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2021 Litigation and Appellate Summit

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Panel 7. Moving Beyond COVID-19: A Judicial Roundtable On Emerging from
Lockdown

Friday, May 21, 2021

11:30 a.m. – 1:00 p.m.

Speaker(s):

Associate Justice Elizabeth A. Grimes; Associate Justice Elena J. Duarte; Hon. Samuel
T. McAdam; Hon. Sunshine S. Sykes

Moderator:

Jessica Riffin

Conference Reference Materials

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Moving Beyond COVID-19: A Judicial Roundtable On Emerging from Lockdown

Moderator:
Jessica Riggin

Speakers:
Associate Justice Elizabeth A. Grimes

Associate Justice Elena J. Duarte

Judge Samuel T. McAdam

Judge Sunshine Sykes



zoom

The Impact of Video
Proceedings on
Fairness and Access
to Justice in Court

Video Proceedings and Substantive Outcomes

- The Covid-19 pandemic has disrupted court operations across the country. Even as courts have begun to reopen, many are also continuing or testing new ways to expand the use of remote technology.
- At the same time, public health concerns are leading some legal services providers and other advocates to oppose the return to in-person proceedings.
- Several court leaders have also suggested that expanded use of remote technology should become a permanent feature of our justice system.



Video Proceedings and Substantive Outcomes

- Remote technology has been a vital tool for courts in this public health crisis.
- But the use of remote technology and its possible expansion also raises critical questions about how litigants' rights and their access to justice may be impacted, either positively or negatively, and what courts and other stakeholders can do to mitigate any harms.
- A handful of studies have directly assessed whether replacing certain in-person proceedings with videoconferences impacted substantive outcomes in criminal, civil, or immigration proceedings.
- Several other studies have sought to evaluate the impact of using video on factors that are likely to affect substantive outcomes, such as credibility assessments by juries or other factfinders, and communication between attorneys and their clients.

Other Effects on Litigants

- Video and Perceptions of Credibility

In addition to studies that directly assess the relationship between video proceedings and outcomes, such as conviction or deportation rates, other research has looked at whether video testimony by a witness has an impact on how they are perceived by factfinders.



IMPROVING ACCESS TO JUSTICE AMID THE PANDEMIC – NEW REMOTE HEARINGS TOOLKIT

The **Legal Permissibility** branch involves a set of questions designed to determine general permissibility of remote hearings under current national legislation and, where restrictive statutes and regulations are in place, establish whether the legislation can be amended or suspended. Furthermore, it encourages court leaders to consider implementation-related permissibility, i.e. whether remote hearings should be implemented state-wide, by local jurisdiction, or by individual judge/court.

The **Technical & Security Aspects** branch helps to determine whether the legal system in question has the requisite technological, human and security capacity. This decision-making process emphasizes strategic planning of types of platforms for internet-based audio and videoconferencing to be used, the revision of hardware and software requirements to guarantee that each participant has access to necessary technology, and encourages to consider establishing an electronic court filing system.

The **Organizational & Logistical Aspects** branch seeks to assess whether the legal system in question has the organizational and logistical capability to conduct remote hearings, and suggests possible solutions if the capability is unknown, known but incomplete, or incapable.

The last branch, **Procedural Safeguards & Access to Justice**, focuses on considerations of access to justice and due process when deciding whether and how to implement remote hearings. It requires considering procedural accommodations courts can make to ensure that access to justice is not infringed. It also assesses whether the plan developed for the establishment of remote hearings adequately protects the right to a fair trial and due process rights.

IMPROVING ACCESS TO JUSTICE AMID THE PANDEMIC – NEW REMOTE HEARINGS TOOLKIT

Courts attempt to balance innovation with access in remote proceedings

Transparency and accountability

Before the Supreme Court began livestreaming, people lined up for hours to watch oral arguments. Now, anyone with a cellphone, laptop, tablet or computer can listen in.

Innovating for accessibility

The pandemic presents an opportunity that few could have foreseen before the coronavirus brought the justice system to its knees: a chance to modernize courts at breakneck speed.



All U.S. Appeals Courts Embrace Argument Streaming Due to Covid

All 13 federal appeals courts now are livestreaming oral arguments compared to four prior to the pandemic, the latest sign of how Covid-19 has made U.S. courts more transparent.

Appeals Courts

June arguments in cases involving Hillary Clinton and former Trump National Security Adviser Michael Flynn attracted 89,000 and 92,000 listeners, respectively, according to Elizabeth Paret, circuit executive for the U.S. Court of Appeals for the District of Columbia Circuit.

That's up from audiences of about 2,000 to 3,000 that listened to big cases before the pandemic. The D.C. Circuit is one of the two appeals courts that regularly offered live audio for years before the pandemic. The other is the California-based Ninth Circuit, which also provides live video.

Future Use

When it comes to live audio, at least, there's no downside, But court staffers said they're reluctant to make predictions. "The court has not yet made a decision about any future post-pandemic plans," said Jarrett B. Perlow, chief deputy clerk for the Federal Circuit in Washington.

Other courts said the remote access they provided before the pandemic was sufficient.



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Justice Duarte was unanimously confirmed by the Commission on Judicial Appointments on December 10, 2010, as an Associate Justice on the Court of Appeal, Third Appellate District. Before she was elevated to the Court of Appeal, she was a Judge of the Sacramento County Superior Court from June 2008 to December 2010, and also a Judge of the Los Angeles County Superior Court from April 2007 to June 2008. Before becoming a judge, she was a federal criminal prosecutor for 14 years in Sacramento, Los Angeles, and Washington D.C.

Active in her community, Justice Duarte regularly presides over local and national mock trial and moot court competitions for students from eighth grade through law school. She has mentored law students and young lawyers through her membership in various organizations and regularly visits high school classrooms to support government and civics education. She is a member of the steering committee of Operation Protect and Defend, a Sacramento-based organization of judges, lawyers, and teachers dedicated to promoting civics education for high school students. She is the immediate past President of the Anthony M. Kennedy American Inn of Court, an organization of judges, attorneys, and law students dedicated to promoting civility, ethics, and professionalism in the legal community, and continues as a member of the Inn's Executive Committee.

In May 2015, Governor Brown appointed Justice Duarte to the Commission on Uniform State Laws. She is also currently a member of the Judicial Council Advisory Committee on Civil Jury Instructions (CACI), the State-Federal Judicial Council, and the Center for Judicial Education and Research (CJER) Criminal Curriculum Committee. She is on the Third Appellate District's Technology and Outreach Committees, and was on the Board of Directors for the California Bar Foundation from 2013 through 2015.

Born and raised in San Jose, California, Justice Duarte attended the Conservatory of Music at the University of the Pacific from 1984-1986. After receiving her Bachelor of Arts degree from the University of Southern California (USC) in 1989, she obtained her law degree from Stanford Law School in 1992.

Upon graduation from Stanford, Justice Duarte moved from California to Washington, D.C., as one of 12 graduating law students selected nationwide to participate in the Attorney General's Honor Program, Criminal Division, at the United States Department of Justice. While at the Department of Justice in Washington, she served as a Special Assistant United States Attorney, where she prosecuted criminal cases in the District of Columbia Superior Court.

In 1994, Justice Duarte returned to California as an Assistant United States Attorney in Sacramento from 1994-2000, prosecuting a wide variety of federal crimes from investigation through appeal. In 2000, she relocated to the Los Angeles Office of the United States Attorney, where she worked as an Assistant United States Attorney, first in the Major Frauds Section and later in the Cyber and Intellectual Property Crimes Section, becoming Section Chief in 2005. During her time in the Los Angeles office, she prosecuted complex fraud cases as well as all types of cyber and intellectual property rights crimes from investigation through appeal. While a federal prosecutor, she received numerous awards and commendations, including her September 2005 selection by the Daily Journal as one of the top 75 female litigators in California.

Justice Duarte has been an instructor of judicial education and has taught, lectured, and presented alone or as a panel member at Stanford Law School, San Francisco School of Law, University of Southern California Law Center, Santa Clara Law School, Loyola Law School, Southwestern Law School, King Hall at U.C. Davis, and Pacific McGeorge Law School, where she was an adjunct professor 2009-2010.

Beth Grimes was confirmed as an Associate Justice of the Second District Court of Appeal, Division Eight, in April 2010.

Her judicial career began when she was appointed to the Los Angeles Superior Court in December 1997. Justice Grimes' first judicial assignment was to the dependency court, after which she presided over a felony calendar court in what was then known as the Criminal Courts Building and later in independent calendar general jurisdiction courtrooms in the Stanley Mosk Courthouse and the Santa Monica Courthouse. Prior to her appointment to the Court of Appeal, from August 2004 through March 2005, Justice Grimes was assigned as a justice *pro tempore* to Division Four of the Second District Court of Appeal.

A Phi Beta Kappa graduate of the University of Texas at Austin, Justice Grimes received her law degree in 1980 from Stanford Law School, where she was an Associate Editor of the *Stanford Law Review*. She also attended the Universidad de los Andes in Bogota, Colombia, for one semester during her senior year of college, and she attended Mount Holyoke College her freshman year of college.

Before her appointment to the bench, Justice Grimes was a partner in the Litigation Department of Gibson, Dunn & Crutcher, engaged in a business litigation practice since joining the firm in 1980. She has extensive trial and appellate experience in federal and state courts involving a wide range of commercial litigation, including securities, bankruptcy litigation, partnership disputes, employment disputes, product liability, unlawful detainer and other general business disputes.

While on the Los Angeles Superior Court, Justice Grimes was a member of the Executive Committee in 2008. She served on other committees of the Los Angeles Superior Court, including the Research Attorneys Committee, the Media Committee, the Bench Bar Committee, and the ADR Committee. She was a member of the JES faculty and taught courses concerning summary judgments, verdicts, anti-SLAPP motions, and employment law. She was a panelist on Legalworks' Annual E-Discovery and Trial Practice Forums in February 2006 and 2007. She was a panelist for the CJA/Rutter Group *Employment Litigation* Programs in 1999, 2000, 2001 and 2002. She has presented lectures at Stanford Law School, USC Gould School of Law and Pepperdine University School of Law.

While on the Court of Appeal, Justice Grimes has spoken on continuing education panels for ABTL, the California Academy of Appellate Lawyers, the State Bar, Pincus Professional Education, The Rutter Group, and the Association of California Insurance Companies General Counsel Seminar.

Justice Grimes is a member of the Judicial Council Appellate Practice Curriculum Committee; a member of the Second Appellate District Technology and Library Committee and Rules Committee, and is also on the Editorial Board of *California Litigation*. Previously, she served as a member of the Judicial Council Advisory Committees on Civil Jury Instructions and on Civil and Small Claims, and was a member of the ABTL Judicial Advisory Council from 2014-2016.

Justice Grimes has been active in community affairs. Over the years, she has sponsored numerous educational programs for children in her courtrooms; has served on the Board of Directors of Big Brothers Big Sisters of Los Angeles and the Inland Empire; chaired the mothers' group of the Pinafores of the League for Crippled Children; and served as an AYSO coach and referee. She has served on the Board of Visitors of Stanford Law School and as co-chair of the Stanford Law Society of Los Angeles. She is devoted to the pursuit of good nutrition and fitness.