

Hawai'i Access to Justice Conference
"Access to Justice and the Time of COVID"
June 25, 2021

Summary of Keynote Speaker¹

HON. NANCY GERTNER, HARVARD LAW SCHOOL

- Is speaking from Boston
- PowerPoint presentation: "Lessons from a Pandemic"
- Two sorts of lessons from pandemic: Need for technological response, and the limits of technology solutions
- "Stories from Courtroom 4"
 - *The Pro Se Litigant and the Judge*, re pro se litigant she encountered early in her career as a judge who believed they'd been wrongfully stopped by the police. Went through trial, but she had no idea how to handle regarding objections, etc. There was unequal playing field, and justice was "stalled." Was rare in federal court to have pro se litigants.
 - *The Interpreter and the Family* re a sentencing, much deeper into her career re someone who spoke only Spanish. Present was family in the courtroom. Interpreter had headset, but she noticed there were other unused headsets. She ordered interpreter to distribute to the family. Suddenly the family could understand what was going on. The access issue was not just in the courtroom, but also access to the family to support their family litigant.
- The pandemic ripped the band-aid off the problem of economic inequality, etc., and essentially exposed pre-existing problems.
- Procedural access issues. Also access to rule making: Who makes the rules? Who lobbies?
- Substantive access: To fair consideration of the case. Caseload pressures can result in two-tiered system of the easy cases and the hard cases (e.g. patent cases). Rules and approaches for the two types of cases are different.
- More Stories from Courtroom 4: *The case of the mangled arm*. Litigant's arm had been mangled in a saw, was suing manufacturer. Case was

¹ This summary was prepared by Jay Mason, Managing Attorney, Kauai Office, Legal Aid Society of Hawai'i.

reversed on appeal, and she was going to do second trial after remanded to her. But plaintiff died. Attorney did not file “suggestion of death” before deadline to do so. Her clerk said attorney screwed up and case can be dismissed. But also said “justice in the world suggests you let it go on.” Access to justice was not allowing a minor procedural issue to interfere where she had discretion to allow this man’s family to have another day in court.

- Longer quote re courthouses measuring and valuing how many cases are closed and not how justly they are decided. There are some such as Social Security disability cases where the law has evolved so overwhelmingly against plaintiffs that they are easy to close.
- Procedural issues can impact how judges see cases.
- Technological fixes, especially for procedural access to justice?
 - Online Courts and the Future of Justice by Susskind (written prior to pandemic)
 - He thought was easier to improve access to technology. Online courts then would improve access to justice issues.
 - Quote from Hawai‘i broadband strategy officer who noted pandemic helped everyone realize the need for “digital equity.”
 - Learning through screens and its limitations (article)
 - U.S. v. Nippon 17 F. Supp.2D 38, 42 (D.Mass. 1998)
 - Japanese companies were accused of conspiring to dump fax paper on American market. There was dispute re interpretation of a single word which could mean either concurrence or agreement. Deposition concerns if a judge was not present. They ultimately set up videotaped testimony; both sides wound up agreeing. But witness testifying on screen with interpreter was not equivalent of in-person.
 - Your body “leaks” more information than your face, but with video you see only someone’s face.
 - The old man in “12 Angry Men” as an example: He testifies re hearing defendant shouting I’ll kill you then fleeing and seeing him. Jurors observe he walks with two canes and they don’t think it’s possible he could have made it to the door to see what he said. Classic example of the video would show one thing, and presence another.
 - Tech problems: civility, the kitchen table courts, when trials look like evening news, and cultural issues.
 - What is gained and lost when translated into virtual court?
 - Virtual jury selection: Multiple prospective jurors were observed with various distractions such as applying false eyelashes. Did not work well for jury selection.
 - Does technology exacerbate substantive access issues?

- “Empathy is erased or sharply curtailed by technology because the other person is not present in an embodied way as an individual, nor can their emotions be experienced.”
- Studies showing higher bond issued in video bail hearings. Also more likely deportations when video hearings are used. Less believable child witnesses when done via video. Sometimes judges even acknowledge changing credibility assessments in immigration courts when there’s video hearing after in-person hearing.
- Are there subcategories of cases where technology enhances justice?
 - Informational settings vs. deliberative settings
 - Communicating information/advice can make more sense (to be done virtually), but deliberation?
 - Federal courts have resisted cameras in courtroom historically but now reporters can cover proceedings across jurisdictions (with cameras in the courtrooms). Transparency access has been enhanced by technology. But will courts continue to allow cameras to provide access?
- What’s next?
 - Raise the technology question – it depends, we will study it. She doesn’t know what next, but this conference and these discussions are critical place to start.
- QUESTIONS AND ANSWERS takeaways
 - Brennan Center Report: Are there different outcomes when hearings are done remotely vs. in-person. How do you evaluate costs and benefits?
 - Example of defendants in orange jumpsuits when on video but would be put in street clothes for in-person hearing
 - Does generally believe that attorneys should be better preparing for virtual courtrooms.
 - Notes that she likes using PowerPoint when cannot as readily interact with audience
 - Language barriers are worse through a screen because you cannot see a whole person speak.
 - Attorneys should be preparing clients for virtual courtrooms but also should be prepared to object to particular settings such as bail hearings. Cannot all walk mindlessly down this road (of virtual technology)
 - The issue cannot be when technology is appropriate, but rather what are the subcategories in which to use it....
 - Virtual can make sense for informational purposes, but there are concerns about hearings in which a judge is making final decisions.

- Reference to the Gertner(?) proposal for perfect balance of in-person and virtual
- Re paralegal question: Does think profession needs to reevaluate the “bar against expanding the practice of law to certified individuals”
- Re-education: Thinks high school, middle schools should get video feeds to real proceedings. Seeing Supreme Court for example can make a big difference in what students understand justice to be.
- Believes federal court has more ability to do remote conferencing...
- Re accommodating shortcomings of technology in record on appeal? Appeal record would have to include the video.