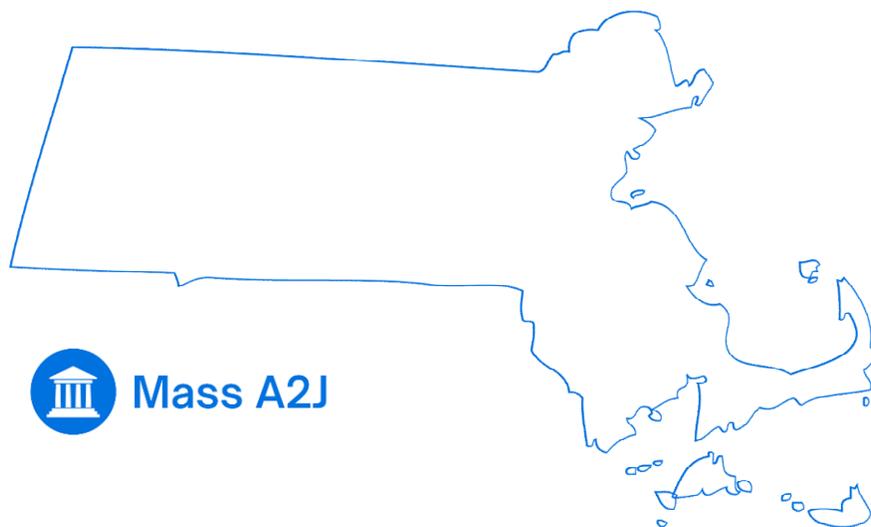


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Massachusetts Access to Justice Commission

**Creating a More Equitable System:  
Lessons Learned During the COVID-19  
Pandemic**

September 2022



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## Introduction

What does access to justice look like during a global pandemic? Prior to March 2020, few would have paused to consider this question, and even fewer would have predicted the complexity of innovations and improvisations courts and court users have developed over the past two and a half years.

Today, courthouses in Massachusetts are once again open to the public, and remote access may no longer be necessary for public health. Nonetheless, what began out of necessity is now widely seen as a desirable complement to in-person services offered by the Trial Court. Many courtrooms and clerks' offices can now function both in-person and remotely. But this hybrid system, with its enhanced capability, raises new questions. How do court users function in this "new normal"? How does the judicial system benefit from increased options while addressing issues of racial equity and fairness and ensuring access for those with limited technology, limited English proficiency, or other potential barriers? How does this system consistently and equitably determine which mode should be used in a given set of circumstances? Who decides?

The Massachusetts Access to Justice Commission ("the Commission")<sup>1</sup> recognizes the tremendous efforts undertaken and successes achieved by the Trial Court and its departments during this pandemic crisis. We know that the courts have engaged in substantial deliberation and innovation over the past two and a half years in striving to improve access to justice.<sup>2</sup> And we appreciate this opportunity to share our reflections about what worked and what didn't and our recommendations for future improvements, gathered from a wide range of stakeholders, with the benefit of hindsight.

Since hybrid court operations that combine both in-person and remote procedures will likely be the "new normal," the Commission has examined how this hybrid system can both facilitate and complicate efforts to provide access to justice to all. The Commission recognizes that remote access to resources, remote filing, and remote court events all have tremendous potential to save resources, and, in a world of limited resources, we seek to realize these savings without creating new barriers to justice, particularly in communities of color and with respect to those with limited English proficiency.

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<sup>1</sup> First established by the Supreme Judicial Court in 2005, the Access to Justice Commission seeks to improve access to justice for people who are unable to afford an attorney for essential civil legal needs, such as cases involving housing, consumer debt, and family law. Among other activities, the Access to Justice Commission coordinates with civil legal aid organizations to support their activities and develop new initiatives to address unmet needs. The Commission also works to increase the number of attorneys able to provide pro bono or limited assistance civil legal services and coordinates with the court system on initiatives that assist individuals to better understand and navigate civil legal proceedings. The Commission's members include representatives from the court system, legal aid organizations, social service organizations, bar associations, law schools, businesses, and other stakeholders in the access to justice community.

<sup>2</sup> See e.g., [resources for remote/virtual court services](#); and [information on virtual court service centers](#).

Achieving access to justice for all litigants requires a legal system that is transparent, consistent, easy to use, and flexible enough to allow for unusual circumstances. It also requires that participants identify and remedy racial disparities in the civil justice system that exist because of biases and structural racism. It will be challenging to achieve an efficient, reliable hybrid system that embodies these tenets, but we have an opportunity at this juncture to make positive systemic changes. Understanding the enormity of the challenge and the importance of meeting it is critical to forging a path forward.

In this Report, the Commission shares the reflections of court users during the pandemic and provides analysis and recommendations that aim to improve access to justice for all court users in post-pandemic times. The first section focuses on the importance of strong, easily accessed channels of communication. The second section focuses on remote court events and offers ideas for an optimal hybrid system. The third section highlights pandemic-spurred innovations that significantly impact access to justice. An overarching theme throughout many of the Report's recommendations is the importance of consistency and uniformity to facilitate access to justice for everyone but particularly for self-represented litigants (SRLs), communities of color and those with limited English proficiency; without significant improvements in both areas, real progress towards a more equitable system will be severely hindered.

## Methodology

The viewpoints expressed in this Report are summaries of a wide range of stakeholder voices, with a particular focus on understanding the experiences of SRLs. For purposes of preparing this Report, the Commission engaged in outreach and gathered feedback in late 2021 and early 2022 from Commissioners, Commission committee volunteers, and court staff. The Commission's Family Law Committee, Housing Law Committee, Consumer Debt Committee and Racial Equity and Justice Committee each contributed feedback compiled by Committee members from their broader networks, experiences, and conversations with court users. Further, during the Commission's December 2021 and March 2022 public meetings, participants shared their views on lessons learned during the pandemic. Finally, in March 2022, the Commission's Ecosystem Committee held a listening session open to non-attorney advocates who had worked with SRLs. While this Report certainly does not capture all voices, the Commission hopes the stakeholder views expressed here can provide guidance to us all as we navigate in the new hybrid environment.<sup>3</sup>

The Commission recognizes the challenges in obtaining feedback from SRLs and recommends that, going forward, the Trial Court continue its efforts to reach these litigants and build feedback systems. The Commission would be pleased to partner with the Trial Court in this process and in any other endeavors.

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<sup>3</sup> The Commission appreciates the input from the range of stakeholders who contributed to this Report. In particular, the Commission recognizes the significant contributions from Commissioners Sheriece Perry and Rachel Biscardi, as well as Samuel Rosen, former Law Clerk to the Honorable Serge Georges, Jr., Associate Justice Supreme Judicial Court.

## Analysis and Recommendations

### Communication

In all circumstances, strong and easily accessed channels of communication are essential to ensure that all court users have a fair opportunity to be heard and to obtain a just outcome. Below we provide overarching guidelines and substantive recommendations aimed toward improving communications between the Trial Court and court users.

#### a. Consistency Facilitates Communication

Communication encompasses more than simply providing information; the goal is to achieve understanding by all participants. For example, standing orders published over the course of the pandemic provided clear information. However, the information provided often did not acknowledge or address differences in practices from county to county or from judge to judge. In general, lack of consistent adherence to published rules and protocols leaves even sophisticated court users in need of additional information and assistance to achieve understanding. As a result, all court users, particularly SRLs who are accessing court systems without the help of an experienced advocate, too often must rely on individualized attention through [Court Service Centers](#) (CSCs) and virtual and in-person registries and clerks' offices to obtain full understanding of court operations. For those unable to access these over-burdened services, access to justice is impaired.

For communication to be effective, it must reach all participants, the substance of the communication must reflect ground-level operations, and what is communicated must include what to do when additional communication is needed.

#### **To facilitate communication with court users, the Commission recommends:**

- Increased adherence to published rules and protocols and ensuring uniformity of forms and filing procedures across each Trial Court department should be an articulated and enforced priority: consistency and uniformity would dramatically improve efficiency of operations throughout the court system, while the lack of consistency prevents development and implementation of most forms of self-help, such as basic “how to” guides and a range of automated technological resources.
- Notices and other communications with court users should routinely include information about whom to contact and how and when to reach out for help or further instruction, in the event of any breakdown or other need for communication.

This information should also be published on *mass.gov* and in registries and clerk's offices.

- Community-based outreach, including presentations to the community on the Office of Language Access and the continuation of the type of community listening sessions and Town Hall events conducted by the Trial Court before and during the pandemic, should be further explored and developed, as such outreach provides unique opportunities to hear directly from SRLs about their needs and can be a particularly effective way to reach communities of color.

## b. Website Augmentation

During the pandemic, the Trial Court and its departments expanded use of the website *mass.gov* to share information about court closures, new standing orders and operating protocols, frequently asked questions, and links to resources. For lawyers and some SRLs, *mass.gov* is a valuable resource. For many others, *mass.gov* is difficult to navigate, especially if the user does not know what to look for, has less than a high school reading level, or is not proficient in English. The Trial Court's access to justice portal ("A2J Portal") initiative, which seeks to provide accessible information to SRLs and other court users, presents an excellent opportunity to review and revise web-based resources.

**To augment the Trial Court's web-based resources, the Commission recommends the following:**

- Development of the A2J Portal, which ideally will provide resources and information in plain language, in multiple languages,<sup>4</sup> and with images to cue the viewer about content.
- Integration of end user testing into all development stages to ensure this important investment achieves its intended goals.

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<sup>4</sup> Court Service Center [guides published in ten languages](#) provide an excellent example of attention to the many languages used by Massachusetts residents.

**c. Virtual Court Service Centers**

The swift creation of a virtual CSC<sup>5</sup> during the pandemic marked a transformative leap forward in realizing our collective goal of providing CSC access statewide. CSCs work to bridge the communication gap between courts and SRLs, and the importance of their role in a system designed for navigation by lawyers cannot be overstated. The ongoing success of this innovation is not guaranteed; rather, it will depend both on the ability of SRLs to access CSC services and on the ability of the CSCs to access registries and clerks' offices.

The impact of the digital divide on SRL access to court services, particularly in communities of color,<sup>6</sup> is widely acknowledged and is reflected in the resumption of some in-person CSC operations. The decision to reduce in-person CSC operations, as compared to pre-pandemic hours, and to continue virtual CSC operations presents a complicated balance across available resources. The need for assistance is enormous and in-person delivery of services often allows for a greater number of clients to be served. Also, in-person services concentrate resources in high-volume SRL locations with significant low-income and Limited English Proficiency populations. On the other hand, a virtual CSC spreads access across the Commonwealth for those with access to Zoom and, to a lesser extent, to those with access to a telephone. A hybrid approach seems optimal; however, staffing must increase in order to make this happen. The needs of SRLs have always exceeded the capacity of the CSCs and expanding access without expanding resources creates an unsustainable service model. Without increased staffing, there is substantial risk that, for many, access to justice will be frustrated, rather than facilitated.

CSCs' ability to maximize the number of SRLs served, remotely or in-person, is significantly impeded by inconsistent communication from the Trial Court departments. As noted above, court-to-court, registry-to-registry, and judge-to-judge anomalies in practice create confusion, even among regular court users. Time spent confirming the process for each case is time that could be more helpfully spent communicating with the next SRL in need of guidance. At times during the pandemic, CSCs reported spending substantial staff time chasing down how to accomplish tasks in each case, rather than on the substantive work of assessing client needs, explaining options and procedures, and assisting SRLs in completing forms.

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<sup>5</sup> See Massachusetts Appleseed Center for Law & Justice, "[Turning on the Lights: How the Massachusetts Trial Court Could Deploy a Virtual Court Service Center to Assist Self-Represented Litigants](#)" (2019), 6.

<sup>6</sup> See [Internet/Broadband Fact Sheet](#), Pew Research Center (Apr. 7, 2021) ("Racial minorities and those with lower levels of education and income are less likely to have broadband service at home.")

**To maximize the number of SRLs served by CSCs, the Commission recommends:**

- Making increased staffing of the CSCs a budget priority for the Trial Court.
- Tracking the relative efficiency and equity of virtual and in-person CSC services delivered by noting the number and demographics of court users served.
- Increasing adherence to published rules and protocols by all Trial Court departments to promote greater consistency and dramatically improve the efficiency of CSCs.
- Prioritizing uniformity in forms used and filing procedures across each Trial Court department, particularly in Probate and Family Court, which would also dramatically improve the efficiency of CSCs.

**d. Virtual Registries / Clerks' Offices**

To meet the needs of litigants during the pandemic, the Trial Court departments developed virtual registries and clerk's offices. At their best, these virtual services offer real-time filing, payment, and issuance of summons, as well as answers to questions, all without travel to a courthouse. The cost saving to the court user is significant when measured in units of missed work, childcare, or travel expense. At their best, virtual registry and clerks' offices are also integrated with CSCs and virtual [Lawyer for the Day](#) ("LFD") programs, legal assistance programs including volunteer lawyers at some courthouses, and facilitate coordination of services.

At their worst, virtual services are "open," but leave users waiting endlessly and without explanation. A person waiting in a Zoom room has no way of looking around to see if others are being helped or if there is a different queue to enter. At their worst, virtual services do not alert SRLs to other available resources and do not facilitate transfer to other virtual services.

In-person registry and clerk's office services have resumed, and some courts are experiencing heavy foot traffic. It is unclear whether the added burdens of operating in multiple modes are contributing to long wait times at some courts. The disparity from court to court in wait times for filing and for processing of filed documents is striking and raises significant concerns about access to justice generally, and equity of access especially in "majority-minority" communities.

**To maximize the benefit of virtual registries and clerk's offices, the Commission recommends the following:**

- Consistent availability of both virtual and in-person services at registries and clerks' offices.
- Clear communication on Zoom waiting room home screens explaining what to expect for court users, ideally in multiple languages.
- Continued telephonic support for litigants, which remains a necessary component of any system designed to reach all residents, including those without access to or ability to use videoconferencing.
- Standardization of service levels and modes across Trial Court departments and communities, even if accomplished over time. The current variation in services from county to county and community to community presents significant equity in access concerns.
- Integration of virtual registries and clerks' offices with virtual CSCs and virtual LFD programs and should facilitate coordination of litigants' access to these services.

**e. Third-Party Electronic Filing Service Providers**

SRLs often do not understand what, where, and how to file, and yet individualized instruction is not always possible, given current resources and needs. During the pandemic, the Trial Court significantly increased the number of fillable court forms available via *mass.gov*, along with written instructions. Legal services providers, law schools, and other entities also have developed on-line tools that use a question-and-answer format to guide litigants step-by-step as they complete necessary court forms (“guided interviews”), and many are designed for use on a cell phone. However, in either case, the litigant is still often left with the need to print out the completed forms and file them, either in-person or remotely. This is a considerable hurdle for many. Facilitating guided submission of forms is a needed component of comprehensive generic assistance for SRLs.

Unlike other fillable form programs, a guided interview that is linked to the Tyler e-filing system offers automatic filing of completed forms. Instead of printing completed forms and separately filing them, the court user can file with the click of a button at the end of the guided interview and can download a copy of submitted pleadings to the user’s cell phone or other device with an additional click of a button. Fluid, on-line submission of completed forms is currently possible

through the Tyler e-filing system in two ways. First, the Trial Court itself can create guided interviews that link directly to the e-filing system.<sup>7</sup> Second, it is possible to allow third-party guided interviews to link with Tyler. In the latter case, the third-party typically is called an Electronic Filing Service Provider (EFSP), and Tyler has a certification process to ensure quality control and compatibility of EFSPs. Allowing EFSPs to transmit pleadings and other documents to the Tyler system’s “in box” does not interfere with the Trial Court’s processes for accepting or rejecting received submissions. EFSP-facilitated filings include an email or other return-to-sender address for each user to confirm that submissions are accepted or to notify the user that submissions have been rejected.

Partnering with EFSPs has already begun in the Appeals Court. Currently, the *mass.gov* website links the Appeals Court Help Center page (accessible [here](#)) to a third-party’s guided interviews (accessible [here](#)). Once the EFSP certification process is completed, court users will be able to use the third-party’s guided interview to complete needed court forms and submit the finished forms at the end of the guided interview program. This provides one-stop, form-to-filing generic assistance.<sup>8</sup>

The Commission supports this kind of partnership, as it allows the justice system to harness the resources of many organizations and does not burden the court system with sole responsibility for creating and maintaining all of the guided interviews that are needed to provide assistance in all of the high-volume SRL court matters across the court system. Looking forward, much could be accomplished if the Trial Court also allowed vetted third-party EFSPs to file through Tyler. This would enable partners in access to justice, like legal services organizations and law schools, to augment existing on-line guidance tools to include fluid filing in the Tyler e-filing system. Providing web-based tools for SRLs that are accessible through a cell phone and do not require printing forms or separate filing would dramatically simplify the experience for SRLs and would reduce current burdens on registries, clerks’ offices, and CSCs.

**To capitalize on the Tyler system’s EFSP capabilities, the Commission recommends the following:**

- Adoption of Tyler’s EFSP certification process to allow certified third-party EFSPs to transmit documents into the Tyler e-filing system.

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<sup>7</sup> This typically is referred to by Tyler as its “Guide and File” capability.

<sup>8</sup> One anecdote shared with the Commission involved a tenant who used the guided interview resource to file a motion to stay an eviction, while at home during the actual physical eviction. The tenant’s motion to stay was granted, and all property was returned.

- Increased adherence to published rules and protocols by all Trial Court departments should be a priority: greater consistency would dramatically improve the efficacy of guided forms completion and submission and other resources for SRLs.
- Prioritization of uniformity in forms used and filing procedures across each Trial Court department: uniformity would dramatically improve the efficacy of guided forms completion and submission and other resources for SRLs.

#### **f. Alerting Litigants to Resources Available While Attending Virtual Court**

Until our legal system is simplified and rendered uniform, many will be denied access to justice if they are unable to access information about resources created to help them navigate a system designed for licensed professionals. Our courthouses contain signage to direct court users to available resources and the Trial Court's Wayfinding project<sup>9</sup> promises to improve courthouse navigation. However, in the virtual setting, it is more difficult to make litigants aware of available resources, such as LFD programs and CSCs. Out of necessity, greater responsibility falls to court employees to alert court users, particularly SRLs, to available resources; when this does not happen, significant access to justice concerns arise. For example, feedback received by the Commission suggested that in some virtual LFD programs there was difficulty in connecting litigants to volunteer attorneys. Notably, however, in consumer debt sessions with clear communication and coordination, virtual LFD programs reported great success.<sup>10</sup>

#### **To improve court user awareness of available resources, the Commission recommends the following:**

- All staff operating virtual court services should be regularly trained on, and reminded of, their vital role in providing information about available resources, including LFD programs and CSCs.
- All staff operating virtual court services should be trained to facilitate real-time transfer of court users to other virtual resources, including LFD programs and the Virtual CSC.

<sup>9</sup> See Bentley University, "Improving the Wayfinding User Experience in Massachusetts Courts" (2022), 3-5.

<sup>10</sup> See Massachusetts Appleseed Center for Law & Justice, "[You're Still Muted: Access to Justice Barriers in Massachusetts' Virtual Small Claims Court](#)" (2022), 5.

- The Trial Court’s 2010 guide, *Serving the Self-Represented Litigant*<sup>11</sup> should be updated and distributed as part of annual training and professional development for court employees.
- A specially designed Zoom background for all court employees providing a simple statement such as “Ask me about free resources,” repeated in several languages, would invite SRLs to ask for help.

## Integrating Remote and In-Person Court Events Can Improve Access to Justice

Pre-pandemic, in-person participation was the rule. Telephonic participation in a hearing was rare, and video participation was limited to incarcerated litigants. Two and a half years later, all these options are available. The challenge now is establishing objective, consistent, equitable parameters for determining which mode to use in each set of circumstances. Sorting out what works and how to make it work better will require consideration of the many changes piloted since March 2020. The pandemic has opened a door to new possibilities. Some are attainable immediately, and more could be attained with strategic planning for a foreseeable future. Here, we report some of the most commonly heard concerns about remote proceedings, note important access to justice gains made possible by remote proceedings, and offer recommendations on development of an optimal hybrid system.<sup>12</sup>

### a. Benefits of In-Person Court Events

The list of factors weighing in favor of in-person events is long:

- SRLs can more easily avail themselves of court resources.
- In-person interpretation is usually clearest and most easily understood.
- Evidence is far easier to submit in-person than remotely.

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<sup>11</sup> See Administrative Office of the Massachusetts Trial Court, "[Serving the Self-Represented Litigant: A Guide By and For Massachusetts Court Staff](#)" (2010).

<sup>12</sup> Several reports that analyze remote court proceedings have been published recently. See, e.g., The Pew Charitable Trusts, "[How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations](#)" (2021); National Center for State Courts, "[The Use of Remote Hearings in Texas State Courts: The Impact on Judicial Workload](#)" (2021); New York Legal Assistance Group, "[Access to Justice in Virtual Court Proceedings: Lessons From COVID-19 and Recommendations for New York Courts](#)" (2021).

- Rules of civility and formality are more easily enforced.
- A day at a courthouse seems to encourage settlement.
- Judges can more easily assess credibility, and report greater confidence in their assessments.
- Courtrooms bring all court users together in a common space, while participants in remote proceedings may be prejudiced by what is seen in the background on Zoom.
- Third parties in attendance are visible and cannot influence proceedings out of view, as they can on Zoom.
- The impact of the digital divide between people who are technologically enabled and those who are not is greatly reduced and concerns around disruptions in Internet service and equipment malfunction are avoided.
- In-person proceedings avoid the difficulties that vulnerable court users, such as elders and those who do not speak English, may face in trying to use technology for remote proceedings or navigating Zoom functions such as mute, camera and breakout rooms.

#### **b. Benefits of Remote Court Events**

However, by uncoupling location and participation through virtual proceedings, the system realizes significant resource gains for everyone:

- Court users save time.
- Court users do not incur travel and parking expenses.
- Court users miss less work.
- Childcare costs and coordination are reduced or eliminated.
- Remote proceedings avoid the burden of travel to and from courthouses, which may be particularly challenging for some litigants, including individuals with disabilities and the elderly.
- Lawyers lose less time traveling and waiting, and their services accordingly cost less.
- Time savings for lawyers facilitates pro bono participation.
- Interpreters participating via Zoom can move among courthouses instantaneously.

#### **c. Building an Optimal Hybrid System**

Nationally, courts are exploring optimal hybrid models.<sup>13</sup> From the Commission's observations, an optimal system would identify events that routinely can be held remotely, clearly inform litigants about the default mode for each type of court event, offer sufficient flexibility to adjust when exceptions to the default mode are warranted, and adhere to a published set of protocols for

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<sup>13</sup> The National Center for State Courts, for instance, has launched the "[Hybrid Hearings Improvement Initiative](#)," which will award grants to court systems in roughly 10 to 20 different jurisdictions for the study and implementation of permanent changes to those systems' hearing practices.

determining when and what adjustments are warranted.<sup>14</sup> To date, it has been difficult to discern consistency in approach, including with respect to adherence to standing orders regarding whether a proceeding will be held remotely. Development and articulation of, and adherence to, a transparent set of factors for determining the mode of any court event would go a long way to ensuring equitable access to our justice system.<sup>15</sup>

The enormity of potential savings that remote court proceedings offer is too great to forgo integration of remote proceedings into ongoing court functions, and yet we know that some litigants struggle in a remote setting for reasons ranging from lack of access to necessary technology, to lack of facility with the technology, to language barriers, and more. One way to assess and mitigate drawbacks of remote court events is through an early case assessment event. Our Trial Court departments already utilize early case assessment and management in a variety of ways: the call of the list in District Court sessions, early case conferencing in the Probate and Family Court, heightened requirements in consumer debt cases,<sup>16</sup> and “Tier-1” events in summary process litigation. The last of these, the “Tier-1” event in eviction cases, was introduced during the pandemic, and assessing access to, and facility with, technology was among the identified purposes of the event. Going forward, we suggest all Trial Court departments implement an initial event, i.e., a “Step One: Navigation” event, the sole purpose of which would be to assess and address issues of access, whether technological, language-related, disability-related, or otherwise. Default should not be entered at the “Step One: Navigation” stage because failure to appear may be caused by the very impediments the event intends to identify and address. Instead, failure to appear should result in scheduling the next event in-person. This new initial event would not require judicial participation and, in some cases, could be skipped altogether. Litigants could bypass this “Step-One Navigation” event by submitting a form confirming access and readiness to proceed substantively. In other cases, a “Step One: Navigation” event would:

- Provide an overview of the court process: what to expect and what is expected at each stage.
- Assess technology capabilities and deficiencies in advance of substantive court events.

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<sup>14</sup> For example, even in cases where it is optimal to have the in-person presence of litigants, such as abuse prevention hearings, the unexpected and immediate need for court-ordered protection may exist while childcare may not be available.

<sup>15</sup> The recent [Joint Standing Order 2-22 of the Boston Municipal Court Department and District Court Department: Court Operational Order](#) (effective September 1, 2022) delineates proceedings to be held presumptively in-person or virtually. It will be important that judges and clerks adhere to consistent processes for any adjustments to these presumptive proceedings.

<sup>16</sup> Clerks magistrate must review plaintiff’s pleadings for compliance with Mass. R. Civ. Pro. 8.1 prior to entering a default against an absent defendant. See <https://www.mass.gov/advisory/implementation-of-mass-r-civ-p-81-special-requirements-for-certain-consumer-debts-and-mass-r-civ-p-551-special-requirements-for-defaults-and-default-judgments-for-certain-consumer-debts>.

- Assess language/translation needs.
- Assess need for accommodations.
- Connect litigants with available resources, including LFD programming.
- Address the procedure, timing, and method of submitting documentary evidence in advance of the hearing date.<sup>17</sup>
- Review contact information and preferred mode of communication for court and court users.

With the benefit of an initial “Step One: Navigation” event, remote court events can be integrated into standard practice. Nonetheless, understanding litigant needs and preferences will not always result in agreement about the mode of each court event. Therefore, an optimal system would also enable one participant to participate via video while another participates in-person. Recognizing potential disadvantages of being a remote participant at an otherwise in-person event, stakeholder feedback suggests that a “colloquy” approach may be a way to ensure that all litigants understand the benefits that they are waiving by appearing remotely, particularly for substantive rather than procedural court events. Equally important, the system should anticipate technology failures, and notices for remote hearings should include both directions on how to attend a remote hearing and what to do if a party cannot attend remotely or experiences technical difficulties during the hearing.<sup>18</sup> Finally, an optimal system would meet the needs of persons with disabilities by affirmatively providing a range of accommodations for both in-person and remote proceedings.<sup>19</sup>

It should also be noted that the Supreme Judicial Court has mandated some of these safeguards in remote proceedings. See [Supreme Judicial Court Seventh Updated Order Regarding Court](#)

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<sup>17</sup>Submission of pleadings and evidence does not need to occur contemporaneously with a court event. In most respects, the system works best when all relevant documents are submitted and exchanged in advance. See *Adoption of Patty*, 489 Mass. 630, 646 (2022) (discussing importance of exchanging exhibits in advance of telephonic hearing). Many court users have the capacity to submit pleadings electronically and evidence that cannot be submitted electronically can be delivered to a courthouse in advance. Screening of cases prior to a court event would allow clerks to assess cases and identify technical difficulties that may create barriers to justice. Both the Housing Court and the Probate and Family Court have been piloting early case management events.

<sup>18</sup> The Western Division of the Housing Court and Berkshire County Division of the Probate and Family Court have been considered models of how to handle these types of issues.

<sup>19</sup> See, e.g., New York Legal Assistance Group, "[Access to Justice in Virtual Court Proceedings: Lessons From COVID-19 and Recommendations for New York Courts](#)" (2021), at 18. In its Report, the New York Legal Assistance Group (NYLAG) recommends the following “to improve disability access. [1] To avoid undue hardships in both virtual and in-person proceedings, the courts must have clear ADA policies available through their websites and at the clerk’s office. [2] These ADA policies must include instructions for requesting an accommodation. [3] Clerks, judges, and other relevant courthouse staff must be trained on the range of accommodations available and their duty to affirmatively offer accommodations, even in the absence of a request. [4] Wherever litigants with disabilities struggle with either in-person or virtual proceedings, the court must consider whether a switch to the other format would serve as an appropriate accommodation.”

Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus)

Pandemic, July 1, 2021, § 3 ("When scheduling a videoconference proceeding in a case with one or more [SRLs], courts will recognize the possibility that SRLs may have limited access to or limited experience with the necessary technology, and will either assist the SRL in being able to conduct the videoconference or offer an alternative to videoconferencing for the virtual proceeding"); *Adoption of Patty*, 489 Mass. 630, 641 (2022) ("Regardless of the technology employed, whether it be an Internet-based video conferencing platform like Zoom or ... telephonic participation ... , the judge must ensure, preferably in advance of the hearing, that the participants understand the procedures to be used when the technology does not work as intended").

**To create an optimal hybrid system, the Commission recommends the following:**

- Each department of the Trial Court, in conjunction with representatives from the Executive Office of the Trial Court, the Office of Court Interpreter Services, and outside organizations that work with SRLs, should draft clear standards, which are accessible to the public, governing when remote hearings should occur, what occurs in exceptional cases, and how to enforce the standards fairly.
- The Trial Court might review some of the methods that medical professionals used during the pandemic as they, like the courts, had concerns regarding privacy, credibility (of patients) and providing visual diagnoses; it is noteworthy that, post-pandemic, many have continued to employ remote doctor visits as an option to patients when appropriate because of the benefits to patients and physicians.
- Continuation of a hybrid approach and establishment of clear standards for determinations regarding choice of mode for court events, embracing clarity and flexibility as guiding principles in establishing these standards.
- Implementation of a “Step One: Navigation” event in all areas of litigation involving significant numbers of SRLs would improve access to justice generally and could facilitate targeted use of remote proceedings.

## Pandemic-Spurred Innovations That Impact Access to Justice for All

### a. Scheduling of Court Events

#### i. Concentrated Scheduling Facilitates Lawyer for the Day

In both consumer debt and summary process cases, the majority of defendants do not have access to counsel, and the majority of plaintiffs do. Access to justice is vastly improved when both sides have access to counsel, and LFD programs are one way to provide legal assistance to more litigants. Although LFD programming does not reach all courts or all litigants, its reach can be extended even without substantial additional resources when case scheduling is clustered on single “block” days and in a single mode, whether in person or virtual. In addition, concentrated scheduling also facilitates the efficient use of per diem interpreter services as the Trial Court’s Office of Language Access can assign multiple interpreters to a full day session.

#### **Therefore, the Commission recommends:**

- Courts that have LFD programs should prioritize block scheduling, or consolidation, of consumer debt and summary process cases to facilitate access to LFD programming.
- Courts should concentrate scheduling to better facilitate the use of interpreter services.

#### ii. Staggered Scheduling in the Probate and Family Court

Prior to the pandemic, the Probate and Family Court piloted staggered scheduling of court events, a change from the more typical practice of scheduling all of a day’s events for 8:30 or 9:00 am. During the pandemic, remote hearings often were scheduled for either a precise time or for a three-hour block of time. More recently, many courts appear to have returned to the single time for all of the day’s events. Requiring all litigants to arrive at the start of the day, knowing that some will likely wait until 4:30 pm to be heard, is costly for all court users; it is an unaffordable expense for low-income workers, especially those without paid time off and those with childcare expenses and responsibilities.<sup>20</sup> A more equitable approach, which would not seem to burden the court to any appreciable degree, would be to schedule in three-hour blocks. A litigant may not be heard exactly within the scheduled block, but overall wait times would be significantly reduced and ability to plan significantly increased.

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<sup>20</sup> Notably, childcare services have been greatly reduced since the pandemic, with limited after school programs and summer camps, rendering it even more difficult for parents and guardians to arrive in court.

**Therefore, the Commission recommends:**

- Staggered scheduling is an important economic access issue for litigants; in particular, the Probate and Family Court is encouraged to implement multiple block times for motion, status, and pre-trial conference days each week.

**b. Early Case Conferencing and Court-Based Dispute Intervention**

Initial case conferencing is essential in proceedings that involve high numbers of SRLs and can be improved to provide greater support to SRLs. As noted above, during the pandemic, the Housing Court piloted a new “Tier 1” event in summary process cases. As described in the [Third amended Housing Court Standing Order 6-20](#), the purpose of the “Tier-1” event is “to determine the ‘status’ of the case, explore the availability of assistance with housing costs and other available resources and programs (e.g., Lawyer for the Day Program, Tenancy Preservation Program, etc.), and attempt a mediation in order to reach a resolution to the case.” The “Tier-1” event takes place before a trial on the merits of the case is scheduled. This form of early case conferencing is similar to aspects of the “Pathways” pilot in the Probate and Family Court and to the PFC’s pandemic practice of scheduling dispute intervention on a date prior to a scheduled court event, rather than on the same day. Feedback on these efforts in both the Housing and Probate and Family Courts suggests that, although court staff trouble-shot access issues, mainly relating to technology, the main focus of the events was dispute intervention and resolution. Provision of court-based mediation and similar forms of dispute intervention should continue, and separating these events from adversarial court events is a pandemic-born innovation that should continue. However, additional improvements could and should be made to ensure that litigants understand the substance of the rights and obligations at stake, as well as resources available to assist them in fulfilling both the substantive and procedural obligations of litigation.

To create access to justice for all, the system should provide an initial event dedicated to assessing litigant needs and alerting litigants of available resources. As suggested above, in Section II(c), a “Step One: Navigation” event would serve this purpose and should come before any dispute -resolution event described above, ideally not on the same day. Feedback from court users in the Housing Court context suggests that breaking the existing Housing Court “Tier-1” event into two--the first focusing on assessing technology capability, providing resources, and explaining options (a “Step One: Navigation” event), and the second offering mediation or other dispute intervention--would create a more constructive and comprehensive opportunity to resolve litigation by agreement rather than by trial. This approach is equally important in family litigation cases and should be considered in all areas of litigation involving a high percentage of SRLs.

**In managing court events with a high percentage of SRLs, the Commission recommends:**

- Starting with two non-adversarial events: a case conference or “Step One: Navigation” event and followed by a dispute intervention or “Dispute Resolution” event.
- Not entering a default in a case prior to the first adversarial event, particularly if the earlier events are offered remotely.

**c. Email as a Mode of Filing Pleadings and Other Documents**

Email filing is an important complement to e-filing.<sup>21</sup> When functional and available, e-filing is likely the most efficient mode for lawyers because it integrates submission, payment, and service in one fluid process and is available on any day and at any time. However, e-filing is not available in all causes of action. Additionally, for non-lawyers, e-filing remains challenging. Setting up an account is daunting for some one-time users, particularly those needing a waiver of fees, and CSCs and LFD programs have experienced difficulty e-filing on behalf of individual SRLs (See Section III (e)). Email allows LFD programs, CSCs, and the Department of Revenue to file in bulk, provides one-time or infrequent court users an electronic mode that does not require an account with or understanding of the court’s e-filing system, and provides a needed pathway for cases in which e-filing is not yet available, submission of evidence, and last-minute pleadings. Uniformly, court users praise courts that allow email filing especially in instances when e-filing is not yet available. It is often the most efficient way to ensure that a judge has access to all necessary documents at the time of the court event. Email also ensures fewer lost pleadings.

The Commission recognizes that accepting email submission of pleadings and other documents alters the traditional workload of staff in registries, clerks’ offices, and courtrooms because it requires someone to receive and review the emails, upload documents to MassCourts and address remote payment of filing fees and costs, but the benefits appear to outweigh the challenges.

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<sup>21</sup> The Commission notes the recent [Joint Standing Order 2-22 of the Boston Municipal Court Department and District Court Department: Court Operational Order](#) (effective September 1, 2022), Section VI authorizes Clerk-Magistrates Offices to return e-mail filing to filers.

**Given the importance of email as a mode of filing, the Commission recommends:**

- CSCs and remote LFD programs should be permitted to file pleadings via email and a standing order should be issued to ensure consistent implementation of an email filing protocol.
- Emailed pleadings should prompt an auto-response confirming receipt of the documents to facilitate follow up.
- Given its utility, the Trial Court should strategize about how best to integrate email filing into ongoing practice for SRLs and lawyers.
- Given the ongoing use of email filing by some courts, consideration must be given to developing and implementing transparent and uniform rules surrounding email submissions. Ad hoc access is not equity in access.
- The Commission does not recommend the replacement of in-person or postal delivery of documents with an electronic-only system. Such a system would not serve all court users, and the courts do not yet have technological capacity to support a completely electronic system.

**d. Language Access**

Many residents of our Commonwealth do not use English as their primary language and are not proficient enough to be required to use English in the context of a court case impacting their basic human needs. The Trial Court’s Office of Language Access faces demand for an ever-growing number of languages and, collectively, a high-volume of requests. At present, the system appears over-taxed and inconsistently implemented. Limited English proficiency (“LEP”) and hearing-impaired litigants regularly wait hours for an interpreter to appear at a scheduled event, and sometimes events are rescheduled after hours of waiting because no interpreter is available. In some cases, interpreters are routinely requested for court events, and in others the request is routinely not made. There does not appear to be universal understanding of and adherence to a process for securing interpreter services. These problems existed before the pandemic but have been exacerbated with the addition of remote proceedings since the advent of the pandemic; the system has new remote capabilities, and the potential interpreter pool has to adjust to the new demands for remote services.

Feedback from court users suggests that in-person interpretation is superior in quality to video-conference interpretation, although the latter is far superior to telephonic interpretation and

arguably sufficient in many circumstances. For high-frequency languages, such as Spanish, it may make sense to continue to provide in-person interpretation. Similarly, determinative events, such as trial, probably warrant in-person interpretation. In many other circumstances, use of videoconferencing might extend limited resources enough that it should become the default mode. Additionally, greater use of videoconferencing might significantly expand the pool of available interpreters.

**The Commission recommends that the Trial Court:**

- Engage in a review of Language Access protocols with the goal of balancing the superiority of in-person interpretation with the potential increased capacity offered by video interpretation.
- Create, implement, and publish a clear set of procedures for securing interpreter services and ensure these procedures are consistently followed.

**e. E-signatures**

The ability to use e-signatures in place of wet signatures has been enormously helpful and should be continued to the greatest extent possible. E-signatures eliminate the need for time-consuming trips to a law office or courthouse, reducing the costs and easing the burdens of litigation for all. This is especially important for wage-earners, individuals with disabilities, and litigants with young children in their care. The Supreme Judicial Court's pandemic order authorizing expanded use of e-signatures was particularly helpful in permitting CSC personnel and lawyers temporarily advising or representing SRLs through LFD programs to sign documents on behalf of SRLs and then email those documents directly to a court. Most e-signatures could be confirmed at the next court event, if necessary.

Looking ahead, continued use of authorized e-signing by LFDs and CSCs will require correction of a small, yet significant, problem at the point of docketing. Specifically, LFD and CSC staff e-filing on behalf of SRLs routinely find themselves listed as the attorney of record in the case. In other words, the act of e-filing is misinterpreted as entry of an appearance in the case, despite marking the complaints with a stamp alerting the court that the attorney is only facilitating the filing and is not representing the litigant. Although this is an administrative error, some courts have required the attorney to file a motion to correct the docket. Left uncorrected, the SRL does not receive court notices and, instead, the LFD or CSC staff receives notice. The magnitude of

this problem creates a substantial barrier to an otherwise highly effective advance in SRL assistance.<sup>22</sup>

**The Commission recommends:**

- The Supreme Judicial Court should permanently adopt its [Updated Order Authorizing Use of Electronic Signatures by Attorneys and Self-Represented Parties](#) (June 10, 2020).
- The Trial Court should review and revise processes for entering and removing attorneys of record in MassCourts.

**f. E-service**

Emailing is easier, more accessible, and less expensive than traditional mailing, and can be an effective means of providing notice. The Commission suggests that the [Supreme Judicial Court Order concerning email service in cases under Rule 5\(b\) of Mass. Rules of Civil Procedure](#) be maintained but also recommends that Section 6 of the Order, which allows SRLs to opt-in, be reconsidered.

While the opt-in provision for SRLs is preferable to an opt-out system, it may be difficult to obtain informed consent to opting-in when a litigant has never before participated in a court case. Many litigants rely solely on smartphones and are not regular email users. It can be difficult to receive and read and effectively process large attachments, like briefs. Further, documents sent electronically might also get sent to a spam folder or, in a quick scan of a crowded email inbox, go unseen. Ideally, SRLs should be permitted to e-file and serve via email while retaining the right to receive both emailed and paper copies of all pleadings and court documents. If that is not possible, at a minimum there should be a robust consent procedure to ensure that SRLs who opt into electronic service are fully aware of the risks and prepared to take steps to mitigate them and can easily opt back out again if they realize e-filing and service is not workable.

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<sup>22</sup>It is noteworthy that Limited Assistance Representation is similarly handicapped. The Commission has received many reports that docketing of a notice of withdrawal of limited appearance does not result in removal of the lawyer as attorney of record. This raises serious due process concerns, in addition to the administrative headache it creates for all involved.

**The Commission recommends:**

- Allowing service by email and include additional safeguards for SRLs:
  - SRLs may opt-in to e-filing and service via email while retaining the right to receive both emailed and paper copies of pleadings and court documents as well as easily opt out.
  - Ensuring a robust consent to email service procedure for SRLs.

## Conclusion

When the pandemic hit Massachusetts, the Trial Court and its departments did an extraordinary job of pivoting in short order to remote proceedings, rather than shutting down. It was a challenging time for court personnel as well as court users, and the courts rose to the challenge admirably. With the lifting of COVID restrictions and resumption of normal operations, it is an ideal time to reflect on lessons learned during the pandemic and opportunities for taking advantage of innovations which will accelerate access to justice for all court users. Let us take the time to review communication and remote hearing innovations and have an open discussion about what should be changed and what should be continued post-pandemic. The Commission hopes this Report will serve to spur further conversation and action surrounding court policies and procedures going forward and encourage all stakeholders to focus on policy choices with a view to improving access to all court users, especially those who frequently need the Trial Court's assistance the most--self-represented litigants.