

COOK COUNTY E-COURT

**EVALUATING THE CIRCUIT COURT'S RESPONSE TO THE
COVID-19 PANDEMIC AND LOOKING TOWARD THE FUTURE**

**CHICAGO APPLESEED & CHICAGO COUNCIL OF LAWYERS
WITH PRO BONO ASSISTANCE FROM LATHAM & WATKINS**

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EXECUTIVE SUMMARY

This report¹ breaks down general best practices, legal research, and especially important anonymous survey responses to help the Circuit Court of Cook County as it navigates an unprecedented public health crisis. In light of the due process and access to justice challenges facing our courts during the COVID-19 pandemic, Chicago Appleseed and the Chicago Council of Lawyers asked individuals familiar with the courts to document their experience during the pandemic using an anonymous online survey [See Appendix]. The most common observations provided by respondents discussed the Circuit Court of Cook County's unpreparedness and inadequate technology to deal with an unforeseen disaster of this kind:

"Each division within the Cook County court system is operating by its own rules about which types of motions it will and will not hear, and how and when it is rescheduling matters. This is chaos. There needs to be uniformity across divisions. Far too much time (billable to clients) is being spent figuring out these logistics."

"To state the obvious, the courts need to update technology. Appearances by video and phone should be easily accessible for the parties, attorneys, court reporters, and the public."

"Remote and video access is ad hoc, with individual judges left to design and implement their own solutions and procedures. No organized solutions are offered from the top across courtrooms, divisions, or courthouses."

In Cook County's Domestic Violence (DV) court, self-represented litigants have repeatedly reported being unable to get copies of protective and other orders following hearings. Advocates in the domestic violence community—both attorneys and non-attorneys—report orders are not being immediately transmitted to the Sheriff's office for service, as required by statute (750 ILCS 60/222(a)(b); 740 ILCS 21/115; 740 ILCS 22/218). Help desk staff at Cook County's Domestic Relations Division (Daley Center) and advocates at DV Court (555 W. Harrison) are being relied upon to print orders — even for people they do not represent or in cases

where they have not appeared. It appears that the Cook County Clerk is not providing timely nor reliable email delivery of orders. Statute requires that a file-stamped copy of any order of protection be given to complainants immediately (750 ILCS 60/222(a)). Email delivery of orders is not always possible in domestic violence cases for reasons of access, safety for petitioners, as well as statutory requirements which do not permit email delivery of orders to a representative instead of the petitioner prior to service on the defendant. At the time of publication, a lawsuit filed by Legal Aid Chicago on behalf of litigants in the domestic violence court alleges that over 200 petitioners did not receive copies of their orders of protection immediately, as required by law (*Kouk v. Brown*, 20 CH 05200).²

Respondents to our survey indicated similar concern with the Clerk of the Circuit Court's Office in other court divisions:

"While most issues arise from a lack of uniformity and direction within the court and its divisions (Chief Judge Evans and the Presiding Judges), the Clerk's office has failed to offer solutions or implement adequate procedures, often because they have been falling behind for years."

"[The Clerk's] system is archaic, and technology is terrible. Worst in the state. Dorothy Brown has resisted computerization in the Clerk's office for years, and what has been done is completely deficient. For example, no electronic access to motions filed."

Our concluding recommendations include specific suggestions to mitigate issues surrounding witness testimony; address implications for right to counsel; understand constraints for judicial empathy and fairness; protect defendants' rights to be heard in-person; maintain the public and dignified nature of proceedings; and ensure equitable access to a virtual courtroom. Chicago Appleseed and the Chicago Council of Lawyers offer these findings in an attempt to help the Court mitigate issues and ensure accessible and equitable justice in future disaster planning.

¹ *The Collaboration for Justice of Chicago Appleseed and the Chicago Council of Lawyers thank the pro bono teams at Latham & Watkins for preparing this report, and Loeb & Loeb and Harrison & Held for the research support.*

² *Kouk v. Brown* seeks writ of mandamus that the Cook County Circuit Clerk immediately correct the deficiency and implement whatever procedures are necessary to provide complainants copies of their orders as the orders are entered and improve whatever procedures are necessary to provide certified copies of Orders of Protection to the Sheriff for service immediately upon entry of those orders.

INTRODUCTION

In response to the COVID-19 pandemic, criminal courtrooms in Cook County were shuttered for all but limited proceedings. Cook County General Administrative Order, issued on March 13, 2020, specifically allowed judges to hear only bond hearings, preliminary hearings, arraignments, and guilty pleas.³ This policy has resulted in delays for defendants, including those who are detained awaiting trial, and risks a serious ballooning of the criminal docket especially on contested matters. The proceedings that do continue to take place risk the health and safety of judges, lawyers, defendants, witnesses, and courthouse staff. According to Douglas Keith of the Brennan Center for Justice at New York University School of Law, courts are going to have to reconcile remote proceedings with Constitutional demands.⁴

In several jurisdictions in Illinois and around the country, courts have begun utilizing videoconferencing platforms, most notably Zoom,⁵ to hold substantive legal proceedings while minimizing health risks. On May 4, 2020, Cook County outlined procedures for Zoom plea hearings.⁶ While beneficial from a public health standpoint, remote court proceedings carry new implications for the rights of defendants and practical functioning of a court proceeding.

PART I:

ISSUES SURROUNDING WITNESS TESTIMONY

Legal Background and Due Process Implications

Unlike more perfunctory proceedings such as arraignments, remote witness testimony over a two-way videoconferencing platform presents special constitutional and practical challenges. Courts rely on in-person testimony and cross-examination to

As outlined below, these implications include the defendant's rights to confront witnesses, to confer with counsel, and to be physically present for court proceedings. Remote proceedings also raise concerns about fundamental fairness, human empathy - which is ideally present during in-person proceedings - and about the public's access to the courtroom.

The following analysis takes each of these implications in turn, by outlining the legal underpinnings of each concern, evaluating how other jurisdictions have handled these concerns in implementing remote proceedings,⁷ and proposing practical guidance to help assure that remote courtroom proceedings in Cook County will be constitutionally sound, fundamentally fair to defendants, transparent to the public, and limited in duration to the current public health crisis.

While the focus of this memorandum is limited to the criminal proceedings that are currently allowed in Cook County, it is our hope that the recommendations we provide will be applied broadly to other types of proceedings if and when the court system begins to open up.

protect the rights of the accused and to make credibility findings.

Practicality

The necessity for parties to present documents, both as evidence and for impeachment, raises practical concerns when using videoconferencing applications. While increased attorney familiarity

³ See General Administrative Order 2020-01 of the Circuit Court of Cook County, available at <http://www.cookcountycourt.org/Manage/DivisionOrders/ViewDivisionOrder/tabid/298/ArticleId/2737/General-Administrative-Order-2020-01-COVID-10-EMERGENCY-MEASURES.aspx>

⁴ Reynolds, M. (May 2020). "Could Zoom jury trials become the norm during the coronavirus pandemic?" In *ABA Journal*: <https://www.abajournal.com/web/article/could-zoom-jury-trials-become-a-reality-during-the-pandemic>

⁵ A recent poll of 702 judges across the country found the Zoom platform to be the overwhelming favorite for remote court proceedings. See Firth, A. (May 13, 2020). "Two platforms dominated in our poll of virtual court operations." From The National Judicial

College: <https://www.judges.org/news-and-info/two-platforms-dominated-in-our-poll-of-virtual-court-operations/>

⁶ See Procedures for Remote Plea Hearings Using the Zoom Application (effective 5/4/2020), Cook County Criminal Division: <http://www.cookcountycourt.org/Portals/0/Criminal%20Division/COVID-19/Procedure%20for%20Remote%20Plea%20Hearings.pdf?ver=2020-04-29-130914-147>

⁷ While several jurisdictions have simply issued orders allowing or encouraging "remote proceedings," this analysis pays special attention to the more detailed guidance issued by the Michigan Supreme Court and the Administrative Judge of the Criminal Division in Miami-Dade County.

with the “Share Screen” function of the Zoom application may help to overcome these concerns, this function still requires discovery to be digitized, which poses additional authentication and privilege problems when it comes to evidence, such as police reports.

Constitutionality

Both the United States and Illinois Constitutions contain a Confrontation Clause establishing the right of criminal defendants to confront witnesses against them.⁸ Illinois courts apply the same analysis to both the Illinois and federal Constitutional Clause.⁹ The confrontation requirement not only guarantees a personal examination but also:

*(1) insures that the witness will give his statements under oath, thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth; and (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.*¹⁰

The Confrontation Clause does not prevent a defendant from calling a non-hostile witness telephonically or via videoconference.¹¹ And even for hostile witnesses, defendants may choose to waive their confrontation rights, and commonly do so in guilty pleas.¹²

Face-to-face is the preference for adverse witness testimony, but it is not an absolute requirement.¹³ This preference “must occasionally give way to the considerations of public policy and the necessities of the case.”¹⁴ Remote testimony may be allowed where “denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise

assured.”¹⁵ The “necessity” requirement is “case-specific.”¹⁶ The U.S. Supreme Court in *Craig* specifically noted the importance of (1) testifying under oath, (2) allowing defendant full opportunity for cross-examination, and (3) allowing the judge, jury, and defendant to view the witness’ demeanor while testifying.¹⁷

Since 1994, Illinois courts have routinely allowed one-way closed-circuit testimony in cases with child witnesses pursuant to the Child Shield Act.¹⁸ While Illinois has a specific statute providing for child victim testimony via one-way closed circuit video, a trial court may make the necessity determination even absent a statutory procedure.¹⁹ For example, in *People v. Cuadrado*, the trial court permitted a wheelchair bound witness to testify from a position that “somewhat limited” the defendant’s observation of the witness.²⁰ The Illinois Supreme Court held that this “physical accommodation” was “necessary” and “consistent with the confrontation clause.”²¹

Unlike one-way closed-circuit testimony in which most parties are typically still in the same room, two-way video conference testimony has not received the explicit approval of the U.S. Supreme Court.²² Although the Seventh Circuit has not explicitly ruled on the matter, other circuits have applied the *Craig* analysis in cases involving two-way videoconference testimony.²³ Several cases outside of Illinois have considered the health implications of testimony for seriously ill witnesses in determining that two-way video testimony was necessary and constitutionally permissible.²⁴

Possible Solutions

Adverse witness testimony and confrontation may be constitutionally allowed in Cook County via remote means provided that certain procedures are followed. The preferential route should be to seek a defendant’s informed and limited waiver of Sixth

⁸ U.S. Const. amend. VI; Ill. Const. art. I, § 8.

⁹ *People v. Lofton*, 194 Ill. 2d 40, 53 (2000).

¹⁰ *Maryland v. Craig*, 497 U.S. 836, 840 (1990).

¹¹ *U.S. v. Olguin*, 634 F.3d 384, 392 (5th Cir. 2011) (“The Sixth Amendment guarantees the right to confrontation against a party testifying against [defendant], not against others.”).

¹² *People v. Stroud*, 208 Ill. 2d 398, 402 (2004).

¹³ *Craig*, 497 U.S. at 847.

¹⁴ *Id.* at 848.

¹⁵ *Id.* at 850.

¹⁶ *Id.* at 855.

¹⁷ *Id.* at 840.

¹⁸ *People v. Pope*, 2020 IL App (4th) 180773 at ¶ 46-47.

¹⁹ *U.S. v. McGowan*, 590 F.3d 446 (7th Cir. 2009).

²⁰ 214 Ill.2d 79, 89-90 (2005).

²¹ *Id.* The court made clear that “[s]ince [the] defendant was given permission to move to a better vantage point within the courtroom, her dissatisfaction with [defendant’s] positioning is a result of her own inaction.”

²² *Wrotten v. New York*, 560 U.S. 959 (2010) (denying certiorari).

²³ *U.S. v. Weekley*, 130 F.3d 757 (6th Cir. 1997); *U.S. v. Rouse*, 111 F.3d 651, 568 (8th Cir. 1997); *U.S. v. Quintero*, 21 F.3d 885, 892 (9th Cir. 1994).

²⁴ *Bush v. State*, 193 P.3d 203, 214-15 (Wyo. 2008) (allowing two-way remote testimony when witness’s “profoundly poor” health prevented his travel to the proceedings); *State v. Sewell*, 595 N.W.2d 207, 211-13 (Minn. Ct. App. 1999) (approving live video testimony of witness who risked paralysis if he traveled to court).

Amendment right to confrontation.²⁵ Additionally, courts should make case-specific findings regarding the necessity of remote testimony based on public policy—particularly, the state of the COVID-19 pandemic response—as well as the feasibility of alternative measures and the defendant’s particular situation, such as whether the defendant is jailed pretrial. The remote testimony must be given live, under oath, and in such a manner as to permit both the finder of fact and the defendant to observe the demeanor of the witness. The technology must permit the defendant to communicate confidentially with counsel during the testimony and must permit effective cross-examination.

These procedural protections are not unfamiliar to American courts. As previously discussed, live, sworn testimony from child victims through closed-circuit television has already been in use in Cook County for some time. Remote witnesses in Rock Island County, Illinois, are required to be alone, in a secure room with the door closed.²⁶ The witness is required to be dressed in “appropriate” attire, e.g. attire that a witness would otherwise wear to an in person proceeding at the courthouse, and to be sworn in by the judge prior to the commencement of their testimony.²⁷ The Florida Supreme Court has expressly authorized witnesses to be put under oath

for remote proceedings.²⁸ So far, the Illinois Supreme Court has only expressly authorized remote testimony for depositions.²⁹

The Zoom application will allow defendants and judges to view the witness’ demeanor and cross-examine the witness in real-time. The additional procedural protections should include: (1) proceeding remotely, only with consent of the defendant, as elicited through a judicial colloquy at the beginning of each proceeding; (2) requiring case-specific findings of necessity in each proceeding; and (3) assuring each defendant’s ability to communicate with counsel confidentially before and after witness testimony, as described in Part II of this report (“Implications for Right to Counsel”), via “breakout rooms” and/or during the testimony through a separate, secure telephone connection.³⁰

Taking the appropriate procedural measures will help ensure that remote witness testimony in Cook County is constitutionally sound and tolerated no longer than the current COVID-19 pandemic response in fact requires, on a case-by-case basis.

PART II: CONSEQUENCES FOR RIGHT TO COUNSEL

Legal Background and Due Process Implications

The ability to confer quietly and privately with one’s attorney is a fundamental protection guaranteed to each and every defendant—and is one that numerous scholars and practitioners worry will be threatened by virtual proceedings. According to Abner Burnett, director of Texas Rio Grande Legal Aid Public Defenders:

If you set up a situation where the client’s access to his or her attorney is through video, then a lot of the assurance that comes from being in close

*proximity with a lawyer—and the ability to think and act on the spot—is decreased.*³¹

A 2017 study out of Sydney, Australia, similarly noted the following:

The right to effective access to counsel may be threatened if remote defendants do not have their lawyers present with them. This could be because the lawyer is in the courtroom and the accused is in a prison video suite without a private communication channel to the lawyer. Or it could be because the accused is isolated from

²⁵ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314 n.3 (2009) (“The right to confrontation may, of course, be waived.”).

²⁶ See Civil Division Administrative Order 10CA-40, Clarence Darrow, Presiding Judge, Civil Division of Rock Island County at ¶ 9.

²⁷ *Id.*

²⁸ See Administrative Order of the Florida Supreme Court, No. AOSC20-16 (March 18, 2020). Accessible at

<https://www.floridasupremecourt.org/content/download/632105/7182680/AOSC20-16.pdf>

²⁹ See Illinois Supreme Court Rule 206(h).

³⁰ See Part II *infra*.

³¹ Reynolds, M. (May 11, 2020). “Could Zoom jury trials become the norm during the coronavirus pandemic?” In *ABA Journal*: <https://www.abajournal.com/web/article/could-zoom-jury-trials-become-a-reality-during-the-pandemic>

*the lawyer in the courtroom due to courtroom design.*³²

A case study of videoconferencing in Chicago immigrant removal hearings, conducted by Chicago Appleseed, found that “videoconferencing creates a major barrier to a detained immigrant’s access to counsel,” primarily causing issues with the ability of the immigrants to confer with their representation. Our study found that problems arose in approximately one-in-six immigration bond hearings involving people represented by attorneys. Two more common complaints were, in particular: first, that videoconferencing makes it more difficult for a defendant to consult with their attorney prior to hearing; and second, that private consultation during the hearing was difficult.³³ Earlier, in 2005, another Chicago Appleseed study—done in collaboration with the Legal Assistance Foundation of Metropolitan Chicago, since renamed Legal Aid Chicago—of 110 master calendar hearings conducted by video “observed deficiencies related to access to counsel, presentation of evidence, and interpretation.”³⁴

During virtual proceedings, large numbers of defendants are “brought before the court” through video link-up with the cell block in the basement of the courthouse.³⁵ These issues related to a defendant’s right to counsel are not new, nor are they limited to virtual proceedings. In Cook County bond hearings, for instance, our research has found:

*...the video-conference aspect of the process prohibits the accused from having any communication whatsoever with his attorney during the bond hearing.*³⁶

Defendants do not always have the opportunity to meet with a public defender or their attorney prior to the hearing. If they have, it is unlikely they have adequate time to communicate more than the most

limited information about their eligibility for release.”³⁷

Approaches in Other Jurisdictions

Judge Christopher Whitten, state court judge in Maricopa County, Arizona, agrees that a “whole host of security and technical issues accompany a jury trial by videoconference,” but he believes the obstacles are “not too great to overcome.” His proposed solution for allowing defendants to communicate both “privately and simultaneously” with their lawyers could potentially include making a second phone line available or enabling a private chat or note-taking function on Zoom for defendants and their attorneys to use.³⁸

In Michigan, Administrative Order No. 2020-6 provides:

*Courts must enable confidential communication between a party and the party’s counsel. In Zoom, a ‘breakout room’ can be used for this communication; there is no audio or video recording in a breakout room when using cloud recording. The court can set up the breakout room so that there is no time constraint and participants can rejoin the hearing when they are done meeting. The host can also limit the time and return participants.*³⁹

Additionally, Michigan’s Virtual Courtroom Task Force, established in order to identify best practices throughout the state of Michigan, identified the following standard: “The court must provide a method to enable confidential communication between a party and the party’s counsel.”

According to recent observations of Cook County court proceedings, prior to the start of a hearing the judge will often explain to the defendant something along the lines of: “I understand that while we go along you may need to communicate with your

³² Tait, D. et al. (July 15, 2017). *Towards a Distributed Classroom*. Western Sydney University: https://courtofthefuture.org/wp-content/uploads/2017/07/170710_TowardsADistributedCourtroom_Compessed.pdf

³³ *Videoconferencing in Removal Hearings: A Case Study of the Chicago Immigration Court* (pg. 38), Chicago Appleseed: http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf

³⁴ Cavendish, S. & Schulman, S. (2012). *Reimagining the Immigration Court Assembly Line*, Chicago Appleseed.

³⁵ Chicago Council of Lawyers and the Chicago Appleseed recommend changes in the way bond hearings are conducted in Cook County. See Coyne, D. (2010). *Restructuring Proposal for the Criminal Division of the Circuit Court of Cook County*. Chicago-Kent College of Law: https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1191&context=fac_schol; Coyne, D. (2007). *A Report on Chicago’s Felony*

Courts (Chicago Appleseed Fund for Justice Criminal Justice Advisory Project, December 2007) (member of advisory board). Chicago-Kent College of Law:

https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1188&context=fac_schol

³⁶ *Id.*

³⁷ *Id.*

³⁸ Reynolds, M. (May 11, 2020). “Could Zoom jury trials become the norm during the coronavirus pandemic?” In *ABA Journal*: <https://www.abajournal.com/web/article/could-zoom-jury-trials-become-a-reality-during-the-pandemic>

³⁹ See “Remote Proceedings During State of Emergency,” Michigan Judicial Institute (Apr. 28, 2020): <https://mjieducation.mi.gov/documents/administrative-qrms/1214-remote-proceedings-during-state-of-emergency-benchcard/file>

lawyer. If you need to, raise your hand to let me know and we can take a break.” Following this, the judge will create a separate breakout room for only the defense attorney and their client to allow them to communicate; once they are done, they subsequently rejoin the larger meeting. However, observations also revealed that even if a defendant is placed in a separate room with no other defendants, there is frequently still a deputy or corrections officer in that room as well. Therefore, even if a judge allows a defendant to consult with their attorney in a breakout room or a separate phone line, it is not a truly private conversation.⁴⁰

Possible Solutions

Based on what other jurisdictions have done to address this issue, our recommendation is for judges to take full advantage of the breakout room feature in Zoom to allow defendants to converse privately with their attorneys. Additionally, there should be a standard speech given by each judge at the start of a proceeding in which the judge explains the breakout room feature to the defendant and informs them how to request that a breakout room be created if they would like to converse privately with their attorney. Specifically, defendants and/or their attorneys may use the “hand raise” feature within Zoom to get the judges attention during a proceeding in order to request time in a breakout room. This will require judges to effectively set ground rules and be diligent at monitoring what is going on during each of the proceedings, in case a defendant or an attorney is trying to get the judge’s attention for a side bar.⁴¹ The following guidelines provided by Michigan’s Virtual Courtroom Task Force may be helpful in developing our own set of guidelines regarding the use of breakout rooms:

In Zoom, courts can allow an attorney to meet with their client in a “breakout room.” “Breakout rooms” will not be audio or video recorded under certain circumstances. If the meeting is being cloud recorded (recommended), it will only record the main room, regardless of what room the meeting host is in. If local recording is being used (not recommended), it will record the room the participant who is recording is in. The host can set a predetermined amount of time and bring them back into the Zoom Meeting. If the host does not want to put a time constraint on the “breakout room,” the host can send a time warning to the breakout room participants to notify them that they should wrap up. If selected as a “breakout room” option, participants in the “breakout room” can rejoin the hearing when they are done meeting.⁴²

One problem that persists, even if breakout rooms are effectively used, is that defendants who are in custody are frequently *never truly alone* during a virtual proceeding. As observed in Cook County, defendants may often be in one large room with other defendants, or even if they are in a separate room, guards are typically present in that room with them at all times. In order to best preserve a defendant’s right to counsel, it will be imperative that sheriffs, at the very least, educate their deputies and corrections officers about leaving the room during these breakout sessions in order to give defendants a moment to converse privately with their attorney and reduce the intimidation factor that exists when the officers are in the room. Alternatively, if it is not possible to leave defendants alone in a room to converse with their attorneys, the Illinois Supreme Court should issue a rule stating that the presence of security personnel does not destroy the attorney-client privilege.

**PART III:
IMPLICATIONS FOR JUDICIAL EMPATHY &
FAIRNESS**

Legal Background and Fairness Implications

Another area of concern that has arisen in remote proceedings is a possible deficiency in empathy from

the judicial perspective when the defendant is a picture on a screen rather than a physical human presence. This phenomenon has been noted in various legal contexts since the advent of

⁴⁰ Conversation with a law practitioner in the Cook County Criminal and Illinois Appellate Courts.

⁴¹ Conversation with a law practitioner in the Cook County Criminal and Illinois Appellate Courts; see Part VII.2 *infra*.

⁴² See “Michigan Trial Courts Virtual Courtroom Standards and Guidelines,” Michigan State Court Administrative Offices (Apr. 7, 2020): https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR_stds.pdf

videoconferencing technology. One compilation of statistics from the Executive Office for Immigration Review found that the introduction of video-teleconferencing to asylum hearings “roughly doubles to a statistically significant degree the likelihood that an applicant will be denied asylum.”⁴³

Other studies have shown that fact-finders empathize more with live witnesses,⁴⁴ and that decision-makers are less sensitive to the impact of negative decisions on physically remote persons.⁴⁵ When videoconferencing was formerly used in Cook County bond court, Chicago Appleseed found that it was a “mass production operation” resulting in few defendants being released on bond.⁴⁶

In addition, the format of video-conferenced hearings also may elicit a perceived informal tone from defendants that judges may interpret as disrespect. Surveys of legal practitioners in 2017 in the United Kingdom found that “70% of respondents said it was difficult to recognize whether someone who was on video had a disability” and that defendants “appear disengaged and remote . . . they often give a nonchalant, poor account of themselves and we are left to infer that they couldn’t care less

that they are disrespectful of the court.”⁴⁷ Another U.K. study found “increased rates of custodial sentences compared to non-Virtual Courts.”⁴⁸

Possible Solutions

The Zoom videoconference platform is a limiting factor in assuring fairness and judicial empathy. Fairness to defendants will largely depend on judges’ willingness to work through and troubleshoot the myriad technical and practical issues to ensure that defendants’ rights are adequately protected.

This problem can, however, be alleviated by taking care to introduce the new technology on a staggered basis, with only volunteer judges at the beginning. By starting with judges who volunteer for the task, these judges will hopefully be more open-minded to the process and perhaps more tech savvy. As these judges become more comfortable and familiar with the technology, they will then be able to train additional judges. Additionally, discussing this issue explicitly with judges will help draw their attention to the risks and possible consequences of reducing empathy within a virtual courtroom.

**PART IV:
DEFENDANTS’ RIGHT TO BE HEARD IN-PERSON**

Legal Background and Due Process Implications

One of the most basic elements of the federal Confrontation Clause is the right of a criminal defendant to be present at every stage of trial.⁴⁹ The Illinois Constitution states even more explicitly that in criminal prosecutions, “the accused shall have the right to appear and defend *in person* and by counsel”⁵⁰ However, the defendant’s physical

presence is not always required. In *Lindsey*, the Illinois Supreme Court held that the defendant’s virtual participation was sufficient:

The record indicates that the closed-circuit system provided defendant with the ability to hear and see the proceedings taking place in the courtroom and, at the same time, allowed the judge and other persons in the courtroom to hear

⁴³ Walsh, F. & Walsh, E. *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*. 22 GEO. IMMGR. L. J. 259 (2000).

⁴⁴ Goodman, G. et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children’s Eyewitness Testimony and Jurors’ Decisions*. 22 L. & HUM. BEHAV. 165, 195 (1998); Davies, G. *The Impact of Television on the Presentation and Reception of Children’s Testimony*. 22 INT’L J.L. & PSYCHIATRY 241, 248 (1999).

⁴⁵ Milgram, S. *Some Conditions of Obedience and Disobedience to Authority*, 18 HUM. REL. 57, 63-65 (1965).

⁴⁶ *A Report on Chicago’s Felony Courts*, Chicago Appleseed (December 2007): http://chicagoappleseed.org/wp-content/uploads/2012/08/criminal_justice_full_report.pdf

⁴⁷ Bowcott, O. (October 23, 2017). “Videolinks in court trials undermine justice system, says report.” In *The Guardian*: <https://www.theguardian.com/law/2017/oct/23/videolinks-in-court-trials-undermine-justice-system-says-report>

⁴⁸ Terry, M. Johnson, S. & Thompson, P. (December 2010). *Virtual Court pilot outcome evaluation*. In *Ministry of Justice Research Series 21*(10): <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/virtual-courts.pdf>

⁴⁹ *Illinois v. Allen*, 397 U.S. 337, 338 (1970).

⁵⁰ Ill. Const. Art. I § 8 (emphasis supplied); see also *People v. Lindsey*, 201 Ill.2d 45 (2002) (“[B]oth the federal constitution and our state constitution afford criminal defendants the general right to be present.”).

*and see defendant. The record demonstrates that defendant was able to interact with the court with relative ease. It also appears from the record that defendant was aware of the nature and significance of the proceedings and the overall solemnity of the proceedings was preserved.*⁵¹

However, the *Lindsey* Court also acknowledged that the defendant’s right to confront witnesses was not implicated because no witnesses were called and his absence from the courtroom did impair his right to counsel.⁵² Nonetheless, the fact that the defendant was not physically present alone did not result in an infringement of his rights.

Possible Solutions

While it is not an express right to be heard *in person*, the right to be present is implied from the due process clause of the Constitution.⁵³ Case law in

Illinois has established that virtual participation by a defendant is permissible absent a showing on the record that the lack of physical presence affected the defendant’s constitutional rights.

Since a defendant may waive the right to be present, best practice would be to allow defendants to confer with counsel and decide before the hearing if they would waive their right to be present physically on the record through a judicial colloquy.⁵⁴ This would allow judges to establish that a defendant is not waiving a constitutional right, but instead this virtual hearing should be considered the same as if it were in person and the defendant was to agree to the same thing. Along these lines, a judicial colloquy can make clear to a defendant that a hearing that takes place over Zoom is their real hearing and that they will not be coming back later to a physical courtroom.

**PART V:
MAINTAINING THE PUBLIC AND DIGNIFIED
NATURE OF PROCEEDINGS**

Legal Background and Due Process Implications

While a defendant’s right to a public trial is enshrined in the Sixth Amendment to the Constitution,⁵⁵ the tension over *how* much public access to the courts should be allowed has existed within our legal system for centuries. The Supreme Court’s unanimous 1984 decision in *Waller v. Georgia* demonstrates how courts have grappled with how open and transparent our court proceedings should be. In *Waller*, the Court held that the closure of a suppression hearing violated a person’s right to a public trial under the Sixth and Fourteenth Amendments. The Court declared public trials to be “essential” for the people accused because “the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their

functions.”⁵⁶ According to the Court, the “aims and interests” of public trials were “no less pressing in a hearing to suppress wrongfully seized evidence,” and this presumption for the openness of courts should only be overcome by a strong, narrowly tailored interest in preserving higher values.⁵⁷

The desire for privacy in many of these proceedings does, however, pose a countervailing concern to the transparency of public courts. The *Waller* Court itself noted that, while overriding privacy interests did not exist in that particular case, there could be proceedings in which a party sufficiently advances such overriding interests that would require restricting public access.⁵⁸ This may include the interest in protecting the disclosure of confidential information (such as tax records, bank statements,

⁵¹ 201 Ill.2d at 58.

⁵² *Id.* at 59-60. It is not clear from the case why the defendant appeared via closed-circuit system, nor why certain witnesses were unavailable.

⁵³ *Id.* at 55. “The right to be present is not an express right under the United States Constitution, but is implied, arising from the due process clause of the fourteenth amendment. . . Article I, section 8, of the Illinois Constitution grants criminal defendants the express right ‘to appear and defend in person and by counsel.’ [] Accordingly, both the federal constitution and our state constitution afford criminal defendants the general right to be present, not only at trial, but at all critical stages of the proceedings, from arraignment to sentencing.”

⁵⁴ *People v. Woods*, 27 Ill.2d 393 (1963).

⁵⁵ See Const. Am. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”).

⁵⁶ *Waller v. Ga.*, 467 U.S. 39, 46 (1984) (“The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.”).

⁵⁷ *Id.* at 46-47.

⁵⁸ *Id.*

medical records, and other personal information), the privacy of juveniles, the safety of domestic violence survivors, or the privacy interests of other people not involved in the proceedings.

While many courts have rules and protections in place to protect these privacy interests, the shift to virtual court proceedings highlights the tension between privacy and transparency and may put these protections at risk. For instance, if parties introduce certain documents into evidence through Zoom using the ‘Share Screen’ feature, and these proceedings are then being streamed through YouTube, those documents may then also be visible on YouTube for anyone to view and potentially record.⁵⁹ There also are privacy concerns regarding the types of charges brought against defendants. For instance, a defendant who is in custody awaiting trial on a child sex case may be subjected to physical harm in the jail if his co-inmates find out the nature of the charge against him. This poses particular concern for larger “cattle” calls, or general hearings, like arraignments or bond hearings, that are often done in larger groups.

This tension cuts both ways. While theoretically, anyone could previously take time out of their day to travel to the courthouse and witness a court proceeding, in practice this rarely happens unless an individual has a specific reason for attending that proceeding. So, allowing anyone to access court proceedings at home potentially increases the possible audience to a much greater degree than previously contemplated or desired. On the other hand, unless a court takes affirmative steps to live stream a trial or otherwise advertise the means of access to the public, only the parties, counsel, court reporter and witnesses will receive the Zoom link and password. This could possibly restrict access to the courts to an even greater degree than before.⁶⁰

In addition to maintaining the appropriate balance between transparency and privacy, it is also critical to preserve the solemnity and dignity of court proceedings. Holding court virtually over Zoom presents the risk that the proceedings will be taken less seriously by those involved, leading to a number of undesired consequences for both the defendant

as well as the sanctity of the court system overall.⁶¹ Researchers have pointed out the following risks associated with virtual court proceedings: first, that “[t]he defendant may not recognise the seriousness of the proceedings and may engage in disinhibited behavior”; and second, that “[t]he dignity of the court process may be compromised if the main participant is not physically present, and the symbolic value of the trial undermined.”⁶²

How Other Jurisdictions are Addressing

Courts around the country have tackled this issue in a variety of ways, ranging from allowing the public full access to hearings, to restricting access entirely. Courts in New York City, for instance, are conducting some proceedings virtually using Skype for Business; however, those proceedings are not streamed or made available to the public.⁶³ Instead, individuals who wish to observe court must travel to the courthouse to watch proceedings on a screen. According to the New York Office of Court Administration, the screens in the courthouse satisfy the need for public access. Spokesperson Lucian Chalfen stated that hearings are not being posted on a virtual platform because of the inability of the court to prevent people from recording the proceedings or rebroadcasting them.⁶⁴

Currently in Cook County, courts are holding a number of proceedings via Zoom, and then live streaming those proceedings over YouTube for the public to access. Observations of Cook County courts show a tendency for the prosecutor or judge to turn off their camera and thus not appear during criminal proceedings that are live streamed over YouTube. While judges and prosecutors may have an interest in protecting their identities from mass distribution to potentially aggrieved parties, it may also defeat the purpose of live streaming court proceedings in the first place.

In Michigan, Administrative Order No. 2020-6 provides:

Unless access is otherwise limited by statute or court rule, access to virtual proceedings must be provided to the public either during or

⁵⁹ Nangia, S., Perkins, J. & Salerno, E. (May 20, 2020). *The Pros and Cons of Zoom Court Hearings*. In *National Law Review X*(141): <https://www.natlawreview.com/article/pros-and-cons-zoom-court-hearings>

⁶⁰ *Id.*

⁶¹ See Part II *supra*.

⁶² Tait, D. et al., (July 15, 2017). *Towards a Distributed Classroom* (pg. 17). Western Sydney University: https://courtofthefuture.org/wp-content/uploads/2017/07/170710_TowardsADistributedCourtroom_Compessed.pdf

⁶³ See Virtual Courts Expanded Beyond the Limited Category of Essential and Emergency Matters [Press Release, Hon. Lawrence K. Marks]. N.Y. State Unified Court System: https://www.nycourts.gov/LegacyPDFS/press/PDFs/PR20_15virtualcourtsortsetc.pdf

⁶⁴ Lartey, J. (April 13, 2020). “The Judge Will See You On Zoom, But The Public Is Mostly Left Out.” In *The Marshall Project*: <https://www.themarshallproject.org/2020/04/13/the-judge-will-see-you-on-zoom-but-the-public-is-mostly-left-out>

*immediately after the proceeding. Each court may determine how to provide this access. Consider announcing at the start of the proceeding that anyone who makes an unauthorized recording may be subject to contempt proceedings.*⁶⁵

In its guidance, the Michigan Judicial Institute promulgated the following standard:

Access to proceedings must be provided to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed, or access would otherwise be limited by statute or rule.

To meet this standard, the following guidelines were provided:

The court should create a YouTube account (live streaming channel). The court can work with its local court website administrator to post a link to the YouTube channel. Information about public availability of court proceedings via live streaming must be accessible to the public and press. This can be accomplished by posting the information on the court's website. If the court does not have a website, it is the court's responsibility to develop another method to effectively communicate the availability of court proceedings. . .

*YouTube automatically records and stores content that is streamed on a channel per its licensing agreements. A YouTube recording is not the official record of the court and need not be maintained on the court's YouTube Channel. Each court is urged to review YouTube's Terms of Service here, especially the possible uses of content recorded to YouTube, to decide whether recordings should be maintained there.*⁶⁶

In Miami, criminal proceedings are currently being held over Zoom; however, unlike in Cook County, these proceedings are not simultaneously live streamed over YouTube or another similar streaming service. Instead, courtrooms are posting Zoom link for the day's proceedings on their official website, and individuals who wish to observe the proceedings must sign into Zoom and join the

proceedings as a participant. For other routine hearings, courts in Miami have used a combination of in-person and over-the-phone conferences, primarily using the service LifeSize for the audio calls.⁶⁷

During a recent webinar hosted by Thomson Reuters as part of their Virtual Courts series, one judge recommended having a coordinator join in on all of the court calls, which he described as emulating the role of a bailiff in the physical courtroom. In his courtroom, the coordinator logs into the video conferencing platform as the judge and creates the settings, and then enters them into the judge's calendar. Once the judge joins the video conferencing platform for that day, he immediately makes the coordinator a cohost and turns the waiting room over to her. The coordinator will let the judge know who is in the waiting room, and the judge will let the coordinator know when to let each person into the full videoconference. This allows the coordinator to troubleshoot and fix any potential problems while an individual is in the waiting room prior to entering the full videoconference, including any audio or visual issues or ensuring that the name that appears is correct.⁶⁸

Possible Solutions

As technology has continued to advance, there are increasingly more options for video conferencing platforms. Courts around the country have used YouTube, Skype, Zoom, Microsoft Teams, WebEx, and GoToMeeting to conduct their business. Each of these platforms allows a range of options for participant control—including break out rooms, waiting rooms for witnesses, and a muting function to reduce static and other feedback—and potentially to exert more control over an unruly party. Utilizing the different functions among these various platforms in an effective way can help to maintain the balance between transparency and privacy when it comes to public access to the courts.

One option that attempts to strike this balance is to live stream only the audio feed from a court proceeding to the public. While restricting public access to only the audio does protect the privacy of parties involved in the proceeding, this option may restrict transparency too much, thus undermining

⁶⁵ See Remote Proceedings During State of Emergency, Michigan Judicial Institute (Apr. 28, 2020): <https://mjieducation.mi.gov/documents/administrative-qrms/1214-remote-proceedings-during-state-of-emergency-benchmark/file>

⁶⁶ See Michigan Trial Courts Virtual Courtroom Standards and Guidelines, Mich. State Court Administrative Offices (Apr. 7, 2020),

https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR_stds.pdf

⁶⁷ Ovalle, D. (April 3, 2020). *Miami's first Zoom crime court hearing: teacher accused of sex with student wants out of jail*. In *Miami Herald*: <https://www.miamiherald.com/news/local/crime/article241708946.html>

⁶⁸ The Courts' Perspective [Webinar], from *Thomson Reuters* (June 10, 2020).

the purpose for allowing public access to the courts in the first place. Streaming a proceeding over video provides a certain deterrence factor that ensures that all parties are taking their job seriously.

The appropriate solution to the issue of public access to the courts is ideally one that most closely replicates the access allowed to the courts prior to the global pandemic. Public access to the courts was guaranteed as a general rule; however, this “access” was limited by a few obstacles—namely, taking time to travel to the courthouse, appearing in person in the courtroom, and refraining from videotaping or photographing any of the proceedings. Streaming the proceedings on a screen in the courthouse most closely mirrors this; however, individuals who choose to visit the courthouse are then risking potential exposure to COVID-19. Live streaming virtual court proceedings over streaming services such as YouTube significantly expands this access by eliminating most obstacles and introducing a potentially undesirable element of anonymity for those watching from behind a screen.

Our recommendation, therefore, is to allow individuals to access virtual court proceedings by signing into the Zoom meeting as a participant, similar to how the public is able to access virtual court proceedings in Miami. The added step of having to create a Zoom account and join the

meeting for all to see provides some accountability, similar to having to travel to the courthouse and appear in person to observe. This also reduces the risk that court proceedings will be illegally or inadvertently recorded. As the Michigan State Court Administrative Offices’ guidelines noted: “YouTube automatically records and stores content that is streamed on a channel per its licensing agreements.”⁶⁹ Additionally, including a coordinator in the videoconference to coordinate the judge’s schedule, monitor the waiting room, and fix any technical issues prior to the hearing itself could also help to alleviate the issues that arise with the use of these platforms.

Furthermore, in order to best maintain the dignity of court proceedings, our recommendation is for the courtrooms to develop protocols and guidelines that would recreate the decorum of court on a virtual platform. These guidelines could include: (1) requiring attorneys as well as witnesses to wear appropriate courtroom attire (i.e. a suit); (2) having the judge wear a robe; (3) requiring the various parties to identify both their name and title in their Zoom username so that it is evident who each person is; and (4) providing virtual backgrounds for all parties to use so they appear to be in the courtroom itself.

PART VI:

ENSURING EQUITABLE ACCESS TO A VIRTUAL COURTROOM

Legal Background and Due Process Implications

A number of issues present themselves when it comes to protecting due process during virtual court proceedings. One issue stems from how virtual proceedings likely exacerbate already-existing socioeconomic divides amongst potential defendants, witnesses, and other court participants, especially when it comes to indigent parties. For instance, access to high-speed internet and technology is not consistent. According to the

Federal Communications Commission, by the end of 2017, 21.3-million Americans did not have access to high-speed internet.⁷⁰

Remote virtual hearings may also unfairly advantage larger and more well-resourced law firms over public defenders and those with indigent clients who do not have access to the same resources.⁷¹ This disparity touches on a number of possible issues including “fairness, effective assistance of counsel, ability to effectively

⁶⁹ See “Michigan Trial Courts Virtual Courtroom Standards and Guidelines,” Michigan State Court Administrative Offices (Apr. 7, 2020): https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR_stds.pdf

⁷⁰ Reynolds, M. (May 11, 2020). “Could Zoom jury trials become the norm during the coronavirus pandemic?” In *ABA Journal*.

<https://www.abajournal.com/web/article/could-zoom-jury-trials-become-a-reality-during-the-pandemic>

⁷¹ Fortin, J. (April 15, 2020). “When Court Moves Online, Do Dress Codes Still Matter?” In *The New York Times*: <https://www.nytimes.com/2020/04/15/us/coronavirus-lawyers-court-telecommute-dress-code.html>

participate in one's own representation, and the right to face one's accuser, to name just a few.⁷²

Pro se defendants and non-English speaking participants face a number of unique challenges when it comes to accessing a virtual courtroom. Pro se litigants may be less likely to read standing orders and protocols issued by the court and may not have access to the internet or other technological equipment necessary to participate in the virtual courtroom. When it comes to presenting evidence, this may hinder their ability to pre-submit certain evidence or exhibits, or even to be able to fully view shared exhibits during the proceeding. Non-English-speaking litigants in a physical courtroom typically have access to simultaneous interpretation and translation; however, this is nearly impossible to provide in a virtual courtroom. Proceedings may be delayed as a result of having to get interpreters as needed, and the inclusion of interpreters on the videoconferencing call would then not only increase the number of participants on the call, but also likely lengthen the time of the proceeding itself.

How Other Jurisdictions are Addressing

In its guidance, the Michigan Judicial Institute promulgated the following standard for courts currently engaging in virtual proceedings: "The court shall provide adequate notice to the parties and ensure that the parties are able to participate remotely." The Task Force also issued the following guidance for how the court can provide the Zoom hearing information to parties:

- a. *Court staff may phone the parties in advance and obtain the e-mail address to which the meeting code/invitation and any password can be sent;*
- b. *If the party does not have e-mail or the ability to join by video, provide the telephone number to join the meeting and the meeting code so that they can participate via phone;*
- c. *The court may design a new document that lists the court proceeding, court date, time of hearing, and the Zoom Meeting ID.⁷³*

Additionally, numerous counties across the country have begun creating "Zoom stations," which are public computer stations or kiosks meant to bridge the digital divide. In the Travis County criminal courthouse in Austin, Texas, these stations are equipped with a computer, webcam, microphone, hand sanitizer, and gloves. Similarly, Harris County's COVID-19 operating plan states:

The county is investigating the ability to have computers or tablets at local libraries or JP courts to increase remote access for the litigants and the public.⁷⁴

Other states, including Idaho and Illinois, have started taking steps to create similar video conferencing stations that would allow individuals to participate in remote court proceedings.⁷⁵

When it comes to participants without legal representation, Judge Emily Miskel from the 470th District Court in Collin County, Texas, always sends the court's videoconferencing protocol along with the notice to appear in court. This protocol also includes information on how to call the court's coordinator to set up a practice call prior to the hearing. Her coordinator makes sure to set aside some time every week to conduct these practice calls, which allows litigants to work through any possible technological issues and become comfortable with the platform prior to the day of the hearing. Judge Miskel also makes sure to give simple and clear admonishments at the beginning of each hearing, which includes a three minute list of instructions on how to use the videoconferencing platform and how to get the judge's attention (i.e. by physically raising your hand or using the "raise hand" function on Zoom). When it comes to non-English speaking participants, Judge Miskel's courtroom has started using Zoom's built in interpretation service, which lets you set up multiple channels (i.e., an English channel and a Spanish channel). She hopes that Zoom will continue to refine its interpretation service and that she can even incorporate this feature when they return to a physical courtroom.⁷⁶

⁷² McKenzie, M. (May 29, 2020). *The New Normal: Face to Face with the Virtual Court Model*. In *Above the Law*. <https://abovethelaw.com/2020/05/the-new-normal-face-to-face-with-the-virtual-court-model/?rf=1>

⁷³ See "Michigan Trial Courts Virtual Courtroom Standards and Guidelines," Michigan State Court Administrative Offices (Apr. 7, 2020), https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR_stds.pdf

⁷⁴ Morris, A. (May 29, 2020). "Now Trending: 'Zoom Kiosks' to Breach Digital Divide Between Public and Remote Courts." For *Law.Com*. <https://www.law.com/texaslawyer/2020/05/29/now-trending-zoom-kiosks-to-breach-digital-divide-between-public-and-remote-courts/?slreturn=20200505113246>

⁷⁵ *Id.*

⁷⁶ "The Courts' Perspective" [Webinar], from *Thomson Reuters* (June 10, 2020).

Possible Solutions

It is our recommendation that Cook County judges take special care to ensure that notice and support is given effectively to pro se and non-English speaking defendants. In Chicago Appleseed’s case study of Chicago Immigration Courts, we recommended:

[The Executive Office for Immigration Review (EOIR)] should draft a separate notice for videoconferencing cases in the languages most commonly spoken by immigrants, explaining the nature of videoconference hearings and the basic videoconferencing procedure, including the right of an immigrant to request an in-person hearing for good cause.⁷⁷

Applying this recommendation will help facilitate equitable access to a virtual courtroom.

It is also especially important to provide adequate technical support both during and prior to a court proceeding in order to ensure both equitable access to a virtual courtroom as well as to efficiency during the proceeding itself. One recommendation, therefore, is that the Chief Judge of Cook County could appoint a coordinator to manage a

troubleshooting phone line, to address any questions or technical issues prior to the proceeding itself. While it may not be feasible for each courtroom to appoint its own coordinator, the county could appoint a coordinator to manage any pro se defendants for purely logistical purposes. The Michigan Judicial Institute has published a checklist on how to set up and conduct a remote proceeding that provides useful, practical steps that courts and parties can take to ensure as fair virtual proceedings as possible.⁷⁸

In addition to providing adequate notice and technological support for virtual proceedings, we recommend looking into the feasibility of establishing “Zoom stations” for use across the county to ensure equitable access to the courtroom for all litigants. According to Danielle Hirsch, National Center for State Courts’ principal court management consultant, these kiosks will help ensure:

...people for whom—either their internet is not strong enough to participate remotely, or they don’t have enough cell phone minutes or data, or they just have technical illiteracy—that they are not barred from the court.⁷⁹

**PART VII:
SUMMARY OF RECOMMENDATIONS**

1. Mitigate issues surrounding witness testimony.

Adverse witness testimony and confrontation may be constitutionally allowed in Cook County via remote means, provided that certain procedures are followed:

- (a)** Remote testimony in Cook County must be given live, under oath, and in such a manner as to permit both the finder of fact and the defendant to observe the demeanor of the witness.
- (b)** This technology must permit a respondent to communicate confidentially with counsel during

the testimony and must permit effective cross-examination.

- (c)** Proceedings should only be held remotely with explicit and informed consent of the defendant, as elicited through a judicial colloquy at the beginning of each proceeding. This requires case-specific findings of necessity in each proceeding and the consideration each person’s particular situation.
- (d)** Each person’s ability to communicate with counsel *confidentially* before, during, and after witness testimony must be guaranteed. The use of “breakout rooms” before and after testimony

⁷⁷ *Videoconferencing in Removal Hearings: A Case Study of the Chicago Immigration Court* (38), Chicago Appleseed: http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf

⁷⁸ See “Setting Up and Conducting a Remote Proceeding Checklist,” Michigan Judicial Institute (Apr. 20, 2020):

<https://mjieducation.mi.gov/documents/administrative-qrms/1213-conducting-remote-proceedings-checklist/file>

⁷⁹ Morris, A. (May 29, 2020). “Now Trending: ‘Zoom Kiosks’ to Breach Digital Divide Between Public and Remote Courts.” For *Law.Com*: <https://www.law.com/texaslawyer/2020/05/29/now-trending-zoom-kiosks-to-breach-digital-divide-between-public-and-remote-courts/?sreturn=20200505113246>

and/or a separate, secure telephone connection during the testimony is necessary.

can rejoin the hearing when they are done meeting.⁸⁰

Implementing these measures will help ensure that remote witness testimony in Cook County is constitutionally sound and tolerated no longer than the current COVID-19 pandemic response in fact requires, on a case-by-case basis.

2. Address implications for right to counsel.

Judges should take full advantage of the “breakout room” feature in Zoom to allow litigants to converse privately with their attorneys and advocates. A standard speech should be given by each judge at the start of a proceeding in which the judge explains the breakout room feature to the defendant and informs them how to request that a breakout room be created if they would like to converse privately with their attorney. Specifically, defendants and/or their attorneys may use the “hand raise” feature within Zoom to get the judges attention during a proceeding in order to request time in a breakout room.

This will require judges to effectively set ground rules and carefully monitor the proceedings, in case a defendant or an attorney is trying to get the judge’s attention for a side bar. The following guidelines provided by Michigan’s Virtual Courtroom Task Force may be helpful in developing our own set of guidelines regarding the use of breakout rooms in Cook County:

In Zoom, courts can allow an attorney to meet with their client in a “breakout room.” “Breakout rooms” will not be audio or video recorded under certain circumstances. If the meeting is being cloud recorded (recommended), it will only record the main room, regardless of what room the meeting host is in. If local recording is being used (not recommended), it will record the room the participant who is recording is in. The host can set a predetermined amount of time and bring them back into the Zoom Meeting. If the host does not want to put a time constraint on the “breakout room,” the host can send a time warning to the breakout room participants to notify them that they should wrap up. If selected as a “breakout room” option, participants in the “breakout room”

It will be imperative that sheriffs, at the very least, require their deputies and corrections officers to leave the room during breakout sessions. To best preserve the right to counsel for a person in custody, people must be given a moment to converse privately with their attorneys and reduce the inevitable intimidation factor that exists when the officers are in the room. If, for some reason, it is not possible to leave defendants alone in a room to converse with their attorneys, the Illinois Supreme Court should issue a rule stating that the presence of security personnel does not destroy the attorney-client privilege.

3. Understand constraints for judicial empathy and fairness.

Zoom (and other) videoconference platforms are, unfortunately, limiting factors in assuring fairness and judicial empathy. This problem can, however, be alleviated by taking care to introduce the new technology on a staggered basis, with only volunteer judges at the beginning. As these judges become more comfortable and familiar with the technology, they can then effectively train additional judges.

Additionally, discussing this issue explicitly with judges will help draw their attention to the risks and possible consequences of reducing empathy within a virtual courtroom.

4. Protect defendants’ rights to be heard in-person.

In Illinois, a person may waive the right to be present in court in favor of virtual participation absent a showing on the record that the lack of physical presence affected the defendant’s constitutional rights.

We recommend allowing people to confer with counsel and decide before the hearing if they would like to waive their right to be present physically, on the record through a judicial colloquy. This would allow judges to establish that this virtual hearing should be considered the same as if it were in person. Along these lines, a judicial colloquy can make clear to a defendant that a hearing that takes place over Zoom is their real

⁸⁰ See ‘Michigan Trial Courts Virtual Courtroom Standards and Guidelines,’ Michigan State Court Administrative Offices (Apr. 7, 2020):

https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR_stds.pdf

hearing and that they will not be coming back later to a physical courtroom.

5. Maintain the public and dignified nature of proceedings.

The Circuit Court of Cook County should utilize the range of options for participant control offered by the various videoconferencing platforms (most notably Zoom), including breakout rooms, waiting rooms for witnesses, and a muting function to reduce static and other feedback, and potentially to exert more control over an unruly party. Using the different functions among these various platforms in an effective way can help to maintain the balance between transparency and privacy when it comes to public access to the courts.

We recommend, also, live video streaming the court's proceedings in order to afford a comparable degree of public access and decorum by court participants as would typically take place in an in-person proceeding.

Allowing the public to observe virtual court proceedings by signing into the Zoom meeting as a participant would most closely replicate the access allowed to the courts prior to the pandemic. The added step of having to create a Zoom account and join the meeting, for all to see, provides some accountability—similar to having to travel to the courthouse and appear in person to observe. This will also reduce the risk that court proceedings will be illegally or inadvertently recorded.

Including a coordinator in the videoconference to coordinate the judge's schedule, monitor the waiting room, and fix any technical issues prior to the hearing itself could also help to alleviate the issues that arise with the use of these platforms.

To best maintain the dignity of court proceedings, our recommendation is for the courtrooms to develop protocols and guidelines that would recreate the decorum of court on a virtual platform. These guidelines could include: (1) requiring attorneys as well as witnesses to wear appropriate courtroom attire; (2) having the judge wear a robe;

(3) various parties identifying both their name and title in their Zoom username so that it is evident who each person is; and (4) providing virtual backgrounds for all parties to use so they appear to be in the courtroom itself.

6. Ensure equitable access to a virtual courtroom.

It is our recommendation that Cook County judges take special care to ensure that notice and support is given effectively to all litigants, especially pro se and non-English speaking defendants.

The Courts should be responsible for drafting a separate notice for videoconferencing cases in the languages most commonly spoken by non-English speakers, explaining the nature of videoconference hearings and the basic videoconferencing procedure. Applying this recommendation will help facilitate equitable access to a virtual courtroom.

It is also especially important that Cook County provide adequate technical support both during and prior to a court proceeding in order to ensure both equitable access to a virtual courtroom as well as to efficiency during the proceeding itself.

We recommend that the Chief Judge of Cook County appoint coordinators to manage a troubleshooting phone line to address any questions or technical issues prior to the proceeding itself. While it may not be feasible for each courtroom to appoint its own coordinator, the county could appoint a coordinator to manage any pro se defendants for, at least, purely logistical purposes. The Michigan Judicial Institute has published a checklist on how to set up and conduct a remote proceeding that provides useful, practical steps that courts and parties can take to ensure as fair virtual proceedings as possible.⁸¹

Finally, we recommend looking into the feasibility of establishing "Zoom stations" for use across the county to ensure equitable access to the courtroom for all litigants. These kiosks will help ensure that people who do not have strong enough internet to participate remotely or enough cell phone minutes or data, or otherwise have technical illiteracy, are not barred from the court.

⁸¹ See "Setting Up and Conducting a Remote Proceeding Checklist," Michigan Judicial Institute (Apr. 20, 2020): <https://mjieducation.mi.gov/documents/administrative-qrms/1213-conducting-remote-proceedings-checklist/file>

APPENDIX:

CATALOGUE OF RESPONSES ON THE COURTS’ DISASTER PREPAREDNESS/HANDLING OF THE PANDEMIC

In light of the due process, access to justice, and public health challenges facing our courts during the COVID-19 pandemic, Chicago Appleseed and the Chicago Council of Lawyers created an informal online form for individuals familiar with court processes and practices (any jurisdiction or federally) to anonymously document their experiences with the court systems’ pandemic responses. Sixteen submissions were offered by ten individuals between April 15 and June 18, 2020.⁸²

PROMPT	RESPONSE	
	CRIMINAL COURTS	CIVIL COURTS
<i>Who are the key players? Who has/had the power to alleviate the issues? Have they done so?</i>	<p>Chief Judge Timothy Evans, Circuit Court of Cook County (4 responses)</p> <p>Presiding Judge LeRoy Martin, Jr., Criminal Division of the Circuit Court of Cook County (2 responses)</p> <p>Presiding Judge John Kirby, Pretrial Division of the Circuit Court of Cook County (1 response)</p> <p>Presiding Judge Michael Toomin, Juvenile Justice Division of the Circuit Court of Cook County (1 response)</p> <p>Director of Information Technology (IT) for the Circuit Court of Cook County (1 response)</p> <p>Dorothy Brown, Clerk of the Circuit Court of Cook County (1 response)</p> <p>Thomas Dart, Cook County Sheriff (1 response)</p>	<p>Chief Judge Timothy Evans, Circuit Court of Cook County (4 responses)</p> <p>Dorothy Brown, Clerk of the Circuit Court of Cook County (2 responses)</p> <p>Acting Presiding Judge Daniel Malone, Probate Division of the Circuit Court of Cook County (1 response)</p> <p>Presiding Judge Grace Dickler, Domestic Relations Division of the Circuit Court of Cook County (1 response)</p> <p>Presiding judges for each division (1 response)</p>

⁸² *Special Thank you to Chicago Appleseed intern, Allison Leon, for cataloging and analyzing these survey responses.*

COOK COUNTY E-COURT

<p><i>What are the barriers to justice and/or constitutional issues you (or your clients) have experienced leading up to or during the COVID-19 pandemic?</i></p>	<p>Adult probation department is working totally remote after a case of COVID-19 amongst staff; checking in by phone (1 response)</p> <p>Parties requesting same-day or next day hearings on emergency motions have to physically file with the Circuit Clerk (1 response)</p> <p>Official court reporter is accepting new requests for transcripts, but it is unclear where staff are fulfilling the orders. Also, unsure as to what extent translators are available (1 response)</p> <p>Forensic clinical services are unstaffed (1 response)</p> <p>Unclear what instruction staff in pretrial services, Circuit Clerk's office, and the State's Attorney's Office have received (1 response)</p> <p>PDs are spending significant amounts of time on the phone with clients, jail and electronic monitoring personnel, and client families. Public Defenders are able to communicate via phone—and are supposed to be able to conduct Zoom meetings—with clients detained in the jail without detainees being required to make collect calls because PD's desk phones are automatically forwarded to cellphones. (1 response)</p> <ul style="list-style-type: none"> - Many Assistant PDs have been filing and litigating emergency bond reduction motions for their clients. Assistants are also able to review previously tendered discovery. Investigation is limited; investigators are working from home and other than serving subpoenas to a limited number of locations such as Chicago Police and Fire headquarters, are not allowed to conduct any street investigation. 	<p>Delay in proceedings for cases not deemed an emergency or judges not responding quickly enough (3 responses)</p> <p>No uniformity amongst divisions (1 response)</p> <p>Costs of cases for clients increasing with little to show (1 response)</p> <p>Judges do not have enough resources or frameworks to work from home (1 response)</p> <p>Clerk system and accompanying technology is outdated (1 response)</p>
<p><i>Could these issues have been prevented or avoided? How?</i></p>	<p>Allow public defenders to file motions and for judges to hear all motions put on call (1 response)</p> <p>Update technology to prevent backlog (1 response)</p>	<p>Updating technology; videoteleconferencing or phone hearings (4 responses)</p> <p>Change rules so motions do not need moral arguments unless courts require them (1 response)</p> <p>Less required appearances (1 response)</p> <p>Judges should make more decisions on paper: briefing schedules, non-contested motions (1 response)</p> <p>Zoom should be made available sooner for when oral arguments are necessary (1 response)</p> <p>Hearing fee petitions/ moving along fee petitions (1 response)</p>

COOK COUNTY E-COURT

<p><i>Please provide recommendations for how courts can improve preparedness for future disasters, public health emergencies, or weather-related crises that may impact the justice system.</i></p>	<p>Incorporate technology into the courts:</p> <ul style="list-style-type: none"> — Provide for video conferencing — Train judges on Zoom — Electronic docket system — Judges and clerks send orders to attorneys and pro-se by email — Online or phone court for certain hearings — Prepare and retool current tech <p>Automate court processes:</p> <ul style="list-style-type: none"> — Default scheduling, response time, and briefing rules — Automatic briefing schedules — Pass oral arguments
<p><i>Suggest any resources or examples of "best practices" for emergency court shutdowns, such as disaster plans, academic publications, or media articles from other jurisdictions.</i></p>	<ul style="list-style-type: none"> — National Center for State Courts (NCSC) — Rapid Response Team — Administrative Office of the Illinois Courts (AOIC) — https://www.lawsitesblog.com/coronavirus-resources — Video conference "Legaler" - free, encrypted web conferencing for lawyers — States that stand out: <ul style="list-style-type: none"> ○ Arizona (civil and criminal) - website and webinars ○ Texas - discussing virtual jury trials already ○ Connecticut: <ul style="list-style-type: none"> ▪ https://jud.ct.gov/HomePDFs/RemotelyHandledCases.pdf ▪ https://jud.ct.gov/HomePDFs/CriminalMattersExpHandleCases.pdf