

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 716 (Bennett)
Version: March 25, 2021
Hearing Date: July 13, 2021
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Court access

DIGEST

This bill clarifies that, absent a health or safety reason to keep courts closed, courts must provide in-person access to proceedings even if they also provide a remote access option; and that, if courts are closed for such reasons, courts must, at a minimum, provide an audio or telephonic option for the public to monitor proceedings.

EXECUTIVE SUMMARY

During the COVID-19 pandemic, many courts moved to partial or fully remote proceedings. Due to the hurried (and harried) nature of this move, some courts' initial remote proceedings did not provide for adequate public access to the courts, in violation of constitutional and statutory protections. This bill is intended to protect the public's right to access court proceedings in both ordinary and extraordinary times. The author has agreed to accept significant clarifying amendments, **so this analysis addresses the bill as it will amended if it passes out of this Committee.**

The bill provides three main protections. First, the bill clarifies that, when courts are generally open to the public, the right of public access is not satisfied with a remote option – in-person access is mandatory absent a legal reason for closing a proceeding or courthouse, and any remote option may be provided in addition to, not instead of, in-person access. Second, this bill provides that, in the rare case where the law requires access to a courthouse to be closed, courts must provide, at a minimum, an audio or telephonic public access option, to preserve the public right of access to the courts. Finally, this bill clarifies that the availability of a remote option does not alter the existing restrictions on who may produce an official transcript of the proceedings, to ensure that unnecessary doubt is not introduced into proceedings with unofficial transcripts gleaned from an audio or audiovisual feed.

This bill is sponsored by the author and is supported by the ACLU of California, the California News Publishers Association, Disability Rights California, SEIU California, and Public Justice. The bill is opposed by the Judicial Council of California.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that, in all criminal prosecutions, the accused shall have a right to a speedy and public trial. (U.S. Const., 6th amend.; Cal. Const., art. I, § 6.)
- 2) Provides that, consistent with the constitutional prohibition on abridging the freedom of the press, substantive court proceedings generally must be open to the public and members of the press. (*Richmond Newspapers v. Virginia* (1980) 448 U.S. 555, 573-574; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1181-1182.)
- 3) Requires that every sitting of the court shall be public, except where otherwise provided by law. (Code Civ. Proc., § 124.)
- 4) Authorizes narrow exceptions to the public trial requirement, including:
 - a) In a proceeding under the Family Code, a court may, when it considers it necessary in the interests of justice and the persons involved, direct the trial to be private and exclude all persons except those participating in the trial. (Fam. Code, § 214.)
 - b) In certain actions under the Uniform Parentage Act, the court may hold a hearing or trial in closed court. (Fam. Code, § 7643.)
 - c) In a juvenile court hearing, the public shall not be admitted unless requested by the minor concerning whom the petition has been filed or unless the hearing concerns a minor alleged to have committed specified criminal acts. (Welf. & Inst. Code, § 676.)
 - d) In a proceeding to have a person involuntarily committed by the court, proceedings are presumptively private unless any party otherwise requests that the hearing be public. (Welf. & Inst. Code, § 5118.)
 - e) In any other proceeding, a trial court may close a proceeding if it (1) provides adequate notice to the public of the contemplated closure, and (2) before closing the proceeding, holds a hearing and expressly finds all of the following:
 - i. there exists an overriding interest supporting closure;
 - ii. there is a substantial probability that the interest will be prejudiced absent closure;
 - iii. the proposed closure is narrowly tailored to serve the overriding interest; and

- iv. there is no less restrictive means of achieving the overriding interest.
(*NBC Subsidiary, supra*, 20 Cal.4th at pp. 1217-1218.)

This bill:

- 1) Prohibits a court from excluding the public from physical access because remote access is available, unless it is necessary to restrict or limit physical access to protect the health and safety of the public or court personnel.
- 2) Provides that, except as provided in Family Code section 214 or other existing law, if a courthouse is physically closed to the extent permitted by law, the court must provide, at a minimum, a public audio stream or other means by which to listen to the proceedings.
- 3) Provides that transcripts produced from remote access recordings shall not be deemed to be official verbatim records of the proceedings and are inadmissible for purposes of any court proceedings, including appeals, except in criminal proceedings pursuant to subdivision (2) of subdivision (f) of Section 28 of Article I of the California Constitution.
- 4) Provides that nothing in the bill authorizes the creation of an official court record by anyone other than a certified shorthand reporter present in person in the courtroom to create the official record.

COMMENTS

1. Author's comment

According to the author:

COVID-19 has made it difficult for the public to have meaningful access to open court proceedings. Public access to the courts guarantees the integrity of judicial processes by demonstrating that justice is administered in the correct manner. Openness is necessary to maintain the independence and impartiality of courts. AB 716 increases public transparency in government and that's a goal we should all be in favor of.

2. The public's right to observe court proceedings and the state of that right during the COVID-19 pandemic

The right to a public trial is twofold: the Sixth Amendment of the United States Constitution guarantees the *defendant* a public trial,¹ while the First Amendment, as

¹ U.S. Const., 6th amend.

interpreted by the United States Supreme Court, gives the *public*, including the media, the right to observe and monitor court proceedings.² California has also enshrined this right in statute, stating that, except where expressly provided by law, the sittings of every court must be public.³ The right is not absolute, however: a court may order a proceeding to be held in closed court where (1) there is an overriding interest supporting closure; (2) there is a substantial probability that the interest will be prejudiced absent closure; (3) the proposed closure is narrowly tailored to serve the overriding interest; and (4) there is no less restrictive means of achieving the overriding interest.⁴ The state has also authorized by statute closed proceedings in certain types of sensitive matters, such as certain family law and Uniform Parentage Act cases.⁵

As highlighted in the February 2021 informational hearing conducted by the Senate and Assembly Judiciary Committees, COVID-19 profoundly affected both the operation of our state courts and the experience of court users.⁶ With many courts closed to the public or imposing strict capacity limits to enforce social distancing, and with the inherent risk of attending a proceeding in-person, the public's right of access was compromised in many courts. In Los Angeles, for example, the Los Angeles Superior Court denied the Ojai Valley News's request for remote access to court proceedings, even though the court provided only one designated media seat.⁷ Over time, many courts adopted a remote public access option, through a public audiovisual streaming service or a public audio-only line.

The remote attendance problems pose their own problems, however. The California Rules of Court give a court significant discretion over whether to allow court proceedings to be recorded or broadcast, when to allow personal recording devices, and under what conditions to allow media coverage.⁸ A public remote option, on the other hand, virtually eliminates a court's control over whether members of the public record, preserve, and publish the proceedings. The result can be that highly sensitive, personal testimony is published and shared – such as Britney Spears' recent testimony about her conservatorship, which was recorded and widely disseminated despite the court's warning that recording was not allowed.⁹ The California Public Defenders Association,

² *Richmond Newspapers v. Virginia* (1980) 448 U.S. 555, 573-574.

³ Code Civ. Proc., § 124.

⁴ *NBC Subsidiary, supra*, 20 Cal.4th at pp. 1217-1218.

⁵ E.g., Fam. Code, §§ 214, 7643.

⁶ *COVID and the Courts: Assessing the Impact on Access to Justice, Identifying Best Practices, and Plotting the Path Forward*. An informational hearing of the Assembly and Senate Committees on Judiciary, Tuesday, February 23, 2021.

⁷ Houten, *Judge bars remote access for OVN to cover hearings for water lawsuit*, Ojai Valley News (Nov. 20, 2020), <https://www.ojavalleynews.com/?view=article&id=19210:judge-bars-remote-access-for-ovn-to-cover-hearings-for-water-lawsuit&catid=856> [last visited Jul. 9, 2021].

⁸ Cal. Rules of Court, rule 1.150.

⁹ Madani & Dasrath, *Britney Spears to court: I feel ganged up on, bullied, left out and alone*, NBC News (Jun. 23, 2021), <https://www.nbcnews.com/pop-culture/pop-culture-news/britney-spears-give-rare-public-testimony-conservatorship-battle-n1271943> [last visited Jul. 9, 2021].

which has not taken a position on this bill, has also expressed concern that allowing remote public access in criminal proceedings could prejudice a defendant's right to a fair trial, especially with a remote video option.

3. This bill clarifies when in-person and when remote access to court proceedings is required

This bill clarifies the statute guaranteeing the public right of access to court proceedings by setting forth the scope of the public's right to access court proceedings during ordinary circumstances and in circumstances where a courthouse must be closed to the public.

With respect to normal times, when courthouse access is not restricted to protect the health and safety of the public or court personnel, this bill clarifies that a court may not provide an audio or remote public attendance option in lieu of permitting in-person access. As long as the courthouse is open, the courts *must* provide in-person access.¹⁰ Any remote option may be provided in addition to, but not as a replacement for, allowing the public to view court proceedings firsthand.

With respect to abnormal times – times when extreme circumstances require extreme measures, such as the COVID-19 pandemic requiring courthouses to limit public access to the courts – the bill requires courts to provide, at a minimum, an audio streaming or telephonic option through which the public may monitor proceedings.¹¹ This provision ensures that, when a courthouse takes steps to protect the health or safety of the public or court personnel, the right of public access is also protected.

4. This bill protects the integrity of official court transcripts when remote access to court proceedings is available

As discussed above in Part 2, providing a remote access option for the public increases the public's ability to monitor proceedings but decreases the court's ability to control whether and how proceedings are recorded and disseminated. As a general rule, the record of proceedings prepared by an official reporter, or official pro tempore, who was duly appointed and sworn and licensed as a certified shorthand reporter, is *prima facie* evidence of the testimony and proceedings reported therein.¹² Courts may also, at their discretion, permit inconspicuous recordings for attendees to use as personal notes of the

¹⁰ This right does not extend to particular proceedings in which there is a statutory basis for closing a particular proceeding (e.g., Fam. Code, § 214), or when a court determines that a particular proceeding must be closed to avoid substantial prejudice (*see NBC Subsidiary, supra*, 20 Cal.4th at pp. 1217-1218). Nothing in this bill is intended to modify the existing statutes or case law regarding closing particular proceedings.

¹¹ This provision is also subject to the case-specific bases for closing a case, discussed *supra*, fn. 9.

¹² *See* Bus. & Prof. Code, § 8016; Gov. Code, §§ 269, 273.

proceedings.¹³ With a remote attendance option, however, there would be no meaningful mechanism for courts to control who records a proceeding, making it easy for individuals to record and transcribe a proceeding without a certified shorthand reporter. Not only would the integrity of such a “transcript” be dependent on the quality of the audio feed, but the person doing the transcribing would not be subject to the professional standards of practice of certified shorthand reporters.¹⁴

While, in most instances, an attempt to introduce statements reported in an unofficial transcription of an audio feed would be inadmissible hearsay,¹⁵ there are potentially circumstances in which an “unofficial” transcript could be used to cast unwarranted doubt on the official court record. For example, if the transcript taken from the audio proceedings conflicted with the official court record, and the transcript from the audio proceedings suggested that the witness made a prior inconsistent statement, a litigant could argue that the statement should be admissible. This would run contrary to the state’s laws establishing the official transcript as prima facie evidence of the events at a proceeding, as well as encourage the use of shoddy transcripts in order to manufacture disputes. To avoid this problem, the bill provides that any transcript made from a remote access recording is not an official record and is inadmissible for any purpose, except in criminal trials as necessary to satisfy the constitutional Truth in Evidence provision.¹⁶ The bill further provides that nothing allowing remote public access authorizes the creation of an official transcript by anyone other than the certified shorthand reporter present in the courtroom to perform that task.

The Judicial Council of California opposes the bill on the basis of the court-reporter provisions. Specifically, the Judicial Council states that existing law already provides adequate protections for court reporters and for the record, and believes that the protections provided for in the bill do not belong in the particular Code of Civil Procedure section being amended. The author has pledged to continue working with the Judicial Council to address the Judicial Council’s concerns.

5. Amendments

The author has agreed to the following amendments, subject to nonsubstantive changes by Legislative Counsel, and which are reflected in this analysis:

Amendment 1

On page 2, strike out lines 14 and 15; in line 16, strike out “(2)” and insert “(b)(1)”

¹³ Cal. Rules of Court, rule 1.150(d).

¹⁴ See Cal. Code Regs., tit. 16, § 2475.

¹⁵ See Evid. Code, § 1200(b).

¹⁶ See Cal. Const., art. I, § 28(f)(2).

Amendment 2

On page 2, in line 18, strike out “or the media”

Amendment 3

On page 2, in line 20, strike out “court employees”, strike out line 21 and insert “the public our court personnel.”

Amendment 4

On page 2, strike out lines 22 to 28, inclusive, and insert:

(2) Except as provided in Section 214 of the Family Code or other existing law, if a courthouse is physically closed to the extent permitted by law, the court shall provide, at a minimum, a public audio stream or telephonic means by which to listen to the proceedings.

(c)(1) Transcripts produced from remote access recordings shall not be deemed to be official verbatim records and are inadmissible for purposes of any court proceeding, including appeals.

(2) Consistent with paragraph (2) of subdivision (f) of Section 28 of Article I of the California Constitution, this subdivision does not exclude relevant evidence that would otherwise be admissible in a criminal proceeding.

(3) This section does not authorize the creation of an official court record by anyone other than a certified shorthand reporter present in person in the courtroom for the purpose of creating the official record.

6. Arguments in support

According to bill supporter ACLU of California:

It is a cornerstone principle of democracy, and of constitutional law, that public business be conducted in public in order for the public to observe and participate in the government – and to correct governmental behavior if necessary. While the recent pandemic has strained some governmental processes, the inconvenience or expense of preserving public access cannot be justification to abandon this principle.

SUPPORT

ACLU of California
California News Publishers Association
Disability Rights California
SEIU California

Public Justice

OPPOSITION

Judicial Council of California

RELATED LEGISLATION

Pending Legislation:

SB 538 (Rubio, 2021) permits a party or witness in a hearing on a petition for a domestic violence restraining order to appear remotely, and requires each superior court to develop rules and instructions for such remote appearances. SB 538 is pending before the Assembly Appropriations Committee.

SB 241 (Umberg, 2021) allows witnesses to testify remotely at trial under specified circumstances. SB 241 is pending before the Assembly Judiciary Committee.

AB 429 (Megan Dahle, 2021) authorizes specified hearings and trials under the Uniform Parentage Act to be held in closed court. AB 429 has been passed by the Legislature and is awaiting the Governor's signature.

Prior Legislation:

AB 2745 (Megan Dahle, 2020) was substantially similar to AB 429 (Megan Dahle, 2021), and would have authorized specified hearings and trials under the Uniform Parentage Act to be held in closed court. AB 2745 died in the Senate Judiciary Committee due to COVID-19-related bill restrictions.

PRIOR VOTES:

Assembly Floor (Ayes 72, Noes 0)

Assembly Appropriations Committee (Ayes 14, Noes 0)

Assembly Judiciary Committee (Ayes 10, Noes 0)
