

The Judicial Branch: Protecting Access to Justice as the COVID-19 State of Emergency Expires

An Informational Hearing of the Senate Committees on Judiciary and Public Safety

Background Paper

By the Staff of the Senate Committees on Judiciary and Public Safety

I. Introduction

At the beginning of 2020, the COVID-19 pandemic required institutions and individuals to undergo rapid changes in how they conducted themselves and their activities to avoid contagion. The judicial system was no exception – California’s courts had to move swiftly to ensure that COVID-19 did not unduly restrict access to justice. Many of the early adaptations were enacted by emergency orders – issued by Governor Gavin Newsom or then-Chief Justice Tani G. Cantil-Sakauye – or by standing orders issued by individual trial courts. As the pandemic wore on, however, the Legislature passed legislation to protect court users, judges, and staff and to advance the courts’ efficiency.

Nearly three years later, Governor Newsom has officially terminated California’s COVID-19 state of emergency. The Legislature is now in a position to consider the effects of the pandemic on the judicial branch and the most pressing issues affecting access to justice, and to incorporate the lessons learned during the pandemic into statute so as to make permanent improvements to court efficiency and access. This paper provides background information on the steps taken by the courts to deal with the pandemic and the status of pending cases; the status of the use of remote technology in civil and criminal cases; and issues relating to the availability of court reporters.

II. The Steps Taken to Address COVID-19 and the Courts and the Status of the Courts as the COVID-19 State of Emergency Expires

California’s court system is comprised of 58 superior courts based in California’s 58 counties, the intermediate Courts of Appeal, and the California Supreme Court.¹ The courts are housed in over 500 buildings throughout the state, and the courts employ approximately 2,000 judicial officers and over 18,000 judicial-branch employees.² In fiscal year 2020-2021, the judicial branch’s budget, excluding infrastructure, was

¹ Judicial Council of California, *2022 Court Statistics Report: Statewide Caseload Trends 2011-12 Through 2020-21* (2022), p. 1.

² *Ibid.*

approximately \$4 billion—about two percent of the state’s budget.³ In the same period, the court system processed about 4.4 million cases.⁴ Prior to the COVID-19 pandemic, approximately 650,000⁵ individual civil cases were filed in California courts each year.

A. 2020-2022: Emergency Orders and Legislation

On March 4, 2020, Governor Newsom declared a state of emergency in California in response to the growing COVID-19 pandemic.⁶ The COVID-19 pandemic and related closures of indoor public spaces constrained the ability of California’s courts, like many other aspects of society, to conduct their business. Beginning on March 13, 2020, Chief Justice Cantil-Sakauye, as Chairperson of the Judicial Council, began approving requests for emergency orders from the superior courts, which enabled them to take steps such as extending case deadlines and declaring as court holidays, for purposes of calculating deadlines, days on which court access was limited.⁷ Many courts imposed temporary closures, not reopening until late April or May of 2020. Other county courts imposed limiting measures without fully suspending regular (i.e., nonemergency) matters.

As the pandemic worsened, Chief Justice Cantil-Sakauye issued additional statewide orders intended to minimize the spread of COVID-19 in the courts.⁸ Among other things, the orders suspended all jury trials and continued them for 60 days; extended the five-year window for a plaintiff to bring a civil case to trial; and authorized the use of remote audiovisual technology to conduct judicial proceedings remotely.⁹ Self-help centers were also closed in an effort to stop the spread of COVID-19.

³ *Ibid.*

⁴ *Ibid.*

⁵ Ronald D. White, *What Happens When COVID Shuts Civil Courts*, Los Angeles Times (Sept. 11, 2020) available at: <https://www.latimes.com/business/story/2020-09-11/covid-shuts-courts-mediation-arbitration-boom>. All links in this background paper are current as of March 1, 2023.

⁶ Office of Governor Gavin Newsom, *Governor Newsom Declares State of Emergency to Help State Prepare for Broader Spread of COVID-19* (Mar. 4, 2020), available at: <https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/>.

⁷ See generally California Courts Newsroom, *Court Emergency Orders*, available at <https://newsroom.courts.ca.gov/covid-19-news-center/court-emergency-orders> (listing superior court emergency orders by date).

⁸ California Courts Newsroom, *Judicial Council of California Statewide Order By Hon. Tani G. Cantil-Sakauye, Chief Justice Of California And Chair Of The Judicial Council* (March 23, 2020), available at <https://newsroom.courts.ca.gov/news/chief-justice-issues-statewide-order-suspending-jury-trials>.

⁹ Statewide Order (Cantil-Sakauye, C.J.) (Mar. 23, 2020), available at <https://newsroom.courts.ca.gov/sites/default/files/newsroom/2020-09/Statewide%20Order%20by%20the%20Chief%20Justice-Chair%20of%20the%20Judicial%20Council%203-23-2020.pdf>; California Courts Newsroom, *Judicial Council of California Statewide Order By Hon. Tani G. Cantil-Sakauye, Chief Justice Of California And Chair Of*

On April 6, 2020, the Judicial Council adopted 11 statewide emergency rules.¹⁰ The rules provided for alternative timelines and procedures for a wide range of civil and criminal matters, including: staying unlawful detainer and judicial foreclosure actions;¹¹ allowing courts to require remote proceedings;¹² tolling statutes of limitations in civil causes of action;¹³ and permitting the parties to conduct depositions by remote means without court authorization.¹⁴ Shortly thereafter, the Judicial Council adopted an emergency rule requiring electronic service by attorneys, if requested by the other party.¹⁵

As the pandemic wore on, courts had to adjust to the pandemic – and the added burdens that came with it – as the “new normal.” In July 2020, the Judicial Council allocated \$25 million of emergency funds (of \$50 million total allocated to the courts) on a pro rata basis based on the courts’ workloads.¹⁶ The Judicial Council approved a plan to distribute the remaining \$25 million in emergency funding in January 2021 with funds allocated based on the extent of the trial courts’ COVID-19-induced case backlogs.¹⁷ Many self-help centers adapted by increasing remote and online assistance options, and by August 2020, approximately 75 percent of self-help services were provided remotely.¹⁸

The Judicial Council (Mar. 30, 2020), available at <https://newsroom.courts.ca.gov/news/chief-justice-issues-order-implementing-temporary-court-emergency-measures>.

¹⁰ California Courts Newsroom, *Judicial Council Adopts New Rules to Lower Jail Population, Suspend Evictions and Foreclosures* (Apr. 5, 2020), available at <https://newsroom.courts.ca.gov/news/judicial-council-adopts-new-rules-lower-jail-population-suspend-evictions-and-foreclosures>.

¹¹ Cal. Rules of Court, Appendix I, Emergency Rules 1 & 2.

¹² Cal. Rules of Court, Appendix I, Emergency Rule 3. Emergency Rule 3 requires courts to receive the defendant’s consent to remote proceedings in criminal matters, but not in civil matters.

¹³ Cal. Rules of Court, Appendix I, Emergency Rule 9. The rule originally tolled all civil statutes of limitation for the duration of the COVID-19 emergency plus 90 days; it was subsequently revised to toll statutes of limitation and repose longer than 180 days until October 1, 2020, and statutes of limitations and repose of 180 days or fewer until August 3, 2020. (See California Courts Newsroom, *Judicial Council Revises Emergency Rule on Statutes of Limitations in Civil Cases* (May 29, 2020), available at <https://newsroom.courts.ca.gov/news/judicial-council-revises-emergency-rule-statutes-limitations-civil-cases>.)

¹⁴ Cal. Rules of Court, Appendix I, Emergency Rule 11 [repealed Nov. 13, 2020].

¹⁵ Cal. Rules of Court, Appendix I, Emergency Rule 12 [repealed Nov. 13, 2020].

¹⁶ Dinzeo, *California Court Administrator Grapples With Crippling Covid Cuts*, Courthouse News Service (Jul. 24, 2020), available at: <https://www.courthousenews.com/california-court-administrator-grapples-with-crippling-covid-cuts/>.

¹⁷ California Courts Newsroom, *Judicial Council Allocates \$25 Million to Address Case Delays Due to COVID-19* (Jan. 22, 2021), available at <https://newsroom.courts.ca.gov/news/judicial-council-allocates-25-million-address-case-delays-due-covid-19>.

¹⁸ Judicial Council of California, *Supplement to Impact of Self-Help Center Expansion in California* (Jun. 2022), p. 10, available at <https://www.courts.ca.gov/documents/lr-2022-narrative-self-help-supplement.pdf>.

The Legislature also passed legislation to address court operations during the pandemic, providing clarity to litigants and courts. SB 1146 codified the use of electronic service by and on represented parties, and the use of remote depositions.¹⁹ AB 3088 temporarily froze evictions and implemented a comprehensive program to provide relief to tenants, homeowners, and landlords;²⁰ the measure's protections were extended the following year.²¹ And SB 241 authorized remote proceedings in civil and juvenile dependency proceedings, subject to certain technological and procedural requirements (remote proceedings are discussed in greater detail in Part III, *infra*).²² The Judicial Council amended or repealed the emergency rules covered by the newly passed legislation.²³

Despite measures taken by the Legislature, the Judicial Council, and individual courts, the COVID-19 pandemic significantly affected the courts' ability to process cases. As reported by the Judicial Council, as of January 2021, every single county had processed fewer cases since the start of the pandemic than in the prior period, resulting in a statewide processing reduction of 49.1 percent.²⁴ Several courts processed fewer than half of the cases they processed prior to the pandemic.²⁵ Filings also decreased in the first half of 2020, dipped again in the winter of 2020-2021, and then surged in the spring of 2021.²⁶

B. 2023: The Status of Court Operations Today

Governor Newsom terminated California's COVID-19 state of emergency on February 28, 2023.²⁷ Although COVID-19 remains prevalent, Governor Newsom and others concluded that the state is now adequately prepared to deal with the virus without the need of emergency measures. For many individuals, the end of the state of emergency will not affect their daily lives – they had returned, more or less, to a state of pre-

¹⁹ SB 1146 (Umberg, Ch. 112, Stats. 2020).

²⁰ AB 3088 (Chiu, Ch. 37, Stats. 2020).

²¹ SB 91 (Senate Committee on Budget and Fiscal Review, Ch. 2, Stats. 2021).

²² See Code Civ. Proc., § 367.75.

²³ See Cal. Rules of Court, Appendix I, Emergency Rules 1-2 [amended Aug. 13, 2020], 11 & 12 [repealed Nov. 13, 2020].

²⁴ Report to the Judicial Council, *Trial Court Budget: \$50 Million COVID-19 Backlog Funding* (Jan. 12, 2021), Attachment A, available at <https://jcc.legistar.com/View.ashx?M=F&ID=9054988&GUID=54812C82-983E-4812-848C-2F4FD9F6F97A>.

²⁵ *Ibid.*

²⁶ Judicial Council of California, *Trial Court Operational Metrics: Year One Report* (Feb. 2023), pp. 8-9, available at <https://www.courts.ca.gov/documents/lr-2023-tc-operational-metrics-BA2022-ch43.pdf>.

²⁷ Gov. Proc. (Feb. 28, 2023); see also Office of Governor Gavin Newsom, Governor Newsom Marks End of California's COVID-19 State of Emergency (Feb. 28, 2023), available at <https://www.gov.ca.gov/2023/02/28/governor-newsom-marks-end-of-californias-covid-19-state-of-emergency/>.

pandemic normalcy in 2021 or 2022. For the judicial branch, however, things are a little more complicated.

According to the most recent data provided by the Judicial Council, trial courts are back to their pre-pandemic case clearance rate.²⁸ Nevertheless, the Judicial Council estimates a statewide pandemic-induced backlog of over 293,000 civil and criminal cases.²⁹ Not every case type has a pandemic-induced backlog, because the reduced filings in certain case types enabled the courts to deal with increased filings in other types of cases; the Judicial Council reports no backlog in conservatorship and guardianship cases, domestic violence cases, and juvenile dependency cases.³⁰ Significant backlogs remain, however, in criminal cases and unlimited civil matters, as well as several other case types.³¹

With respect to the ongoing risk of COVID-19, it appears that the courts have generally moved away from requiring safety precautions, though some courts, such as the Superior Court for the County of Los Angeles, “strongly recommend” masking inside the courthouse.³² And as discussed in the next section, many litigants continue to opt to appear for proceedings remotely, which reduces the risk of contagion.

III. Remote Proceedings: the Unprecedented Shift and the Ongoing Debate

A. Remote proceedings in civil matters

Until the arrival of the COVID-19 pandemic, the default mode for appearing in court on a civil matter was in-person. Although telephonic appearances have been permitted for decades in specified proceedings, such as law and motion hearings, they were generally prohibited in trials and other proceedings involving witnesses.³³

As this Committee heard at its joint informational hearing with the Assembly Judiciary Committee on February 23, 2021, *COVID and the Courts: Assessing the Impact on Access to Justice, Identifying Best Practices, and Plotting the Path Forward*, the COVID-19 pandemic and the need to socially distance caused massive disruption to California’s justice system. According to the Judicial Council, California’s courts resolved nearly 1.4 million fewer cases during the first six months of the COVID-19 pandemic – a decline of 49.1

²⁸ *Id.* at pp. 9-10.

²⁹ *Id.* at p. 11.

³⁰ *Id.* at pp. 10-11.

³¹ *Id.* at p. 11.

³² See AccessLACourt Your Way, News Release, Presiding Judge Eric C. Taylor Announces Longstanding Mask Mandate Will End On April 4 In Los Angeles County Courthouses (Mar. 25, 2022), available at <https://www.lacourt.org/newsmedia/uploads/14202232517164722NRFACEMASKS.pdf>.

³³ See Code Civ. Proc., § 367.5; Cal. Rules of Court, r. 3.670.

percent from the same six-month period in 2019.³⁴ The pandemic-induced slowdown disproportionately affected civil cases because constitutional speedy trial guarantees for criminal cases required courts to prioritize those matters.³⁵

To prevent cases from grinding to a complete halt, many courts pivoted to remote proceedings which allowed them to process cases while still complying with state and local health and safety orders. This pivot was first authorized by the Judicial Council's Emergency Rule 3, adopted on April 6, 2020.³⁶ Then, in 2021, the Legislature enacted SB 241 (Umberg, Ch. 214, Stats. 2021), which authorized remote proceedings in civil and juvenile dependency proceedings, subject to certain technological and procedural requirements.³⁷ The statute generally grants each party or other court participant the option to appear remotely; a court may not require a party to appear remotely, so that each individual can determine whether to appear in-person or remotely based on their own assessment of the needs of the case.³⁸ The statute also permits a court to halt a proceeding and require in-person appearances if the court determines that technological issues prohibit the creation of an accurate record or effective resolution of the matter,³⁹ consistent with the obligation of the court and the parties to ensure that the record is accurate.

The statute permitting remote appearances is set to sunset on July 1, 2023. Two bills to extend the sunset to 2026 and to clarify the requirements for remote proceedings rules in juvenile justice and certain civil commitment proceedings are currently pending before the Senate Judiciary and Public Safety Committees.⁴⁰

For many court participants, the option of appearing remotely for a court proceeding provides numerous advantages. A remote appearance spares the need for a litigant to drive to a courthouse and pay for parking and saves time by not making a litigant sit in the courtroom while waiting for their case to be called. Persons appearing remotely

³⁴ Report to the Judicial Council, *Trial Court Budget: \$50 Million COVID-19 Backlog Funding* (Jan. 12, 2021), at Attachment A.

³⁵ E.g., White, *What happens when COVID-19 shuts civil courts?*, Los Angeles Times (Sept. 11, 2020), available at <https://www.latimes.com/business/story/2020-09-11/covid-shuts-courts-mediation-arbitration-boom>.

³⁶ Cal. Rules of Court, Appendix I, Emergency Rule 3; California Courts Newsroom, *Judicial Council Adopts New Rules to Lower Jail Population, Suspend Evictions and Foreclosures* (Apr. 6, 2020), available at <https://newsroom.courts.ca.gov/news/judicial-council-adopts-new-rules-lower-jail-population-suspend-evictions-and-foreclosures>.

³⁷ See Code Civ. Proc., § 367.75; see also Cal. Rules of Ct., r. 3.672.

³⁸ Code Civ. Proc., § 367.75(f).

³⁹ *Id.*, § 367.75(b).

⁴⁰ See SB 21 (Umberg, 2023), SB 22 (Umberg, 2023). In 2022, a bill to extend the sunset on the remote proceedings statute was killed at the request of the author after the Assembly Appropriations Committee amended the bill to prohibit remote appearances in certain case types. (See SB 848 (Umberg, 2022).)

might not need to pay for child care or take a whole day off of work. Some advocates report that remote appearances can be less stressful for persons who might not feel comfortable in a courtroom setting, such as minors and first-time litigants. Stakeholders also report that remote appearances in civil commitment hearings are less disruptive for persons housed in state hospitals and other medical facilities.

Others, however, have raised concerns with the current remote regime. The “digital divide” in California means that some persons do not have access to the requisite technology or internet quality to appear remotely, meaning the benefits of remote appearances are not equally available to all court users;⁴¹ these people lose out on the potential advantages that remote appearances may offer. Similarly, users who are not comfortable with the necessary technological platforms might encounter issues that prevent them from meaningfully participating or require their matters to be postponed so that they can appear in person.⁴² In cases involving interpreters, the inability for the interpreter to be physically present with the participant who needs translation services, and the lack of a space for the interpreter to engage one-on-one with the participant, may decrease trust and result in a less effective engagement with the court. Court reporters also report that the remote technology platforms used by the courts can have sound-quality issues – including technological problems like static, and background noise such as dogs barking and babies crying – which can threaten the integrity of the official record and the ability of a party to exercise their right to appeal.

B. Remote proceedings in criminal matters

Similar to civil cases, prior to COVID-19, with the exception of appearances that could be waived, defendants in criminal cases generally appeared in person, with the option of remote appearances limited to in-custody defendants. The Emergency Rules generally allowed defendants and attorneys to appear remotely in proceedings with the consent of the defendant. Prior to the June 30, 2022, sunset of the Emergency Rules and through the budget process, discussions were had amongst interested parties to continue remote appearances in criminal cases. The Courts, Public Defenders, District Attorneys, Probation, Sheriffs, and various criminal justice groups were supportive of the final version of the legislation. The result was a continuation of remote proceedings with some changes to what had been in place during the Emergency Rules. The new provisions, which are currently in place, provide:

⁴¹ See California Commission on Access to Justice, *Remote Hearings and Access to Justice During COVID-19 and Beyond* (May 18, 2020), p.5.

⁴² See Queally & Hamilton, *Lawsuit seeks to limit in-person L.A. County civil trials because of COVID-19 risk*, Los Angeles Times (Feb. 9, 2020), available at <https://www.latimes.com/california/story/2021-02-09/lawsuit-seeks-to-stop-l-a-courts-from-holding-some-civil-trials-due-to-covid-concerns> (attorney explaining that Los Angeles Superior Court’s “remote access platforms have proved extremely difficult to use for older clients, as well as those who speak poor English or struggle with internet literacy, leaving many of her most at-risk clients stuck choosing between their health or the likelihood that they will lose their case unless they appear in person”).

- Misdemeanors: Defendants may appear remotely in all proceedings except trials. Attorneys may appear remotely if the court finds it appropriate and practicable.
- Felonies: Defendants may appear remotely in all proceedings except trials and sentencing, unless the court allows a waiver for non-critical, non-testimonial portions of the trial. Remote proceedings are allowed for post-conviction relief proceedings. Attorneys may appear remotely if the court finds it appropriate and practicable.
- Witnesses: may testify remotely except for felony trials, and only with the consent of both parties and the court.
- Court reporters: must be physically present in a courtroom when remote proceedings occur and cannot be retaliated against for reporting technology and audibility issues.
- Courts must have a process for participants to alert the court of audibility or technology issues before and during a proceeding and shall require a person to appear in person if the issues cannot resolved.

The statutes authorizing these remote appearances in criminal cases are set to sunset on January 1, 2024. SB 22 (Umberg, 2023), which is currently pending before the Senate Public Safety Committee, would extend the sunsets until January 1, 2028.

IV. Court reporters

As a general rule, the official record of a court proceeding can be made only by a shorthand reporter licensed to practice by the Court Reporters Board of California.⁴³ To obtain a license, a person must pass a three-part exam and, generally, graduate from a state-approved school that takes four years to graduate.⁴⁴ Court reporters are vital to the litigation process: “the absence of a court reporter at trial court proceedings and the resulting lack of a verbatim record of such proceedings will frequently be fatal to a litigant’s ability to have [their] claims of trial court error resolved by the appellate court.”⁴⁵ All felony trials are automatically reported; in civil trials, any party may request that a court reporter make a record of the proceedings.⁴⁶

Prior to budget cuts made by the state in connection with the Great Recession, California’s courts generally made official court reporters available for civil trials.⁴⁷ Many of these court reporters were court employees who “occupy a unique dual status,” because they are “considered court employees when taking notes in a recorded

⁴³ Code Civ. Proc., § 269; Gov. Code, §§ 69941, 69942, 69957.

⁴⁴ Commission on the Future of California’s Court System, Report to the Chief Justice (2017), Appendix 5.1C, p. 262.

⁴⁵ *Jameson v. Desta* (2018) 5 Cal.5th 594, 608.

⁴⁶ Code Civ. Proc., § 369(a.)

⁴⁷ *Jameson, supra*, 5 Cal.5th at p. 610.

proceeding but operate as independent contractors when producing and selling the certified verbatim transcript.”⁴⁸ As a result of budget cuts, however, many courts opted to reduce their number of employee court reporters and adopted policies for providing official court reporters only in narrow categories of civil cases that do not include “ordinary contract, personal injury, or professional negligence cases.”⁴⁹ The Superior Court for the County of Los Angeles recently announced that it would no longer provide court reporters in family law and probate matters or for cases in the writs and receiver departments.⁵⁰

If a party in a matter in which the court does not provide a reporter wishes to have a record of the proceeding made, the party has to arrange for a non-employee reporter to attend and make a record of the matter. The per diem cost for an independent reporter can represent a significant expense for litigants, and stakeholders report that independent reporter costs can be prohibitively expensive. Litigants have also reported being unable to find reporters for certain trials and proceedings.

In recent years, the Legislature has taken steps to encourage the courts to hire more court reporters as employees so as to minimize the number of litigants who have to find an outside-contractor reporter. The 2021 Budget Act included a grant of \$30 million to increase the number of court reporters in family law and civil law cases.⁵¹ And in 2022, the Legislature authorized the Court Reporters Board to license voice writers as shorthand reporters⁵² with the goal of increasing the number of available licensed reporters: the training period for voice writers is generally shorter and less expensive than that for reporters who make a record of the proceedings through shorthand or stenographic means.

According to the Judicial Council, as of July 1, 2022, the courts had a 20 percent vacancy rate statewide for court reporter positions, 10 percent higher than the prior year.⁵³ Stakeholders disagree on the reason the vacancies continue despite the additional funding.

⁴⁸ Commission on the Future of California’s Court System, Report to the Chief Justice, *supra*, Appendix 5.1C, pp. 260-261.

⁴⁹ *Ibid.*

⁵⁰ Superior Court of California, County of Los Angeles, News Release, Effective November 14, The Court Will Prioritize Official Court Reporters for Criminal Felony, Juvenile Cases As Severe Staffing Shortages Persist Despite New State Funding (Aug. 25, 2022) available at <https://www.lacourt.org/newsmedia/uploads/14202282512465522NRCOURTREPORTERS.pdf>.

⁵¹ SB 170 (Skinner, Ch. 240, Stats. 2021).

⁵² See AB 1056 (Assembly Committee on Budget, Ch. 569, Stats. 2022); Bus. & Prof. Code, §§ 8017, 8017.5, 8024.

⁵³ Judicial Council of California, *Trial Court Operational Metrics: Year One Report*, *supra*, at p. 12.

V. Conclusion

This oversight hearing will examine the current status of court operations as the COVID-19 state of emergency expires, provide an update of the ongoing use of remote technology in civil and criminal proceedings due the COVID-19 pandemic, and examine court reporter availability and how remote proceedings have affected their ability to do their jobs.