no comments received	Tabs 2-5	Chris Hogle
Discussion: Public comments to URE 506 proposed amendments	Tabs 6 & 7	Sarah Carlquist
Discussion: Supreme Court letter re in-person vs remote appearances (URE 615)	Tabs 8 & 9	Chris Hogle

Meeting Schedule:

November 14, 2023

Rule Status:

URE 101, 412, 615, and 1101 – Back from public comment period without comments

URE 106 - Under consideration by Supreme Court

URE 404 - Awaiting advice from Supreme Court

URE 506 – Back from public comment period with comments

URE 507.1 - Awaiting DoH guidelines

TAB 1

**UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE**

MEETING MINUTES

DRAFT

April 11th, 2023

5:15 p.m.-7:00 p.m.

Via Webex

<u>MEMBERS PRESENT</u>	<u>MEMBERS EXCUSED</u>	<u>GUESTS</u>	<u>STAFF</u>
Chris Hogle Sarah Carlquist Dallas Young Hon. Michael Leavitt Tenielle Brown Nicole Salazar-Hall Hon. Richard McKelvie Adam Alba Hon. David Williams	Hon. Linda Jones Deborah Bulkeley Jennifer Parrish Melinda Bowen Tony Graf Hon. Vernice Trease Ryan McBride Matthew Hansen Ed Havas	Jacqueline Carlton	Jace Willard Angelica Juarez

1. WELCOME AND APPROVAL OF MINUTES

Chris Hogle welcomed everyone to the meeting. After making a few changes to the February minutes, Dallas Young moved to approve the minutes. Tenielle Brown seconded. The motion carried.

2. WELCOME NEW STAFF, JACE WILLARD, ASSOCIATE GENERAL COUNSEL, AOC

Mr. Hogle welcomed Jace Willard who is taking over for Bryson King. Mr. Willard introduced himself to the group.

3. LEGISLATIVE AMENDMENTS TO URE 1102

Mr. Hogle introduced, and the group discussed, the additions of Subsections (d)(1) and (d)(2) to Utah R. Evid. 1102. Because these additions were made by the Legislature (pursuant to S.J.R. 6), they will become effective without further action.

4. STATUS OF AMENDMENTS TO URE 506

The Supreme Court previously approved certain proposed amendments to Utah R. Evid. 506 to go out for public comment. Sarah Carlquist inquired as to when the updated rule would go out for public comment. Mr. Willard agreed to follow-up on this with Mr. King.

5. STATUS OF JUVENILE COURT-RELATED AMENDMENTS TO URE 101, 412, 615, AND 1101

The Committee previously approved certain proposed amendments to Utah R. Evid. 101, 412, 615, and 1101 to be presented to the Supreme Court for approval to go out for public comment. Mr. Willard agreed to follow up with Mr. King on this.

ADJOURN:

Richard McKelvie moved to adjourn. Judge Leavitt seconded.

With no further items to discuss, Mr. Hogle adjourned the meeting. The next meeting will be June 13th, 2023, at 5:15 pm, via Webex video conferencing.

TAB 2

Rule 101. Scope; Definitions.

(a) Scope. These rules apply to proceedings in Utah courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in [Rule 1101](#).

(b) Definitions. In these rules:

(1) “civil case” means a civil action or proceeding, including all juvenile court proceedings that are not delinquency proceedings-non delinquency proceedings;

(2) “criminal case” includes a criminal proceeding and a juvenile court delinquency proceeding;

(3) “public office” includes a public agency;

(4) “record” includes a memorandum, report, or data compilation;

(5) a reference to any kind of written material or any other medium includes electronically stored information;

(6) “defendant” includes a minor in a juvenile delinquency proceeding accused of committing an act that would be a crime if committed by an adult;

(7) “conviction” includes an adjudication in a juvenile delinquency proceeding.

(c) To the extent the above definitions and the Utah Rules of Juvenile Procedure conflict, the provisions of the Utah Rules of Juvenile Procedure shall govern.-

TAB 3

Rule 412. Admissibility of Victim's Sexual Behavior or Predisposition.

(a) Prohibited Uses. The following evidence is not admissible in a criminal ~~or juvenile delinquency~~ proceedings involving alleged sexual misconduct:

- (1) **evidence offered** to prove that a victim engaged in other sexual behavior; or
- (2) **evidence offered** to prove a victim's sexual predisposition.

(b) Exceptions. The court may admit the following evidence if the evidence is otherwise admissible under these rules:

- (1) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
- (2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; or
- (3) evidence whose exclusion would violate the defendant's constitutional rights.

(c) Procedure to Determine Admissibility.

(1) **Motion.** If a party intends to offer evidence under [Rule 412\(b\)](#), the party must:

- (A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;
- (B) do so at least 14 days before trial unless the court, for good cause, sets a different time; and
- (C) serve the motion on all parties.

(2) **Notice to the Victim.** The prosecutor shall timely notify the victim or, when appropriate, the victim's guardian or representative.

(3) **Hearing.** Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless

the court orders otherwise, the motion, related materials, and the record of the hearing are classified as protected.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

TAB 4

Rule 615. Excluding Witnesses.

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;
- (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
- (c) a person whose presence a party shows to be essential to presenting the party's claim or defense;
- (d) a victim in a criminal ~~or juvenile delinquency~~ proceeding where the prosecutor agrees with the victim's presence;
- (e) a victim counselor while the victim is present unless the defendant establishes that the counselor is a material witness in that criminal ~~or juvenile delinquency~~ proceeding; or
- (f) a person authorized by statute to be present.

TAB 5

Rule 1101. Applicability of Rules.

(a) **Proceedings Generally.** These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in subsections (c) and (d). They apply generally to civil actions and proceedings, criminal cases and contempt proceedings except those in which the court may act summarily, and all juvenile court proceedings unless stated otherwise in the Utah Rules of Juvenile Procedure.

(b) **Rule of Privilege.** The rule with respect to privileges applies at all stages of all actions, cases and proceedings.

(c) **Rules Inapplicable.** The rules (other than with respect to privileges) do not apply in the following situations:

(1) **Preliminary Questions of Fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under URE 104.

(2) **Grand Jury.** Proceedings before grand juries.

(3) **Revoking Probation.** Proceedings for revoking probation, unless the court for good cause otherwise orders.

(4) **Miscellaneous Proceedings.** Proceedings for extradition or rendition; sentencing; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(d) **Reliable Hearsay in Criminal Preliminary Examinations.** In a criminal preliminary examination, reliable hearsay shall be admissible as provided under URE 1102.

TAB 6

Public Comments to Proposed Amendments to Rule 506:

1. Monica Diaz
April 21, 2023 at 10:10 am

The new (3)(e) says it only applies in criminal cases. Does this mean the rule does not apply in delinquency proceedings? Delinquency proceedings are considered civil proceeding but proceed under Title 76 and conducted akin to a criminal trial. It would be helpful to know if this rule is to apply in juvenile court or is being specifically excluded.

2. Jennifer Foresta
May 4, 2023 at 9:42 am

These amendments provide much-needed clarity and direction for all parties and the court in proceedings under the Rule, as this is a frequently litigated issue in criminal cases. Very pleased to see the recognition of the defendant's constitutional rights, as relates to accessing this often highly-relevant information, while preserving the privilege-holder's privacy rights. The guidance to the court about disclosures, re-evaluation of the records, and the use of protective orders is also welcome, as these concerns are frequently raised. These amendments are a significant improvement to the Rule, for all involved.

3. Matt Morrise
May 4, 2023 at 12:30 pm

I am concerned that, without having access to the relevant communications (e.g., therapy records), a criminal defendant will not ever be able to show by a preponderance that an accusation was the product of suggestion or undue influence. Typically, the most a criminal defendant might have is good evidence to suggest that an accusation may have been the product of suggestion or undue influence (e.g., an alleged victim may tell a law enforcement interviewer that the allegations were first disclosed in therapy). Hopefully, this type of evidence will be enough to trigger an in camera review under this proposal if it is adopted.

With that said, I think this proposal is a step in the right direction, and I applaud the committee for taking such a hard look at this.

4. Susanne Gustin
May 5, 2023 at 12:12 am

This amendment is definitely an improvement over the current version of Rule 506. That being said, I echo Mr. Morrise's concerns that a criminal defendant, even under a preponderance standard, will rarely be able to make a showing that the accusation was the result of undue influence or suggestion. It's always a catch-22 in these cases. The defendant generally does not know what is in the records and would need to see the records to make the showing. I think any case where the accusation was first disclosed to a therapist should automatically trigger at least an in-camera review of the accuser's records.

I would guess that 98% of the sex cases I handle are "he said-she said" cases with no DNA, pictures, witnesses, etc. It would definitely be a travesty of justice if a defendant is convicted on an accusation made first to a therapist who uses improper techniques to help an accuser "remember" abuse. Or, to learn that the therapist also noted in the records that the alleged victim was diagnosed with borderline personality disorder (diagnosis includes lying), or hallucinates or has accused others of sexual abuse.

Thank you for working on Rule 506. For years, it has been an insurmountable hurdle in the cases I have handled.

5. Jeanne Campbell
May 5, 2023 at 1:04 pm

I wholeheartedly agree with Ms. Gustin and Mr. Morrise's comments and concerns. The bulk of my cases are sex offense cases and I have had to deal with this very issue several times. I have a case pending right now involving allegations first made to a therapist and the therapist reported the alleged crime AND provided a letter to the State detailing the alleged victim's account of abuse, her diagnosis, treatment protocol, etc. In this pending case, the alleged victim also signed a release of information. Yet, we still had multiple evidentiary hearings on the applicability of the Rule. The Judge ultimately decided that the alleged victim (upon hearing from the victim's advocate atty) didn't intend for the therapist to release all of the information that he did in the letter and did not intend for her therapy records to be provided. The Judge, nevertheless, granted my motion for an in-camera review, agreeing with my argument that the exception to the Rule applied.

Even under a preponderance standard, I don't see how a criminal defendant can show an accusation was the result of undue influence or suggestion without having the records to begin with. I think the Rule already protects the privacy of the privileged party by requiring an in-camera review by the Judge prior to any disclosure of the records. I agree with Ms. Gustin, I think if the accusations are first made to a therapist and not law enforcement, it should automatically trigger an in-camera review. A defendant is still left with relying on the Judge's discretion as to which, if any, records are disclosed. These cases often involve mandatory prison sentences, and many individuals are convicted based only on the testimony of the accuser with no corroborating evidence. So, having access to the very records that could contain exculpatory evidence is vital to presenting a good defense.

This amendment is definitely a step in the right direction and, as a defense attorney handling a huge number of these types of cases, I appreciate the hard work of the committee.

6. David Ferguson
May 5, 2023 at 2:01 pm

I applaud the committee's efforts to create a balance here, and I echo the concerns raised by Mr. Morrise and Ms. Gustin. Specifically, I'm trying to play out in my head how a defendant can show by a preponderance of the evidence that a communication "contains a recantation or material inconsistency" (2)(A) without having the communication to meet that burden.

In some cases an alleged victim may have given one narrative to police and then an inconsistent narrative to a friend who then relays some of that conversation to the defendant. I just can't picture a judge who would accept that proffer and conclude that a therapy disclosure is "more likely than not" to contain a recantation or material inconsistency. But I also can't picture a realistic alternative scenario where a defendant could meet that burden.

In civil procedure when one party claims a privilege that prohibits disclosure, the seeking-party can get an in-camera review by simply bearing its burden of showing that the documents may not be privileged, and that discovery of them meets proportionality and relevance. *Allred v. Saunders*, 2014 UT 43. Certainly there are important distinctions between a civil case in which a victim may be a party and a criminal case where they are not. But there's an appreciation in that context that discovery of a document and admissibility of a document are two different things. A preponderance standard here effectively shields admissibility

by making discovery highly onerous. I'm sure that's not the goal, but it is the practical effect.

My suggestion would be to lower the threshold for discovery. To the extent that there are concerns about a defendant seeing a victim's sensitive documents, the rule could distinguish between a regular protective order and an attorney-eyes only protective order. This can include a requirement for limited purpose counsel for pro se individuals, and an appropriately declassifying of the records on a showing that they meet a preponderance threshold via a sealed hearing. I don't believe that this would interfere with a defendant's constitutional rights because if counsel cannot show that the evidence is as exculpatory as originally believed, then non-disclosure to the defendant wouldn't raise constitutional issues because the information wouldn't be relevant.

Additionally, there are some minor fixes that should be addressed, such as the word "shall" where, I believe, the word "will" is consistent with the rule style guide.

7. **Tom Means**
May 8, 2023 at 10:42 am

I support the long-needed proposed additions of sub paragraphs (d)(2) and (e) to URE506.

However, I agree with the observations of other commenters here that the "extrinsic indicators" required by State v Worthen often result in a defendant being unaware of exculpatory evidence communicated to therapists. Perhaps this committee should further consider automatic in-camera review of disclosures made to therapists and/or protected discovery of such disclosures, as have been suggested.

8. **Will Carlson**
June 5, 2023 at 10:38 am

While the language of the proposed amendment appears facially neutral, as if either party could claim an exception to the privilege, the conditions all aim at divulging a crime victim's communications with a physician or therapist (the requisites being recantation, influenced accusation, reliability of the means of communication, or protecting a defendant's constitutional rights).

And though the proposed amendment directs the court to consider a defendant's constitutional rights, it doesn't even gloss over the reality that the amendment will impair Utah's Constitutional guarantee to victims "to be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process." The rule offers no process for a victim/ declarant, always a non-party to a criminal case, to have standing in court regarding releasing their previously privileged disclosures. This one-sided exception wrongly assumes that the interests of the prosecution and the patient are the same, ignoring that the state's and a victim's interests are, at best, a Venn diagram or, at worst, completely separate spheres.

Just as defense counsel has expressed concern that this proposed amendment will be difficult for attorneys to establish by a preponderance of the evidence without having access to the records, prosecutors will feel compelled to seek the documents themselves to evaluate whether any of the requisites under Subsections (A) through (D) apply to argue the matter before the judge. The justice system will breach a patient's private communications with a doctor or therapist. Several entities outside the doctor's or therapist's office will learn details about the communications even if the court ultimately decides the communications are inadmissible. This breach will have a chilling effect on traumatized victims seeking treatment or even contacting law enforcement. Victims exposed to this public dispute over their private records will inevitably share with friends, family, and social media how invasive their experience has been.

The Utah Supreme Court tipped its hat to a more limited privilege in *State v. Bell* based on the defendant's failed argument relying on the SCOTUS' 1987 decision in *Pennsylvania v. Ritchie*. But the *Ritchie* decision was about disclosing records created by a government agency, Children and Youth Services (CYS). Utah's statutory scheme already articulates a difference between a victim's communications with a criminal justice system advocate and any other advocate. See Utah Code Title 77 Part 4, Privileged Communications with Victim Advocates Act. This proposed amendment goes far beyond government records. It invades private spaces where no criminal defendant, prosecutor, or court should have a right to go. Accordingly, the Supreme Court should reject this proposed amendment.

9. William Hains & David Simpson
June 5, 2023 at 11:56 am

The proposed amendment creates ambiguity as to the standard applicable to showing an exception under (d)(1) (condition as an element of a claim or

defense). Under current case law, a party asserting the exception must show to a reasonable certainty that records exist that would meet the exception and that contain exculpatory information. See *State v. Bell*, 2020 UT 38, ¶ 15.

The new committee note suggests that the amendment is not intended to change that standard. The committee minutes also suggest that the committee views the preponderance standard as identical to the reasonable-certainty standard, and the committee apparently decided on the preponderance language because it was more familiar to judges and litigants and would be easier to apply. The preponderance language is indeed preferable because it lends more clarity to the standard. And it likely is the same as the reasonable-certainty standard. But that's not entirely clear from the caselaw.

The reasonable-certainty standard is discussed in tort cases dealing with lost profits. Plaintiffs must prove damages by a preponderance of the evidence, but in satisfying that standard, lost profits need only be proved to a reasonable certainty—not with precision. Courts describe reasonable certainty as “sufficient certainty that reasonable minds might believe from a preponderance of the evidence that the damages were actually suffered.” *Kilpatrick v. Wiley, Rein & Fielding*, 2001 UT 107, ¶ 76. Because that statement arises in cases reviewing the sufficiency of the evidence for damages, that language is likely just a gloss on the preponderance standard. See *Howarth v. Ostergaard*, 515 P.2d 442 (Utah 1973). On the other hand, that language could be read to mean that reasonable certainty is greater than a reasonable likelihood, but less than a preponderance: to show something to a reasonable certainty, a party need not convince the trier of fact by a preponderance; rather, it need only convince the trier of fact that it would be reasonable for someone to conclude by a preponderance of the evidence that the fact has been established.

Again, the better reading is likely that the reasonable-certainty standard is the same as the preponderance standard. And if there is a difference, it appears to be slight and would matter only in rare cases. But at the very least, the committee should consider adding a committee note indicating that it understands the preponderance standard to be synonymous with the reasonable-certainty standard applicable to subsection (d)(1). Otherwise, the amendment invites litigation over whether a different standard applies to (d)(1) and (d)(2).

Criminal Appeals Division
Office of the Utah Attorney General

TAB 7

Rule 506. Physician and Mental Health Therapist-Patient.**(a) Definitions.**

(1) "Patient" means a person who consults or is examined or interviewed by a physician or mental health therapist.

(2) "Physician" means a person licensed, or reasonably believed by the patient to be licensed, to practice medicine in any state.

(3) "Mental health therapist" means a person who

(A) is or is reasonably believed by the patient to be licensed or certified in any state as a physician, psychologist, clinical or certified social worker, marriage and family therapist, advanced practice registered nurse designated as a registered psychiatric mental health nurse specialist, or professional counselor; and

(B) is engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction.

(b) Statement of the Privilege. A patient has a privilege, during the patient's life, to refuse to disclose and to prevent any other person from disclosing information that is communicated in confidence to a physician or mental health therapist for the purpose of diagnosing or treating the patient. The privilege applies to:

(1) diagnoses made, treatment provided, or advice given by a physician or mental health therapist;

(2) information obtained by examination of the patient; and

(3) information transmitted among a patient, a physician or mental health therapist, and other persons who are participating in the diagnosis or treatment under the direction of the physician or mental health therapist. Such other persons include guardians or members of the patient's family who are present to further the interest of the patient because they are reasonably necessary for the transmission of the communications, or participation in the diagnosis and treatment under the direction of the physician or mental health therapist.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, or the guardian or conservator of the patient. The person who was the physician or mental

health therapist at the time of the communication is presumed to have authority during the life of the patient to claim the privilege on behalf of the patient.

(d) Exceptions. No privilege exists under paragraph (b) in the following circumstances:

(1) Condition as Element of Claim or Defense. If a party shows by a preponderance of the evidence that the ~~For a~~ communications is relevant to an issue of the physical, mental, or emotional condition of the patient:

(A) in any proceeding in which that condition is an element of any claim or defense, or

(B) after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense;

(2) Necessary to a Criminal Case. If a party in a criminal ~~case matter~~ shows by the preponderance of the evidence that the communication is necessary to a fair determination of guilt or innocence and the communication:

(A) contains a recantation or material inconsistency;

(B) shows that an accusation was the product of suggestion or undue influence;

(C) relates to the reliability of the method or means by which the communication was disclosed; or

(D) is necessary to protect a criminal defendant's constitutional rights.

~~(2)~~(3) Hospitalization for Mental Illness. For a communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the mental health therapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization; and

~~(3)~~(4) Court Ordered Examination. For a communications made in the course of, and pertinent to the purpose of, a court-ordered examination of the physical, mental, or emotional condition of a patient, whether a party or witness, unless the court in ordering the examination specifies otherwise.

(e) Effect of Claiming any Exception in a Criminal Case. The following provisions apply only in criminal **cases matters** and only if a party is claiming an exception under paragraphs (d)(1) or (d)(2).

(1) If the party claiming any exception makes the required showing, the court shall conduct an in-camera review of the communications and shall release to the parties any communication to which the exception applies, subject to any protective orders entered by the court.

(2) If the party claiming the exception makes the required showing and the court has not released all communications that were subject to the in-camera review, upon motion of a party based on changed circumstances, the court shall conduct further in camera review of the communications to re-examine the applicability of an exception and to release any additional communication to which the exception applies.

(3) Any communications submitted to the court for in-camera review and that are not otherwise released under an exception shall be sealed and made part of the record.

(f) Reasonable Protective Orders and Procedures. The court may make reasonable orders regarding confidentiality protections and the procedure to be followed when a party claims an exception.

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2023~~1~~ Advisory Committee Note. The language of this rule has been amended in light of the Utah Supreme Court's decision in *State v. Bell*, 2020 UT 38, 469 P.3d 929. There, the Court noted "that Mr. Bell raise[d] important constitutional and policy concerns regarding a criminal defendant's access to records that may contain exculpatory evidence[,] and referred the rule to its advisory committee for review. *Id.* ¶ 1. Specifically, the court directed the committee "to consider the importance of": (1) "maintaining a strong privilege rule"; (2) "more clearly defining what is required to qualify for exceptions to the privilege"; and (3) "respecting a criminal defendant's constitutional rights." *Id.* The amendments contained in subsections (d)(2) and (e) are intended to address the court's directive. Further, the amendment in subsection (d)(2) is not intended to change the longstanding requirement that "some type of extrinsic

indication” is necessary to show the exception applies. *See State v. Worthen*, 2009 UT 79, ¶ 38. The amendments do not limit the availability of this rule’s other exceptions in criminal proceedings. Communications released to the parties may qualify as private records and be subject to Rules 4-202.02 and 4-202.03 of the Utah Rules of Judicial Administration.

2011 Advisory Committee Note. The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Original Advisory Committee Note. Rule 506 is modeled after Rule 503 of the Uniform Rules of Evidence, and is intended to supersede Utah Code §§ 78-24-8(4) and 58-25a-8. There is no corresponding federal rule. By virtue of Rule 501, marriage and family therapists are not covered by this Rule.

The differences between existing Utah Code § 78-24-8 and Rule 506 are as follows:

(1) Rule 506 specifically applies to psychotherapists and licensed psychologists, it being the opinion of the Committee that full disclosure of information by a patient in those settings is as critical as and as much to be encouraged as in the “physician” patient setting. The Utah Supreme Court requested that Rule 506 further apply to licensed clinical social workers. To meet this request, the Committee included such individuals within the definition of psychotherapists. Under Utah Code § 58-35-2(5), the practice of clinical social work “means the application of an established body of knowledge and professional skills in the practice of psychotherapy. . . .” Section 58-35-6 provides that “[n]o person may engage in the practice of clinical social work unless that person: (1) is licensed under this chapter as a certified social worker,” has the requisite experience, and has passed an examination. Section 58-35-8(4) refers to licenses and certificates for “clinical social

worker[s].” As a result of including clinical social workers, Rule 506 is intended to supplant Utah Code § 58-35-10 in total for all social workers.

(2) Rule 506 applies to both civil and criminal cases, whereas Utah Code § 78-24-8 applies only to civil cases. The Committee was of the opinion that the considerations supporting the privilege apply in both.

(3) In the Committee's original recommendation to the Utah Supreme Court, the proposed Rule 506 granted protection only to confidential communications, but did not extend the privilege to observations made, diagnosis or treatment by the physician/psychotherapist. The Committee was of the opinion that while the traditional protection of the privilege should extend to confidential communications, as is the case in other traditional privileges, the interests of society in discovering the truth during the trial process outweigh any countervailing interests in extending the protection to observations made, diagnosis or treatment. However, the Supreme Court requested that the scope of the privilege be broadened to include information obtained by the physician or psychotherapist in the course of diagnosis or treatment, whether obtained verbally from the patient or through the physician's or psychotherapist's observation or examination of the patient. The Court further requested that the privilege extend to diagnosis, treatment, and advice. To meet these requests, the Committee relied in part on language from the California evidentiary privileges involving physicians and psychotherapists. See Cal. Evid. Code §§ 992 and 1012. These features of the rule appear in subparagraphs (a)(4) and (b). The Committee also relied on language from Uniform Rule of Evidence 503.

Upon the death of the patient, the privilege ceases to exist.

The privilege extends to communications to the physician or psychotherapist from other persons who are acting in the interest of the patient, such as family members or others who may be consulted for information needed to help the patient.

The privilege includes those who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist. For example, a certified social worker

practicing under the supervision of a clinical social worker would be included. See Utah Code § 58-35-6.

The patient is entitled not only to refuse to disclose the confidential communication, but also to prevent disclosure by the physician or psychotherapist or others who were properly involved or others who overheard, without the knowledge of the patient, the confidential communication. Problems of waiver are dealt with by Rule 507.

The Committee felt that exceptions to the privilege should be specifically enumerated, and further endorsed the concept that in the area of exceptions, the rule should simply state that no privilege existed, rather than expressing the exception in terms of a “waiver” of the privilege. The Committee wanted to avoid any possible clashes with the common law concepts of “waiver.”

The Committee did not intend this rule to limit or conflict with the health care data statutes listed in the Committee Note to Rule 501.

Rule 506 is not intended to override the child abuse reporting requirements contained in Utah Code § 62A-4-501 et seq.

The 1994 amendment to Rule 506 was primarily in response to legislation enacted during the 1994 Legislative General Session that changed the licensure requirements for certain mental health professionals. The rule now covers communications with additional licensed professionals who are engaged in treatment and diagnosis of mental or emotional conditions, specifically certified social workers, marriage and family therapists, specially designated advanced practice registered nurses and professional counselors.

Some mental health therapists use the term “client” rather than “patient,” but for simplicity this rule uses only “patient.”

The committee also combined the definition of confidential communication and the general rule section, but no particular substantive change was intended by the reorganization.

TAB 8



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

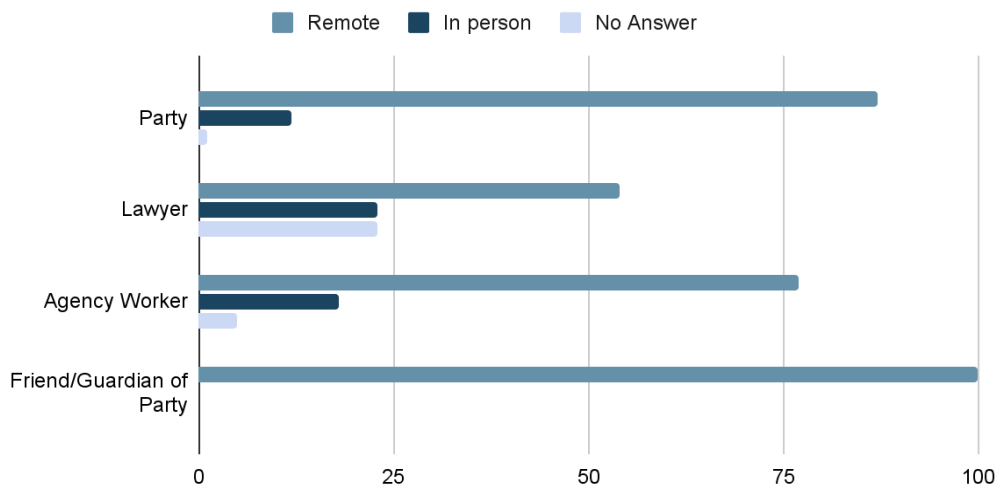
At the time the report was published, a total of 212 individuals had provided survey responses, including 116 parties, 68 lawyers, 22 government agency workers, and 5 friends/guardians of a party. These individuals participated in a variety of hearings in district court (criminal and civil), juvenile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

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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>).
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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



Party (54.72%) Lawyer (32.55%)
Agency Worker (10.38%)
Family/Guardian/Friend (2.36%)

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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.

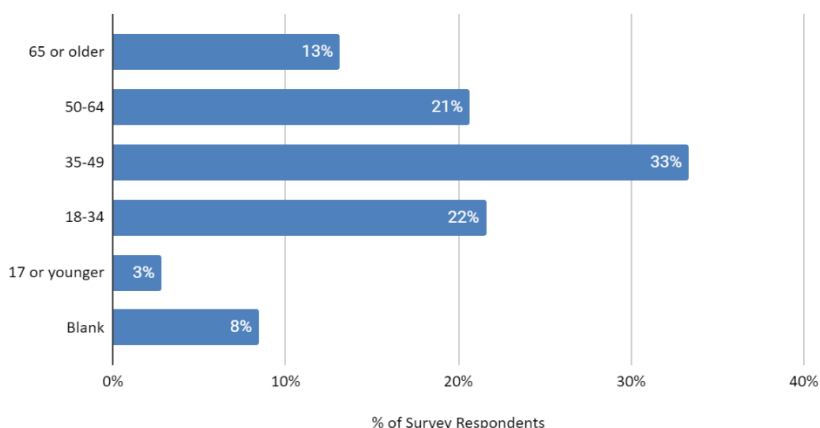
Age of Respondents

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.

Age of Survey Respondents



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

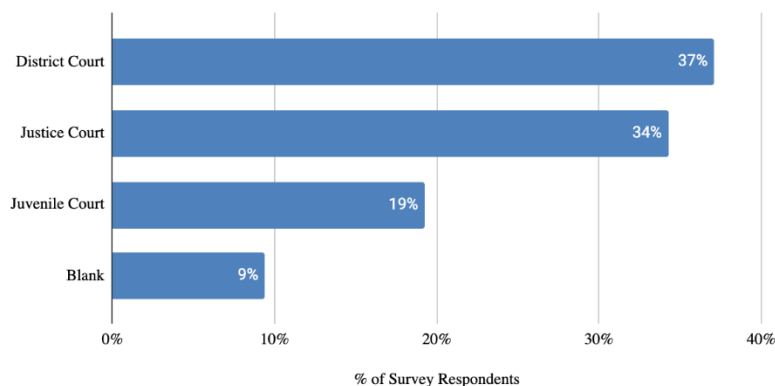
Appendix B - Utah Survey of Court Users

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%).

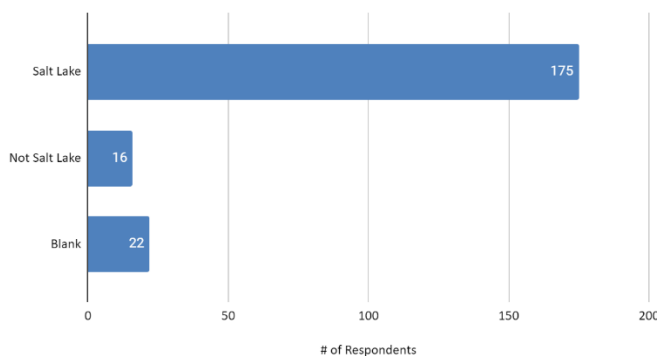
Survey Respondents Participated in District, Justice, and Juvenile Courts



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

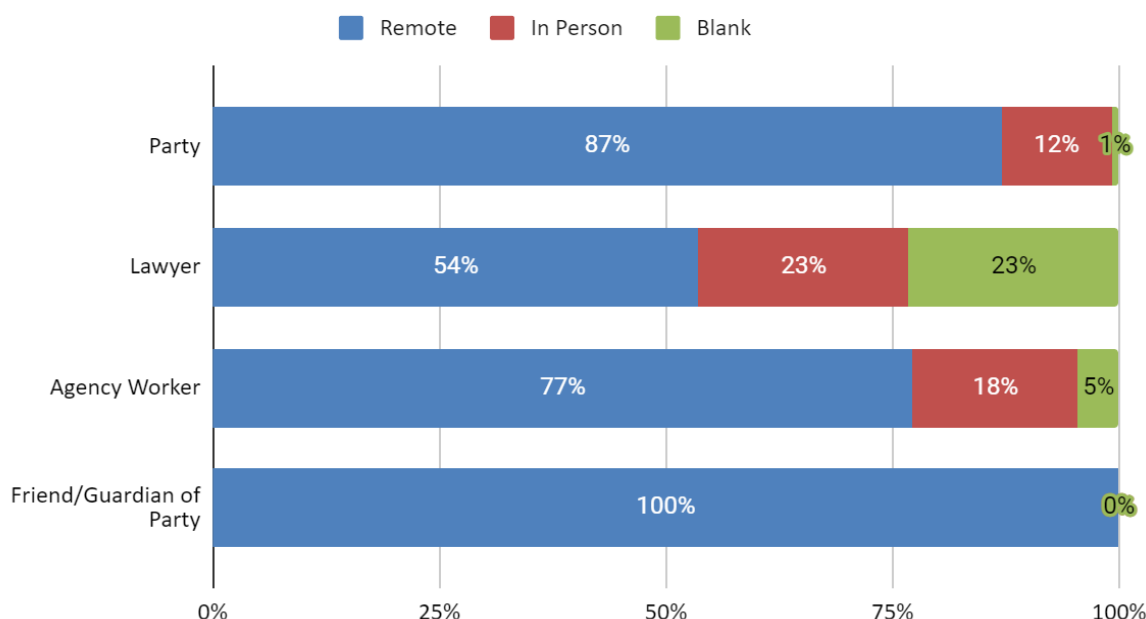
This court user survey reveals important benefits to holding remote hearings. Remote hearings have made court more accessible, whether the participant was young or old, in the metro area or more rural, in small claims or district court. Participants believe remote hearings are usually handled professionally 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

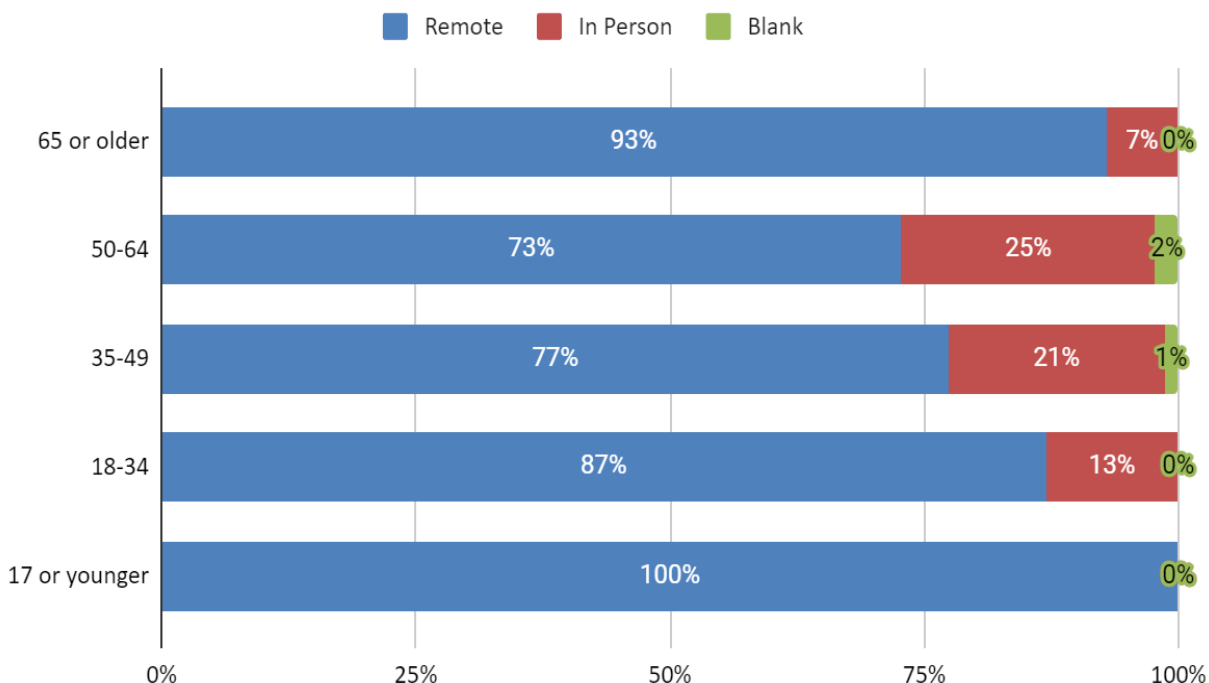


breakdown, it becomes clear that lawyers are participants who most want court to be in-person. Yet even this category shows that the majority of lawyers prefer remote access. Moreover, the people with the most to gain or lose – plaintiffs and petitioners, defendants and respondents, and their family, 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.”

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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.

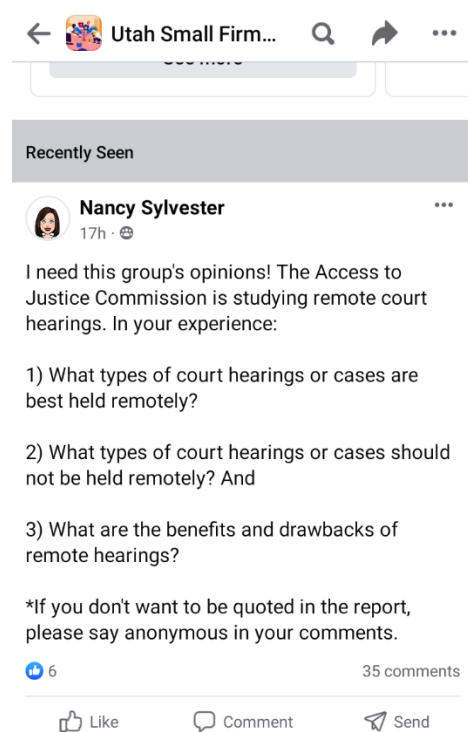
The Webex platform provides adequate sound and video quality, which allows survey respondents to participate in remote hearings. The NCSC and ATJ Surveys asked this question differently, so responses cannot be combined.⁹ However, the results show participants generally had a very positive view of Webex 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

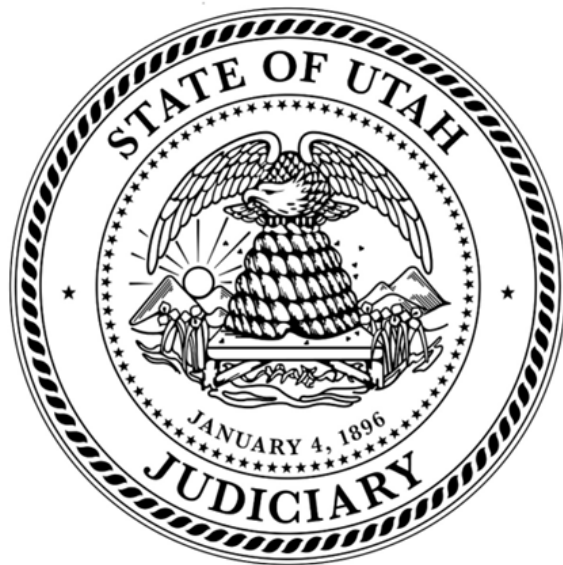
	that notice the Webex link to the meeting.
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UTAH STATE COURTS

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 9

1 **Rule 615. Excluding Witnesses.**
2

3 At a party's request, the court must order witnesses excluded so that they cannot hear
4 other witnesses' testimony. Or the court may do so on its own. But this rule does not
5 authorize excluding:

6 **(a)** a party who is a natural person;

7 **(b)** an officer or employee of a party that is not a natural person, after being designated as
8 the party's representative by its attorney;

9 **(c)** a person whose presence a party shows to be essential to presenting the party's claim
10 or defense;

11 **(d)** a victim in a criminal or juvenile delinquency proceeding where the prosecutor agrees
12 with the victim's presence;

13 **(e)** a victim counselor while the victim is present unless the defendant establishes that the
14 counselor is a material witness in that criminal or juvenile delinquency proceeding; or

15 **(f)** a person authorized by statute to be present.

16

17 **2011 Advisory Committee Note.** The language of this rule has been amended as part of
18 the restyling of the Evidence Rules to make them more easily understood and to make class
19 and terminology consistent throughout the rules. These changes are intended to be stylistic
20 only. There is no intent to change any result in any ruling on evidence admissibility.
21