

VIA EMAIL ONLY

March 29, 2020

The Honorable Chief Justice Nathan L. Hecht
Chief Justice
The Supreme Court of Texas

David Slayton
Administrative Director
Office of Court Administration

Re: Office of Court Administration's Electronic Hearings In Response To COVID-19

Dear Chief Justice Hecht and Mr. Slayton:

I write in my capacity as Executive Director of the National Crime Victim Law Institute (NCVLI) to recommend amendments to the Office of Court Administration (OCA)'s plan to provide all Texas courts with the ability to stream and host court proceedings via Zoom and YouTube, as stated on <https://www.txcourts.gov/programs-services/electronic-hearings-with-zoom/> (the Zoom Hearings Guidance). NCVLI is a nonprofit educational and advocacy organization located at Lewis & Clark Law School in Portland, Oregon, where I am also a Clinical Professor of Law. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to criminal justice practitioners and policy makers; and amicus curiae participation in cases nationwide.

Recognizing the unprecedented times we live in, we applaud the OCA's efforts to ensure access to Texas courtrooms. We hope, however, that the OCA will act expeditiously to modify the Zoom Hearings Policy to incorporate elements that protect crime victims' constitutional "right to be treated with fairness and with respect for the[ir] . . . dignity and privacy throughout the criminal justice process." Tex. Const. art. I, § 30(a)(1).¹

¹ See, e.g., *Matamoros v. State*, 901 S.W.2d 470, 479 (Tex. Crim. App. 1995) (Baird, J., concurring) (recognizing the victim has a state constitutional right under article I, section 30; observing that "victimization by crime brings not only the trauma of the crime itself but humiliation and embarrassment" and "there is a general presumption under Texas law that the public has no legitimate interest in embarrassing facts about private citizens"; and stating that "it is [therefore] improper to further invade a crime victim's privacy by unnecessarily stating the victim's name in an opinion"); *Williams v. State*, 474 S.W.3d 850, 852 n.2 (Tex. App.—Texarkana 2015, no pet.) (explaining that "[t]o protect the privacy of the victim and a child witness, we use pseudonyms for children in this case, and we do not use surnames of witnesses"); *Andrus v. State*, 495 S.W.3d 300, 303 (Tex. App.—Beaumont 2016, no pet.) (using initials "to conceal [the victim's] actual name" and citing the victim's state constitutional "'right to be treated with fairness and with respect for the victim's dignity and privacy'" (quoting Tex. Const. art. 1, § 30(a)(1))).

The Zoom Hearings Guidance suggests that the Open Courts Provision of the Texas Constitution requires courts to stream “public” hearings on YouTube. Texas law does not, however, require unlimited open access of all public proceedings. *See, e.g., In re M-I L.L.C.*, 505 S.W.3d 569, 577 n.6 (Tex. 2016) (“While there is some evidence to suggest that the clause guaranteeing ‘open courts’ was originally understood to establish a right of public access to court proceedings, . . . this Court has traditionally interpreted that clause in light of the following clause as merely requiring courts to be in operation and available for redressing injury.”); *id.* at 577-78 (“To the extent the open-courts provision might confer a right of public access, this right clearly would not be absolute, but instead would be subject to reasonable limitations imposed to protect countervailing interests, such as the preservation of trade secrets.”). Notably, unlike a physical courtroom with fire code capacity limitations, both live streamed and recorded proceedings on YouTube have the potential of reaching millions of viewers. *See, e.g., Skydiver Baumgartner Sets YouTube Live View Record*, BBC News (Oct. 15, 2012) <https://www.bbc.com/news/technology-19947159>. The risks to victims’ health and safety from this extraordinary access cannot be overstated.

On behalf of crime victims who will be impacted by the Zoom Hearings Guidance, we request the OCA to amend the guidance to ensure hearings in cases that involve or concern crime victims will be conducted in a way protective of the victims’ constitutional right to be treated with fairness and respect for their privacy and dignity. Such guidelines may include:

- Not livestreaming hearings via YouTube or alternative channels for criminal and civil protection order proceedings or other release hearings in which the court anticipates testimony or other evidence concerning the victim will be at issue;
- Ensuring that no cameras capture a victim’s image during any livestreamed proceeding or during a recorded proceeding that will be broadcast or ensuring redaction prior to broadcast;
- Ensuring that no audio recording is made of a victim’s voice during any livestreamed proceeding or during any recorded proceeding that will be broadcast or ensuring redaction prior to broadcast;
- Limiting the number of “public” participants for any Zoom hearing to a number that does not exceed the physical capacity of the courtroom in which the hearing would have been conducted in ordinary times;
- Affording the victim an opportunity to proceed in the Zoom hearing via a pseudonym—and upon such election a court order will issue that directs all parties and witnesses to refer to the victim via the pseudonym;² and

² Texas laws explicitly recognize propriety of pseudonyms in certain contexts. *See, e.g.,* Tex. Crim. Proc. Code Ann. art. 57.02(b) (providing that “a victim [of a sex offense] may choose a pseudonym to be used instead of the victim’s name to designate the victim in all public files and records concerning the offense, including police summary reports, press releases, and records of judicial proceedings”); Tex. Crim. Proc. Code Ann. art. 57A.02(b) (same for victims of stalking); Tex. Crim. Proc. Code Ann. art. 57B.02(b) (same for victims of family violence); Tex. Crim. Proc. Code Ann. art. 57D.02(b) (same for victims of trafficking).

- Requiring any argument or reference to the victim’s confidential, private or otherwise sensitive information—*e.g.*, date of birth, home address, place of employment, doctor’s name—to be submitted via paper and not verbally revealed in the Zoom hearing.

Incorporating such protections is the best to ensure the Court’s standing order complies with the law and truly be in the best interest of the administration of justice. *See Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (“[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.” (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122, 54 S.Ct. 330, 78 L.Ed. 674 (1934))). Failure to include such guidelines risks court congestion and increased health risks for the community as victims whose rights may be or have been violated will have to move the court for redress, which may entail additional hearings. Victims should not have to choose between accessing justice and safeguarding their health and privacy.

Thank you for your work during these trying times and for your quick attention to this matter.

Respectfully,

Meg Garvin, M.A., J.D.
Executive Director