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Hear from the Judges: The Latest News about the Courts and the Pandemic: A Discussion about the Effects of Ever-Changing Rules, Lessons Learned, and Finding Pandemic Positives

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COVID's Impact On Litigation To Persist In 2022

By **Jack Karp**

Law360 (January 4, 2022, 12:02 PM EST) -- The coronavirus pandemic will continue to impact both the types of cases that are litigated and the mechanics of how those cases play out through 2022, litigation attorneys predict.

Remote court proceedings and depositions are here to stay, as is the ongoing backlog in trials, litigators say. Meanwhile, disputes arising from employees' return to the office, business interruption issues and bankruptcies will keep litigators busy.

Intellectual property and regulatory enforcement are also likely to be active areas of litigation in the coming 12 months, regardless of what happens with COVID-19.

More than anything, litigators will have to be flexible in 2022, attorneys say.

"Preparation has always been key to a litigator's success," said Michele D. Johnson, global chair of the litigation and trial department at Latham & Watkins LLP, "but litigating in 2022 will require us to be particularly nimble and adaptable."

Virtual Litigation Is Here to Stay

Disruption to the mechanics of litigation will likely be the biggest challenge litigators will face, as COVID-19 continues to affect courts, attorneys told Law360 Pulse.

"The more interesting and biggest shift we're going to see is not the 'what changes' but the 'how practice changes,'" said Rebecca Woods, a partner in Seyfarth Shaw LLP's commercial and construction litigation practice.

Court proceedings like status conferences, discovery hearings, hearings on motions to dismiss and even oral arguments will remain largely remote through 2022, and possibly for good.

"I think there will be a significant piece of the traditional litigation appearances that will be remote forever," said Jack J. Laffey, a partner at Laffey Leitner & Goode LLC.

The same is likely true of depositions, mediations and arbitrations.

"I think the days of lawyers flying all over the country for every meeting and every deposition and every

hearing are probably over," said Mark A. Klapow, a partner in Crowell & Moring LLP's litigation group.

The one exception may be trials. Fully virtual trials aren't likely to become routine, though hybrid trials in which at least some witnesses testify remotely will continue, according to Lisa Wood, co-chair of Foley Hoag LLP's litigation department.

To adapt, litigators will have to become far more flexible and tech-savvy, attorneys say.

"There's going to be a huge premium on outside counsel who are a little bit more adroit at the use of technology and aware of the pitfalls," said Seyfarth's Woods.

For depositions and hearings on Zoom, litigators will need to consider their video settings and backgrounds, and they may want to use more demonstratives. Lighting, sound quality and camera angles will be important, as will making sure to have a reliable video feed.

And in person, they will have to hone their skills in dealing with masked judges and juries, Johnson said.

Foley Hoag's Wood has heard judges complain about lawyers who haven't invested in their equipment, she says, with one judge telling her, "I would hope that people would spend as much money on the technology as they spend on some of the suits they wear."

These pandemic-fueled changes are largely positive, says Wood. The new technology has made litigation more efficient and less expensive, and has removed some barriers to participation.

But not all lawyers are excited about the adjustment.

"It is at least my hope that we will gradually return to in-person litigation," Laffey said.

COVID-19 Keeps Fueling Litigation

With new waves of COVID-19 continuing to surge around the world, pandemic-related litigation will likely continue "at a strong clip" through much of the year, according to Johnson. Litigators can expect to see business interruption-related and breach of contract suits across industries, with many of those disputes tied to the cascading impact of supply chain disruptions.

While the number of new filings in insurance coverage disputes has waned slightly from its peak in the middle of 2020, those numbers could rise again depending on how courts decide key legal issues involving force majeure and insurance claims for physical damages, Johnson added.

The new year could also see plenty of employment disputes involving the terms of employees' return to the office and accommodations for remote work, according to Klapow.

And bankruptcy and real estate litigation is likely to become increasingly robust as federal stimulus money runs out and tenant protections sunset, cautioned Seyfarth's Woods.

But no matter the practice area or industry, litigators should expect to be very busy in 2022, according to Wood at Foley Hoag, with a lot of cases "coming back to life" after being stalled by COVID-19.

"I think '22 will be a busy year just catching up," she said.

IP and Regulatory Disputes on the Rise

Rest assured, attorneys also expect plenty of litigation that doesn't involve COVID-19, particularly in the areas of intellectual property and white collar and regulatory cases.

For many companies, their intellectual property is their most valuable asset. The past decade has seen a dramatic transformation in IP litigation, driven by changes to patent law and venue rules as well as the practical difficulties of enforcing patent protections across international boundaries, according to Klapow.

So IP litigation, which used to consist largely of patent infringement cases heard in district courts, has evolved into multifaceted disputes that also involve copyrights and trade secrets, Klapow said.

The inter partes review process at the Patent Trial and Appeal Board will continue to play a significant role in these disputes in 2022. So will the International Trade Commission, a patent dispute venue that "is hot and will continue to be," Klapow added.

Battles over software copyrights and biotechnology patents are especially likely, said Johnson. The pandemic could play a role here, with litigation over COVID-19 treatments and vaccines.

Meanwhile, white collar and other regulatory enforcement litigation is also likely to see an uptick.

The Trump administration presided over "historic lows" in federal law enforcement action, according to Wood at Foley Hoag.

But the Biden administration has a very different approach.

The U.S. Securities and Exchange Commission has already previewed increased regulation of cryptocurrency trading, according to Johnson.

The administration is also likely to be more aggressive in the realms of antitrust, environmental and white collar regulation, said Klapow.

"The regulatory litigation, or litigation that is sort of adjacent to regulation, can be up or down depending on the administration," said Klapow. "I think obviously right now we're clearly up."

Continued Backlogs

Courts still face a substantial backlog as a result of the pandemic, and it could take them 18 more months to work through the glut of trials, Klapow said.

Virtual alternatives are helping courts catch up, and calenders are starting to resemble pre-pandemic schedules. Litigators will see "an unprecedented number of trials" teed up in the next 12 months, Johnson predicted.

It's not just attorneys who will have to deal with backlogs. Judges are also feeling stressed by the number of cases on their dockets and will be ordering attorneys to move quickly, whether they want to or not, said Wood.

So in 2022, litigators should be prepared, write short briefs and refrain from filing unnecessary motions.

"There'll be just a lot of pressure to get things done," Wood said.

--Editing by Bruce Goldman.

Skadden

The Pandemic Brought Some Welcome Innovations to the Justice Process, but Also Many New Challenges

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Takeaways

- Courts and litigators have become increasingly comfortable with remote proceedings, and they are likely to be used more frequently after the pandemic subsides than they were before.
- Where jurors participate remotely, it can be challenging to keep their attention and maintain communication.
- For the foreseeable future, case and trial backlogs and delays are likely to remain a problem.

The COVID-19 pandemic is hardly the first emergency to test the resilience of the judiciary. Following the September 11 terrorist attacks, federal courts enhanced security and testing for biological weapons, and in response to Hurricane Katrina, Congress passed legislation that allowed federal courts to temporarily host proceedings in adjacent judicial districts.

In many respects, however, the operational disruptions from COVID-19 have been unprecedented — and remain unrelenting. Jury and bench trials and in-person appellate arguments began their comeback in 2021, but each new wave of the virus appears to reset expectations and demand flexibility.

With parallel state and federal court systems, and some rules and procedures set locally, it is difficult to make general observations about the courts' response to the pandemic. Even within the federal system, responses have varied district to district and circuit to circuit. Some circuits that had begun holding in-person arguments again have now reverted to virtual format — others have stuck to traditional, in-person appearances.

Still, here are some observations and reflections gleaned from nearly two years of litigating in the shadow of COVID.

Expect That Many Technology Changes Are Here To Stay

Like many work environments, the practice of civil litigation may never return to the "old normal." Courts and lawyers were forced to break with tradition and innovate in ways that may make litigation more efficient.

For example, it was confirmed that some aspects of litigation do not have to be conducted in person.

- Telephonic court conferences and remote depositions might not become the norm when the pandemic risk subsides, but they will certainly be far more commonplace than they had been before. In a recent Thomson Reuters poll, 49% of the state judges and court professionals surveyed felt that virtual hearings made access to the justice system easier. For more complex cases, with witnesses and counsel in many locations, litigants may want to avail themselves of these tools even when the health risks recede.
- Recent juror interviews from cases we tried in person in 2021 revealed that jurors were not bothered by watching witnesses appear on video. In some instances, they even preferred viewing witnesses on a big screen to observing them from across a large courtroom. This ran counter to pre-pandemic accepted wisdom.

The federal judiciary's investments in response to the pandemic may lay the foundation for permanent changes. The federal courts expanded public and media remote access to proceedings, obtained equipment and licenses necessary to support remote communication platforms and strengthened their IT infrastructure.

The more courts innovate, the more momentum will build to use technology at all levels of the justice system.

In many respects, these changes are overdue and — especially in the context of complex multidistrict or cross-border disputes — could reduce some litigation costs. Companies with large litigation portfolios should view remote technology not as a temporary response to a public health crisis, but as a lasting change in how they access the courts.

Trials With Jurors Participating From Home Are Challenging

Not every innovation was an unqualified success. Our experience trying cases with jurors participating remotely from home showed that there was a significant risk of distractions. With two-way video links, for example, jurors were seen participating in voir dire while driving, playing a video game on a second monitor, and receiving a delivery during the proceedings.

For lawyers, the most challenging part of a virtual jury trial might be the inability to connect with jurors. Since our job is to respond to jurors, who are not allowed to talk to us during trial, that means making eye contact, reading body language, and observing actions like note-taking. These critical parts of our practice are almost impossible in a virtual courtroom.

Despite these difficulties, post-pandemic, we expect some courts to remain receptive to trying cases with jurors participating remotely.

What To Watch For

Changing court protocols. With the most recent variant of the virus, some courts are imposing stricter masking requirements and other precautions. As pandemic conditions evolve in different regions of the country, we expect more changes in these protective measures. Companies with geographically dispersed litigation portfolios will need to track court requirements on an ongoing basis.

Anticipate further delays in civil trials. Time to trial in civil cases may be another casualty of the latest pandemic surge. Some courts have begun to postpone jury selection and delay trials. These developments will likely compound trial backlogs, especially if criminal trials receive priority as public health restrictions ease. Companies planning and budgeting for complex civil litigation should consider the possibility of an even longer timeline to reach a jury or bench trial. Alternative dispute resolution mechanisms like mediation or expedited arbitration may become an attractive option for some time-sensitive conflicts.

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ARTICLES

The Practical and Constitutional Issues with Virtual Jury Trials in Criminal Cases

Virtual jury trials in criminal cases are constitutionally questionable and far from ideal in terms of effective criminal trial practice.

By Phillip C. Hamilton

> Trial is theater, and the jury is the audience—watching every part of the show.
>
> *Pexels | Anna Shvets*

We are monitoring the coronavirus (COVID-19) situation as it relates to law and litigation. Find more resources and articles on our COVID-19 portal. For the duration of the crisis, all coronavirus-related articles are outside our paywall and available to all readers.

When government shutdowns forced the closures of courthouses around the nation last year, questions arose as to how criminal trials would proceed. Some jurisdictions conducted virtual bench trials on consent, while one court in Texas conducted a virtual jury trial. Since then, many jurisdictions have sporadically resumed in-person court proceedings, hearings, and jury trials.

With the COVID-19 vaccination effort well underway in 2021, there seems to be light at the end of a very dark tunnel. Of course, because there is no exact timetable as to when the pandemic will be behind us, many jurisdictions will continue to exercise caution in the face of COVID-19, which will continue to limit the availability for jury trials. Thus, [illegible]can only wonder: Will more parties in criminal actions feel pressured to try their [illegible] virtually as opposed to waiting indefinitely? And, if so, is that a good idea?

The Confrontation Clause and Virtual Testimony: An Inharmonious Marriage

American courtrooms, by their very nature, are physically constructed from the blueprint of the Sixth Amendment. The witness stand is built for the right to confrontation. The jury box is built for the right to an impartial jury. And the pews are installed for the public's right to view the trial. Without question, it is highly doubtful that the framers ever envisioned government witnesses testifying via Zoom or Microsoft Teams.

The idea of witnesses testifying by video in criminal trials is still a relatively novel concept. Only in 1990 did the Supreme Court take up the first case involving the

constitutionality of a witness testifying by video. In *Maryland v. Craig*, the Court, in a 5-4 decision by Justice O'Connor, held that the Confrontation Clause did not bar the use of one-way, closed-circuit television to present testimony by an alleged child sex abuse victim. 497 U.S. 836 (1990). Thus, post-*Craig*, a witness may testify against a criminal defendant by video where the court "(1) holds an evidentiary hearing and (2) finds: (a) that the denial of physical, face-to-face confrontation at trial is necessary to further an important public policy and (b) that the reliability of the testimony is otherwise assured." *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006).

Notwithstanding *Craig*, video testimony in criminal cases remains the rare exception to the constitutional rule. The fact that face-to-face confrontation is not absolutely required by the Sixth Amendment "does not, of course, mean that it may easily be dispensed with." *Craig*, 497 U.S. at 850. Face-to-face confrontation still forms "the core of the values furthered by the Confrontation Clause." *Id.* at 848. And from a practical perspective, "it enhances the accuracy of [fact-finding] by reducing the risk that a witness will wrongfully implicate an innocent person." *Id.* at 846. Indeed, "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back,'" which is because "there is something deep in human nature that regards face-to-face confrontation

between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Coy v. Iowa*, 487 U.S. 1012, 1017, 1019 (quoting *Pointer* v. *Texas*, 380 U. S. 400, 404 (1965)).

Anyone who has ever tried, judged, or watched a criminal jury trial can speak to the moment and feeling of tension when the prosecution's star witness walks into the courtroom. Not only are the eyes of the criminal defendant locked upon the witness, but so are the eyes of the entire jury and courtroom. The gravity of that moment is enough to keep some witnesses from ever taking the stand—especially those witnesses who have no problem with lying under oath but who in no way want to be embarrassed and exposed in a room full of people during an effective cross-examination. By physically removing the jury and/or the trial from the courtroom, virtual jury trials will inevitably take away the intangible constitutional protections and accountability measures that are built into in-person jury trials.

Virtual Juries: Selection from a Fair Cross-Section of the Community?

The Supreme Court has held that a criminal defendant has the constitutional right to draw an impartial jury from a group "composed of [his] peers or equals; that is, of his neighbors, fellows, associates, [and] persons having the same legal status in society [that] he holds." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

Unfortunately, virtual jury trials will inevitably stymie that right due to the digital divide that currently exists in the United States. "Roughly three-in-ten adults with household incomes below $30,000 a year (29%) don't own a smartphone. More than four-in-ten don't have home broadband services (44%) or a traditional computer (46%). And a majority of lower-income Americans are not tablet owners." Monica Anderson & Madhumitha Kumar, "Digital Divide Persists Even as Lower-Income Americans Make Gains in Tech Adoption," *Pew Rsch.* (May 7, 2019). Accordingly, it will be difficult, if not impossible, to guarantee a criminal defendant a virtual jury selected from a "fair cross-section of the community" when a large percentage of lower-income jurors do not have the technology required to be included in the virtual jury pool. *See* 28 U.S.C. § 1861. And even when they do have the technology, it is often of lesser quality and prone to connectivity issues that undercut the ability to truly be a part of the process.

Moreover, because Black Americans are twice as likely to live in poverty as White Americans, virtual jury trials could effectively undercut the ability of Black Americans to serve on virtual juries, implicating the Fourteenth Amendment's Equal Protection Clause in a manner reminiscent to the Jim Crow–era jury pool litigation of the early 20th century. *See generally Hill v. Texas*, 316 U.S. 400 (1942); *Smith v. Texas*, 311 U.S. 128 (1940); *Pierre v. Louisiana*, 306 U.S. 354 (1939). There is likewise a strong practical consideration to this issue: studies have proven that criminal defendants—of any race—need black jurors to hold the prosecution accountable to its burden of proof. Indeed, the presence of even one or two Blacks in the jury pool, let alone on the actual jury, often results in significantly lower conviction rates for criminal defendants.

Identifying Juror Competency and Misconduct in a Virtual Trial

Generally speaking, the validity of a jury's verdict may not be impeached. *Tanner v. United States*, 483 U.S. 107 (1987). The "no-impeachment" rule dates back to English common law and has few exceptions in American jurisprudence. Federal Rule of Evidence 606(b), which is generally followed in most states, only allows a jury's verdict to be impeached where "(A) extraneous prejudicial information was improperly

brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form." Fed. R. Evid. 606(b)(2). Additionally, the Supreme Court recently has held that where a juror makes a clear statement indicating reliance on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

Short of the courts finding an exception in the "gravest and most important cases" (*see generally United States v. Reid*, 53 U.S. 361 (1851); *McDonald v. Pless*, 238 U.S. 264 (1915)), however, a jury's verdict will stand even where the jurors were drunk and/or high on drugs throughout the trial. *Tanner*, 483 U.S. at 116–27. Thus, the onus generally falls to the parties in a criminal action to immediately put the court on notice of any potential juror misconduct.

But in the virtual trial context, how is this practical? How will the parties be able to discern whether a juror is actually paying attention to the trial as opposed to catching up on some work on another open tab? Or worse, contemporaneously researching issues arising in testimony with the same technology being used to watch the trial?

When jurors are on "mute," how will the parties know when a juror is being distracted by a screaming child or missing critical testimony because of a neighbor's noisy landscaping company? Where jurors cannot be fully observed, real-time objections to their circumstances cannot be made.

A judge cannot effectively impose the rules and decorum of the courtroom within a juror's home, place of business, or anywhere outside of the courthouse. Whether grand or bland in design, physical courtrooms connote seriousness, process, and high stakes. From the power of the judge seated high on the bench to armed court officers watching over the courtroom, jurors can never escape the formality of the process. This creates a controlled environment generally devoid of outside distractions, which better commands jurors' adherence to the rules. From a constitutional perspective, there is no better forum.

Stage Acting Versus Television Acting: A Criminal Trial Perspective

For criminal trial attorneys, the scariest prospect of virtual jury trials is the inherent ...lity to connect with the jurors. From a procedural perspective, trial is theater. The

courtroom is the stage. The attorneys are the performers. And the jury is the audience—watching every part of the show.

If an attorney appears organized and well put together, the jury will notice. If a criminal defendant or alleged victim is supported by family attending the trial every day, the jury will notice. If the judge is making subtle nonverbal cues in favor of one of the parties, the jury will notice. These off-the-record intangibles that can best be observed inside the courtroom often influence how jurors come to view the parties and the ultimate issues within the case.

And just like Broadway performers feeding off the energy of their audience, seasoned trial attorneys do the same with their juries. Especially when jurors are positively signaling to them—be it by nodding their heads during an opening statement, rolling their eyes at an adversary, or warmly smiling at a witness on the stand—that their case is going well. These cues are priceless, but not easily discernable in speaker view on Zoom. It is therefore no surprise that most trial attorneys are not keen on virtual jury trials and would prefer a return to the courtroom stage.

Looking Forward

Virtual jury trials in criminal cases are constitutionally questionable and far from ideal in terms of effective criminal trial practice. They should never be contemplated outside of extreme circumstances, and only then on a case-by-case basis where the inherent constitutional risks are outweighed by a criminal defendant's well-informed desire for a more expeditious resolution.

Thus, before jury selection commences in a virtual criminal case, an exhaustive record should be made detailing the practical and constitutional issues that come with virtually conducting a criminal jury trial. Subsequently, the court will have to make certain that a defendant understands and accepts each and every prospective issue prior to moving forward with the case. Fair and equitable justice will always demand much more, but certainly no less.

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https://www.law360.com/articles/1379757/demystifying-the-virtual-civil-jury-trial-experience

Expert Analysis

Demystifying The Virtual Civil Jury Trial Experience

By **Sozi Tulante, Kimberly Branscome and Emily Van Tuyl**

Law360 (April 29, 2021, 4:51 PM EDT) --
In the early days of the COVID-19 pandemic, civil jury trials around the country largely ground to a halt. Yet as the months wore on, judges, court administrators and parties faced mounting pressure to begin processing the growing backlog of cases, and resume jury trials in a format that was safe for everyone involved.

At roughly the one-year anniversary of many COVID-19-induced court closures, we examine how courts and parties have successfully transitioned to holding virtual civil jury trials in product liability cases, highlight some of the positive attributes of virtual proceedings and identify factors to consider for successfully trying cases with virtual components.

During the pandemic, formats of civil jury trials have varied widely, and have included fully in-person trials — with participants maintaining social distance and wearing personal protective equipment — as well as fully virtual trials and hybrid approaches.

Factors that may be considered by courts and parties in determining which format is most appropriate include applicable COVID-19 laws and guidelines; infection rates in the forum state, and in the home states of attorneys and witnesses; the ability of the courthouse to accommodate safety requirements of in-person trials, and technical requirements of virtual or hybrid trials; and the preferences of judges, jurors, parties, attorneys and witnesses.

Here, we focus on cases in the product liability context, where, as in other contexts, courts and parties have had to balance the interests of justice and public health to find workable solutions, including proceeding with virtual trials.

Virtual trials did not begin immediately at the start of the pandemic. In fact, the first fully virtual asbestos trial in the nation, in Ocampo v. Aamco Transmissions Inc. et al., did not begin until July 2020, in the Superior Court of Alameda County, California.[1] Over the defendant's objection, the court ordered a virtual trial via Zoom, and the defendant's emergency appeal seeking a stay of the trial was denied.[2]

During trial, the defendant also filed a notice of irregularities including that jurors were chronically inattentive by walking around, laying down and doing other work.[3] The defendant's misgivings were unfounded, as the jury later returned a defense verdict.[4]

In February of this year, Washington state's King County Superior Court held its own virtual

asbestos trial, in Little v. Air & Liquid Systems Inc. et al.[5] In fact, in King County, all civil jury trials are proceeding virtually via Zoom, for now.[6]

During the pandemic, the King County Superior Court has conducted more virtual trials than any other court system in the country — over 300 virtual civil trials, including jury trials.[7] According to the presiding judge, the court is considering continuing aspects of its virtual civil jury trial system even after the pandemic.[8]

Numerous other courts are planning for virtual jury trials in 2021, within and outside of the product liability context. Indeed, based on its experience as likely the first U.S. federal court conducting virtual jury trials,[9] the U.S. District Court for the Western District of Washington has developed a handbook "to guide attorneys through the use of the ZoomGov platform for conducting virtual trials."[10]

Following that court's lead, other federal courts — in Florida, Kansas, Minnesota and Rhode Island — are preparing to hold their own virtual civil jury trials in 2021.[11] In fact, the districts of Minnesota and the Middle District of Florida have already held their first civil jury trials.[12]

Some state courts, too, have held and are planning for virtual proceedings. For example, New Jersey is planning for virtual jury trials in what it calls "straightforward cases" such as those with "a single plaintiff, a single defendant, a limited number of issues in dispute, and a modest number of live witnesses."[13]

A few hybrid jury trials had been held in New Jersey in October and November 2020, before in-person jury trials were suspended again due to worsening COVID-19 trends in the state.[14] In Texas, Judge Emily Miskel of the 470th district court of Collin County oversaw the first fully virtual jury trial in the nation on May 8, 2020, a nonbinding summary jury trial in an insurance dispute.[15]

Early on in the pandemic, the U.S. Supreme Court ordered that courts may "allow or require anyone involved" in any proceeding to participate remotely, without requiring a participant's consent, and "[s]ubject only to constitutional limitations" — authority that continues even today.[16] And Texas legislators are considering passing a law that would grant courts the same latitude even after the pandemic, and would require any court overseeing a virtual jury trial to "ensure all prospective jurors have access to the technology necessary to participate in the remote proceeding."[17]

The message from these courts is clear: Virtual and hybrid proceedings are here to stay, at least for the foreseeable future, and for certain types of cases. Although, like most trial attorneys, we are eager to return to the courtroom, we also see the potential for virtual trials to be a reasonable alternative in appropriate circumstances.

First, in virtual trials compared to in-person trials, the focus is likely to be more on the facts, and less on theatrics or emotions, which may not translate as powerfully to jurors observing on a computer. As a result, jurors may feel less of an emotional connection to witnesses, and may be less likely to direct any anger at a corporate defendant.

Trial attorneys may want to consider assigning one member of the trial team solely to

observing jurors during trial, as it may be more difficult for the speaking attorney to monitor jurors' engagement, body language and facial expressions via a virtual platform than it would be in the courtroom.

Second, virtual jury selection may provide opportunities to get a fuller profile of potential jurors than the traditional in-person approach. For example, in some circumstances virtual questionnaires may be able to be sent out and returned well in advance of voir dire, giving attorneys more time to analyze jurors' responses and prepare before the voir dire process begins.

Furthermore, because jurors are participating in voir dire from the comfort of their homes, they may be more candid in their responses, and attorneys may be better able to connect with them.

Third, the virtual format may lead to greater engagement and understanding from jurors. Depending on the circumstances, jurors may have better access to and view of the evidence than they would during an in-person trial.

In some courtrooms, jurors may strain to hear witnesses testifying and see documents being displayed; but during virtual trials, jurors may have close up, direct views of that evidence through their own computer screens. And if the alternative is a masked in-person trial, one advantage of a virtual trial may be that facial expressions of attorneys, witnesses and jurors can be seen if they are not required to be masked.

Fourth, examining witnesses virtually offers opportunities to use new techniques, and apply tried-and-true techniques in a different way. In virtual trials, creatively using technology and demonstratives, and conducting crisp and focused witness examinations, may be even more important to keeping the jury's attention and effectively presenting evidence.

Trial attorneys may also want to spend time teaching their own witnesses to minimize distracting tics, and maximize the effective use of facial expressions and vocal inflection, to better communicate with the jury. Even the right lighting, background and camera angles can make a difference in how a witness's testimony and credibility are perceived.

Fifth, virtual proceedings may allow for participation from a more diverse array of jurors and attorneys.[18] The rate of return of jury summonses in some jurisdictions suggests that more people may be willing to serve on virtual juries than in-person juries,[19] potentially resulting in a venire more representative of the broader population.

Although a digital divide exists between those potential jurors who have access to reliable internet and the necessary technology to serve and those who do not, virtual participation may still result in a more representative jury if the technology and technological training necessary for jury service can be made available to all jurors. Indeed, some courts likely will require that technology and training to be provided to jurors.[20]

Virtual trials may also allow for more adaptable and diverse trial teams. For example, in some circumstances attorneys could participate from multiple remote locations, and some attorneys may not need to be present for the entire trial.

Sixth, virtual trials may provide judges with a much-needed mechanism for managing their dockets for as long as it is not feasible to hold in-person trials at a pre-pandemic pace[21] — and potentially even thereafter, given that some court researchers are expecting a post-pandemic surge in new civil case filings.[22]

Some judges have recognized other advantages with virtual proceedings, such as the fact that a judge can see testifying witnesses face to face, rather than from the side, as they sit at the witness stand.[23] Others have expressed a preference for in-person proceedings.[24]

It remains to be seen whether virtual jury trials will continue in product liability cases in the second half of 2021, or after the pandemic ends. But if they do, virtual trials present opportunities for judges to move through case backlogs created or exacerbated by the pandemic; for jurors to participate who may be unable or disinclined to do so in person, and for those who do participate, to better engage with the evidence; and for trial attorneys to adapt their existing skill sets to become even more effective and well-rounded advocates for their clients.

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Dechert partner Sara B. Roitman and associate Monica Gorny contributed to this article.

https://thecrimereport.org/2021/06/28/are-virtual-courtrooms-here-to-stay/

Are Virtual Courtrooms Here to Stay?

By **Eva Herscowitz** | June 28, 2021

Multimedia courtroom in Suffolk County, NY. Photo by Jake Wark via Flickr

When the pandemic forced attorneys to present their cases remotely, courtroom members had little time to adapt in-person practices to online platforms. Some changes were glaring, like the court's inability to 'all rise' remotely.

Others were smaller but still consequential: sitting behind separate screens, clients and attorneys could no longer whisper to one another — a loss that Howard 'Rex' Dimmig, the public defender for the 10th Judicial Circuit of Florida, said conveys the disadvantages of virtual court proceedings.

“When they’re talking on a virtual platform where dozens of people are listening, or if they have to say, ‘Wait a minute, I need to take a break to talk confidentially with my attorney,’ they’re not inclined to do that,” said Dimmig, who serves as the president of the Florida Public Defender Association.

“The quality of communication is impacted.”

Fifteen months have passed since Florida Supreme Court Chief Justice Charles T. Canady issued an administrative order temporarily suspending grand jury proceedings, jury selection proceedings, and criminal and civil jury trials, later instructing judges to facilitate court proceedings “with the use of technology.”

Across the country, judges and attorneys, plaintiffs and defendants suddenly found themselves scrambling to adapt to platforms designed for corporate meetings and college classes.

As in-person proceedings begin to resume, lawyers are reflecting on the long-term viability of virtual proceedings. While some remain skeptical that technology can reproduce the right to fairness legal cases require, others cite the benefits: convenient appearances, cheaper costs and, in some cases, increased accessibility.

Pandemic, Pile-up and Virtual Proceedings

Victor Plantinga, a criminal defense attorney who primarily litigates in the federal courts in Wisconsin and Illinois, said remote proceedings have saved money and time. Prior to the pandemic, presenting a motion for civil cases in the Northern District of Illinois, for instance, required Plantinga commute from Miluakee to northern Illinois for a “three minute”

appearance — an endeavor virtual proceedings have eliminated, he said.

“This is on the taxpayer dime. It was a great expense to have someone who can bill for travel,” Plantinga said.

“So, in some ways, I think COVID has made us rethink how we’re going to do that going forward. I can’t speak for the judges, but it certainly makes sense to keep some of those remote appearances.”

Remote appearances have happened against the backdrop of a massive case backlog. Most courts postponed jury trials, leading to a case buildup with years-long consequences.

In Texas, a pandemic-induced backlog could last until 2026, with David Slayton, the Administrative Director of the Texas Office of Court Administration, estimating that the number of jury trials plunged in the state from 168 each week to four.

Texas courts have conducted two million remote hearings since March 2020, he said, lessening the backlog of civil and family cases. With attendance up among parties and prospective jurors, judges are seeing fewer default judgements and more racially diverse juries, he added.

“Remote technology and remote appearances remove barriers to court participation that we didn’t really even know existed prior to the pandemic,” Slayton said.

But as delayed criminal cases accumulate, the backlog carries the most consequences for criminal defendants, many of whom are “sitting in local jails where there’s no programming

available, basically under the worst conditions" for up to two years before their trials begin, Plantinga said.

As jury trials resume, he expects courts will prioritize criminal trials ("which they should," he added), tipping the scales and setting civil cases behind.

"There's so many of those trials that are stacked like cordwood," he said.

The (In)accessibility of Online Court

Like most spheres that have shifted online, the judicial system hasn't been spared from hiccups, video-call accidents and viral moments. After he was unable to remove a kitten filter from his profile during a virtual hearing, a Texas lawyer was forced to clarify to a judge, "I'm not a cat" in a clip that animated Twitter.

In one of the limited juror selection processes Texas courts conducted, prospective jurors in Harris County were caught applying makeup, playing video games, driving, sleeping and vaping on Zoom.

Dimmig said he's seen people napping during virtual proceedings, adding that many clients have appeared "in, to put it politely, very informal ways." Informality isn't the only issue: technological inaccessibility has hampered proceedings for many of Dimmig's clients, particularly those who are incarcerated or living in rural areas.

When clients can't access two devices — one to connect to court proceedings and another to communicate with attorneys — attorney-client confidentiality suffers, he said.

Slayton cited the flipside: courts have aimed for accessibility by inviting people to courtroom kiosks designed for remote appearances and distributing iPads equipped with cell service — efforts he hopes will stick. Technology, he said, has enabled people to appear in court without scrambling for childcare, transportation or time off work.

“If you’re a long haul trucker and you need to appear in court today, if your normal route would have you in Kentucky today — obviously that’s not possible in a normal in-person appearance,” Slayton said. “But with remote appearances, you pull over on the side of the road and you log in and you’re in court.”

Although Plantinga said some court appearances should remain online, he said he prefers in-person proceedings for certain circumstances, like sentencing. In the pandemic’s early months, defendants could choose to attend sentencing hearings remotely or delay the date indefinitely. Most defendants chose virtual hearings.

But Plantinga said he doubts defendants had a genuine choice. “Is it really a free choice when you know the alternative is a big unknown?” he asked.

He said he suspects in-person sentencings are more advantageous for defendants.

“I like in person sentencings because I think it humanizes the person a lot more than seeing some disembodied head on the screen,” he added.

Are Face-to-Face Hearings History?

As courtrooms and law firms reopen, it's likely that courts will embrace a mix of in-person and online proceedings, though most attorneys doubt that courts will ever adopt virtual jury trials for criminal cases. In a February article for the American Bar Association, New York attorney Phillip C. Hamilton wrote that virtual jury trials introduce a host of constitutional issues.

"American courtrooms, by their very nature, are physically constructed from the blueprint of the Sixth Amendment," Hamilton wrote. "Without question, it is highly doubtful that the framers ever envisioned government witnesses testifying via Zoom or Microsoft Teams."

With respect to liberty interests, parties deserve an effective defense, said Adam Plotkin, the Legislative Liaison for the Wisconsin State Public Defender. "But to provide an effective defense you need to see those people in person."

Plotkin added that if a court issues a sequestration order barring a witness from viewing the proceedings, it's nearly impossible to ensure that witness doesn't access the broadcast. It's also difficult to discern if a witness, testifying remotely, is "being coached or prompted or even threatened," he said.

Slayton said officials should consider adopting virtual jury selection, citing its high attendance rates during the pandemic. Dimmig, though, said the inevitable introduction of technology into the courtroom should be handled with caution.

"A scheduling matter can probably be handled remotely, but anything that addresses fundamental rights — that, in my opinion, has got to stay in person, so that there can be effective justice administered," he said.

“I do think we’re going to see an expansion in the use of technology, but expanding technology cannot be the goal. Improving access to the courts while ensuring fundamental due process has got to be the goal.”

Eva Herscowitz is a TCR justice reporting intern. She welcomes comments from readers.

What's the Verdict?

How are virtual trials working, and are they here to stay?

July 06, 2021

Tweet

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"You're on mute, your honor." If Black's Law Dictionary held a "Phrase of the Year" contest for the last 12 months, that would be our nomination. Like most attorneys with active trial practices, when COVID-19 hit our region, we had a number of cases postured for trial. Unlike most attorneys, fortune and circumstance led us to several "virtual verdicts"—cases tried from voir dire to verdict completely virtually.

After trying one of the first virtual jury trials in the nation, we presented and spoke with local and national bar groups, claims professionals, and groups of judges about our experiences. In doing so, we have a unique perspective on the virtual trial: What it looks like, its pros and cons, and whether it will survive the end of the pandemic.

The Virtual Trial—How Did it Happen?

One of the first virtual jury trials in the country was conducted by Judge Thomas Zilly in the Federal District Court for the Western District of Washington in September 2020. The case had unique factors favoring a virtual trial, including an elderly plaintiff who might not have been able to survive the end of the pandemic for a trial. The case also had many out-of-state experts and witnesses who probably would have testified virtually anyway.

Since then, the Western District of Washington has been a leader in conducting virtual Zoom trials both by bench and by jury. As of July 2021, the Western District has held 26 fully virtual trials, with more than half of them tried with a jury. Some of the reasons cited in favor of virtual trials include the cost and time savings of allowing jurors to sit at home rather than travel to a city (especially for distant counties that are part of the federal district), as well as convenience for court and counsel. All of it was necessitated by COVID-19, of course, but the arguments are advanced for proceeding in this fashion in the future.

State courts in Washington also joined in the experiment. King County, which is home to Seattle and Bellevue, was a leader in setting protocols for virtual jury trials. In December 2020, we participated in one of the first fully virtual jury trials. Every aspect of trial was conducted via videoconference, including jury selection, presentation of evidence and exhibits, closing and deliberations, and entry of verdict. Jurors attended via videoconference from their respective homes. Since then, we have conducted four fully virtual trials under similar circumstances.

Virtual trials have been the subject of much debate, and considerable motions practice. This article is too short to go into the details on the topic of legal challenges to virtual trials, but Federal District Judge Marsha Pechman, in *Goldstine v. FedEx Freight, Inc.*, 2021 U.S. Dist. LEXIS 46478 (W.D. Wa. Mar. 11, 2021), has issued a ruling clarifying the constitutional issues surrounding (and allowing) fully virtual trials. State trial court judges issued similar rulings in favor of holding a virtual trial.

What's Different?

When we speak about virtual trials, the most common question we get is, "Who does it favor—plaintiff or defense?" It is also our favorite question to ask audiences because everyone disagrees, and it always creates a discussion about trial tactics and strategy. If you are looking for our answer, you might be disappointed, since our answer is usually—drumroll please—"it depends."

In our experience, voir dire is the part of the trial affected most by the virtual format. Of course, we are biased; we believe voir dire is the most important part of trial. In King County, potential jurors were asked to complete a lengthy questionnaire given to counsel in an Excel format the night before voir dire. Potential jurors were broken into groups of 15 to 25. Each panel was then examined separately. This is a huge change from normal practice in which all potential jurors would be examined at once in the courtroom.

In a virtual format, the attorneys essentially repeat their voir dire for each panel—sometimes up to five or six panels—until there are enough qualified jurors from which to select the jury. Jury selection did not take more time than the "normal" method, but it is a decidedly different process. Smart attorneys reacted to each panel by changing their presentation—anticipating the other's presentation or abandoning a dull line of questions. Jurors seemed less willing to react to each other's responses, but were no less willing to be candid and open in responses.

Another major difference is presentation of exhibits. All attorneys are becoming proficient at introducing exhibits electronically and virtually in depositions, but it is a very different thing when it comes to a virtual trial. Gone are the days of excellent (and vastly enlarged) demonstrative exhibits, such as blow-ups of testimony and medical records. Instead, we now have pre-marked electronic copies that can be referenced and shown on the screen, and on command (after admission by the judge, of course). This strips much of the theater away from exhibits. Hitting "screen share" is not as dramatic as

waiving the report in front of the witness or slamming a heavy stack of records on the table. The upside is that virtual jurors can review exhibits whenever they want, and every juror has electronic access to the exhibits (at least in federal court).

Addressing the Negatives

As for the negatives, there are several—and this list is not exhaustive. Being inclusive to all demographics is a major concern. Some of our objections to virtual trials are that they may disadvantage, and even preclude, those who are less likely to have access to the internet and a web camera.

Yet, this topic is being addressed by the courts. We have heard proposals for loaning iPads to jurors or setting up remote juror rooms at the courthouse or a library. All of this might be a solution in the future. Time will tell if courts can get it right. From our conversations with both federal and state judges, we know that this is one issue that is on the forefront of many jurists' minds.

Another negative is the loss of the grandeur, gravitas, and "significance" of attending a trial in an actual courthouse, with the solemn and reverent responsibility that goes with that process. Common sense suggests jurors and witnesses might act differently in the marbled halls of a courthouse than when sitting on their couch holding a laptop.

On the other hand, some judges believe that virtual proceedings will be able to deliver justice to those who might otherwise be preempted from a trial due to location, age, finances, or other circumstances. In our minds, there is no question that a virtual proceeding could level the playing field by decreasing the cost of bringing witnesses and parties to a courtroom—especially if the courtroom is far away.

Positive Perceptions

On the positive side, jurors seem to love virtual trials. Many jurors commented that the virtual format helped them manage the difficulty of taking time off for jury duty. We know many jurors "alt-tab'ed" from the virtual trial to work emails as soon as the judge sent them to their virtual jurors' room. Others used breaks to check in on children who themselves were attending a virtual classroom.

Initially, we were concerned that jurors would drift off or watch Netflix on a second screen (the former is not unheard of, even in live trials). We were pleasantly surprised that this did not occur in our virtual trials. The credit belongs to the judges, who required jurors to have their cameras on and took the added responsibility of monitoring jurors for inattention or napping. The best virtual judges also made sure that no one else was in the room with a juror during a presentation. This helped narrow the gap in formality between a normal and virtual trial.

There are too many other variables to cover all the pros and cons of fully virtual jury trials, but anybody who has tried or watched a trial can easily make a list. Can you tell if

someone is telling the truth or lying on screen? Can you do so better or worse than if they are in person, but farther away? Remember, anybody speaking during a virtual trial will “fill up” the screen for the jurors, as they are supposed to be watching in speaker mode, not gallery mode.

From a true trial lawyer’s perspective, virtual trials do not encompass the full theatrical opportunity that an in-person trial affords. Hand gestures are all but gone, and there is no more pacing the courtroom or using the space of a courtroom in a strategic manner for cross-examination. Is this necessarily a bad thing? Trials have evolved constantly over the years, but one thing has stayed the same: True trial attorneys have found ways to use the procedures and circumstances to tell their clients’ stories. A move to virtual trials doesn’t change that.

What Happens Next?

You would not be alone if you thought that ending COVID-19 protocols would see the end of the virtual trial. We believe otherwise. As previously discussed, there are real benefits to jurors. If using a virtual trial increases juror participation, then many jurisdictions will consider it.

Additionally, jurisdictions that have conducted virtual trials have spent resources in the form of time and money to develop the capability. Those jurisdictions may want to reap the benefits of those investments. Clients and claims handlers may enjoy the benefit of attending trials without having to sit in a courtroom (and rely on spotty courthouse Wi-Fi to catch up on emails).

The biggest factor behind virtual trials may have nothing to do with litigation. We now live in a virtual world. Increasingly, everyone is more accustomed to remote work, virtual meetings, and videoconferencing. In the litigation world, virtual depositions, virtual mediations, and virtual hearings have become commonplace. Law can be slow to react to social change; to some extent that is with good reason. But law cannot escape social change forever.

That raises the question: Under what circumstances should courts allow or require virtual trials once the pandemic has ended? Our view has evolved.

First, courts should allow virtual trials where the court has the capacity and where the parties stipulate to the procedure. We envision a spectrum of virtual trials—on one end, only voir dire is held by videoconference; on the other end, the entire trial is held virtually.

Second, we see a role for virtual trials in helping rid overburdened courts by expediting lower-stakes lawsuits. Cases with damages under a certain threshold could be required to be held virtually. If any party disagrees with the result and thinks that they would do better in person, then they could request a second live trial. To encourage acceptance of a virtual verdict, parties who request a live trial but fail to meaningfully improve their

positions would face exposure to attorneys' fees. This proposal would help move cases to trial but also preserve litigants' perceived right to have their day in court (in person).

One thing is for certain: Some form of virtual trial practice is here to stay. Courts and jurors have embraced the concept, and despite questions regarding fairness, equity, and full demographic participation in virtual trial process, the efficiency factor is undeniable and the need for virtual hearings and trials to clear the backlog of cases seems inevitable. There is also the prospect of some hybrid proceedings—perhaps virtual jury selection but in-person trial, or some combination of both. With time, good trial attorneys will adapt (and judges will learn to remember to unmute themselves).

https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations

How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations

What the changes mean for the millions of people who interact with the civil legal system each year—and what remains to be done

REPORT December 1, 2021

Overview

The outbreak of COVID-19 in early 2020 forced public services to shift to online operations in a matter of weeks. For the nation's courts, that meant reimagining how to administer justice. Media coverage has focused mainly on the effects of the digital transformation in criminal courts, but a rapid deployment of new technology also took place in the civil legal system.

This adoption of digital tools in the civil courts has significant real-world implications. Unlike their criminal counterparts, civil courts do not guarantee a right to counsel, meaning they do not provide attorneys for those who cannot afford them. This leaves roughly 30 million Americans each year to navigate potentially life-altering legal problems, such as eviction, debt collection, and child support cases, on their own. For these litigants who are responsible for a variety of complex tasks—including finding the appropriate court to hear their case, filing motions, arguing before a judge, and interpreting laws—technology holds the promise of a more accessible system with better outcomes.

Even before the pandemic, national judicial groups such as the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) had called on courts to use technology to improve the experience of litigants, especially people who do not have attorneys. And just months after the pandemic began, states throughout the country moved to adopt a range of technological tools to keep their court systems available to the public, quickly shifting from requiring people to submit paper documents and appear in person before judges to widespread use of electronic filing (e-filing) systems, virtual hearing platforms, and other tools.

To begin to assess whether, and to what extent, the rapid improvements in court technology undertaken in 2020 and 2021 made the civil legal system easier to navigate, The Pew Charitable Trusts examined pandemic-related emergency orders issued by the

supreme courts of all 50 states and Washington, D.C. The researchers supplemented that review with an analysis of court approaches to virtual hearings, e-filing, and digital notarization, with a focus on how these tools affected litigants in three of the most common types of civil cases: debt claims, evictions, and child support. The key findings of this research are:

- **Civil courts' adoption of technology was unprecedented in pace and scale.** Despite having almost no history of using remote civil court proceedings, beginning in March 2020 every state and D.C. initiated online hearings at record rates to resolve many types of cases.[1] For example, the Texas court system, which had never held a civil hearing via video before the pandemic, conducted 1.1 million remote proceedings across its civil and criminal divisions between March 2020 and February 2021. Similarly, Michigan courts held more than 35,000 video hearings totaling nearly 200,000 hours between April 1 and June 1, 2020, compared with no such hearings during the same two months in 2019.

  Courts moved other routine functions online as well. Before the pandemic, 37 states and D.C. allowed people without lawyers to electronically file court documents in at least some civil cases. But since March 2020, 10 more states have created similar processes, making e-filing available to more litigants in more jurisdictions and types of cases. In addition, after 11 states and D.C. made pandemic-driven changes to their policies on electronic notarization (e-notarization), 42 states and D.C. either allowed it or had waived notarization requirements altogether as of fall 2020.

- **Courts leveraged technology not only to stay open, but also to improve participation rates and help users resolve disputes more efficiently.** Arizona civil courts, for example, saw an 8% drop year-over-year in June 2020 in the rate of default, or automatic, judgment—which results when defendants fail to appear in court—indicating an increase in participation.[2] Although national and other state data is limited, court officials across the country, including judges, administrators, and attorneys, report increases in civil court appearance rates.[3]

- **The accelerated adoption of technology disproportionately benefited people and businesses with legal representation—and in some instances, made the civil legal system more difficult to navigate for those without.** Although all states and D.C. took steps to allow court business to continue during pandemic lockdowns, those options were not always available in all localities, for all types of cases, or for people without attorneys.[4] Litigants with lawyers, on the other hand, found that technological improvements made it easier for them to file cases in bulk: For example, after courts briefly closed, national debt collectors who file suits in states across the U.S. quickly ramped up their filings, using online tools to initiate thousands of lawsuits each month.

> By contrast, litigants without legal representation, especially those with other accessibility needs, faced significant disadvantages, even when systems were technically open to them. For instance, users without high-speed internet service or computers faced significant hurdles when trying to access courts using the newly available tools. And although technology holds promise to improve the legal system for people with disabilities and limited English proficiency, courts—like various other government services—have struggled to ensure that their technology is accessible to all users.[5] Of nearly 10,000 state and local pandemic-related orders reviewed for this study, none specifically addressed technology accommodations for people with disabilities and limited English proficiency.

Court officials have made clear that improvements in technology must benefit all parties. CCJ and COSCA approved a resolution in July 2020 recommending that their members "ensure principles of due process, procedural fairness, transparency, and equal access are satisfied when adopting new technologies."[6]

Based on research and in consultation with CCJ, COSCA, and other experts, Pew has identified three key steps courts could take to realize the full potential of improvements in technology-driven tools:

1. Combine technological tools with process improvements to better facilitate resolution of legal problems.
2. Before adopting new tools, test them with and incorporate feedback from intended users.
3. Collect and analyze data to help guide decisions on the use and performance of the tools.

The monumental efforts made by state courts in 2020 and 2021 represent an important step toward modernization. This report examines courts' transformation during the pandemic and assesses the extent to which it has made the civil legal system more open, with operations and procedures that are clear and understandable; equitable, so that all users can assert their rights and resolve disputes even without legal representation; and efficient, to ensure that people's interactions with courts ensure due process and feel easy and timely. And finally, this report explores additional steps court systems could take to build upon their progress.

Methods

This study employed a two-pronged approach to data collection and analysis of state civil court responses to the coronavirus pandemic. To understand how rapid adoption of online processes affected the ways litigants could interact with the civil legal system, Pew researchers examined pandemic-related emergency orders issued by the supreme courts of all 50 states and D.C. between March 1 and Aug. 1, 2020. That five-month period featured the greatest amount of decision making related to court operations,

technology adoption, and the suspension and resumption of various types of cases, of any span since the onset of the pandemic.

The analysis focused on technologies adopted to address court processes that occur across case types, including e-filing, virtual hearings, and e-notarization, as well as the management of specific types of cases—eviction, debt collection, and child support modifications—that fill civil dockets and acutely affect economic outcomes for individuals and families. Which technological tools were examined reflects the importance of two functions— court appearances and document submission—to litigants' efforts to advance their cases.

Further, the research included a review of about 70 academic and "gray literature" sources (i.e., studies that have not been peer reviewed). About half of those related to how technology adoption affected the experiences of litigants in the three types of cases, including advantages and barriers to online court processes. The other half helped to place pandemic-related adoption of virtual hearings and e-filing within the broader historical context of courts' use of technology.

Pew researchers also examined data from the U.S. Census Bureau and the Federal Communications Commission (FCC) on broadband internet and related technologies necessary for accessing online court services as well as from a Wesleyan University database of state and local emergency court orders to identify how often those orders referenced accessibility for people with disabilities and limited English proficiency. Please see the separate methodological appendix for more details.

Courts adopted technology at unprecedented speed and scale

In a typical court case, the first step in resolving a legal problem has been filing paperwork with the court clerk to initiate a lawsuit. The opposing sides then appear in court to learn the status of the case, report on whether they have been able to reach a settlement, and determine the steps needed before trial. The process also typically involves submission of evidence, including materials that need to be signed and witnessed by a third party, as well as status reports on negotiations, examination of evidence, and other tasks. And if the dispute is not resolved before the trial date, the parties then appear before a judge.

Even long before the pandemic, court officials recognized that technology would need to become a permanent feature of the legal system. In 2006, CCJ and COSCA called for courts to use technology to improve affordability, efficiency, and access.[7] Other judicial bodies, as well as individual judges, have made similar pronouncements and recommendations over the past 20 years.[8]

However, that guidance had not delivered the sort of sweeping change that could benefit a variety of users. During the first two decades of the 21st century, some courts had been slowly moving their processes online. Their efforts focused mainly on two sets of functions: the completion of discrete tasks, including filing and notarizing documents; and the hearing of disputes by a judge. (See Figure 1.)

Figure 1

Digital Tools Can Help Courts Streamline Processes, Litigants Prepare for and Resolve Cases

Steps of a civil case and the technologies that support them

	Filing of lawsuit	Defendant response	Hearings and discovery	Trial	Resolution
Discrete tasks					
E-filing	✓	✓	✓		✓
E-signatures	✓	✓	✓	✓	✓
E-notarization			✓	✓	✓
E-payment	✓	✓			✓
E-discovery			✓		
E-records			✓	✓	✓
Virtual proceedings					
Online dispute resolution			✓		✓
Virtual hearings			✓		✓

Remote oaths	✓	✓
Virtual testimony	✓	✓
Virtual trials		✓

Navigating Civil Courts Without an Attorney

Even before the pandemic, the many steps and complex documentation required to proceed in a case made the civil legal system difficult to navigate for people without lawyers. The National Center for State Courts (NCSC) estimates that 3 in 4 civil cases involve at least one party without an attorney.[9] People without counsel are perhaps the largest and most diverse group affected by court processes, and, whether plaintiffs or defendants, they face myriad barriers.

People seeking to initiate cases in civil courts are met with a byzantine process that presumes a basic level of legal knowledge. Understanding complex language and knowing the correct forms to file and how to submit them are prerequisites for civil plaintiffs. And the civil court system is at least equally difficult for individuals who are being sued. Defendants may not receive, or may be confused by, notice of a lawsuit against them, which can result in a failure to appear in court and a default judgment in favor of the plaintiff.[10] When courthouses were still open, litigants without lawyers often endured long lines, struggled to complete complicated forms without legal help, or could not get the necessary time off of work, find child care, or arrange transportation to even make it to a courthouse.[11]

Although courts clearly recognize the need to be useful to all litigants, they were designed by and for lawyers and have historically had difficulty meeting the needs of people without counsel—and even more so certain subpopulations within that group. Unrepresented people who have disabilities or limited English proficiency encounter additional barriers to access that civil courts overall have not addressed. Although court officials have long acknowledged the issues faced by people without lawyers and the potential of technology to remove some of those barriers, changes had been halting before the pandemic.

Further, the extent to which court systems were already online before the pandemic struck—and the types of technologies they were using—varied widely from one state to the next and between cities and counties within the same state.

However, as COVID-19 swept across the country, courthouses shut their doors, and state court systems moved swiftly to digitize their processes. Beginning in March 2020, all 50 states and D.C. adopted statewide or local rules to govern digital operations, shifting civil court business online in two areas: moving from in-person to virtual hearings and digitizing practical tasks—such as preparing and tendering court documents—that litigants must complete before a hearing. In particular, e-filing tools allow litigants to submit documents online, and e-notarization systems facilitate electronic verification of documents.

For evictions, one of the most common types of civil case, no jurisdiction in the country had consistently used virtual meeting technology for these proceedings before the pandemic, but by November 2020, 82% of all state courts were permitting or encouraging remote hearings, with 15% mandating them.[12] (See "Evictions Proceeded During the Pandemic.")

And similar shifts took place across civil court dockets, as states quickly moved to use virtual meeting technology. For instance, neither Michigan nor Texas had conducted a single video hearing for a civil court case before the pandemic, but between April 1 and June 1, 2020, they conducted more than 35,000 and 122,000 video hearings, respectively.[13]

Further, before the pandemic, many states had some procedures for the electronic submission and verification of documents, but the COVID-19 lockdowns forced the adoption of additional tools and systems to allow business to continue. And the changes reflect court officials' ability to put user needs before their own preferences and traditions, namely, complex paper-based and in-person functions.

As of 2019, 37 states and D.C. allowed litigants without lawyers to use e-filing to upload complaints, responses, and other documents directly to court systems, and 34 states had authorized e-notarization for official documents, such as written testimony and statements. (See Figure 2.)

Figure 2

Before COVID-19, Courts Were Slow to Embrace Online Document Submissions

Stacked bar graph, with the y axis from 0 to 51, the x axis from 1996 to 2019. Legend at the bottom: in blue, "States that previously adopted e-filing," and in orange, "New states." 1996 has one orange block, and by 2019, the bar is stacked up to No. 49 in blue and two additional states in orange.

Electronic filing adoption by number of states, 1996-2019

YearStates that previously adopted e-filingStates that adopted e-filing that year1996199719981999200020012002200320042005200620072008200920102011201220132014201520162017201820190102030405060

Source: Pew analysis of state court e-filing websites and related administrative orders issued from 1996 through 2019 for all 50 states and D.C.

As a result of the pandemic, 10 states created new paths for people without lawyers to file papers electronically using dedicated software or other mechanisms, such as email, because either they previously had no e-filing system or their existing tools were accessible only by attorneys. And beginning in March 2020, seven states began allowing electronically notarized documents for the first time.[14] (See Figure 3.) For instance, Alabama courts had long allowed electronic signatures but did not accept electronically, remote, or virtually notarized documents before April 2020; in New Jersey, a 2020 law allowed for temporary use of e-notarization.[15]

Figure 3

Beginning in March 2020, Courts Deployed Tools to Help Some People Without Lawyers Perform Essential Tasks Online

Data, chart, bar chart, court system

States where at least one jurisdiction allowed unrepresented litigants to use electronic filing and notarization

Number of StatesBefore March 2020From March 2020 to August 2020E-filing for unrepresented litigantsE-notarization and alternatives01020304050

Source: Pew analyses of state supreme court COVID-19 pandemic emergency orders issued March 1-Aug. 1, 2020 and of state court e-filing adoption between 1996 and 2019

Additionally, seven states and D.C. responded to the paperwork challenge by identifying alternatives to notarization.[16] Ohio, for example, waived notarization requirements during the public health emergency, and South Carolina now allows court users to submit affidavits, which previously had to be notarized, with simple written certification from the filer that the affidavits' statements are true.[17] Such solutions reflect the courts' commitment to examining operations with users' experiences in mind and devising practical solutions to improve processes, especially for people without lawyers, rather than engaging in a blanket digitizing of all court tasks.

Court officials demonstrated a commitment to a more open, equitable, and efficient civil legal system

These changes are impressive not only because they show the ingenuity of courts in the face of an emergency and allowed court operations to continue during the pandemic, but also because they upended long-standing court norms to better serve court users. And as courts deployed online tools, court officials set out goals for ensuring that those technologies were implemented in ways that addressed inequities in civil legal proceedings.

In July 2020, CCJ and COSCA adopted a resolution declaring that "state courts must ensure that all parties to a dispute—regardless of race, ethnicity, gender, English proficiency, disability, socioeconomic status, or whether they have professional legal representation—have the opportunity to meaningfully participate in court processes and be heard by a neutral third party who will render a speedy and fair decision."[18]

CCJ and COSCA also jointly released the following six guiding principles to help courts build on the technological advances made during the coronavirus pandemic:[19]

1. Ensure principles of due process, procedural fairness, transparency, and equal access are satisfied when adopting new technologies.
2. Focus on the user experience.
3. Prioritize court-user driven technology.
4. Embrace flexibility and willingness to adapt.
5. Adopt remote-first (or at least remote-friendly) planning, where practicable, to move court processes forward.
6. Take an open, data-driven, and transparent approach to implementing and maintaining court processes and supporting technologies.

States are also working to create technology guidance. In September 2020, the Texas Judicial Council adopted a statewide framework for implementing online dispute resolution to which all county and local courts must adhere.[20] The document gives straightforward guidance on how cases that cannot be resolved online should proceed to court, including procedural requirements to ensure that all parties have an opportunity to be heard and to present their cases before a judge.

In April 2020, the Michigan Virtual Courtroom Task Force released the Michigan Trial Courts Virtual Courtroom Standards and Guidelines to ensure that virtual courtrooms operate efficiently and with transparency,[21] and published a comprehensive toolkit to help courts in the state comply with the new guidance. The guidelines are based on an assessment of best practices from courts across the country and the state and cover every step in the virtual hearing process, from notification and attorney-client communications to technical standards and press access.

And in June 2020, New York created the Commission to Reimagine the Future of New York's Courts, a group of judges, lawyers, academics, and technology experts that is studying how courts operated during the pandemic. In April 2021, the group issued technology recommendations to "improve the efficiency and quality of justice services during the ongoing health crisis and beyond."[22]

Technology increased participation in civil courts

Early data indicates that court technology is beginning to deliver on its potential. During 2020, judges and other state court officials reported increases in case participation rates, which they have attributed to the move to remote proceedings.[23] Although recent data on participation in the civil system is limited, experts have noted an overall uptick across court settings. Before the pandemic, civil courts were plagued by a critical challenge to their integrity: low participation, particularly among defendants. From 2010 to 2019, more than 70% of respondents in debt collection suits across multiple jurisdictions failed to appear in court or respond to summonses, resulting in a default judgment for the plaintiff.[24] According to Michigan Chief Justice Bridget Mary McCormack, that rate of participation has "literally flipped. The number of people who now show up is as high as the number of people who didn't show up in physical courtrooms."[25]

Case participation is typically measured in two ways: by the number of people filing or initiating lawsuits and by the count of defendants in cases filed against them. Data reviewed by Pew researchers suggests that by the second metric, online proceedings may have driven an increase in participation.[26] In June 2020, for example, Arizona civil courts saw an 8% decline in the rate of default judgment resulting from litigants' failure to appear, compared with June 2019, indicating an increase in participation.[27] And the state found similar results at the local level. In Arizona's largest county, Maricopa, the failure-to-appear rate for eviction cases decreased from nearly 40% in 2019 to approximately 13% in February 2021.[28]

That finding is consistent with data from other court settings, which shows that failure-to-appear rates dropped dramatically in several states at the start of the pandemic. For instance in criminal courts, New Jersey reported that the no-show rate fell from 20% in the first week of March 2020 to 0.3% the week of March 16, when the state began using virtual hearings, and Michigan reported that its rate dropped from 10.7% in April 2019 to 0.5% in April 2020.[29] Similarly, court observers in Texas report that with the switch to video hearings, parent participation in child welfare cases increased in May and June 2020 compared with in-person hearings before the pandemic.[30] These state court reports of improved participation rates are consistent with national survey data in which judges cited increased participation as the leading improvement to come from the move to virtual proceedings.[31]

The boost in court appearances that followed the shift to virtual hearings is consistent with pre-pandemic assertions that reducing the day-to-day costs of coming to court—such as transportation, child care, lost wages, and travel time—would increase people's

ability to meaningfully engage in court cases.[32] In addition, technology can be used to help people show up to court if tools are made available in multiple languages and are designed to serve people with a range of abilities. And although recent indications are promising, courts need more data to analyze and confirm the trend toward greater participation.

Further, the most active court users—attorneys—have reported a range of benefits associated with the move to online processes. According to one survey from Texas, most judges, prosecutors, and defense attorneys said that remote proceedings saved time and improved efficiency.[33] And in interviews, attorneys in Florida, Missouri, Montana, and Texas reported that not having to travel to and wait at court enabled them to serve more clients than before the pandemic.[34]

Further, examples from across the country indicate that technology, when implemented thoughtfully, can effectively help people navigate the civil court system, even when they are not represented by an attorney. For instance, Suffolk Law School in Massachusetts, in collaboration with courts in three states, developed Court Forms Online, a website that improves on typical e-filing tools by offering a more user-friendly interface that guides litigants through various court processes. The site walks users through the steps for obtaining a domestic violence restraining order, applying for eviction protection under the Centers for Disease Control and Prevention (CDC) moratorium, and even handling certain appellate matters.[35] In one example, a woman was able to use forms provided through the website to electronically file a motion to the state's Appeals Court and obtain a stay of her improper eviction just as the constable was beginning to move her out of her home.[36]

In recognition of technology's potential to make it easier for people to participate in court processes, more court officials plan to embrace virtual services. In 2021, CCJ and COSCA passed a resolution promoting the continued use of remote hearings; and in a June 2021 survey of 240 magistrates, trial judges, and appellate justices from across the country, a majority said they expect remote proceedings to become a permanent fixture of state courts.[37]

Technology often made the civil legal system harder to navigate for people without lawyers

Although people using the civil legal system, regardless of whether they had legal representation, benefited from courts' rapid adoption of technology, the advantages were disproportionately enjoyed by parties with lawyers.

This gap between the promise of technology to make courts more equitable for individuals without attorneys and the reality of its implementation is consistent with previous analyses of pioneering court systems that adopted new technologies around the turn of the century. In 2010, the NCSC examined seven states—Iowa, Michigan,

Minnesota, New Hampshire, Oregon, Utah, and Vermont—at the forefront of court "re-engineering," a restructuring of services that included the expanded use of technology.[38] But most of the solutions that the center observed were either exclusively for lawyers—such as e-filing systems accessible only by attorneys—or required too much legal expertise to be helpful to people using the courts without professional assistance.

Court processes are not fully open, transparent

Court administrators moved quickly to respond to the pandemic and communicate with the public about changes to court operations. But that rapid action also created some confusion for court users. Information shared on public websites and directly with litigants about online processes did not always fully explain key details, such as how and where documents should be submitted or which types of cases would be served by virtual hearings.

And in those instances, court users sometimes did not know where to turn for help and clarification.[39] As more operations moved online during 2020, courts worked to untangle complicated processes and used tools such as legal information portals, virtual help desks, and kiosks in public libraries to provide more usable and accessible public information, but these efforts have also been inconsistent.[40]

Equity gaps

During the pandemic, technology has continued to disproportionately benefit parties with counsel and high-volume users of the court system, such as certain debt collectors, creating challenges to court officials' goal of ensuring equitable processes. Even before the pandemic, debt collection lawsuits—the most common type of civil case—presented a challenge to the integrity of the courts. A 2020 Pew analysis found that in the several states where data was available, less than 10% of consumers had a lawyer and more than 70% of debt suits ended in default judgment for the collector.[41]

However, since the pandemic began, these cases have shown the inequitable availability of electronic court processes.[42]

Large debt collectors, operating with significant professional legal assistance, leveraged new court technology to their advantage. A review of records from county and state court websites by ProPublica, an independent investigative news organization, found that some major collectors were able to accelerate their filings during the pandemic by using electronic systems to initiate lawsuits in bulk.[43] Texas court data likewise demonstrates that debt collectors were able to continue to bring lawsuits at the same rate in fiscal year 2020 as in the previous year.[44] And according to researchers in California, when courthouses in that state closed in April 2020, debt collectors were able to file as many suits against consumers as they had in April 2019, thanks to electronic filing.[45]

However, electronic filing was not equally available to all: In eight states, people without lawyers had almost no way to file court documents in debt claims against them, leaving most debt defendants in those states unable to participate in court proceedings so that the judges could hear all the facts and render verdicts accordingly.[46]

This research also found similar access and equity problems in eviction cases. Technology would ideally both allow plaintiffs to quickly file cases and give defendants a clear and easy way to respond. Instead, in nine states, people without lawyers had almost no avenue for filing paperwork in eviction cases. Such rules unintentionally advantaged landlords, who have representation in an estimated 90% of eviction cases, compared with 10% for tenants.[47] (See "Eviction Cases Proceeded During the Pandemic.")

Efficiency gaps

A lack of consistent rules and offerings of online tools has also limited the potential efficiency that people could gain from their use. For instance, parents who have child support obligations but experience job losses or wage cuts are required to seek a modification of their payments to reflect their change in circumstance. Online tools could offer these people a faster, easier way to request a change and save them the cost of a trip to the courthouse. But many courts did not include online filing for parents in their 2020 technology innovations. Of the 43 states plus D.C. in which courts normally handle child support modifications, 33 and D.C. issued pandemic-related orders or set up formal procedures to allow individuals without lawyers to submit modification requests electronically. The remaining 10 states effectively rendered parents without counsel unable to modify their payments in a timely fashion while courthouses were closed. (See Figure 4.) Parents who fail to modify and subsequently miss payments are subject to enforcement actions, such as garnishment of wages and even jail time.

Figure 4

Online Tools Excluded Court Users Without Lawyers in the Early Months of the Pandemic

Count of states that prohibited unrepresented litigants from e-filing, by case type, March 1-Aug. 1, 2020

Source: Pew analysis of state supreme court COVID-19 pandemic emergency orders issued March 1-Aug. 1, 2020

Even before the pandemic, 1 in 3 U.S. households faced a housing, family, or debt issue serious enough to result in an interaction with the civil legal system.[48] The sort of planning that identifies and supports the needs of users involved in such high-volume, high-need cases in civil court may not have been possible leading up to and during the first months of the COVID-19 outbreak, but now that the foundational work of moving processes online is done, court officials have an opportunity to improve and enhance those systems to better serve all litigants.

Eviction Cases Proceeded During the Pandemic

As the pandemic raged across the country, federal, state, and local officials put policies in place to halt eviction cases, with the goal of keeping people housed and preventing the spread of COVID-19. At the federal level, Congress enacted a nationwide moratorium on evictions from March to June 2020 as part of the coronavirus rescue package. After that expired, the CDC implemented another national freeze in September 2020, which was extended five times before being struck down by the U.S. Supreme Court in August 2021.[49] In addition, 13 state supreme courts and 11 governors issued orders as early as March 2020 postponing the filing of eviction and foreclosure cases, and 36 states suspended the enforcement of eviction orders—the stage in an eviction when residents lose their homes—by court or executive order.[50]

Yet eviction cases continued to dominate civil dockets during the pandemic despite these historic moratoriums.

Why did eviction cases proceed?

A typical eviction process takes place in five stages: notice from landlord to tenant that eviction is forthcoming, filing of a case by the landlord, court hearing, issuing of a judgment and writ of eviction, and removal of tenants from their homes by the local sheriff's department. Except for the first and last, these steps play out in civil court.

Although most of the emergency government orders prevented the final stage of eviction, just 54.5% of jurisdictions suspended eviction filings during 2020.[51] And even policies that sought to freeze filings did not do so automatically. Instead, policies such as the CDC moratorium, which was in place from September 2020 until mid-August 2021, added new steps that tenants had to complete to have their cases paused.

As a result, millions of people had to assemble and submit paperwork to demonstrate to the court that they qualified for protection because of pandemic-related economic hardship, and data shows that very few successfully did so. For example, court data from Harris County, Texas, revealed that in 2020, tenants filed CDC declarations in only 16% of eligible eviction cases.[52]

Ultimately, about 1 million evictions moved through the civil court system during the first year of the pandemic.[53]

Courts' technology choices hindered participation for some people without lawyers

During the pandemic, courts—like schools, government agencies, and some businesses—discovered that shifting processes from in-person to online does not necessarily make them easier to navigate. For people without the tools needed to use court technology, such as high-speed internet and a sufficiently powerful computer, the move toward modernization failed to improve their interactions with the civil legal system and may even have made them more difficult. And although technology can be used to make the courts more accessible to people with disabilities and limited English proficiency,[54] that promise remains largely unrealized. In practice, the new technologies often limited, rather than expanded, the ways in which these groups could interact with the civil system.

Despite their many documented benefits, the digital tools that courts implemented during 2020 often widened the chasm between people with and without attorneys. This was especially true of users with additional access needs.

Internet and computer access and experience

Access to internet service is the baseline requirement for web-based court technologies. Yet, despite the steady growth of internet use over the past two decades, as of 2018, 42

million U.S. adults lacked reliable broadband connectivity, including disproportionately low rates of access for certain populations and locations.[55] For instance, U.S. Census Bureau research showed that 36.4% of Black households and 30.3% of Hispanic households had neither a computer nor broadband subscription, compared with 21.2% of White and 11.9% of Asian households.[56]

Further, families with incomes below $25,000 were less likely than those with higher incomes to have even minimal internet connectivity, and tribal and rural regions lagged far behind urban areas in terms of internet access.[57] According to a 2018 FCC report, slightly more than 77% of rural populations had access to an internet connection that met the agency's benchmark for reliable connectivity, compared with 98.5% of urban populations. Tribal populations fared even worse, at 72.3%.[58]

In addition, many court users access the internet only via smartphone. Approximately a quarter of Hispanic adults identify as "smartphone only" internet users.[59] Notably, location is not a driver of disparities in mobile internet access, with figures close to 100% no matter where one lives: 99.4% for rural populations and 97.5% for tribal populations, provided they have a mobile phone. But mobile access has limitations, particularly related to streaming live content—such as meetings via Zoom, WebEx, or similar platforms—which are basic requirements for participation in virtual hearings.

Although the courts cannot expand people's access to broadband internet or computers, they can—and many do—recognize these roadblocks and adjust their processes to account for these challenges. For instance, 28 states and D.C. installed drop boxes outside courthouses to help litigants submit court documents during the pandemic.[60] And in some states, courts have permitted litigants for whom video technology is not an option to participate in hearings via telephone.

Even when users have sufficient tools to access a court's online services, e-filing or participating in a video hearing requires a level of digital experience that many people lack. A 2019 Pew Research Center report found that most U.S. adults could answer fewer than half the questions correctly on a digital knowledge quiz.[61] Younger adults and those with bachelor's degrees were more likely to know the answers to questions about internet privacy measures, such as two-factor authentication, which many users must navigate to take advantage of online court processes.

Access for users with disabilities and limited English proficiency

State courts, like other public institutions, have specific obligations under the Americans with Disabilities Act related to access for people with disabilities, and federal law also requires courts to provide language assistance for those with limited English proficiency.[62] But according to the National Center for Access to Justice's 2021 Justice Index, which scores states from 0 to 100 on their adoption of specific policies related to disability accessibility and language access, including court access for people without

lawyers, 44 states scored below 50 for accessibility, and 31 scored below 50 for language access.[63]

Research indicates that, during the height of the pandemic, people relying on court documents for information related to obtaining an interpreter, ensuring reasonable accommodations for a disability, or generally accessing the courts during courthouse closures would have found little.[64] In a review of nearly 10,000 court documents from all 50 states and D.C., between February and October 2020, researchers from Wesleyan University found that only 253 documents mentioned language access and just 154 contained information for people with disabilities. In total, less than 3% of the documents referenced access for people with limited English proficiency, less than 1.5% mentioned the needs of people with disabilities, and none specifically addressed technology accommodations for these populations.

Now that courts have taken the step of adopting technology, they have an opportunity to use it to address longstanding inequities for these populations. By making sure their technology is accessible and multilingual, and offering a range of high- and lower-tech tools and resources to meet the diverse needs of their users, courts can ensure that technology improves the experiences of all litigants.

Recommendations

CCJ's and COSCA's adoption of technology principles is an important first step toward ensuring that measures taken to modernize the civil legal system benefit all users. However, now that state courts have practical, firsthand experience with legal technologies, court officials realize the urgent need to apply such guidance. To that end, and drawing on work with state and local court systems across the country, Pew has identified three important steps court officials should take to make their processes more open, equitable, and efficient:

1. Combine technological tools with process improvements.

Technology, if layered on top of complex court processes, will only reinforce the status quo: complicated, attorney-centered procedures that are difficult for people without lawyers to navigate. Court officials must examine the processes that litigants have to complete during various types of cases to identify opportunities to simplify forms and procedures.

One example of such an effort is that several states reviewed notarization policies, which in many instances led to the elimination of traditional verification requirements, such as in-person document review by a certified notary public. Another is how Hawaii leveraged its online dispute resolution (ODR) project to re-examine and revise its small claims process. ODR was originally developed as a dispute resolution mechanism in the e-commerce sector, and courts around the country began adopting it in 2014 to allow

litigants to negotiate and resolve disputes among themselves outside of court business hours. Hawaii took the opportunity presented by the new system to add an early review step in which judges ensure that the collector-plaintiffs own the debts they are attempting to recoup before the case moves forward.[65] The state also developed and embedded in its ODR platform a user-friendly fee waiver application and review function so that litigants without lawyers must navigate only a single online platform.[66]

2. Test new tools with intended users and incorporate their feedback.

Without rigorous testing of technology platforms, courts may find themselves locked into expensive systems that do little to simplify the legal process for their users. Testing not only helps courts refine and improve upon these tools, but it also gives them an opportunity to proactively engage with end users to make sure that the technology products are functional and meet their needs.

Court ODR pilot projects undertaken before the pandemic demonstrate that it is indeed possible to incorporate user feedback in the deployment of technology. For example, in 2019, the Utah courts engaged an external researcher to conduct a usability study of its ODR platform for small claims cases, which included testing by end users. The research uncovered various issues with the platform's accessibility and functionality, and the court was able to make targeted improvements.[67]

To help more courts undertake similar efforts, CCJ recommends models of participatory design, including convening stakeholders to establish shared goals, seeking design and implementation guidance from community organizations and key user groups, and incorporating user feedback mechanisms and usability testing in planning.[68]

3. Collect and analyze data to help guide technology decisions.

Most states do not share information with the public in an easy-to-understand format. For example, Texas is the only state that collects and makes publicly available information on debt claims lawsuits, including outcomes, across all courts.[69]

Some courts have begun to share their data with users and the media, for public information purposes, and with external evaluators to enable monitoring of their technology innovations. For example, courts in Florida, Michigan, and Texas have engaged third-party researchers to study their dispute resolution platforms. To support such analyses, NCSC developed a framework for evaluating ODR and made it available to courts across the country. And analysts at Indiana University are partnering with their state's courts to examine the impact of online hearings on litigants without lawyers.[70] These state efforts will help courts better understand the effects of their online processes, leverage the benefits, and mitigate any harms.

CCJ and COSCA have promulgated a set of data elements that courts should collect and report on—as well as explanations of what those data elements can reveal about court

processes pre- and post-pandemic—that states can use to create guidelines for the collection and reporting of court data.[71] Having operated under pandemic protocols for more than a year, civil courts should engage researchers and other experts to help in developing metrics to measure modernization efforts, collecting data, identifying pandemic-era successes and areas for improvement, and fine-tuning technologies and systems. Such a thorough examination will allow courts to implement data-informed process improvements that enable them to better help people without attorneys navigate and resolve legal issues.

As courts collect and analyze the data on technological solutions, they should consider the following questions:

- What data must be tracked to answer key questions?
- How can litigants, attorneys, court staff, and other stakeholders be engaged in the process of improving the court experience?
- What can the civil court system learn from the experiences of other courts that are implementing and testing similar changes?

An analysis of efforts thus far not only will help courts operate more efficiently but also will help them improve the civil legal system on a broad scale.[72]

Conclusion

Technology has the potential to substantially improve the civil legal system. Digital tools helped courts remain operational during the public health emergency and are poised to become permanent fixtures of the legal system. By studying how technology worked well—or did not—during the COVID-19 pandemic, courts can better understand their effects on litigants, especially those without lawyers, and undertake improvements to help Americans settle disputes and avoid life-altering consequences.

As courts work to assess and improve these tools, they will need to incorporate feedback from court users, test multiple technology products, collect and analyze use and performance data, combine technology with other process improvements, and implement the principles and safeguards that court officials already have identified as critical to ensuring effective use of technology. With these steps and proven tools, states can modernize the civil courts and make them more open, equitable, and efficient than ever before.

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Forum Infographic: The COVID-19 pandemic and the courts — Aggravation or opportunity?

Steve Rubley CEO / Thomson Reuters Special Services

8 Dec 2021

Ever since the lockdowns made necessary by the global COVID-19 pandemic began 18 months ago, courts everywhere have been relying on technology to continue providing access to justice while also protecting the public's health

Depositions and hearings have gone virtual. Jury selection is often conducted remotely, as are some trials. Evidence can be presented via videoconferencing and other digital means. Trials are televised to media and the public using closed-circuit television, and information about almost everything the court does is available online.

Today, hybrid arrangements allow some in-person court participation, but many problems persist. For example, case backlogs, already large before the pandemic, continue to grow; evidence-sharing and storing of digital files are often a logistical hassle; and even though virtual court participation is technically possible, low-income citizens don't always have access to computers or a reliable internet connection. In fact, a 2020 study by the independent research group BroadbandNow estimates that as many as 42 million Americans currently live without access to high-speed broadband, an increasingly essential prerequisite for accessing employment resources, educational materials, telehealth services, and **virtual or remote court proceedings**.

Virtual improvements

Still, despite these challenges, it's also true that technology has improved many aspects of the American justice system. In a recent Thomson Reuters report on the impact of the COVID-19 pandemic on state and local courts, 42% of respondents said they felt virtual hearings had increased access to justice, including 49% of county and municipal court participants, where backlogged civil matters are a source of constant distress. That stands in contrast to the 23% of respondents who felt that virtual hearings decreased court access, likely because virtual participation requires technology that many people still do not have.

Technological solutions capable of improving court performance now and in the future are only being used by a relatively small handful of tech-savvy courts.

These statistics aren't surprising. For people who live in rural areas and have adequate internet connections, the option of virtual participation means not having to drive for hours or miss a day of work to meet with a lawyer or make a court appearance. Virtual convenience in turn has resulted in better attendance at pre-trial and trial hearings, as well as greater participation by all parties overall, particularly in civil court. With more online resources available, pro se litigants – those who opt to defend themselves in court – have greater access to legal support services, procedural guidelines, docket schedules and digitally stored evidence. Technology has also streamlined many of the day-to-day operations of the court, simplifying the process for everyone.

A better system for all

Much more can and should be done to improve future court services, of course, but many judges and attorneys are reluctant to change any more than they have to, an attitude that also needs to change.

Consider the problem of access to justice. On August 10, the US Senate passed the Infrastructure Investment and Jobs Act, which will provide $42.5 billion to fund broadband network deployment in remote areas that currently have little or no service. This build-out of America's wireless infrastructure will also accelerate the availability and adoption of 5G networks all over the country.

Check out our Infographic on the COVID-19 Pandemic & the Courts

Why is this important? Because even if low-income individuals don't have access to a computer, almost everyone has a smartphone. **According to the Pew Research Center**, 97% of Americans own a cell phone of some kind, and 85% own a smartphone (up from 35% in 2011). Soon, then, lack of access to court information will be a thing of the past, and anyone's ability to participate in court proceedings of all kinds will be only as far away as the nearest cell phone.

Another set of issues that technology can address involves the collection, submission and storage of digital evidence. Currently, many courts are overwhelmed with the explosion of multimedia evidence coming from mobile devices, body-cam videos, audio files, computer hard drives and many other sources. Storing and securing all that data is an increasingly expensive undertaking, and even if a court's storage and security are adequate, using the data effectively can also be a challenge.

These issues aren't surprising. In the Thomson Reuters survey, 72% of respondents said they continue to submit proposed exhibit and hearing bundles to the court via email, 64% work in jurisdictions that still use paper and less than one-third use file-sharing platforms.

An even newer normal

Technological solutions capable of improving court performance now and in the future are only being used by a relatively small handful of tech-savvy courts. More widespread adoption of such tools would expand access to the justice system for millions of Americans and provide courts with an efficient, cost-effective way to future-proof themselves against a wide variety of unpredictable social disruptions.

A more efficient, user-friendly court system also would go a long way toward addressing case backlogs, which plague almost every court in the land. How much more efficient would the courts have to be in order to eliminate backlogs? Well, according to our research, the average number of cases handled by individual courts every year is 12,309, and the average current backlog is 1,274 cases. If the courts were just 10% more efficient, then backlogs too would eventually disappear, enabling more timely trials and hearings, and reducing the number of stalled proceedings.

The fact that remote hearings and other forms of virtual participation have already improved court efficiency and expanded access to justice for so many is yet another indication that today's burgeoning technologies have an important role to play in the courts of the future.

In-person jury trials will always be necessary in some cases, of course, but attorneys who have suspended jury trials under the assumption that "normal" proceedings will soon resume are kidding themselves. What once began as a series of hybrid work-arounds is now a more or less permanent feature of the modern court system, so reluctant attorneys need to adapt. Not only is adapting a practical necessity, the American Bar Association has gone so far as to suggest that attorneys have an ethical obligation to consider virtual jury trials and other creative procedures in order to expedite logjammed court proceedings and **provide litigants with a swifter path to justice**.

Reimagining justice

The past year has given US courts an extraordinary opportunity to reimagine how justice in this country is managed and administered. As we all know, the justice system has always been slow to embrace change, especially when it comes to technology. But the pandemic has also shown us that, if necessary, the system can and will adapt and evolve with remarkable speed, continuing to operate even under the most daunting circumstances. The fact that remote hearings and other forms of virtual participation have already improved court efficiency and expanded access to justice for so many is yet another indication that today's burgeoning technologies have an important role to play in the courts of the future.

Technology can't solve every problem, of course, but it can help create a more resilient, responsive court system that works for the American public in ways the current system does not and never has. The persistence of the pandemic is a tragedy, of course, but where the courts are concerned it can also be viewed as the much-needed push to continue developing a more flexible, future-proof justice system that works better and more efficiently for everyone. And today's rapid technological advances are making this transformation not only possible, but inevitable.

THOMSON REUTERS INSTITUTE

The Impacts of the COVID-19 Pandemic on State & Local Courts Study 2021:

A LOOK AT REMOTE HEARINGS, LEGAL TECHNOLOGY, CASE BACKLOGS, AND ACCESS TO JUSTICE

THOMSON REUTERS®

In 2020, the United States judicial system faced unprecedented challenges

as it was required to quickly adapt to an ever-evolving virus, new health mandates, and court closures, all while ensuring that litigants had access to the court system. People are entitled to their day in court, as they say, and this has been no easy feat.

Where there is a challenge, however, there is also opportunity. Judges, court staff, and attorneys have risen to the occasion, finding new and innovative ways to keep the daily operations of civil and criminal court moving. In this "new normal", courts used short- and long-term solutions to ensure that the public has continuous access to the U.S. justice system, while also reducing the danger to public health and maintaining safety. However, these solutions still didn't meet all the needs to ensure access to justice and elimination of backlogs.

As a result, we saw an increased reliance on technology in almost all aspects of court proceedings, from virtual or remote pre-trial hearings to remote jury selection and even digital evidence sharing. Many judges found this to be challenging, but many also embraced the opportunity to act as a salve against further case backlogs. While many courts relied on social distancing and were involved in some aspect of remote hearings, they now plan to continue to do so in hybrid-fashion into the future, whether by using social media and remote meeting tools like Zoom, YouTube, Microsoft TEAMS and even Facebook Live.

Despite the COVID-inspired emergency, courts continued with most hearings, while simultaneously dealing with the growing pains of using legal technology and the rapid rise of digitalization of data.

Indeed, a key component in courts' rapid pivot to digitization is a heightened awareness of access to justice. Without equal and fair access to our courts, individuals risk the loss of liberty, property, and much more. When citizens do not have the same access to knowledge of their rights or an understanding of courts' processes, we are left with a weakened and unbalanced justice system.

To explore the impacts of the pandemic on the nation's courts further, Thomson Reuters surveyed more than 238 judges and court professionals at the State, County, and Municipal Courts level in June 2021 in order to gain insights into how the pivot to remote hearings impacted their daily processes, how well they adapted, and what they envision the future of court hearings will look like. Respondents held numerous positions including judges and chief justices, magistrates, court administrators, attorneys, and clerks of the court. More than half of the respondents were either key decision-makers or provided input on decisions related to court administration.

Courts around the nation indicated that virtual hearings increased individuals' engagement with the courts but also increased the burden of self-representation on litigants who may not have the same access to high-speed broadband networks, or even the technology necessary to meaningfully participate in court proceedings.

Overall, respondents indicated the courts' backlog would increase in some circumstances, but most felt it would stay the same. Herein lies more opportunities for change. While most respondents said they didn't believe the backlog would decrease, that backlog can act as a catalyst, propelling our more traditional legal systems towards expansion and development, resulting in a revolutionary way of conducting court business using technology platforms to get through the backlog by allowing digitization of how evidence is submitted, stored, and shared to better support remote hearings.

Courts go remote

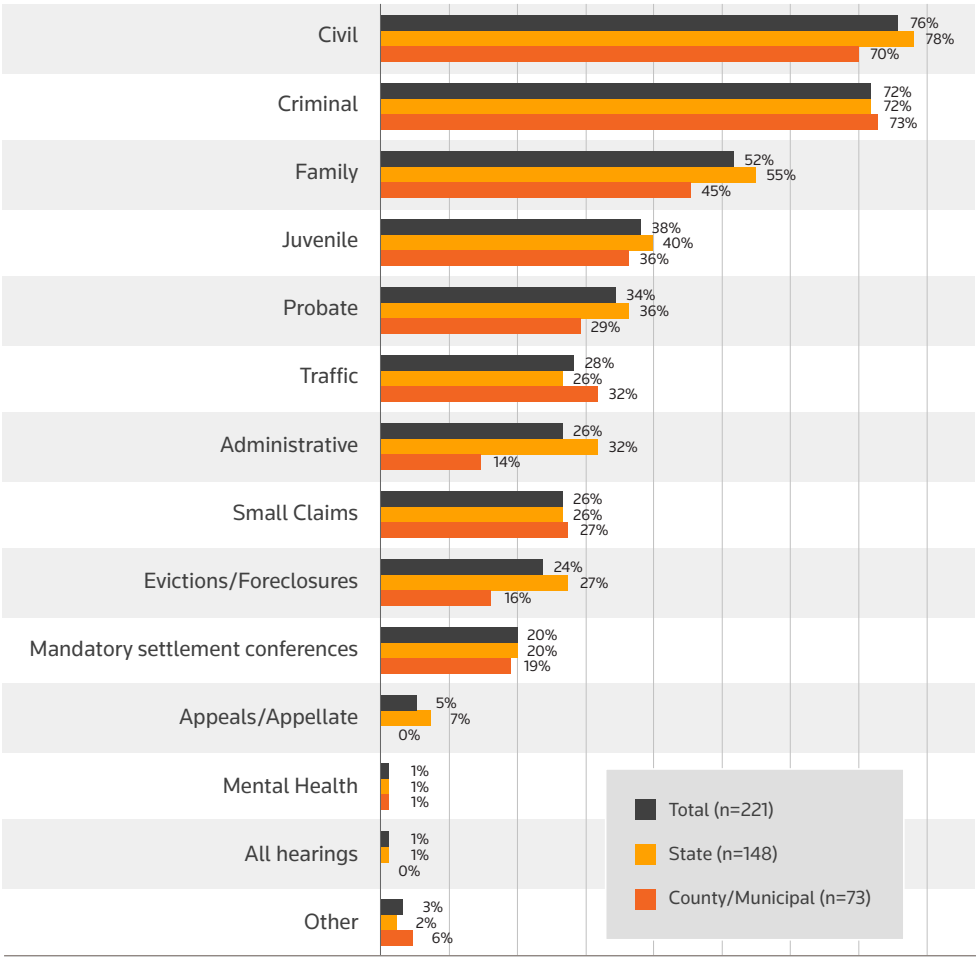
As a result of stay-at-home orders stemming from the 2020 COVID-19 pandemic, courts had to quickly decide how, when, and where they would hold hearings. In many states, judges, attorneys, and court staff immediately brainstormed ways to bring the courtroom into a virtual environment using audio or video technology to facilitate a hearing without all the participants being physically gathered in one location.

Overall, 93% of respondents in our survey said they were involved in conducting or participating in remote hearings in 2020, while 89% are currently doing so in 2021. Of those currently participating in remote proceedings, almost two-thirds are conducting trial and pre-trial hearings online. The main types of hearings being conducted are civil and criminal with a greater breakdown in the chart below:

While some courts delayed trial hearings, many actively participated in the trial process with 63% of the respondents stating they had conducted both pre-trial and trial hearings remotely. An additional 30% have been conducting only pre-trial hearings remotely but that could change if vaccine rates remain low in pockets of the U.S. and new COVID-19 variants begin to emerge.

Additionally, when asked to rate how challenging virtual hearings have been for their group, about 1-in-3 said they thought it was challenging, and 1-in-3 said they thought it was not challenging. The mixed responses here are likely due to geographic locations, differing court budgets, changing pandemic restrictions, and various levels of technical support. Several respondents said they felt that remote court hearings had worked out better for them, especially in larger counties where attorneys often must travel long distances to get to court. It made scheduling easier and avoided unnecessary delays, especially in uncontested matters, like case status updates.

Figure 1:
Types of Hearings Conducted Virtually



Source: Thomson Reuters 2021

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Court backlog: An opportunity for growth

Even in the best of times, the nation's courts consistently battle case backlogs for a variety of reasons. When you add a public health crisis into that equation, it is easy to see why the backlog situation may become much more difficult to manage. Cases continued to mount as courts dramatically altered operations to respond to the pandemic; and in almost all situations, these altered operations delayed proceedings further as courts closures, extended time for arraignments and trials to be heard; and temporarily paused jury trials all added to the backlog.

So, how bad is the backlog? According to our survey respondents, the average caseload for a court is 12,309 cases. In 2019, a year before the pandemic, the average backlog was 958 cases. During the last 12 months, the average backlog increased to 1,274 cases. On the flip side, one-third of courts saw their case backlog increase greatly, meaning more than 5%.

Figure 2: Cases/Backlog	Total (n=238)	State (n=162)	County/ Municipal (n=76)
Average number of cases handled in a year	12,309	13,888	9,080
Average cases backlog 2019 (pre-COVID)	958	1,030	828
Average current backlog (2021)	1,274	1,430	940

Source: Thomson Reuters 2021

Figure 3: Change in Backlog Last 12 Months	Total (n=238)	State (n=162)	County/ Municipal (n=76)
Increased Greatly (>5%)	34%	38%	26%
Increased Slightly (1%-5%)	23%	16%	39%
No Change	29%	28%	30%
Decreased Slightly (1%-5%)	5%	7%	3%
Decreased Greatly (>5%)	9%	12%	4%

Source: Thomson Reuters 2021

Figure 4: Anticipate Change in Backlog Next 12 Months	Total (n=238)	State (n=162)	County/ Municipal (n=76)
Increased Greatly (>5%)	8%	7%	8%
Increased Slightly (1%-5%)	18%	20%	16%
No Change	32%	30%	36%
Decreased Slightly (1%-5%)	29%	28%	32%
Decreased Greatly (>5%)	13%	14%	9%

Source: Thomson Reuters 2021

Moreover, only 8% of respondents said they anticipate a *great* backlog increase in their courts over the next 12 months; while half of respondents said they anticipate either a slight increase or no increase at all. And about 42% said they expect a decrease in the next 12 months.

Challenges in a virtual court environment

One of the primary challenges in a virtual court environment is related to collaboration and managing documents — sharing evidence, accessing evidence and multimedia files, organizing all evidence, and communicating on annotations on evidence. While this is a serious problem in a civil case, it can be a detrimental, constitutional violation in a criminal case.

For instance, the Confrontation Clause in the Sixth Amendment guarantees the right to confront adverse witnesses, which, interpreted by the Supreme Court, includes all "testimonial" evidence, unless the witness is unavailable, and the defendant had a prior opportunity to cross-examine such witness. If the court or the parties are unable to access hearing documents, evidence, files, images, or communicate with the court about these case materials, this creates potentially serious constitutional violations that could be brought up on appeal.

Figure 5:
Challenges of Virtual Court Environment

Base = Conducted or participated in virtual hearings during the pandemic

Source: Thomson Reuters 2021

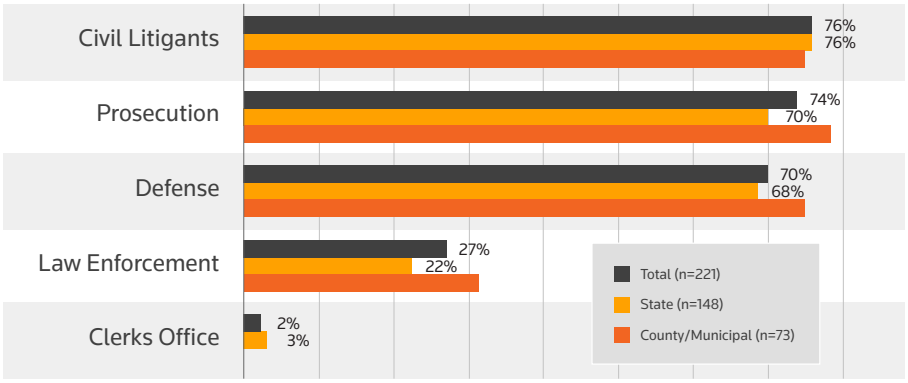
In the future, this can be solved by having better familiarity with technology solutions for ease of use. The good news is you can meet remotely; however, there are still challenges. The technology is now available to share case materials such as documents and digital evidence. As in many corporate settings, courts too can take advantage of the advances in technology, while also keeping cybersecurity concerns in mind when it comes to storing sensitive evidence or documents.

Courts and court staff will also want to consider having live and on-demand technology training sessions available to all participants so they may familiarize themselves with the technology *before* the hearing.

Exhibits and hearing documents in a virtual environment

The parties most involved in collecting and providing evidence to the courts tended to be civil litigants, prosecutors, and defense counsel, according to our survey.

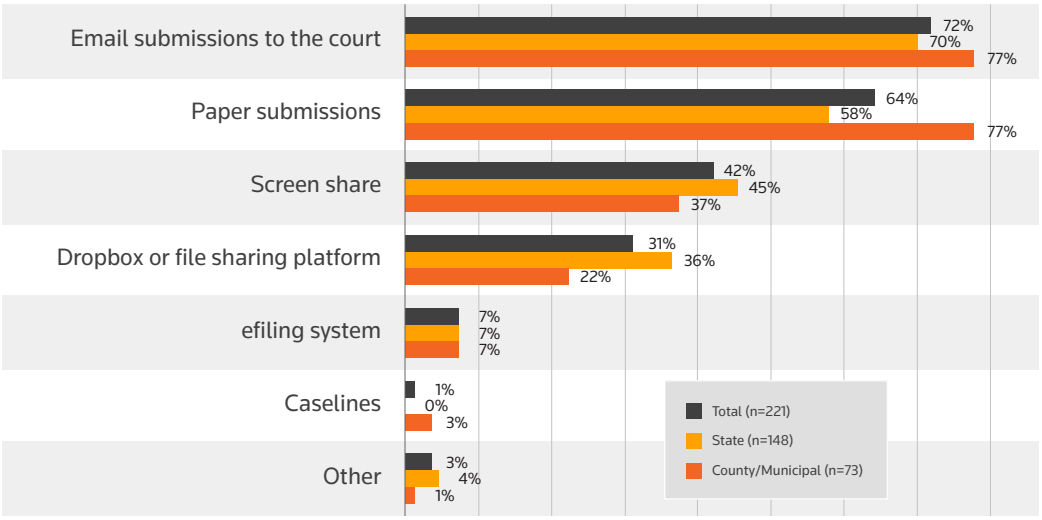
Figure 6:
Parties Involved Collecting/Providing Evidence



Source: Thomson Reuters 2021

As noted, the challenges of accessing exhibits and multimedia files during a hearing seem to be a sticking point. Most courts, around 72%, are currently handling proposed exhibits or hearing bundles via email submission. Part of the issue, then, may be that parties and the court have differing levels of access to the emailed submissions. If all files were submitted, shared, and stored on one, ubiquitous platform, this might ease some of the burdens and provide greater transparency, while also decreasing hearing delays.

Figure 7:
How Courts Currently Deal with Proposed Exhibits/Hearing Bundles from Parties



Source: Thomson Reuters 2021

If all files were submitted, shared, and stored on one, ubiquitous platform, this might ease some of the burdens and provide greater transparency, while also decreasing hearing delays.

Other technology-related effects: Witness credibility and translators

The finder of fact, whether a judge or jury, has the important task in determining witness credibility. Before the onset of the COVID-19 pandemic, most witnesses testified in person, giving the judge or jury a bird's eye view in assessing witnesses' testimony about the event in dispute. Often this credibility determination is described as a "common-sense determination" which includes more than just whether a witness can be believed or not. In addition to the substance of the testimony — which includes the amount of detail, the accuracy of past events, and whether witnesses are contradicting themselves — fact-finders also look to demeanor such as body language, eye contact, and whether responses are incomplete or evasive.

Remote proceedings and depositions pose new challenges for determining demeanor and body language. Overall, 35% of our survey respondents stated that virtual hearings diminished the ability to assess litigant or witness credibility, while 27% felt that there was a loss of the ability to read behavior and/or body language. Some reasons include poor camera quality, bad lighting, unstable internet connections, and, perhaps most importantly, whether someone was coaching the witness in the background.

While there are remedies, such as having the witness pan their camera around the room before testifying or asking that no one else be present, overall, these types of matters can raise appellate issues later if not dealt with at the outset.

Finally, remote hearings also further exposed the corollary problem of not having enough court-certified legal interpreters. In an open-ended question, survey respondents indicated that they needed a larger pool of certified interpreters. Most keenly in a remote hearing, they stated that it was important to have the translator and litigant in the same room to avoid translation delays or misinterpretations.

Justice delayed is justice denied: Access to justice in a virtual environment

Access to justice is a vital part of the court process in any functioning society. We asked respondents if they felt access to justice changed overall with the use of virtual hearings. On the positive side, 77% of respondents said they felt that access to justice increased (42%) or stayed the same (35%); and within that, 49% of county and municipal court respondents said they believed access to justice increased. More than one-half of those respondents felt that access to justice increased specifically for litigants.

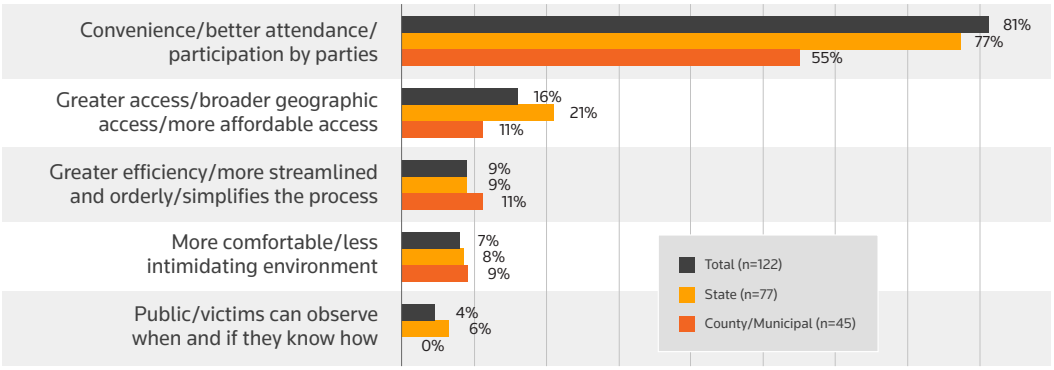
Figure 8: Change to Access of Justice with Virtual Hearings	Total (n=238)	State (n=162)	County/ Municipal (n=76)
Access to Justice Increased	42%	39%	49%
Access to Justice Stayed the Same	35%	36%	32%
Access to Justice Decreased	23%	24%	19%

Specifically, among those who felt access to justice increased, the main reason cited was convenience to the parties and attorneys, better attendance (which included fewer failures-to-appear), and increased participation by the parties. Allowing hearings to go remote has eliminated the need for judges, attorneys, and litigating parties to travel to different courts in some circumstances.

42% of respondents felt access to justice increased with virtual hearings

Figure 9:

How Access to Justice Changed with the Use of Virtual Hearings for Litigants – Increased
(Open End top mentions)



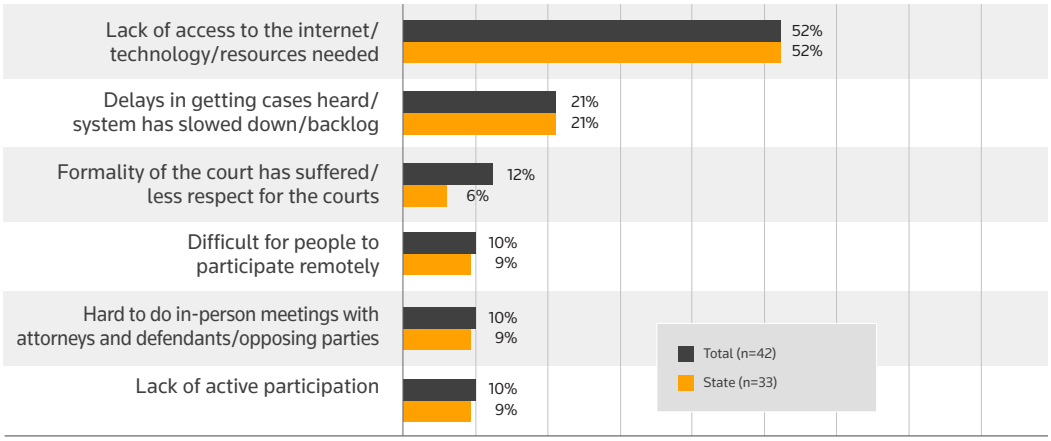
Base = Conducted or participated in virtual hearings during the pandemic

Source: Thomson Reuters 2021

For the 23% of respondents who felt access to justice had decreased during the pandemic, not surprisingly, they cited lack of internet access (52%) and general delays and court backlogs (21%). Some of these challenges may be alleviated by the strategic allocation of funds from the American Rescue Plan Act (ARP), which could be used to help update technology on legacy systems, investing in digital evidence solutions and improving broadband internet connectivity, thereby increasing access to the courts.

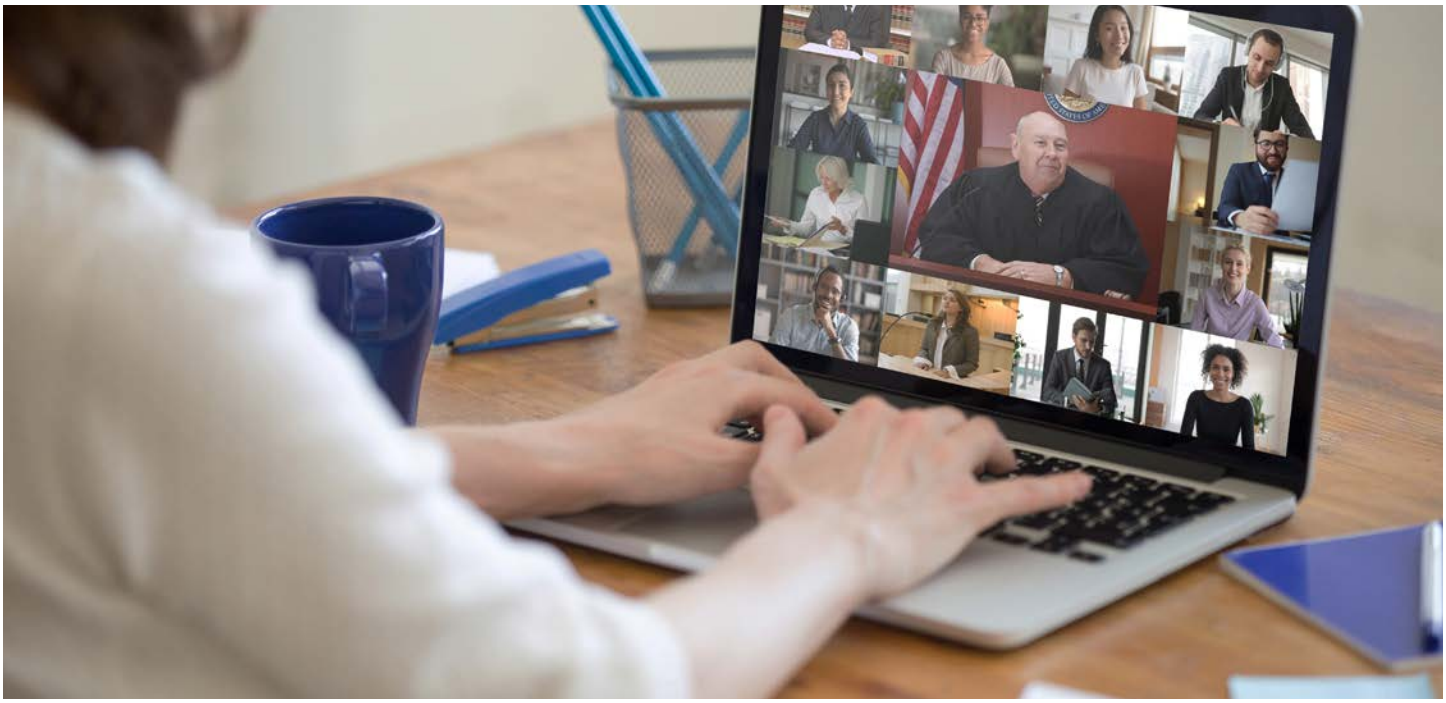
Figure 10:

How Access to Justice Changed with the Use of Virtual Hearings for Litigants – Decreased
(Open End top mentions)



Base = Conducted or participated in virtual hearings during the pandemic

Source: Thomson Reuters 2021



Self-represented litigants: Are they seeing the benefits of remote proceedings?

Navigating the judicial system can be tricky, even if you have a lawyer. For non-lawyers who aren't as familiar with court processes, this moment may be an inflection point for the courts.

Almost two-thirds of the respondents to our survey (63%) described video hearings as an increased burden on self-represented parties. The biggest reason cited was the inherent technology challenges individuals face including not having proper computer hardware, webcams, microphones, or access to a stable internet connection. Some also indicated that self-represented litigants' ability to access or provide evidence or documents to the courts was diminished as well.

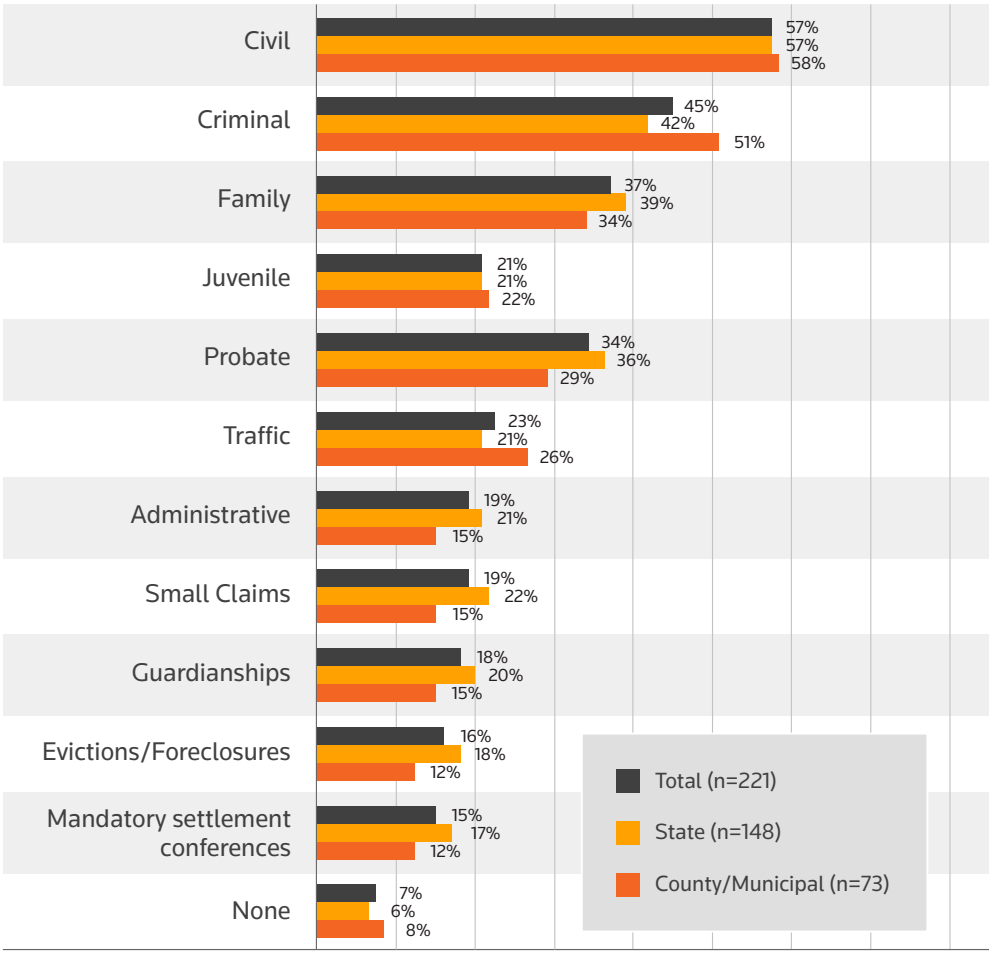
Conversely, 35% of respondents said they believed that video hearings relieved the burden on self-represented litigants. For instance, if a criminal defendant is in custody, they can appear over video by using the jail's resources; however, if that same defendant is out of custody and wishes to represent themselves, those technology issues can surface again.

Courts have stepped up their service offerings in anticipation of the technology challenges presented by remote proceedings. Respondents from roughly 40% of the courts in our survey said they were offering some form of online mediation services or self-help services, in addition to virtual hearings.

Virtual hearings are here to stay, in a hybrid fashion

Naturally, there are growing pains when it comes to virtual hearings, but many participants have seen the substantial benefits in this new way of working. An overwhelming majority of courts (86%) indicated that in the future they plan to use a mixture of in-person and virtual formats for courts hearings, with civil cases topping that list. Only 13% of courts said they would return to pre-pandemic, in-person operations for court hearings.

Figure 11:
Types of Hearings Courts Plan to Conduct Virtually in the Future (Top mentions)



Base = Conducted or participated in virtual hearings during the pandemic

Source: Thomson Reuters 2021

Challenges to overcome

As courts and administrative hearing offices continue to grapple with the uncertainty of the pandemic, one thing we know is that hybrid court proceedings — a mixture of in-person and remote hearings — will continue.

The next phase of hybrid hearings will require courts to deploy a platform of optimized, seamless technology to avoid more backlogs and disruptions. Court administrators will need to find the right technology that allows lawyers and litigants to focus on the substance of proceedings, not the procedural, audio, and visual aspects of it.

Finally, despite today's advances in legal technology, self-represented litigants still face many challenges in securing fair access to justice. And as we continue to see a rise in cases filed by non-lawyers, the hope is that legal technology will promote meaningful access to courts and encourage the increased use of plain language, process simplification, procedural fairness, and equal access.

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https://www.courtstoday.com/blog/the-cat%E2%80%99s-out-of-the-bag-remote-trials-are-flexible-easy-and-efficient

The Cat's Out of The Bag: Remote Trials Are Flexible, Easy and Efficient.

Digital Trials Continue Post Pandemic.

Judge Marsha J. Pechman began a trial in an empty federal courtroom in Seattle, Washington. Although the courtroom was unpopulated, familiar voices could still be heard. The law clerks, the court reporter, the litigants, and their lawyers were all present not in the room but on screen. Eight jurors were right beside them, not in the jury box but in virtual boxes. An entire civil jury trial was set to commence--digitally.

The pandemic closed courts around the world, facilitating the need for a system that is characteristically slow to change and adverse to technology to dive into the deep end of modern communication. In March the U.S government passed the CARES Act (Coronavirus Aid, Relief, and Economic Security Act) which expanded the court's ability to conduct proceedings by video or audio conferencing. The goal was simple: to keep the courts afloat amidst the mounting backlog of unheard cases.

Since the CARES Act's inception courts have conducted trials digitally, including the federal circuit, district, and bankruptcy courts. All of which are utilizing audio and visual technologies to host oral arguments, first appearances of suspected offenders, preliminary hearings, arraignments, misdemeanor sentencing, and other proceedings. State courts are also implementing virtual technology for civil and some criminal cases.

Recently, the Western District of Washington began holding all-virtual jury trials for civil lawsuits. Courts have also conducted virtual bench trials (which don't require a jury), and even high-profile cases have utilized virtual technology to allow access to large groups of listeners. The trend of courts across the country and around the world continues to be a virtual one, and with this new trend comes the need for new technologies to help support the courts in their modernization.

Judge Pechman notes that "video jury trials are a tool that can be used, and it's a tool we need to use unless we are going to be backed up forever and ever. It has worked better than my initial expectations, all the way around. The jurors have been very, very diligent. They've cleared themselves of distractions and worked hard to pay attention."

At the start of the pandemic, courts began looking to videoconferencing as a way to continue ongoing hearings and pre-

trial conferences. This was something new to some courts, and they had to take steps to adapt. Many courts did not have the necessary AV (audiovisual) systems to conduct court business digitally. At first, some courts brought multiple laptops into the courtroom for participants to connect via Zoom. Not only was this a cumbersome solution, but there were many issues with feedback. According to Brian Green vice president of operations JAVS Justice AV Solutions, “courts finally began to see the wisdom in having JAVS multicamera systems for their courtrooms.”

However, it wasn’t just the courts that had to adapt, companies like JAVS had to adapt as well. Going digital meant the courts had to address the issues that arose from this new method of conducting court business. One of the issues that came up as a result of this new format was the need for all remote participants to be able to see the court-side participants throughout the proceedings. In response to these issues, JAVS sought to find a solution. They solved this problem by providing multiview video outputs from the court over a single Zoom or Microsoft Teams connection, making it much easier to manage. This multiview setup can be adapted to the number of participants on the courtroom side and can accommodate up to four key positions in the courtroom whilst integrating them into the court's video conferencing and public address systems.

JAVS Hybrid Conferencing technology allows courtroom side participants to be visible to remote participants via the JAVS Control Bridge which provides a 1080p or 1080i output through its web conferencing system. It provides up to four equally sized views of the courtroom’s video sources and can accommodate three-way and two-way layouts from up to six video sources. Remote users virtually appearing in court can “spotlight” or “pin” the courtroom stream using web conferencing tools to maximize the available space on their screen.

JAVS multicamera system with two court side participants

Green mentions that going forward “courts will be looking for hybrid courtroom solutions to accommodate a mix of in-person and remote participants.” These interactions will need to run smoothly and be dependable. All of which is made possible by the JAVS platform which is also capable of integrating new technologies as they become available. Green adds that “everyone learned from the pandemic that digital resources are necessary for effective communication in the modern world.”

The pandemic forced courts to permit greater remote participation; a byproduct of this new approach was that cases were processed faster. Brad White CEO and President of Nomad AV Systems says “with that genie out of the bottle, courts are beginning to return to normal operating procedures while continuing to use remote participation when it adds efficiency or flexibility to the court proceedings.”

Nomad's hybrid AV system back view

Sensing this new current of court proceedings, companies like Nomad AV Systems adapted to meet the greater demands for remote and hybrid AV technology. Before the pandemic, Nomad's core products focused on in-person presentations where courts often utilized legacy video conferencing solutions for limited remote participation events (a legacy system is an outdated computing software or hardware that has difficulty interacting with newer systems). White says that "as courts embraced soft codec VTC solutions such as Zoom, Teams and so on, Nomad responded by adding hybrid presentation technologies that seamlessly blend traditional in-person court proceedings with a variety of remote participation scenarios."

Nomad AV Systems specializes in courtroom audio-visual technology. At the center of their courtroom solutions is the Nomad evidence presentation system which allows attorneys to

present any type of evidence from physical 3D objects to digitized documents stored on personal devices. Nomad solutions can incorporate an array of supporting technologies needed throughout the courtroom, including video distribution and display, video conferencing that allows input of evidence presentation, and audio reinforcement solutions.

Nomad provides online user training that is tailored to each product and reduces training requirements improving end-user experience. The company uses high-grade components that are proven to work together, and they implement standardized-control system programming which results in intuitive ease of use. White states “I believe that courts will continue to embrace hybrid technologies that provide robust in-person presentations, as well as leveraging the efficiencies and flexibility of ever-improving remote participation technologies. These technology investments will improve efficiency today while preparing for the potential of another pandemic that we all hope never happens.”

It seems that the court's rigid system and its outdated methods are changing for the better. After experiencing the greater flexibility and efficiency of remote participation as well as hybrid proceedings the trend continues to be towards modernization and integration of digital communication methods. These improvements benefit judges, court administrators, attorneys, participants, and spectators alike.

COVID-19 and Its Lasting Impact on the Legal Profession

COVID-19 and its delta variant have created ever-changing workplace scenarios for lawyers and law firms. Should we go hybrid? If so, how will that work in practice? Should we continue to be mostly remote? How will we replicate the collaboration and cooperation of the 2019 workplace under new workplace guidelines?

Amid all this flux and uncertainty, law firms responded quickly and efficiently. The 2020 move-out was almost instantaneous. Technology, which has moved slowly into law firms, exploded as firms added security features, upgraded computers and monitors, reinforced cybersecurity for home use, linked mobile apps to office databases and added videoconferencing technology, plus all the lights and cameras needed to participate effectively in meetings online.

To understand where we are now and where we are going, NYSBA appointed a task force on the future of the legal profession. The task force is sending out a survey to find out what you, in the trenches, think about the future for lawyers and law firms and is gathering information at public

forums held by its four working groups. The association is also delving into this topic in this edition of the Bar Journal. For this article, I conducted electronic interviews with 23 New York lawyers; six are solos and the rest are in small to mid-size firms, ranging from two to 100 lawyers. Their geographic reach is fairly evenly divided into thirds: one-third covering New York City, one-third regional/New York State, and one-third either national or international in scope. All major practice areas are represented.

Most firms found that remote work did not impact productivity, although those unable to create a separate office space faced greater challenges. Similarly, most felt that client service levels did not decline. But many have missed the collaborative and collegial aspects of in office activity.

These lawyer respondents are optimistic about the future and proud of their responses to the pandemic. The lawyers felt that their firms did well in 2020 in terms of both clients and revenue, and very well in 2021. Only 16% reported fewer clients in 2020; 35% reported revenue decreases in 2020. With most of the firms seeing growth even in the worst of COVID times, it is not surprising that 85% are optimistic about growth in 2022. The management challenges during this period were diverse, ranging from managing a digital transformation to supporting the culture and retaining talent.

Firm Culture

Firm culture is an especially important aspect of ensuring continued high-quality client service in the face of the pandemic. Culture and attitude determine whether a firm can manage this roller coaster or whether it will manage them.

According to Joel Weiss, managing partner of the intellectual property boutique Weiss & Arons: “The 2020-21 pandemic year challenged our firm to remain relevant and vital in the new world order. Every firm is being challenged on some level to reconstruct itself to deal with what seems to

be a new distributed model. Throughout the pandemic, our emphasis has been safety first. This will continue as the unwritten portions of the pandemic develop."

Amy Goldsmith, partner and chair of the privacy/cybersecurity group at Tartar Krinsky & Drogin, stresses the importance of lawyers' attitudes: "The most important impact felt by Tarter Krinsky & Drogin as a result of the pandemic is not defined by a singular word but by several: adaptability, resilience and teamwork."

Nancy Schess, partner at the management-side employment boutique firm, Klein Zelman Rothermel Jacobs & Schess, similarly focuses on attitude: "We have all learned the importance of both flexibility and a sense of humor in running a law practice. The pandemic kept proving, and is still proving, that plans get disrupted. Consistent with our firm's culture, we make a conscious effort to pivot as necessary and keep our attitudes intact."

On a less positive note, Mark Mulholland, partner at Ruskin Moscou Faltischek, notes that "the lack of physical presence in the office, particularly among senior attorneys, and the corresponding fall-off in mentoring and spontaneous collaboration."

Location, Location, Location

Firms have been embracing the office return slowly as vaccination mandates and news about increasing hospitalizations make togetherness sound more hazardous. The issue is still not resolved in many businesses. A "Smart Brief on Your Career" September poll of readers of the SmartBrief website showed that 52% said their office reopening decision was still in flux, 22% said their opening had been postponed and 22% said they were fully open in person.

As Tracey Daniels, principal at Daniels O'Connell, a real estate boutique, explains, "Real estate closings were happening in person even at the height of the pandemic, so we were in person, as

needed, all along. That said, when we didn't need to be in, we were all home as it was of topmost importance that our employees felt and were safe."

George Kontogiannis, trust and estates partner at Tesser, Ryan and Rochman, describes his firm's evolutionary process: "Initially with the unknowns of this new pandemic, we mandated 100% remote working. By July 2020, we started relaxing our protocols, first having just a few attorneys go into the office. Couple of months later, we expanded to mandate two-thirds occupancy."

The different attitudes toward the return to the office reflect different perceptions about efficiency and effectiveness of remote work. Opinions are split. Some feel that working from home is more time-efficient because you don't have to commute to work or travel to court. Some see remote work as more efficient because so much time can be wasted by those in-office conversations people miss the most.

Tara Fappiano, partner, Haworth Barber & Gerstman, a boutique trial and litigation firm, says, "I found that the efficiency of an attorney to work remotely is highly dependent on the attorney and their work style, environment, and motivation to be productive. Those who have set up productive situations and want to make it work, do; those who have always had organizational challenges find it harder." Others tied efficiency and effectiveness to age because they saw older attorneys struggling to accommodate to remote work.

Others noted the impact of context: the ability to create an office setup at home. Jim Landau, partner and commercial litigator with McCarthy Fingar, says, "Work is more efficient and effective for those who were able to work at home. Those attorneys with distractions (young children, spouses working in the same room, etc.) did better at work."

Nancy Schess says, "We do see the value of time together in the office – but also understand that some appreciate remote work as a means of balancing life."

While personal flexibility and health safety are the obvious forces impacting office schedules, a host of other reasons also enter into the picture:

- “Some of the driving forces behind any decision about our space use model are current and future practice area needs, client needs, and attracting and retaining talent.” (Amy Goldsmith)
- “Billing appropriate hours. Maintaining focus. Proper supervision.” (George Kontogiannis)
- “Attorney and staff productivity and efficiency.” (Jim Landau)
- “Convenience, economics and possible cross-referrals.” (Alan J. Schwartz, managing partner, Law Offices of Alan J. Schwartz)
- “Grounded in efficiencies and effectiveness, together with individual preferences.” (Nancy Schess)

Asked if they planned to change their office configuration to accommodate the impact of remote work, several attorneys say that their firms plan to reconfigure their space to add multimedia conference rooms, hoteling and/or more meeting space to foster collegial interactions.

From personal observation, Mark Seitelman, managing partner, Mark E. Seitelman Law Offices, a personal injury firm, says, “Many single practitioners have either given up their downtown/midtown offices or have scaled back. They have elected to save the office rent. This is especially so with transactional attorneys who do the work themselves. They will now use either Manhattan mail drops or a friend’s address when needed for a meeting or a deposition.”

Technology as Workplace Savior

Many lawyers have been reluctant to take advantage of the many document management systems, single application apps and other technologies that can mitigate careless errors, tailor invoices. and expediate document preparation. They say they prefer their current approach and are concerned about the impact of faster and better on billable hours.

Come the pandemic, everyone was forced to reconsider their view of technology. For instance, the only way to "see" others was videoconferencing. As Joel Weiss explains: "Video conferencing became the most important technology. This opened new doors to legacy clients that previously didn't exist. But I caution that video conferencing remains an evolving discipline. It is not clear where this will end up."

"Zoom has become a mainstay of my world. From client meetings, mediations, board meetings, committee meetings, and court hearings, my day is spent in front of the multiple computer screens on my desk." says Marilyn Genoa, partner, Genoa and Associates, a mediation and business law firm.

Many of the lawyers were already technology-savvy when the pandemic hit, but most had to buy videoconferencing equipment and its collaterals: lights, camera, microphone, etc. Many had technology that had to be upgraded to support a dispersed system.

Many of the firms already had lawyers using technology. Sarah Gold, Gold Law Firm, a business boutique, says, "I had them all before, but now people actually want to use them."

The pandemic also democratized the use of technology by giving it to everyone. As Amy Goldsmith, partner, Tarter Krinsky and Drogin, says, "Most of the technologies that we used the most during the pandemic, including our remote access software, VOIP phone system and video conferencing system, were put in place long before the pandemic. During the pandemic we leveraged our scalable technology structure to expand access to these systems to all of our employees."

Nancy Schess says, "We had some technology and had to invest in others. When it became apparent early on that this remote work was going to go on for a while, the investment just made sense. In hindsight, that technology commitment was one of the factors that helped us pivot so smoothly."

Firms that plan to expand their technology in 2022 plan to upgrade their practice management software, expand their use of cloud storage, add email filing, become paperless, and, for Jim Landau, "Look into employing AI in connection with legal research."

The Rise and Fall of Practice Areas

Respondents mentioned seven practice areas that grew exponentially because of pandemic behavior.

- *Bankruptcy and restructuring*: "Many businesses faced extraordinary financial challenges requiring counsel on a wide variety of bankruptcy and restructuring issues." (Amy Goldsmith)
- *Criminal defense*: "Many people are acting irrationally, drinking is at an all-time high (no pun intended), leading to a variety of different types of inappropriate behavior. People are driving a lot more instead of relying on car services and municipal transportation when they otherwise would have and should have." (Alan Schwartz)
- *Intellectual property*: "Our intellectual property group saw growth as a result of the expansion of our online sellers practice group and privacy and cyber security practice." (Amy Goldsmith)
- "For trademark, many clients sensed new business opportunities that required them to protect their brands. Some copyright clients had more time to find infringing uses of their works." (Mike Steger, Law Offices of Michael D. Steger)
- *Labor and employment*: Nancy Schess, the compliance lawyer in her firm, says, "Due to the constantly changing rules during the pandemic, coupled with the need to be responsive to employees as in no other time in modern history, we have been very busy."
- *Litigation*: "All sorts of businesses defaulted on obligations due to the pandemic and this created litigation; people died, leading to probate/estate administration/surrogate's court litigation; people's fear of getting sick and dying led to estate planning; people's race to leave the city created real estate litigation." (Jim Landau)
- *Residential real estate* as people moved out of the city, and commercial real estate as businesses tried to renegotiate their leases. "Transactional real estate is CRAZY." (Tracey

Daniels)
- *Trust and estate work*: “It’s amazing what happens when people face their mortality.” (Sarah Gold)

Lawyers involved with the courts or government agencies cited harm to their practice when the courts were closed and calls to understaffed government agencies went unanswered.

“Grand jury presentations, hearings and trials may never be the same again. Virtual court proceedings deprive litigants of the opportunity to be totally present with judges, adversaries and witnesses, depriving us of the opportunity to read body language and judge the reactions of judges, jurors and adversaries.” (Alan Schwartz)

“Our plaintiffs’ personal injury practice did not grow because our intake of new cases diminished. During the height of the lockdown people stayed at home. Therefore, there were much fewer opportunities for clients to get injured.” (Mark Seitelman)

One negative impact mentioned by several lawyers is the change in clients’ definition of responsiveness. Clients now expect their lawyers to be available 24/7.

Mediator Marilyn Genoa says, “After over 18 months, I am definitely feeling the effects of always being ‘on call.’ Emails and texts are never ending and seem to be without the boundaries which previously existed.”

George Kontogiannis sees this change in expectations as a key effect of the pandemic: “The most important lasting effect is the clients’ expectations of always being available from anywhere. Even before COVID, clients expected responses to emails as if they were calls. Now being out of the office is no longer an excuse for replying later because you are expected to work from anywhere.”

Last but Not Least: Clients

Lawyers made several points about the importance of clients as an influencing factor in their pandemic-related decisions. For Amy Goldsmith, "Our clients and their respective industries all went through the same metamorphosis as we did, adapting to remote and then hybrid work in ways we never anticipated. To that end, we see a lot of alignment with our future plans and those of our clients when it comes to space planning and in-office needs. Nevertheless, providing best in class service to our clients is our number one priority, and their needs will play a central role in our planning."

Elissa Hecker, Law Office of Elissa Hecker, sees the pandemic as reinforcing the "continued value of relationships." "It's good to spend time listening to the big picture of what's happening in our clients' lives and businesses. Sometimes they just need kindness and a good ear."

Many feel that clients don't care how they run their offices or where they work as long as their matters move along:

- "The subject has never come up and I have no reason to believe that any care." (Richard Friedman,)
- "I have not heard any clients offer any opinion on this; it makes little difference to them." (Tara Fappiano)

Others feel their clients appreciate their workplace decisions. "Most clients are very pleased that we are continuing to offer online legal services, and that they do not have to commute to our office." (Alla Roytberg, Roytberg Traum Law and Mediation)

"I think our clients appreciate that we have put an emphasis on returning, with caution, to the office. We set up Zoom conference calls so people can see the firm employees walking in the background. I think this increases our credibility as a firm and gives us an appearance of normalcy. Client confidence in the firm is at an all-time high." (Joel Weiss)

For some lawyers, there is a need to meet the safety concerns of clients:

- “Like everything else with the pandemic, every client has a different comfort level, and while many cannot wait to meet with us in person, some simply do not want to leave their homes.” (Alan Schwartz)
- Donna Drumm, DrummAdvocacy, represents clients with disabilities, so safety is very important. “Since many of them have comorbidities and a few suffered from COVID aggravating their disabilities, they want to feel safe and prefer to meet virtually.”
- “Our clients appear very comfortable with few to no in-person meetings.” (Mark Mulholland)

Concluding Thoughts

Most lawyers have a positive attitude about future opportunities and their ability to meet future challenges. Andrew Peskoe, managing partner of Golenbock Eiseman Assor Bell & Peskoe, exemplifies this feeling:

“The most important lasting effects will clearly be the necessity of permitting remote work for attorneys and optimizing that business plan on a flexible basis. We have fortunately been able to meet our clients’ needs just as effectively and efficiently remotely; it is the needs of our team members that are more challenging to meet. There are so many lessons to be learned; I look forward to having a little break and perhaps a true return to normalcy, before I try to digest and learn from those lessons.”

The acceptance of new technology that makes it possible to continue connections with clients and among teams has made it easier for law firms and lawyers to pivot to remote work relationships. Most lawyers want to continue to have the flexibility provided by remote work, thus leading to a hybrid office plan. The conundrum now is how best to structure a combined in-office and remote workforce.

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Note
Kimberly K. Henrickson [d1]

COVID-19 & THE COURTS: THE PANDEMIC'S IMPACT ON THE PRACTICE OF LITIGATION AND CONSIDERATIONS FOR FUTURE REMOTE PROCEEDINGS

ABSTRACT

After COVID-19 was declared a national emergency in the United States on March 13, 2020, many courthouses closed indefinitely or began operating at a limited capacity in compliancewith federal, state and local guidelines. Subsequently, many courts started conducting remote proceedings via telephone or video. This Note explores some of the unique challenges presented by remote proceedings, identified through a survey of contemporaneous news articles written during summer and early fall 2020. Next, the Note outlines best practices and key considerations for attorneys participating in remote proceedings. Finally, the Note explores three areas of interest regarding the future of remote proceedings: 1) potential changes to the **Federal Rules** of **Civil Procedure** that would authorize the continued use of remote proceedings after the COVID-19 **pandemic** officially ends, 2) the benefits, risks, and best practices of a shift to virtual jury selection proceedings, even outside a public health emergency, and 3) the potential impact of COVID-19 on juror disposition and psychology. These findings suggest two main points. First, federal and state judiciaries should consider shifting to remote alternatives for certain in-person proceedings, such as jury selection, even after the COVID-19 pandemic ends. Second, attorneys must proceed cautiously, understanding that they are operating in a far different world than before March 2020, and adjust their practice accordingly.

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*306 I. INTRODUCTION

During the first few months of the COVID-19 pandemic, while most government buildings wereunder lockdown mandates, [1] court proceedings that could not be conducted via telephone or video were largely postponed. [2] The pandemic abruptly halted many civil and criminal cases, leading to case backlog in federal and state courts throughout the U.S. [3] Relying on a provision in the Coronavirus Aid, ***307** Relief and Economic Security (CARES) Act, the federal judiciary temporarily approved the use

of video and teleconferencing technologies for certain civil and criminal proceedings during the pandemic.[4] During summer 2020, state and federal judges held virtual bench trials[5] and some state courts held virtual jury trials for civil matters.[6] While many proceedings were uninteresting, others featured *Parks and Recreation*[7] style challenges, making them fodder for local news. One publicly teleconferenced hearing was forced to adjourn early due to consistent interruptions from listeners who did not mute their phones,[8] while during a jury selection conducted over videoconference, jurors were spotted lying in bed andusing exercise equipment.[9]

This delay of civil and criminal cases led to significant case backlog in federal and state courts throughout the U.S.[10] Aggregate data from 12 judicial districts demonstrates the amount of judicial work ***308** product created between March - May 2020 was much less than during this same block of months in prior years.[11] The number of judicial opinions written during March, April, and May 2020 was 11%, 15%, and 24% fewer, respectively, than the average number written each month during the four years prior.[12] However, there was substantial variation between districts; the number of written opinions decreased by 41% in the Northern District of California and *increased* 79% in the Western District of Texas.[13]

While courts dealt with their delayed dockets, they also contended with additional lawsuitsfiled due to the pandemic. The pandemic and subsequent economic downturn led to many litigation-spurring events, including evictions and foreclosures, employment issues, consumer debtfallout and increased domestic violence.[14] Additionally, businesses, religious institutions and individuals filed lawsuits alleging social distancing guidelines infringed on their rights.[15] Despite the nationwide shift to working from home, government enforcement agencies such as the Securities & Exchange Commission have continued to file enforcement actions at the same or greater rate as they have in past years.[16] Future cases related to the pandemic may relate to the distribution and administration of the forthcoming COVID-19 vaccines. Cases related to the pandemic will likely continue to be filed for many years.

***309** During summer 2020, courts developed plans to safely facilitate in-person proceedings. Courthouse reopenings took place at different times, typically when deemed safe for the surrounding community, and at partial capacity.[17] By August 2020, only one-third of district courtshad issued orders allowing in-person jury trials to resume.[18] The same month, New Jersey state courts were only allowing 10-15% of judges and staff onsite at a time.[19]

Many of these plans included interior reconstruction to make courthouses more socially distant, with the intention of decreasing the risk of viral transmission. Courtrooms were reconfigured and repurposed.[20] In the Southern District of New York, the court constructed a second jury box in the gallery, seating some jurors behind counsel tables.[21] Areas of the courtroomwhere counsel and witnesses speak from were enclosed in plexiglass so parties could enter it and then remove face coverings.[22] The court also limited gallery seating to two people per row, with only half of the normal rows open for seating.[23] In a plan for an October 2020 trial that was postponed twice due to COVID-19, the judge limited both sides to three people per counsel tableand said gallery seating would be “extremely limited.”[24]

Some courts sat jurors in the public gallery instead of the jury box and used another courtroom for breaks and deliberations, while other spectators watched through a video feed set up in a third courtroom.[25] Common alterations included plexiglass “sneeze guards” in ***310** front of the judge's seat, court stenographer's seat, and witness box;[26] pens separated into cups denoting “clean” and “used” for better sanitation;[27] hand sanitizer and disinfecting products kept throughout the courtroom;[28] and installing specially sanitized ventilation filters.[29] Physical alterations to courthouses had not been budgeted for.[30] Trial rules were also adjusted. The Northern District of Illinois' restart plan limited civil jury trials to eight jurors and restricted counsel from approachingwitnesses, leaving their designated table during trial, using hard-copy exhibits, or participating insidebars with judges and opposing counsel.[31]

Courts that hosted in-person proceedings during the pandemic required temperature checks and face masks for all visitors and severely limited the amount of people allowed in at a time.[32] Some courts have also imposed a verbal assessment prior to entry, asking visitors whether they've recently experienced symptoms, gotten positive COVID-19 test results, or traveled to

states and countries with high ***311** infection rates.[33] One issue with creating reopening plans is that courthouses often have non-litigative functions, such as housing state or local agencies, so additional employees and visitors needed to be accounted for in reopening plans.[34]

Some courts looked outside the traditional courthouse for unique, safe ways to facilitate in-person proceedings. In addition to spreading participants between multiple courtrooms,[35] some districts used local convention centers to restart jury trials.[36] In August 2020, the Chief Judgeof the Northern District of Texas announced she was investigating whether an outdoor trial could be conducted using the courtyard of Southern Methodist University's Dedman School of Law.[37] An "outdoor court" is not a brand-new idea. Historically, outdoor trials were prevalent in Englishcommon law courts and date back to the use of the forum during the Roman empire.[38]

***312** In-person proceedings that were held faced their share of pandemic-related issues. During a September 2020 in-person trial in the U.S. District Court for the Northern District of Illinois, oneof 14 paneled jurors called in sick the morning closing statements were delivered, reporting symptoms of COVID-19.[39] Two other jurors immediately left after finding this out, concernedabout exposure risk and planning to either self-isolate or seek medical advice.[40] This "domino" risk of juror abdication is even more concerning in districts with smaller civil jury panels, as even a few jurors leaving could lead to mistrial.

The costs and issues associated with adapting in-person proceedings to the pandemic haveincreased the appeal of remote proceedings. In October 2020, the U.S. District Court for the Western District of Washington held what was believed to be the first federal jury trial held over videoconference.[41] The court decided to begin conducting videoconference civil jury trials to make progress on their inundated dockets.[42] Despite minor tech issues, participating parties reflected positively on the experience.[43]

II. BEST PRACTICES FOR ATTORNEYS NAVIGATING VIRTUAL PROCEEDINGS

Remote proceedings introduce many additional challenges attorneys must consider in orderto best represent their clients. To be successful during virtual proceedings, attorneys must rehearsediligently, remain flexible, and understand their audiences. First, for trials held overvideoconference, trial teams should run through their presentations using the software that will beused during the trial. Attorneys should also practice delivering their arguments to their colleaguesvia videoconference. Alternatively, they can record themselves and ***313** critique the resulting "game tape." While doing so, teams can identify potential technological hiccups, such as when introducing exhibits or when an objection is anticipated. Due to the nature of participating througha screen, any "awkward moments" during trial will be magnified in videoconference proceedings. Some issues to look out for are improper camera positioning, sound transmission issues, poor lighting, background noise, the speaking attorney's position within the frame, and any attention- grabbing items in the background.

There is a definite risk of distraction inherent in remote proceedings as participants are logging in from devices that access the internet and are not physically under the scrutiny of a judge. Attorneysmay need to alter their tone or advocacy style to keep the attention of participants. They may conduct contemporaneous independent research of case-relevant topics or the parties themselves, or leak information about the trial via email or social media.[44] Jurors may also engage in less nefarious, but still harmful, multitasking. To avoid these risks, courts may issue laptops or tabletsto jurors that are equipped with only the software necessary to participate.[45] If these device have other functionalities, courts can program them so common social media sites and other distractorsare blocked. Providing jurors with needed devices has the extra benefit of ensuring the inclusion of demographic groups with lower-than-average access to technology, such as the elderly or lowincome, in the jury process. Some courts have already done this during the COVID-19 pandemic.[46] Judges can also instruct jurors to angle their camera in ways to maximize the amount of body that is visible on the screen so that any multitasking is more readily detectable.[47] While some remote proceedings have allowed jurors to participate via ***314** smartphones, jurors have experienced greater difficulty using these devices than when logging on through a laptop or tablet.[48] Jurors should notrely on participation via smartphone but may use them as back-up in emergent situations. Courts should also establish IT support lines that parties can call if they experience technical difficulties during the remote proceeding.

When participating in remote jury proceedings, attorneys must be cognizant of maintainingtheir clients' privacy. For example, parties should pay attention to whether jurors are taking notesduring the trial and direct such jurors to destroy all notes after trial. When representing a corporation, attorneys must recognize that they are effectively a corporate spokesperson. [49] Although statements of attorneys in open court were already on the record, livestreams and publicly available call-in information allows press and other members of the public to listen easilyto what attorneys are saying without the burden of traveling to the court. [50] In bench trials, attorneysmust give greater consideration how their arguments may sound to someone without knowledge of the case, or how their words may be twisted against them. Not to do so is to risk leaving the courtroom and finding one's words have gone viral on social media for the wrong reasons.

III. CHANGES TO THE PROCEDURAL RULES NEEDED TO CONTINUE REMOTE COURT PROCEEDINGS

The CARES Act, enacted on March 27, 2020, authorized federal judges to hold civil proceedings remotely during the pandemic. This authorization will expire 30 days after the pandemic is officially declared over. [51] The Judicial Conference is also empowered to end authorization sooner if it determines federal courts are no longer "materially affected" by COVID-19. [52] When CARES Act ***315** authorization ends, courts will not be able to rely on this broad authorization to conduct any remote proceedings, including non-jury proceedings such as bench trials and preliminary hearings.

Thus, the **Federal Rules** of **Civil Procedure** need to be altered in order for remote civil proceedings to continue once the COVID-19 **pandemic** is officially over. [53] The Judicial Conference is the policyregulating body for the U.S. federal court system. [54] In May 2020, the Judicial Conference sought public feedback on potential changes to the Federal Rules of Procedurefor emergency situations. [55] The Conference received about 60 letters from individuals and legal associations during the month-long comment window. [56] Many of the comments suggested relaxing the **Federal Rules** of **Civil Procedure** governing how trials are conducted, both during andafter the **pandemic**. [57] Some comments supported regularly conducting proceedings remotely to increase efficiency and decrease cost. [58]

Remote trials could be authorized through additions to Rule 77(b). Rule 77(b) states: "Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom." [59] "Open court" is undefined in the Federal Rules. Both regular and legal dictionariesdefine "open court" as judicial proceedings that are open to the public, distinguishing proceedingsconducted in open court from in camera review and specially protected proceedings. [60] Thus, the common interpretation of "open court" hinges not on physical location, but on whether a proceeding is publicly viewable. Public viewing of a ***316** videoconference trial or proceeding is possible through software that allows viewers to observe but restricts them from participating in the proceeding in any way.

The second clause of 77(b) states: "so far as convenient, in a regular courtroom." [61] A globalpandemic necessitating social distancing certainly makes the use of a regular courtroom inconvenient, but this will be harder to establish after the COVID-19 pandemic officially ends. Tobroadly authorize remote civil trials, the framers should append on 77(b) "except upon agreementby both parties and when compelling circumstances requires." Adding "upon agreement by both parties" will allow cases to be adjudicated remotely when it is mutually agreed upon as the most convenient, optimal choice for both parties. This will be especially helpful in federal diversity cases if a party does not have the means to travel or stay for extended period in a faraway venue, or if members of the legal teams involved are spread across the world. It may also lead to trials being completed more quickly because removing the burden of travel will make parties' schedulesmore flexible. The wording of this addendum would also restrict judges from ordering remote proceedings *sua sponte*. However, the addition of the phrase "when compelling circumstances requires" will allow courts the discretion to keep trials in-person if they are personally uncomfortable with remote trials, envision a risk of prejudice to either party, or see it as an unethical choice for any reason.

Another potential alteration to Rule 77(b) is including an explanatory definition for the phrase "as far as convenient." This definition should read: "In situations of safety risk to any participant, staff, or party, trials on the merits may be conducted in a remote capacity or in a different location." This would enable the judiciary to function remotely during future public health crises as well as emergency situations. The broad term "safety risk" would cover situational threats to court participants as well. This is necessitated by recent demands by judges for the government to assure their safety, following recent high-profile acts of violence against membersof the judiciary. [62]

The Federal Rules already authorize contemporaneous transmission of witness testimony from a remote location in Rule 43(a). [63] Rule 43(a) states:

> ***317** "At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location."

This Rule presents the question of who determines whether the circumstances require contemporaneous transmission. In *Gould Electrs. Inc. v. Livingston Cty. Rd. Comm'n*, [64] authoredJune 2020, a judge in the Eastern District of Michigan wrote: "determining whether good cause and compelling circumstances exist is a matter left to the court's discretion." [65] A global pandemichinging on viral transmission certainly seems to meet the "compelling circumstances" requirement, and judges have agreed. In March 2020, a judge from the District Court for the District of Minnesota wrote: "COVID-19's unexpected nature, rapid spread, and potential risk establish good cause for remote testimony." [66] In addition to overall circumstance, the court may consider personal facts about the witness when determining if the situation merits remote testimony. In a case resolved in September 2020, a judge in the District of South Carolina allowedan expert witness to testify via video because he was 66 years old and had "remained isolated, avoided contact with people other than his immediate family, and had not participated in any group activities." [67]

IV. ANALYSIS OF A VIDEOCONFERENCE VOIR DIRE MODEL

Nothing in Rule 47, which outlines the process of jury selection, requires that voir dire takeplace in a physical courtroom. [68] During COVID-19, some state courts have conducted jury selection via videoconference. [69] Voir dire can attract hundreds of jurors to a courtroom ***318** at a time. Holding voir dire remotely, via a videoconference proceeding, would severely cut pedestrian traffic in courthouses and make reporting to jury selection less onerous to prospective jurors. Additionally, it may make jurors more open about their opinions and help attorneys identify and strike biased jurors. In this section, the idea of videoconference voir dire is explored and several potential models for the process are explained.

A. Introduction To The Voir Dire Process

Every jury trial begins with voir dire, the process of questioning the jury pool before dismissing certain members and officially impaneling the jury. [70] During voir dire, either the judgeor both parties question the jury pool to elicit case-relevant opinions. [71] An attorney's goals duringjury selection are to find and strike biased jurors, protect favorable jurors, build rapport with the jury, and preview the client's case for the jury and judge. [72] Each judge creates his or her own voir dire rules, so voir dire methods vary between and within jurisdictions. [73] Three basic questioning formats are used during voir dire: the individual, group, and talk show methods. [74] When using theindividual questioning method, the questioner directs an inquiry at one juror at a time, often randomly. [75] This may result in a juror feeling "put on the spot," self-protective and defensive of his or her true views. When using the "group" method, which is most common, the questioner directs each inquiry to the entire panel at once. Jurors wishing to respond raise hands and are calledupon by the questioner to express their answers. In the "talk show" method, after each individual juror provides their answer, the questioner solicits agreeing and disagreeing opinions from the restof the panel to link the jurors' answers with each other. The talk show method makes voir dire something of a conversation and can lead to more candid disclosure. [76]

***319** The trick of voir dire is getting jurors to admit controversial opinions that reveal hidden bias. Jurors are reticent to express these opinions in front of the court and their peers, particularlywhen they are insecure about the social acceptability of the opinion. [77] Even "getting-acquainted" questions, such as favored TV news stations, may make jurors insecure. Different psychological factors may explain this phenomenon, such as a need for social desirability or peer approval, internal pressure

to appear fair or "politically correct," conformity pressures, shyness, fear of criticism, fear of being wrong, and unwillingness to extend the time the voir dire process will take. [78]

Voir dire is a uniquely challenging court proceeding mid-pandemic because it requires many prospective jurors to be called to court at the same time. Traditionally, courthouses order upto hundreds of jurors to report to court on the same day. There, they sit next to each other in small, enclosed courtrooms and share pens and clipboards. [79] Even prospective jurors who are not ultimately selected may be kept at the courthouse for the entire day. [80] During the COVID-19 pandemic, courts facilitating in-person proceedings have lowered the number of jurors asked to report to court for voir dire. [81] Understanding some jurors will be afraid to report for in-person jury service, many judges have sent out more summons than usual, and some have used written questionnairesto determine preliminary eligibility. [82] Some courts have proposed moving jury selection toalternative, larger venues, like convention centers or movie theaters, [83] but these plans impose negative externalities of high rental costs, which may trickle down to the parties through court costs.

***320** While software enabling videoconferencing may also be expensive, [84] remote voir dire processes are preferable to in-person but socially distanced versions. Remote voir dire, hosted primarily via videoconference, is likely to be accepted by jurors because it removes the burden oftraveling to court. Traditional voir dire requires many people to report to court who do not end upon the resulting jury panel. While jurors will still be required to report to the virtual jury selection, there will be less opportunity cost expended as they can "leave" the videoconference immediatelyafter they are done and do not have to deal with traveling and parking at a new place. Additionally, because Americans are now more cognizant of the viral transmission risk of large gatherings, it may prove difficult to get an adequately large jury pool to report to voir dire, particularly during flu season.

Voir dire could become partially or entirely remote, with separate phases of the process facilitated through written questionnaire, videoconference, or in-person questioning. An entirely written voir dire process is not likely to be accepted by parties, [85] but breaking substantive questioning (i.e. case-related, non-hardship questions) into two phases could increase efficiency by allowing parties to remove jurors for cause before subjecting the remaining jurors to live questioning. Fully remote voir dire would take place entirely over videoconferencing or could utilize both videoconferencing and written questionnaires. Partially remote voir dire would use videoconferencing and/or written questionnaires for early stages but require a small number of jurors (close to the final paneled amount) to ultimately report to the court before peremptory challenges are made. The following tables lay out different possible combinations, split into when the eventual trial is remote or in-person.

***321 Remote Trials**

HARDSHIP PHASE	VOIR DIRE QUESTIONING	ADDITIONAL VOIR DIRE QUESTIONING
Written Questionnaire	Remote Live Questioning	Remote Live Questioning
Remote Live Questioning	Remote Live Questioning	Remote Live Questioning
Written Questionnaire	Written Questionnaire	Remote Live Questioning

In-Person Trials

HARDSHIP PHASE	VOIR DIRE QUESTIONING	ADDITIONAL VOIR DIRE QUESTIONING
Written Questionnaire	Written Questionnaire	Remote Live Questioning Followed By In-Person Live Questioning
Written Questionnaire	Written Questionnaire	In-Person Live Questioning
Remote Live Questioning	Remote Live Questioning	In-Person Live Questioning
Written Questionnaire	Remote Live Questioning	In-Person Live Questioning

322** ***B. Use of Written Questionnaires

Using written questionnaires distributed by mail, attorneys can submit to potential jurors around of written questions to shorten the amount of time live questioning will take. These questions should be case-specific and designed to identify biased jurors, while still vague enough to preventjurors from researching the case before trial. Written questionnaires are already used in increasing frequency during voir dire, to encourage jurors fully disclose their views without fear of judgement. [86] In many jurisdictions they are nearly routine. [87] Written questionnaires increase the efficiency of jury selection by eliminating time-consuming, repetitive questions and gathering more detailed information from prospective jurors. Prospective jurors are sometimes more willingto disclose personal sensitive information through a written questionnaire than verbally. [88] Questionnaires also provide information collateral to the answers themselves, including the prospective jurors' vocabulary choices, spelling, grammar, sentence structure and response organization. [89] Gleaning this additional information compensates for the inability of the parties toexamine the jury pool in-person, and may relieve some fears about the virtual voir dire model. However, written questionnaires require careful follow-up live questioning. [90]

Even if parties are reluctant to include substantive questions on a written questionnaire, theyare an efficient way to remove jurors for hardship. Notably, in a recent survey conducted by the Civil Jury Project, all judges surveyed who had resumed trials noted increased requests by potentialjurors to be excused for hardships. [91] To streamline this process, the court could send hardship questionnaires to the number of prospective jurors needed by the court for a set time period (e.g. two or three months). Each prospective juror would receive summons by mail directing them to complete an online questionnaire regarding their availability over the period. To respond, the prospective juror would note his or her unavailability over the covered period and attach any required supporting documentation. The court clerk would then ***323** proactively assign jurors to days they are available within the covered period. Under this method, more of the jury pool originally summoned will eventually end up on a case.

Written hardship questionnaires may augment risk of prospective jurors fabricating excuses to avoid service, without the presence of a judge or the formality of being in court. For this reason, prospective jurors should be required to provide supporting documentation affirmingtheir reason for excusai. For example, if someone's excuse is that they are immunocompromised and cannot attend an in-person court proceeding, they can send a doctor's note. Additionally, judges can review the excuses and documentation offered and decline to excuse jurors if they choose. After the judge reviews excuses and the clerk assigns jurors to cases, jurors will receive summons instructing them to report to the court or a videoconference for live questioning.

C. The Benefits of Videoconference Voir Dire

Even if in-person proceedings become largely feasible again after the end of the COVID- 19 pandemic, voir dire conducted over videoconference may remain preferable to the traditional in-courtroom model. Parties who have participated in videoconference voir dire during COVID- 19 have reflected positively on the experience. [92] Virtual voir dire presents many benefits for bothattorneys and jurors. First, it allows for greater scrutiny of each jurors' facial expressions and mayimprove attorneys' ability

to identify deceitful or evasive jurors. Videoconferencing programs such as Zoom and Google Meet have “Speaker View” settings in which the person speaking fills up the entire screen of other participants. A screen brings the jurors' face much closer to its observers than is possible in person. Multiple attorneys on one team will be able to analyze each juror from their own screens without making jurors feel uncomfortable. One plaintiffs' attorney who participated in a virtual jury selection over Zoom in May 2020 credited the platform's “gallery view” option for allowing him to see the jurors' nonverbal reactions and establish a rapport. [93] Because ***324** only the jurors' shoulders, necks and faces will be visible, however, the ability to read body language may be somewhat limited. [94]

Participating in voir dire from their own homes is likely to make jurors more honest, comfortable and relaxed. Recent virtual voir dire experiments have concluded jurors are more likely to stick to their opinions while in their home, suggesting the home environment inspires greater confidence in their own opinions. [95] The same plaintiffs' attorney mentioned in thepreceding paragraph stated his belief that wearing comfortable clothes and being in their own homes helped jurors open up and provide more natural answers than the traditional courtroom environment. [96] At-home voir dire removes the stress of traveling to and sitting in an unfamiliar environment, as well as being among strangers. [97] Judges who have implemented video-based voir dire have noted increased juror comfort and participation. [98]

Hosting parts of voir dire virtually may also lead to silent jurors speaking up, increasing attorneys' ability to identify “stealth” or “activist” jurors. Jurors that are typically shy among unfamiliar people may be more willing to express their thoughts and opinions. It is unlikely that each juror will be able to see the entire pool on their screen at once, although this depends on the size of the group being questioned and the features of the software being used. Due to this, jurors may forget about the number of people listening to them and care less about how others may viewtheir opinion. Vidéoconférence voir dire also does not preclude private conferences from taking place; if a juror requests a private audience with the judge, he or she can be moved into a breakoutroom to separate them from the pool.

***325** *D. Risks of Virtual Voir Dire, and How to Avoid and Confront Such Risks*

The risk that jurors will be distracted during voir dire has been demonstrated through proceedings conducted during the COVID-19 pandemic. During virtual jury selection for a case in the U.S. District Court for the Northern California, prospective jurors reportedly curled up in inbed, exercised on gym equipment, and worked on extraneous electronic devices during proceedings. [99] Other jurors left their “frames” to tend to children, pets, and kitchen appliances. [100] External distractions, such as ringing doorbells and telephones, will compete for jurors' attention, especially if other members of their household are working or schooling from home.

To mitigate the risk of distraction, judges should begin voir dire with an accurate description of what will happen and how long it will take. They should also instruct jurors on theimportance and purpose of the voir dire process at that time. Then, questioning attorneys should use the “talk show” method of questioning to make the process as engaging as possible. If jurors feel they are part of the conversation even when they are not themselves speaking, they will be less vulnerable to distraction. Alternatively, prospective jurors who have been observing social distancing may be more curious about their fellow community members' answers and thus pay closer attention than they would have before COVID-19.

Other potential risks relate to the use of the internet to participate in voir dire. During questioning, an internet glitch may disrupt a question or a response; however, this is easily mitigated if jurors are instructed to alert the parties when this happens and ask the speaker to repeattheir statement. The judge can also instruct the jurors to make sure they properly hear and understand each question before offering a response. A fear regarding all videoconference court proceedings is that such proceedings will exclude participants who do not have access to technology, a trait that may be especially prevalent in demographic groups such as the indigent orelderly. During the COVID-19 pandemic, courts have confronted this problem by supplying jurors ***326** with laptops or tablets if needed. [101] However, there are certain conditions, such as one's personalinability to utilize technology or a lack of internet access at home, that might be more difficult to address.

A risk of prejudice has been born from jurors being “friendly” with the parties through the videoconference. In addition to lacking the formality of a courtroom, videoconferencing platformsput the jurors in closer “proximity” with the parties in that everyone's faces are immediately nextto each other on the screen. In the courtroom, there are physical barriers such as the jury box, witness stand, and party table. These separate participants and signify their independence from each other. During a virtual

trial in the Alameda County (California) Superior Court, jurors casually conversed with the plaintiff about setting up virtual backgrounds while the judge and attorneys were in a breakout room having a bench conference. [102] In a mistrial motion, the defendant argued the plaintiff "intentionally and subtly created juror empathy" through this friendly conversation. [103] The judge denied the motion because the interaction contained no discussion of the case. [104] While this took place while the case was already in the trial stage, it is easy to imagine a similar situation occurring during jury selection. However, this risk is easily avoided if upfront precautions are taken. Since this incident, the Alameda County Superior Courthas changed its Zoom protocol so jurors, witnesses, and parties are kept in a waiting room where they are unable to interact while they judge is not present. [105] Other courts using videoconference to facilitate remote proceedings should follow this model.

Another concern is whether attorneys, judges and parties will be amenable to remote jury selection. In a survey of over 2400 Texas attorneys conducted during summer 2020, 23% said theywould participate in a remote jury selection while 33% were willing to participate in a remote jury qualification. [106] The Association of Criminal Defense ***327** Lawyers of New Jersey objected to New Jersey's plan to resume jury trials in September 2020 using a model combining remote jury proceedings with in-person proceedings. [107] The plan was for jury selection to be initiated via Zoom, with the final phases conducted in-person using 30 or fewer prospective jurors at a time. [108] However, the Association believed this plan did not allow enough face-to-face interaction betweenattorney and prospective jurors, claiming "individual voir dire of jurors should be conducted in person in the courtroom before the final jury is selected because video impairs the ability to successfully gauge natural human responses." [109] Attorneys are likely to have widely divergent views on whether videoconference voir dire is a sufficient alternative to the traditional model.

Ultimately, an analysis of whether courts should categorically conduct jury selection via videoconference requires a realistic look at the currently available alternatives. Currently, many state and local guidelines require wearing facial coverings indoors. Facial coverings like masks and face shields impede counsels' ability to discern jurors' facial cues as well as hear their answersto voir dire questions. Even when masks are no longer required by national, state and local guidelines, it's easy to envision a situation in which a prospective juror is willing to participate inan in-person proceeding but refuses to take off their mask while doing so. This situation would puta judge in a controversial position of having to remove someone from their jury for wearing a mask.

Such an approach may be a beneficial improvement on voir dire proceedings even after therisk of contracting COVID-19 decreases. In addition to the benefits for juror disclosure and attorney analysis described above, it would have positive impacts on the courthouse. Conducting voir dire virtually would greatly decrease the number of people in the courtroom each day, eliminating potential security issues. It will trim the lines for airport-style security screenings thatvisitors go through before entering courthouses. Decreasing the amount of people required to report for jury selection, which is hundreds in some jurisdictions, will result in positive externalities such as reducing carbon ***328** emissions, lessening traffic, and freeing up available parking spots. Most notably, it will remove the burden on jurors of reporting to court and waiting for hours to see if they are called for a case.

E. Suggested Features for Software Platforms Developed to Facilitate Voir Dire Proceedings

If virtual voir dire becomes the norm, federal and state courts may consider adopting software made specifically for facilitating voir dire, to be used consistently by all judges within the jurisdiction. A developer inventing a voir dire platform will want to enable the administrator to "lock" the screen view, so each juror's video tile remains located on the same place on the screenfor the entirety of the proceeding and on all participants' screens. [110] This will help attorneys followwhich jurors have said what. Another helpful feature would allow the judge or clerk to mute or unmute all jurors at once, without muting counsel or staff, to prevent jurors from purposefully or inadvertently interrupting while a question is being asked.

Additionally, the platform could require all participants to sign in not with their names, butas their roles in the court. A clerk or court administrator would log in through an administrator account as the "host" and maintain functional control over the proceeding. This individual wouldbe well-educated on the software and be on standby to troubleshoot any issues. Plaintiff's and defendant's counsel would log on as "Plaintiff" and "Defendant," the judge would log in with theirtitle and name, staff would log on as their respective roles, and jurors would log on as their juror number. Each role would have its own preset, specialized settings. For example, "Judge" would have the ability to mute all other parties and establish breakout rooms when needed, while jurors and counsel would not have this ability.

V. COVID-19'S POTENTIAL IMPACT ON JUROR TURNOUT FOR IN-PERSON PROCEEDINGS

If attorneys are given the option to choose between in-person and remote trials, they mustconsider how the jury pool may differ after COVID-19. The first consideration is what kinds of people will feel comfortable reporting for jury service during and after the ***329** pandemic. Many Americans may be wary of attending jury selection from a public health standpoint even after thepandemic officially ends, as they are now more aware of the viral transmission risks of large gatherings. Magna Legal Services conducted a survey in June 2020 entitled "What will jury panelslook like in a post-pandemic world?", the results of which were presented during a public Winston & Strawn webinar on August 11, 2020. [111] One of the questions was: "If called as a juror for a civilor criminal, would health and safety concerns make you less likely to report for jury duty?" 40% of the nearly of the nearly 4,000 respondents said yes, 32% said no and 28% were undecided. Similarly, a June 2020 survey conducted for the National Center for State Courts asked participants, "Are you most comfortable with inperson or remote jury service?" [112] 44% said "remote," 23% responded "in-person," and 32% said "no difference." [113] Understanding jury service was unpopular even before COVID-19, the risk of disease transmission is likely to increaseanimosity towards reporting for jury service.

In-person juries paneled after the COVID-19 pandemic began have had different demographicmakeups than they did before the pandemic. In a survey of 83 judges conducted by the Civil JuryProject, 44% of the judges who had resumed trials said they had noticed a difference in the demographics of a gender, age, or race of potential jurors as compared to before the pandemic. [114] As senior citizens are more likely to get seriously sick or die from COVID-19, or be vulnerable due to a comorbidity, in-person juries are likely to trend younger, a phenomenon that has already been noticed by judges conducting trials during the pandemic. [115] Since the COVID-19 pandemic began, some judges have categorically excused senior citizens and people with underlying health conditions without hesitation. [116] One Miami-Dade ***330** County Circuit Court Judge automatically struck any juror above age 70 for a one-day trial in July 2020, even though multiple jurors in that age group expressed willingness to participate. [117]

Research suggests those feeling most vulnerable to COVID-19 will be less likely to reportto in-person jury service. [118] Reported willingness to report for in-person jury service varied greatlybetween different demographic groups, just as COVID-19 has affected many groups disproportionately. [119] For example, less than 50% of older African American women surveyed said they were willing to report to in-person jury service, compared to 80% of young white men asked the same question. [120] In the Magna Legal Services study, females expressed greater concernabout the risks of reporting for duty. [121] Holding in-person jury proceedings will likely exclude certain demographic groups from the jury process, resulting in certain voices and experiences being less represented injury deliberations.

The self-selection of different demographic groups out of the jury pool means trialoutcomes may differ greatly than expected prepandemic. With the demographic representation of juries now undermined, jury research conducted before COVID-19 may need to be adjusted orredone. Attorneys preparing for in-person trials should keep in mind that older jurors, now largely excluded, tend to be more ***331** conservative and receptive to defense themes. [122] At the same time, excusing those with underlying heath conditions will remove individuals more likely to besympathetic to plaintiffs seeking compensation for injury. [123] Electing to conduct proceedings viavideoconference, if possible, may help ensure statistically appropriate demographic representation.

When deciding whether to pursue a remote or in-person jury trial, the paramount concern of attorneys must be the composition of the jury pool under both models. Attorneys must estimatewhether pandemic-related fears will prevent jurors from reporting for in-person jury service, and if so, which jurors, and how important those jurors may be to their side's case. Attorneys facing this decision may consider the following decision-making framework. First, attorneys must be familiar with the demographics of the trial venue. For example, attorneys should understand whatpercentage of the local population is elderly or otherwise considered high-risk. They should also consider at this stage which demographic groups they believe will be helpful to their side. Second, attorneys must analyze the prior and current impacts of COVID-19 on the local population. Important considerations are the number of deaths and hospitalizations, whether the local hospitalswere overrun at any point, and current and former local social distancing guidelines. Third, if possible, attorneys should learn what they can about the juror turnout in other remote and in-personproceedings conducted in the trial venue since the beginning of the COVID-19 pandemic. Using this information,

attorneys should map who they expect to participate in both types of proceedingmodels, and choose the model they believe will be least harmful to their client's case.

Case complexity is another important factor in deciding whether a case should be in-personor remote. During pre-pandemic inperson proceedings, jurors had trouble comprehending complex civil suits involving, for example, the operation of financial instruments or the patentingof biological compounds. [124] Due to the inherent distractions of remote proceedings, jurors may have a harder time grasping complex arguments while at home. Even if a juror holds pre-existing beliefs that makes them more plaintiff or defense leaning, there is no ***332** guarantee they will stick to this belief if presented with an argument they cannot comprehend. Attorneys who believe their case may be too complex for the virtual environment may want to seek alternative dispute resolution methods rather than take a risk on a jury proceeding at all. Due to the lack of research on COVID-19's impacts on juror psychology and lessened ability to predict outcomes, even in simple cases, clients may be better served by forgoing jury trials altogether and seeking alternativedispute resolution methods instead.

VI. COVID-19'S POTENTIAL IMPACT ON JUROR DISPOSITION & PSYCHOLOGY

The COVID-19 pandemic is likely to have changed the way jurors view the world and thusimpact their opinions and decision-making, which will impact deliberations regardless of whethera trial is being conducted in-person or remotely. The impact of the pandemic on juror psychologyand disposition will vary depending on the venue where the case is being tried and how impactedthe local community was by the pandemic. [125] In terms of Maslow's hierarchy of needs, generally, Americans' feelings of safety and security have been threatened by COVID-19. [126] Those who havepersonally contracted COVID-19, lost a family member or close friend to the disease, worked in an overwhelmed healthcare facility, or suffered severe economic challenges may have had those needs severely impacted. [127] The undermining of basic needs leads to the hoarding effect, when individuals trying to grab as many resources for themselves as possible. [128] This was demonstratedin March 2020, when Americans rushed to buy food and toilet paper in preparation of COVID-19 related lockdowns. The hoarding effect may decrease jurors' propensity to award damages to others if they have adopted a “self-first” mentality. [129]

Jurors may also be more cynical and distrusting of plaintiffs seeking compensation for loss.After living through the COVID-19 ***333** pandemic, jurors may suffer from learned helplessness, orcompassion fatigue, which is when an individual stops trying to improve their situation after beingcontinually faced with negative, uncontrollable situations. [130] In the Magna Legal Services studyconducted in June 2020, 92% of jurors surveyed agreed with the statement: “People are more likelyto blame others for their problems than to accept responsibility,” typically a defense sentiment. [131] However, the vulnerability caused by the COVID-19 pandemic may result in increased empathy towards harmed parties. [132] In the Magna study, 52% of respondents said they felt veryvulnerable during the pandemic. [133] 88% agreed with the statement: “Juries need to be guardiansof the community by forcing companies to change their bad behavior with large damages awards.” [134] The “reptile theory” suggests humans lash out when their feelings of safety and security are threatened, which may lead to juries casting these feelings on defendants and orderingthem to pay large amounts to harmed plaintiffs. [135] To tap into this theory, plaintiff attorneys can use the defendant's conduct to remind jurors of their own vulnerability. [136] Jurors may give a largerthan usual punitive awards to plaintiffs if they see their own fears reflected in the actions of a defendant. [137]

The pandemic may have engrained more positive opinions towards members of thehealthcare profession. Since March 2020, there has been a large cultural push in America to viewand praise healthcare workers as “heroes” for their fight against COVID-19 pandemic. In the Magna study, 23% of respondents said they knew a COVID-19 healthcare worker. 60% said they would be less critical of healthcare workers after the pandemic, and 81% said they have a greatersense of compassion for healthcare workers. [138]

The public sentiment of praising healthcare workers might result in “halo effect,” which is when one's overall impression of a ***334** person influences their evaluation of the person's specific traits. [139] For example, if one views medical staff as heroic and brave, the halo effect means they will also view their intelligence and judgement highly. Medical malpractice defense attorneys expect jurors will be less critical of health care workers' medical decisions. [140] The “halo effect” on healthcare workers is not expected to extend to the broader healthcare industry or pharmaceutical companies, but such companies might see benefits

stemming from greater societal knowledge regarding the work and investment that goes into vaccine development, testing, and distribution. [141]

Finally, opinion polls show "confirmation bias" has increased during the pandemic. [142] Confirmation bias is an intensifying of previously held feelings. [143] In relation to the pandemic, forexample, this may mean that someone who previously held positive attitudes toward their local government will view the local government's response to the pandemic positively. An increase inconfirmation bias could lead to greater polarization within a jury and an inability to reach unanimous verdicts. [144]

VII. CONCLUSION

The world has changed drastically since the beginning of the COVID-19 pandemic. As remote proceedings become more common, attorneys must remain aware of challenges that arise and the modifications they must make to their practices to continue offering ideal client representation. They must assess the risks of this transition and consider how it might impact ongoing and future cases. At the same time, judiciaries should use this unique opportunity to integrate technology in existing practices and make lasting changes to the court system.

Footnotes

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https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic

Court Orders and Updates During COVID-19 Pandemic

Federal courts are individually coordinating with state and local health officials to obtain local information about the coronavirus (COVID-19), and some have issued orders relating to court business, operating status, and public and employee safety. Below is a list of links to all federal court websites, as well as links to court orders and other information posted to the courts' websites regarding the COVID-19 pandemic and court business.

The information below will be updated periodically. We cannot ensure the latest information is posted below. We strongly suggest you visit a court's website to confirm you have the latest information. If you have questions about a court order posted on this page, contact the court.

- U.S. Courts of Appeals Information
- U.S. District Courts Information
- U.S. Bankruptcy Courts Information

Note: This page was last updated at 1:30 p.m. on March 3, 2022.

U.S. Supreme Court

U.S. Supreme Court	Guidance: Clerk's Office Operations (4/17/2020) Order List: 589 U.S. (3/19/2020)

U.S. Courts of Appeals

U.S. Court of Appeals	Court Orders & Info
First Circuit	Order: Deadlines (4/20/2020) Order: BAP Filing Deadlines (3/27/2020) Order: Filing Deadlines (3/26/2020)
Second Circuit	Review the Announcements section on the court's homepage: Document Deadlines, Paper Copies, Sealed Documents (3/26/2020) Teleconference and Livestream Oral Arguments (3/19/2020) Oral Arguments, Access to the Courthouse, Filings, Staffing, Emergency Applications (3/16/2020) Calendars (3/9/2020)
Third Circuit	Notice of Operations (9/25/2020) Order: Filing Deadlines (4/1/2020) Press Release (3/19/2020) Notice re Court Operations (3/17/2020)
Fourth Circuit	COVID-19 Announcements Amended Order 20-1: Oral Argument (4/7/2020) Order 20-01: Court Operations (3/23/20) Notice re Court Operations (3/17/2020)
Fifth Circuit	General Docket Order 2021-12 (12/29/2021) General Docket Order 2021-6 (7/29/2021) General Docket Order 2021-4 (2/18/2021) General Docket Order 2021-3 (1/22/2021) Order 2020-7: Deadlines (6/2/2020) Order 2020-6: Deadlines (5/5/2020) Order 2020-5: Videoconferencing (4/20/2020)

U.S. Court of Appeals	Court Orders & Info
	Order 2020-4: Court Operations (3/25/2020) Order 2020-3: Court Operations
Sixth Circuit	Order 21-01 (4/23/2021) Updated Notice (4/7/2020) Order: Deadlines/Oral Argument (4/7/2020) Notice re Sixth Circuit Judicial Conference (3/26/2020) Notice re Court Operations (3/16/2020)
Seventh Circuit	General Order 21-009 Amended: Vaccination (8/25/2021) General Order 21-010 (8/13/2021) General Order 21-009 (8/13/2021) General Order 21-008 (8/13/2021) General Order 21-007: Court Operations (7/22/2021) General Order 21-006: Court Operations (7/22/2021) General Order 21-005: Court Operations (7/22/2021) Order: COOP (3/10/2021) Order: Court Operations (8/3/2020) Order: Continuity of Operations (3/18/2020)
Eighth Circuit	Order: Court Operations (3/23/2020) Order (3/16/2020)
Ninth Circuit	COVID-19 Update (8/9/2021) Order: Judicial Emergency, California Eastern (4/16/2020) Order: Judicial Emergency, California Central (4/10/2020) Order: Judicial Emergency, California Southern (4/2/2020) Policy re: Electronic Conduct of Court Proceedings(link is external) (3/24/2020) Notice 2 (3/17/2020)

U.S. Court of Appeals	Court Orders & Info
	Order: Building Closure (3/16/2020) Notice 1 (3/12/2020)
Tenth Circuit	General Order No. 95-01: Vaccination (8/12/2021) Local Access Practice (6/22/2020) Order 95-1: Court Operations (6/12/2020) Order 95-1: Entrance Protocols (3/16/2020) Entry Information (3/13/2020)
Eleventh Circuit	Amended General Order No. 51: Vaccination (8/13/2021) General Order No. 51 (8/11/2021) Order 50: Court Operations (7/28/2021) Order 45: Teleconferencing (7/6/2021) Visitor Restrictions (3/16/2020) Order 44: Entrance Protocols (3/15/2020)
District of Columbia Circuit	COVID-19 Information & Announcements Order: Court Operations (3/17/2020) Visitor Restrictions (3/12/2020) Notice Announcement
Federal Circuit	COVID-19 Response & Information Administrative Order 2022-02 (Entrance Protocols) (10/25/2021) Revised Protocols for In-person Arguments: Vaccination (8/12/2021) Public Advisory: Oral Arguments (4/21/2020) Order: Service of Documents (3/27/2020) Notice: Modified Service Procedures Pro Se (3/20/2020) Notice: Modified Filing Procedures Pro Se (3/20/2020)

U.S. Court of Appeals	Court Orders & Info
	Notice: Modified Clerk's Office Assistance (3/20/2020) Order: Court Operations (3/20/2020) Order: Entrance Protocols (3/16/2020) Notice 1 (3/16/2020) Order 1 (3/16/2020) Press Release (3/12/2020)

U.S. District Courts

U.S. District Courts	Court Orders & Info
Alabama Middle	Coronavirus Information Order 3910-05: CARES Act (4/5/2020) Order 3910-04: Court Proceedings (3/30/2020) COVID-19 Updates Order 3910-03: Court Operations (3/18/2020 Order 3910-02: Court Operations (3/17/2020) Order 3910-01: Entrance Protocols (3/11/2020)
Alabama Northern	General Order 21-0006 (8/3/2021) General Order 21-0005 (6/1/2021) General Order 21-0003 (4/12/2021) General Order 21-0002 (3/2/2021) General Order 20-0013 (12/2/2020) General Order 2020-11 (9/8/2020) General Order 20-0010 (6/18/2020) General Order 20-0009 (6/17/2020) General Order 20-0008 (6/17/2020) Order 2020-07: Court Operations (5/4/2020) Order 2020-04: Court Operations (4/13/2020) Order 2020-03: CARES Act (3/30/2020)

U.S. District Courts	Court Orders & Info
	Order: Court Operations (3/17/2020) Order: Entrance Protocols (3/11/2020) Notice
Alabama Southern	COVID-19 Screening Procedures Order: CARES Act (3/30/2020) Information re Coronavirus (3/10/2020)
Alaska	COVID-19 (Coronavirus) and Court Operations Order 20-24: Court Proceedings (7/9/2020) Order 20-22: Face Coverings (6/22/2020) Order 20-21: Courtesy Copy Suspension (6/22/2020) Order 20-20: Court Operations (6/22/2020) Order 20-19: Courtesy Copy (5/27/2020) Order 20-18: Face Covering (5/27/2020) Order 20-17: Court Operations (5/21/2020) Order 20-13: Court Operations (4/20/2020) Order 20-12: Expedited Detention Hearings (4/7/2020) Order 20-11: Court Proceedings (3/30/2020) Order 20-10: Court Operations (3/22/2020) Order 20-09: Criminal Proceedings (3/20/2020) Order 20-08: Criminal Proceedings (3/18/2020) Order 20-07: Initial Appearances (3/16/2020) Order 20-6: Court Operations (3/16/2020) Order 20-05: Grand Jury (3/16/2020) Order: Entrance Protocols (3/13/2020)
Arizona	21-01 CJA Panel COVID Modified Protocol (5/5/2021) General Order 21-11 (6/17/2021) General Order 21-03 (2/25/2021) General Order 20-42 (12/4/2020) Order 20-30: CARES Act Extention (6/24/2020) Order 20-27: Grand Jury (6/17/2020)

U.S. District Courts	Court Orders & Info
	Order 20-26: Court Operations (5/28/2020) Order 20-25: Court Operations - Flagstaff (5/1/2020) Order 20-22: CJA Voucher (4/24/2020) Order 20-20: Jury (4/16/2020) Order 20-19: Court Operations - Flagstaff (4/10/2020) Order 20-18: CARES Act (3/30/2020) Order 20-17: Court Operations (3/27/2020) Order 20-16: Court Operations (3/23/2020) Order 20-15: Court Operations (3/20/2020) Order 20-13: Court Operations (3/18/2020) Order 20-12: Grand Jury (3/16/2020) Order 20-11: Court Proceedings (3/16/2020) Order 20-10: Court Operations (3/13/2020) Notice
Arkansas Eastern	Administrative Orders Regarding COVID-19 Administrative Order 21: Court Operations (2/28/2022) Administrative Order 20: Court Operations (1/24/2022) Administrative Order 19: Court Operations (1/4/2022) Administrative Order 18: Court Operations (12/17/2021) Administrative Order 16: Court Operations (7/26/2021) Administrative Order 15: Court Operations (6/18/2021) AO-14: Court Operations (5/26/2021) Admin Order Four: Court Proceedings (4/7/2020) Admin Order Three: Court Operations (3/31/2020) Order: Court Operations (3/18/2020) Order: Court Operations (3/13/2020)
Arkansas Western	Admin Order 2021-10 Court Operations (7/30/2021) Admin Order 2021-07 Court Operations (5/28/2021) Admin Order 2021-06 (5/26/2021) Admin Order 2021-05 (Revised) (5/26/2021) Admin Order 2021-04 Court Operations (4/22/2021) Admin Order 2021-03 Court Operations (3/15/2021) Admin Order 2021-02 Court Operations (3/1/2021)

U.S. District Courts	Court Orders & Info
	Admin Order 2021-01 Court Operations (1/15/2021) Admin Order 2020-15 Court Operations (11/29/2020) Admin Order 2020-14 Court Operations (11/18/2020) Order 2020-13: Court Operations (9/2/2020) Order 2020-12: Videoconferencing (8/31/2020) Order 2020-11: Court Operations (7/28/2020) Order 2020-10: Entrance Protocols (7/24/2020) Order 2020-8: Court Operations (6/29/2020) Order 2020-7: Videoconferencing (6/29/2020) Order 2020-5: Court Operations (5/21/2020) Order 2020-4: Court Operations (4/21/2020) Order 2020-3: CARES Act (3/31/2020) Announcement (3/18/2020) Order 2020-2: Entrance Protocols (3/16/2020) Order 2020-1: Court Operations (3/16/2020)
California Central	General Order 21-17: Vaccination Mandatory (10/1/2021) Coronavirus (COVID-19) Guidance Order 20-080: CARES Act (6/26/2020) Order 20-078: Face Coverings (6/1/2020) Order 20-08 (5/28/2020) Order 20-074: Social Security Matters (4/17/2020) Order 20-044: Grand Juries (3/31/2020) Order 20-043 (3/29/2020) Order 20-042: COOP Plan Activation (3/19/2020) Press Release (3/19/2020) Order 20-02: Court Proceedings (3/17/2020) Order 20-03: Entrance Protocols (3/13/2020) Press Release (3/13/2020) Visitor Restrictions (3/12/2020)
California Eastern	COVID-19: Courthouse Closure and Court Hearing Information Order 621: Face Coverings (7/28/2020) Order 620: CARES Act (6/29/2020) Order 618: Courthouse Access (5/13/2020)

U.S. District Courts	Court Orders & Info
	Order 617: Court Access (4/17/2020) Order 616: Signature Requirements (4/15/2020) Order 615: Social Security Matters (4/14/2020) Order 614: CARES Act 3/30/2020 Order 613: Pretrial 3/25/2020 Announcement: Interpretation of General Order 612 Order 612 (3/18/2020) Order 611: Court Proceedings (3/17/2020) Order 610: Entrance Protocols (3/12/2020)
California Northern	General Order 80 (Vaccination Mandatory) (10/15/2021) Update on Court Proceedings, Operations, and Safety Protocols (8/2/2021) Notice re: Pess and Public Access to Court Hearings (6/23/2021) General Order 78 (6/23/2021) General Order 74 (6/13/2021) Order 74 (CARES Act) (9/16/2020) Order 72-5: Court Operations (7/23/2020) Order 73: Amended (5/21/2020) Order 72-3: Court Operations (5/21/2020) 3rd Amended Order 73: Entrance Protocols (4/2/2020) Order 75 (Process Service) (3/30/2020) Amended Order 73: Building Closure (3/25/2020) Notice: Press and Public Access to Court Hearings (3/23/2020) Announcement (3/18/2020) Order 39: Electronic Filings (3/18/2020) Order 72: Court Operations (3/16/2020)
California Southern	Updates on Coronavirus (COVID-19) and Court Operations Order 33: Court Operations (7/13/2020) Order 31-B: Criminal Proceedings (7/13/2020) Order 31-A: Criminal Proceedings (7/9/2020) Order 32: Extends Order 29 (7/6/2020) Order 30: Extension (6/11/2020) Order 29: Safety Protocols (6/10/2020)

U.S. District Courts	Court Orders & Info
	Order 27: Criminal Proceedings (5/15/2020) Order 26: Criminal Proceedings (5/6/2020) Order 25: Courthouse Access (4/30/2020) Order 25: Entrance Protocols (4/30/2020) Order 24: Jury Trials & Other Proceedings (4/15/2020) Order 23: Civil Forfeiture (4/14/2020) Order 22: Criminal Sentencing (4/9/2020) Order 21: Social Security (4/8/2020) Order 20: CARES Act (3/30/2020) Order 19: CJA (3/23/2020) Order 18A: Court Proceedings (3/23/2020) Announcements (3/17/2020) Order 18: Court Proceedings (3/17/2020) Visitor Restrictions (3/13/2020) Order 17: Entrance Protocols (3/13/2020)
Colorado	Coronavirus (COVID-19) Guidance General Order 2022-1 (1/20/2022) General Order 2021-2 (1/14/2021) Order 2020-21: Court Operations (12/16/2020) Order 2020-19: Court Operations (11/5/2020) Order 2020-18: Trials (10/15/2020) Order 2020-12: CARES Act (7/2/2020) Order 2020-8: Court Proceedings (5/6/2020) Order 2020-6: Court Operations (4/21/2020) Order 2020-5: Electronic Transmission (4/8/2020) Order 2020-4: CARES Act (4/6/2020) Order 2020-3: Court Operations (3/27/2020) Order 2020-2: Court Operations (3/13/2020) Order 2020-1: Entrance Protocols (3/13/2020)
Connecticut	Court Operations during the COVID-19 CARES Act Reauthorization (6/17/2021) Order: CARES Act (12/23/2020) Order: Court Operations (12/14/2020)

U.S. District Courts	Court Orders & Info
	Order: Court Operations (12/3/2020) Order: CARES Act (9/25/2020) Order: Jury Trials (7/14/2020) Order: Court Operations (6/12/2020) Order: Court Proceedings (5/19/2020) Order: Entrance Protocols (5/19/2020) Order: Court Operations (4/27/2020) Order: Video Hearings (4/7/2020) Order: Criminal Proceedings (4/7/2020) Order: Court Operations (4/2/2020) Order: CARES Act (3/29/2020) Order: Court Operations (3/24/2020) Order: Court Operations (3/24/2020) Order: Court Operations (3/24/2020) Order: Court Operations (3/16/2020) Order: Court Operations (3/16/2020) Order: Detainees (3/16/2020) Order: Court Operations (3/11/2020) Order: Entrance Protocols (3/11/2020)
Delaware	COVID-19 Announcements, Notices and Orders Order: CARES Act (9/25/2020) Order: Court Operations (9/1/2020) Order: Jury Trials (7/17/2020) Order: Entrance Protocols (7/16/2020) Order: CARES Act (6/25/2020) Order: Court Proceedings (6/22/2020) Order: Recovery Plan (6/15/2020) Order: Court Operations (5/27/2020) Order: Electronic Signatures (4/29/2020) Order: Entrance Protocols (4/28/2020) Order: Grand Juries (4/28/2020) Order: Court Operations (4/17/2020) Order: CJA (4/9/2020) Order: CARES Act (4/1/2020) Order: Deadlines (3/27/2020) Order: Building Closure (3/21/2020) Order: Building Closure (3/19/2020)

U.S. District Courts	Court Orders & Info
	Order: Entrance Protocols (3/17/2020) Order: Electronic Filings (3/13/2020) Notice
District of Columbia	Standing Order 21-57: Vaccination (9/21/2021) Memo: Vaccination Mandatory (8/24/2021) Coronavirus (COVID-19) Information and Announcements Order 20-26: Entrance Protocols (4/27/2020) Order 20-20: Court Proceedings (4/8/2020) Order 20-19: Court Operations (4/2/2020) Order 20-18: Process Service (3/31/2020) Order 20-17: CARES Act (3/30/2020) Order 20-12: CJA (3/23/2020) Order 20-9: Court Operations (3/16/2020) Order 20-8: Entrance Protocols (3/13/2020) Notice (3/12/2020)
Florida Middle	Coronavirus and Email Filing Information Order: Court Operations (7/9/2020) Order: Court Proceedings (7/1/2020) Order: Entrance Protocols (6/5/2020) Order: Entrance Protocols (6/3/2020) Order: Court Proceedings (3/26/2020) Order: Court Proceedings (3/20/2020) Order: Court Proceedings (3/19/2020) Order: Court Proceedings (3/18/2020) Order: Entrance Protocols (3/13/2020)
Florida Northern	Coronavirus (COVID-19) Updates Order: Court Operations (3/23/2020) Coronavirus Updates (3/18/2020)

U.S. District Courts	Court Orders & Info
Florida Southern	Administrative Orders relating to COVID-19 Administrative Order 2021-70: Vaccination (8/13/2021) Order 2020-24: Court Proceedings (4/3/2020) Order 2020-23: CARES Act (3/28/2020) Order 2020-22: Grand Jury) (3/26/2020) Order 2020-21: Court Operations (3/20/2020) Order 2020-20: Court Operations (3/18/2020) Order 2020-18: Court Proceedings (3/13/2020)
Georgia Middle	COVID 19: Public Health and Safety Order 2020-04: Court Operations (4/7/2020) Order 2020-03: CARES Act (3/30/2020) Order 2020-02: Criminal Proceedings (3/20/2020) Order 2020-01: Court Operations (3/16/2020)
Georgia Northern	General Order 20-04 - Seventh Amendment (9/22/2021) General Order 21-04 (9/2/2021) General Order 20-04 - Sixth Amendment (8/24/2021) General Order 20-04 - Fifth Amendment (5/27/2021) General Order 20-04 - Fourth Amendment (3/9/2021) General Order 20-01 - Eleventh Amendment (3/9/2021) General Order 20-01 - Tenth Amendment (1/27/2021) General Order 21-01 (1/13/2021) General Order 20-04 - Third Amendment (12/8/2020) General Order 20-01 - Ninth Amendment (12/8/2020) General Order 20-01 - Eighth Amendment (9/28/2020) General Order 20-04 - Second Amendment (9/26/2020) General Order 20-01 - Seventh Amendment (9/1/2020) General Order 20-01 - Sixth Amendment (8/3/2020) General Order 20-01 - Fifth Amendment (7/10/2020) General Order 20-08 (7/1/2020) Order 20-01-Fourth Amendment: Court Operations (7/1/2020) General Order 20-04 - First Amendment (6/28/2020) Administrative Order 20-04 (6/2/2020)

U.S. District Courts	Court Orders & Info
	Order 20-01-Third Amendment: Court Operations (5/26/2020) Order 20-01-Second Amendment: Court Operations (5/1/2020) Administrative Order 20-03 (4/16/2020) General Order 20-07: Building Closure (4/8/2020) General Order 20-06: Court Proceedings (3/30/2020) General Order 20-05: CJA (3/30/2020) General Order 20-04: Court Proceedings (3/30/2020) Order 20-01 Amended (3/30/2020) General Order 20-03: Entrance Protocols (3/23/2020) Amendment to Administrative Order 2020-01: Entrance Protocols (3/20/2020) Order 20-02: Building Closure (3/17/2020) Order 20-01: Court Operations (3/16/2020) Waiver (3/16/2020) Administrative Order 2020-01: Entrance Protocols (3/11/2020) Notice (3/11/2020)
Georgia Southern	COVID-19 Updates Standing Order in re Electronic Signatures (4/9/2020) Order: National Emergency (3/30/2020) Order: Court Operations (3/17/2020)
Guam	General Order 21-0015 (6/20/2021) General Order 21-0011 (5/14/2021) General Order 21-0007 (3/22/2021) General Order 21-0002 (1/27/2021) General Order 21-0001 (1/5/2021) General Order 20-0048 (12/21/2020) Order 20-00046: Conditions of Readiness (11/30/2020) Order 20-0040: Conditions of Readiness (10/9/2020) Order 20-0025: Conditions of Readiness (6/26/2020) Order 20-0024: CARES Act (6/26/2020) Order 20-0021: Conditions of Readiness 2 (5/28/2020) Order 2020-0019: Court Operations (5/8/2020) Order 20-0018: Court Operations (5/4/2020)

U.S. District Courts	Court Orders & Info
	Order 20-0017: Grand Jury (5/4/2020) Order 20-0016: Interim Rule 1020 (4/24/2020) Order 20-0015: Court Operations (4/13/2020) Order 20-0014 (4/3/2020) Order 20-0013: CARES Act (3/30/2020) Order 20-0012: Court Operations (3/23/2020) Order 20-0011: Court Proceedings (3/19/2020) Order 20-00010 (3/18/2020) Order 20-0009: Entrance Protocols (3/16/2020) Order 20-0008: Court Proceedings (3/16/2020)
Hawaii	COVID-19 Orders COVID-19 Court Operations Order: CARES Act (11/24/2020) Order: Grand Jury (11/18/2020) Order: Court Operations (11/12/2020) Order: CARES Act Extension (10/13/2020) Order: Court Operations (10/9/2020) Order: Court Operations (7/28/2020) Order: CARES Act (7/28/2020) Order: CARES Act Extention (6/29/2020) Order: Court Operations (4/16/2020) Order: Grand Jury (4/16/2020) Order: CARES Act (3/30/2020) Order: Court Operations (3/23/2020) Order: Court Operations (3/17/2020) Order: Entrance Protocols (3/12/2020)
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Illinois Central	Amended General Order 21-02 (6/21/2021) General Order 21-02 (3/23/2021) Seventh Amended General Order 20-01 (10/30/2020) Sixth Amended General Order 20-01 (8/14/2020) Fifth Amended General Order 20-01 (7/16/2020) Amended General Order 20-03 (6/30/2020) Fourth Amended General Order 20-01 (6/15/2020) Third Amended General Order 20-01 (5/21/2020) Order 20-01: Court Operations (4/30/2020) Order 20-03: CARES Act (4/1/2020) Order 20-02: Court Operations (3/26/2020) Amended Order 20-01: Court Operations (3/18/2020)
Illinois Northern	Sixth Amended General Order 20-0022: Criminal Proceedings (9/21/2021) General Order 21-0033: Vaccination Mandatory (9/20/2021) Third Amended Order: Mask Requirements (7/30/2021) Coronavirus/COVID-19 Guidance General Order 21-006 (5/2/2021) Order 20-0014: Court Operations (3/20/2020) Amended Order 20-0012 (3/17/2020) Order 20-0012 (3/12/2020)
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Kansas	COVID-19 Information Order 2020-13: Court Proceedings (12/8/2020) Order 2020-12: Court Proceedings (11/17/2020) Order 2020-11: Court Proceedings (7/16/2020) Order 2020-10: Court Proceedings (6/12/2020) Order 2020-9: Electronic Signatures (6/12/2020) Order 2020-8: Compassionate Release (5/27/2020) Order 2020-6: Hearings (4/16/2020) Order 2020-5: Grand Jury (4/10/2020) Order 2020-4: CARES Act (3/30/2020) CARES Act Consent Form Administrative Order 2020-2 (updated 3/16/2020) Administrative Order 2020-3 (3/13/2020)
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Maryland	COVID-19 Response - Information and Orders Standing Order 2021-10: Vaccination (8/25/2021) Order 2021-02: Highly Sensitive Documents (1/8/2021) Order 2021-01: Court Operations (1/4/2021) Order 2020-23: Grand Jury (12/9/2020) Order 2020-22: Teleconferencing (12/8/2020) Order 2020-21: Court Operations (11/19/2020) Order 2020-20: Court Operations (11/11/2020) Order 2020-19: Court Proceedings (10/22/2020) Order 2020-17: Teleconferencing (9/16/2020) Order 2020-10: Entrance Protocols (9/4/2020) Order 2020-16: Court Proceedings (9/2/2020) Order 2020-16: Court Proceedings (8/19/2020) Order: CVB Proceedings (8/18/2020) Order 2020-10 Amended: Courthouse Access (7/6/2020) Order 2020-15: CARES Act (6/24/2020) Order 2020-14: Courthouse Access (6/17/2020)

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Massachusetts	COVID-19 Related Information Order 21-9: Court Operations (8/16/2021) Order 21-8: Court Operations (8/16/2021) Order 20-30: Naturalizations (6/30/2020) Order 20-29: Criminal Proceedings (6/29/2020) Order 20-28: Grand Jury (6/29/2020) Order 20-27: CARES Act (6/26/2020) Order 20-26: CARES Act (6/26/2020) Order 20-25: Admin Forfeiture (6/9/2020) Order 20-24: Court Operations (5/27/2020) Order 20-23: Criminal Proceedings (5/27/2020) Order 20-22: Grand Jury (5/27/2020) Order 20-21: Speedy Trial (5/27/2020) Order 20-20: Criminal Proceedings (5/8/2020) Order 20-19: ADR (5/7/2020) Order 20-18: Naturalizations (4/22/2020) General Order 20-15 (3/31/2020) General Order 20-14 (3/30/2020) General Order 20-13 (3/30/2020) General Order 20-12 (3/30/2020) General Order 20-11 (3/30/2020) General Order 20-10 (3/27/2020) General Order 20-9 (3/27/2020) General Order 20-8 (3/26/2020)

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Michigan Eastern	Coronavirus (COVID-19) Administrative Orders Order 20-AO-046: CARES Act (9/28/2020) Order 20-AO-038R: CARES Act (9/8/2020) Order 20-AO-039: Jury Trials (7/21/2020) Order 20-AO-038: Court Operations (7/2/2020) Order 20-AO-036: Filings (7/1/2020) Order 20-AO-034: Grand Jury (6/9/2020) Order 20-AO-027: CARES Act (4/10/2020) Order 20-AO-026: Filings (4/2/2020) Order 20-AO-025: CARES Act (3/30/2020) Order 20-AO-024: Detainees (3/26/2020) Advisory: Building Closure (3/27/2020) Order 20-AO-023: Court Operations (3/20/2020) Order 20-AO-021: Court Operations (3/13/2020) Order 20-AO-020: Entrance Protocols (3/11/2020) Visitor Restrictions (3/11/2020)
Michigan Western	Order 20-MS-074: CARES Act (9/30/2020) Order 20-MS-049: CARES Act (6/29/2020) Order 20-MS-037: Court Operations (4/29/2020) Order 20-MS-029: Court Operations (4/10/2020) Order 20-MS-030: CARES Act (4/10/2020) Notice Access to Facilities (3/23/2020) Order 20-MS-024: Court Operations (3/23/2020)

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Mississippi Northern	Standing Order: CARES Act (4/2/2020) Standing Order: Attorney Admissions (3/31/2020) Order 20-MC-9: Court Operations (3/13/2020)
Mississippi Southern	Coronavirus Orders General Order - Filed 04/13/20 (4/8/2020) Videoconferencing Plan (5/29/2020) Order: Court Operations (5/29/2020) Order No. 4: Court Operations (5/1/2020) Special Order No. 3: Attorney Admissions (4/7/2020) Special Order No. 2: CARES Act (3/31/2020) Order: Court Operations (3/13/2020)
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Missouri Western	Coronavirus (COVID-19) Guidance Order: Court Operations (4/20/2020) Order: CARES Act (3/30/2020) Order: Court Operations (3/24/2020) Order: Court Operations (3/16/2020)
Montana	Administrative Order 21-8 (5/25/2021) Order 21-04: Court Operations (3/31/2021) Administrative Order 21-3: Teleconferencing (3/4/2021) Order 20-39: Court Operations (12/2/2020) Order 20-34: CARES Act Renewal (9/18/2020) Order 20-28: CARES Act (9/18/2020) Order 20-27: Bar Admission (8/7/2020) Order 20-25: Safety Measures (7/6/2020) Order 20-23: CARES Act (6/29/2020) Order 20-21: Phased Resumption (5/14/2020) Order 20-18: Court Operations (4/10/2020) Order 20-17: Court Operations 3/27/2020 Order 20-16: Pretrial 3/24/2020 Order 20-15: CJA Panel (3/24/2020) Notice: Suspension of Cash Payments (3/23/2020) Announcements (3/16/2020) Order 20-14: Court Operations (3/16/2020)
Nebraska	General Order 2021-09: Videoconferencing (12/10/2021) General Order 2021-08: Videoconferencing (9/15/2021) Order 2021-07 (8/3/2021) Order 2021-05 (6/21/2021)

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Nevada	Information Regarding Coronavirus Disease (COVID-19) and Court Operations Order 20-03: Amended (11/12/2020) Order 20-10: Jury Service (10/27/2020) Order 20-05: Extended (9/25/2020) Order 20-09: COVID-19 Testing (6/23/2020) Order 2020-08: Court Access - Face Coverings (5/14/2020) Order 2020-06: CARES Act (4/16/2020) Order 2020-03: Court Operations (4/9/2020) Order 2020-05: CARES Act (3/30/2020) Order 2020-04: Court Operations (3/19/2020) Press Release (3/16/2020) Order 2020-03: Court Operations (3/16/2020) Order 2020-02: Entrance Protocols (3/13/2020)
New Hampshire	Court Response to Coronavirus Disease (COVID-19) Order 20-30: Court Proceedings (9/11/2020) Order 20-29: CARES Act (9/11/2020) Order 20-28: Entrance Protocols (8/5/2020) Order 20-17: Deadlines (5/13/2020) Order 20-16: Speedy Trial (4/15/2020) Order 20-15: Court Proceedings (4/15/2020) Order 20-14: Court Proceedings (4/3/2020) Order 20-13: CJA Vouchers (3/30/2020) Order 20-12: Cares Act (3/30/2020)

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New Jersey	Standing Order 2021-08 (Vaccination Required) (9/13/2021) COVID-19: Orders, Procedures and Changes Order 2020-17: Court Proceedings (11/25/2020) Order: Entrance Protocols (10/15/2020) Order: Court Operations (9/23/2020) Order: CARES Act (9/23/2020) Order: Entrance Protocols (9/17/2020) Order: Entrance Protocols - Trenton (9/17/2020) Order 2020-12: Court Operations (8/17/2020) Order 2020-06: CARES Act (6/22/2020) Order 2020-13: Entrance Protocols (5/22/2020) Order 2020-12: Court Operations (5/22/2020) Order 2020-11: Fees (5/15/2020) Order 20-10: Detainees (4/17/2020) Order 20-09: Court Operations (4/17/2020) Order 2020-07: Electronic Signatures (3/30/2020) Order 2020-06: CARES Act (3/30/2020) Order 20-05: Building Closure (3/26/2020) Order 2020-04: Deadlines (3/24/2020) Notice re Paper Filings/Drop Box (3/18/2020) Notice (3/17/2020) Order 20-03: Criminal Proceedings (3/16/2020) Order 20-02: Court Operations (3/16/2020) Visitor Restrictions (3/16/2020)

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New York Eastern	Administrative Order 2021-04-06 (8/27/2021) Administrative Order 2021-05-01 (6/22/2021) Order 2020-13-3: CARES Act (12/21/2020) Order 2020-26-1: Court Proceedings (12/3/2020) Order 2020-26: Court Proceedings (11/24/2020) Order 2020-24: Videoconferencing (9/29/2020) Order 2020-13-2: CARES Act (9/21/2020) Order 2020-22: Entrance Protocols (8/5/2020) Order 2020-20-1: Speedy Trial (7/1/2020) Order 2020-19-1: Service of Process (6/30/2020) Order 2020-18-1: Court Proceedings (6/30/2020) Order 2020-13-1: CARES Act (6/25/2020) Order 2020-20: Court Operations (6/15/2020) Order 2020-15-1: Speedy Trial (5/21/2020) Order 2020-18: Court Proceedings (5/6/2020) Order 2020-16: CJA (4/21/2020) Order 2020-15: Court Proceedings (4/21/2020) Order 2020-14: Detainees (4/2/2020) Order 2020-13: CARES Act (3/30/2020) Order 2020-12: Process Service (3/27/2020)

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New York Northern	Coronavirus COVID-19 Public Emergency Announcements Order 60: CJA (12/4/2020) Order 59: CARES Act (12/4/2020) Order 58: Court Operations (12/4/2020) Order 61: Entrance Protocols (10/8/2020) Order 59: CARES Act (10/8/2020) Order 58: Court Operations (10/8/2020) Order 59: CARES Act (8/6/2020) Order 58: Court Operations (8/6/2020) Order 59: CARES Act (6/12/2020) Order 58: Court Operations (6/12/2020) Order 61: Entrance Protocols (5/13/2020) Revised Order 59: CARES Act (5/13/2020) Revised Order 58: Court Operations (5/13/2020) Order: Admin Forfeiture (4/29/2020) General Order 60: CJA (4/1/2020) General Order 59: CARES Act (3/30/2020) Coronavirus Updates Notice re Clerk's Office Hours (3/16/2020) Order 58: Court Operations (3/13/2020)
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New York Western	Court Operations during COVID-19 Pandemic Event Order: Court Operations (12/8/2020) Order: Court Operations (9/23/2020) Order: Court Operations (7/15/2020) Order: CARES Act (6/26/2020) Order: Court Operations (6/15/2020) Order: Court Operations (5/13/2020) Order: Entrance Protocols (4/23/2020) Order: Court Proceedings (4/17/2020) Order: CARES Act (3/30/2020) Order: CJA Payments (3/20/2020) Order: Attorney Admissions (3/19/2020)

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North Carolina Middle	Coronavirus (COVID-19) Guidance Order 13: Court Operations (7/30/2020) Order 12: Courthouse Access (6/9/2020) Order 16: Recovery Plan (5/13/2020) Order 13: Court Operations (4/28/2020) Order 12: Entrance Protocols (4/28/2020) Order 12 Amended: Entrance Protocols (3/24/2020) Order 13: Court Operations (3/16/2020)
North Carolina Western	COVID-19 Repository Order: Court Operations (12/13/2021) Order: Recovery Plan (5/29/2020) Order: Court Operations (4/1/2020) General Directive re Court Operations (3/13/2020)

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North Dakota	Administrative Order: Court Operations (6/21/2021) Order: Court Operations (5/12/2020) Order: Court Operations (3/27/2020)
Northern Mariana Islands	General Order No. 22-00002 (2/18/2022) General Order No. 21-00004 (6/4/2021) Order 20-00007: Court Operations (5/15/2020) Order 20-00006: Interim Rule 1020 (4/22/2020) Order 20-00005: Court Operations (4/3/2020) Order 20-0004: CARES Act (3/30/2020) Order 20-0003: Court Operations (3/22/2020) Order (3/16/2020)
Ohio Northern	Order No. 2020-06-8 (3/2/2022) Eleventh Amended General Order No. 2020-08 (2/8/2022) Amended General Order No. 2020-08 (Court Operations) (1/6/2022) Order No. 2020-06-7 (12/2/2021) Order No. 2020-08-9 (8/24/2021) Order No. 2020-06-5 (6/7/2021) Order 2020-08-7: Court Operations (4/5/2021) Order 2020-06-4: CARES Act (3/17/2021) Order 2020-08-6: Court Operations (3/1/2021) Order 2020-08-5: Court Operations (1/13/2021) Order 2020-06-3 CARES Act (12/17/2020) Order 2020-08-4: Court Operations (12/7/2020) Order 2020-08-3: Court Operations (10/5/2020) Order 2020-06-2: CARES Act (9/25/2020) Order 2020-08-2: Court Operations (8/25/2020) Order 2020-08-1: Court Operations (7/28/2020) Order 2020-06-1: CARES Act (6/26/2020) Order 2020-08: Court Operations (5/22/2020) Order 2020-05-2: Court Operations (4/20/2020)

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	Order 2020-06: CARES Act (3/30/2020) Order 2020-05-1: Court Operations (3/23/2020)
Ohio Southern	Order 22-09: Court Operations (2/28/22) Order 22-08: Court Operations (2/16/22) Order 22-06: Court Operations (1/31/22) Order 22-02: Court Operations (1/14/22) Order 21-23: Videoconferencing (11/2/21) Amended General Order 21-20: Vaccination (9/17/2021) Order 21-20: Court Operations (8/12/2021) Order 21-19: CARES Act (8/6/2021) Order 21-17: Court Operations (7/16/2021) Order 21-14: Court Operations (6/9/2021) Order 21-12: CARES Act (5/11/2021) Order 21-11: Court Operations (5/7/2021) Order 21-10: Court Operations (5/7/2021) Order 21-09: Court Operations (3/31/2021) Order 21-07: Court Operations (3/3/2021) Order 21-06: Court Operations (2/26/2021) Order 21-05: CARES Act (2/11/2021) Order 21-04: Court Operations (1/29/2021) Order 21-02: Court Operations (1/11/2021) Order 20-39: Certified Mail Processing (12/29/2020) Order 20-38: Court Operations (12/21/2020) Order 20-36: Court Operations (11/25/2020) Order 20-35: CARES Act (11/17/2020) Order 20-32: Court Operations (11/5/2020) Order 20-31: Court Operations (10/30/2020) Order 20-30: Jury Sequestration (10/22/2020) Order 20-27: Court Operations (9/29/2020) Order 20-22: Attorney Admissions (7/23/2020) Order 20-23: Court Operations (7/23/2020) Order 20-20: Court Operations (7/15/2020) Order 20-10: Attorney Admissions (6/11/2020) Order 20-14: Court Operations (4/27/2020) Order 20-12: Court Operations (4/22/2020) Order 20-11: Naturalizations (4/13/2020) Order 20-09: Process Service (4/6/2020)

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Oklahoma Eastern	Amended COVID-19 General Orders re Restrictions and Court Operations General Order 20-15: CARES Act (6/24/2020) General Order 20-14: Court Operations (6/24/2020) General Order 20-12: Entrance Protocols (5/18/2020) Order 20-10: CJA (4/9/2020) Order 20-9: Court Operations (4/6/2020) Order 20-8: CARES Act (4/1/2020) Order 20-7: Entrance Protocols (3/17/2020) Order 20-6: Court Operations (3/16/2020) Order 20-5: Entrance Protocols (3/16/2020)
Oklahoma Northern	Coronavirus Information Order 20-12: Admin Forfeiture (5/6/2020) Order 20-09: Entrance Protocols (4/13/2020) Order 20-08: CJA (4/8/2020) Order 20-07: CARES Act (3/30/2020) Order 20-06: Court Operations (3/20/2020) Order 20-5: Court Operations (3/17/2020) Order 20-4: Entrance Protocols (3/12/2020)
Oklahoma Western	Information on COVID-19 and Court Operations General Order 21-6 (4/14/2021) Order 21-4: Court Operations (3/10/2021)

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	General Order 21-3 (2/3/2021) Order 21-1: Trials (1/5/2021) General Order 20-9.4: CARES Act (12/14/2020) General Order 20-28: Quarantine Protocol (12/9/2020) General Order 20-27: Trials (12/9/2020) Order 29-9.3: CARES Act (9/17/2020) Order 20-21: Trials (9/17/2020) Order 20-5.1: Court Operations (5/28/2020) Order 20-15: Entrance Protocols (5/28/2020) Order 20-13: Court Operations (5/6/2020) Order 20-12: Admin Forfeiture (5/6/2020) Order 20-14 (5/5/2020) Order 20-4.1 (4/20/2020) Order 20-9.1: CARES Act (3/31/2020) Order 20-8: Court Operations (3/17/2020) Order 20-7: Entrance Protocols (3/16/2020) Order 20-6: Court Operations (3/13/2020)
Oregon	Information Regarding Coronavirus Disease (COVID-19) and Court Operations Order 2020-12: CARES Act (6/29/2020) Order 2020-12: CARES Act Amended (6/20/2020) Order 2020-11: Social Security Cases (4/27/2020) Order 2020-10: Attorney-Client Communication (4/10/2020) Order 2020-9: Court Operations (4/7/2020) Order 2020-8: Pro Se Filing (3/31/2020) Order 2020-7: CARES Act (3/30/2020) Announcements (3/18/2020) Order 2020-5: Court Operations (3/17/2020) Press Release (3/13/2020) Order 2020-4: Court Operations (3/13/2020)
Pennsylvania Eastern	Response to COVID-19 (Coronavirus) Order: CARES Act (12/21/2020) Order: Court Operations (11/25/2020)

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Pennsylvania Middle	COVID-19 Orders Order: Jury Trials (12/29/2020) Order 2020-30-1: Recovery (12/7/2020) Order 2020-30: Recovery (11/30/2020) Order 2020-29: Court Operations (11/19/2020) Order 2020-25: Entrance Protocols (10/6/2020) Order 20-23: CARES Act (9/23/2020) Order 2020-22: Court Proceedings (8/6/2020) Order 2020-21a: Speedy Trial (7/28/2020) Order 2020-21: Court Proceedings (7/28/2020) Order 2020-20: Mediations (7/1/2020) Order 20-19: CARES Act (6/24/2020) Order 20-17: Recovery Plan (6/17/2020) Order 2020-16: Court Proceedings (5/26/2020)

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Pennsylvania Western	Court Operations and COVID-19 Administrative Orders Order: CARES Act (12/14/2020) Order: Speedy Trial (12/7/2020) Order: Entrance Protocols (12/7/2020) Order: Court Operations (10/30/2020) Order: CARES Act (9/18/2020) Order: Court Operations (8/27/2020) Order: Courthouse Operations (6/30/2020) Order: CARES Act (6/25/2020) Order: Court Operations (5/29/2020) Order: CARES Act (5/11/2020) Order: Speedy Trial (5/1/2020) Order: CARES Act (4/27/2020) Order: Courtesy Copies (4/27/2020) Order: Entrance Protocols (4/21/2020) Order: Court Proceedings (4/16/2020) Order: Electronic Signatures (4/3/2020) Order: Court Proceedings (4/3/2020) Order: CJA (3/31/2020) Order: Cares Act (3/30/2020) Order: Detainees (3/23/2020) Order: Entrance Protocols (3/20/2020) Order: Filing Dates (3/19/2020)

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Puerto Rico	COVID-19 Pandemic Orders and Important Information Order 20-0088: Court Operations (3/31/2020) Order: CARES Act (3/31/2020) Order: Foreclosures (3/26/2020) Order: Court Operations (3/24/2020) Order: Title III Cases (3/17/2020) Order: Extension of Deadlines (3/16/2020) Notice (3/16/2020) Order 20-088: Court Proceedings (3/15/2020) Order: Entrance Protocols (3/11/2020)
Rhode Island	COVID-19 & Court Operations Amended General Order re: Courthouse Visitation and Access Restrictions (5/30/2021) Order: Court Proceedings (5/6/2020) Order: Electronic Signatures (5/6/2020) Order: Detainees (4/16/2020) General Order: Responses to Emergency Motions (4/7/2020) Amended General Order: Criminal Matters (3/30/2020) General Order: Interim CJA Vouchers (3/27/2020) General Order: Criminal Matters (3/21/2020) Order: COOP (3/19/2020) Order: COOP (3/13/2020) Order: Entrance Protocols (3/13/2020)
South Carolina	3:21-mc-00336-RBH (8/4/2021) 3:21-mc-00353-RBH (6/17/2021) 3:21-mc-00337-RBH (6/4/2021) 3:21-mc-00332-RBH (6/3/2021) 3:21-mc-00330-RBH (6/3/2021)

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	3:21-mc-00331-RBH (6/3/2021) Order: Teleconference/Videoconference (9/29/2020) Order: Court Operations (9/18/2020) Order: Entrance Protocols (5/19/2020) Order: Courthouse Access (5/19/2020) Order: Court Operations (4/14/2020) Order: CJA (4/10/2020) Order: CARES Act (4/2/2020) Order 20-MC-105: Court Operations (3/16/2020) Order: Entrance Protocols (3/13/2020)
South Dakota	Important Court Operations Information for COVID-19 Order 20-03: Court Operations (7/22/2020) Order 20-05: CARES Act (6/29/2020) Order 20-03: Court Operations (5/21/2020) Order 20-02 First Amended: Entrance Protocols (4/24/2020) Order 20-03: Court Operations - amended (4/8/2020) Order 20-05: CARES Act (3/31/2020) Order 20-04: Criminal Proceedings (3/20/2020) Order 20-03: Court Operations (3/17/2020) Order 20-2: Entrance Protocols (3/13/2020)
Tennessee Eastern	Coronavirus Disease 2019 - Important Information Standing Order Order 21-14 (Court Operations) (9/30/2021) Standing Order Order 21-13 (CARES Act) (9/21/2021) Order 20-21: Court Operations (11/30/2020) Order 20-19: Court Access (11/17/2020) Order 20-17: Court Operations (9/23/2020) Order 20-15: Naturalizations (7/21/2020) Order 20-14: Court Operations (6/22/2020) Order 20-12: Court Operations (4/27/2020) Order 20-11: Court Operations (4/15/2020) Order 20-10: Court Operations (4/15/2020) Order 20-09: Grand Jury (4/1/2020) Order 20-08: CARES Act (3/30/2020)

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Tennessee Middle	Administrative Orders and Other COVID-19 Notifications Order 209: Court Operations (10/29/2020) Order 209: Court Operations (8/19/2020) Order 209 Fifth Amended: Court Operations (7/8/2020) Order 209-1 First Amended: CARES Act (6/22/2020) Order 209 Fourth Amended: Court Operations (6/22/2020) Order 209-2: Court Operations (6/12/2020) Order 209 Clarifying First Amended: Court Operations (4/2/2020) Order 209-1: CARES Act (3/31/2020) Order 209 First Amended: Court Operations (3/23/2020) Order 209: Court Operations (3/16/2020)
Tennessee Western	Administrative Order No. 2022-01 (1/4/2022) Administrative Order No. 2021-30 (10/4/2021) Administrative Order No. 2021-18 (6/3/2021) Administrative Order No. 2020-39 (10/29/2020) Administrative Order No. 2020-26 (5/29/2020) Order 2021-12: CARES Act (4/21/2021) Administrative Order 2021-08 (Court Operations) (2/24/2021) Order 2021-06 (CARES Act) (2/3/2021) Order 2021-01: Court Operations (1/12/2021) Order 2020-45: Court Operations (12/30/2020) Order 2020-42: CARES Act (11/25/2020) Order 2020-37: Court Operations (10/2/2020) Order 2020-34: Court Operations (9/11/2020) Order 2020-33: Court Operations (8/21/2020) Order 2020-30: Court Operations (7/17/2020) Order 2020-28: CARES Act (6/26/2020) Order 2020-25: Court Proceedings (5/28/2020) Order 2020-24: Court Proceedings (5/28/2020) Order 2020-21: Court Operations (4/21/2020) Order 2020-19: Court Operations (4/3/2020)

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Texas Eastern	Order 21-14 (9/30/2021) Order 21-13 (9/21/2021) COVID19 General Orders General Order 20-06: CARES Act (3/30/2020) General Order 20-05: Filings (3/25/2020) General Order 20-04: Entrance Protocols (3/18/2020) Order 20-03: Court Operations (3/16/2020)
Texas Northern	Court Orders and Updates During the COVID-19 Pandemic Order 13-17: Entrance Protocols (5/22/2020) Order 13-16: Entrance Protocols (5/21/2020) Order 13-15: Entrance Protocols (5/18/2020) Order 13-14: Entrance Protocols (5/18/2020) Order 13-12: Entrance Protocols (5/15/2020) Order 13-11: Court Operations (4/22/2020) Order 13-10: BOP (4/2/2020) Order 13-9: CARES Act (3/29/2020) Order 13-8: Entrance Protocols (3/20/2020) Order 13-7: Criminal Proceedings (3/19/2020) Order 13-6: Criminal Proceedings (3/18/2020) Order 13-5: Court Operations (3/13/2020)
Texas Southern	COVID-19 General and Special Orders General Order 2021-15: Vaccination (8/6/2021) Order 2020-7: Admin Forfeiture (4/27/2020) Order H-2020-11: Building Closure (4/10/2020) Supplemental Order C-2020-8: Court Operations (4/8/2020)

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	Order H-2020-10: Building Closure (4/7/2020) Order 2020-6: Hearings (4/7/2020) Order V-2020-03: Building Closure (4/6/2020) Order C-2020-7: Court Operations (4/6/2020) Order C-2020-06: Building Closure (4/3/2020) Order H-2020-9: Court Operations (4/3/2020) Order B-2020-003: Building Closure (4/2/2020) Order G-2020-01: Building Closure (4/2/2020) Order H-2020-8: Building Closure (4/2/2020) Order L-2020-6: Building Closure (4/2/2020) Order: Entrance Protocols (4/3/2020) Order M-2020-2: Court Operations (4/3/2020) Order M-2020-3: Filings (4/3/2020) Order 2020-5: Hearings (3/30/2020) Order 2020-4: Hearings (3/30/2020) Order 2020-3: CARES Act (3/30/2020) Order L-2020-5: Court Operations (3/20/2020) Order M-2020-1 (3/20/2020) Order L-2020-4 (3/19/2020) Order L-2020-3 (3/19/2020) Order B-2020-002 (3/18/2020) Order B-2020-001 (3/18/2020) Order C-2020-5 (3/18/2020) Order C-2020-4 (3/18/2020) Order H-2020-7 (3/17/2020) Order H-2020-6 (3/17/2020) Order H-2020-4 (3/12/2020) Order H-2020-3 (3/12/2020) Press Release (3/12/2020) Announcement
Texas Western	Coronavirus (COVID-19) Guidance Order: Admin Forfeiture (4/27/2020) Order: Court Operations (4/15/2020) Order: Court Operations (4/9/2020) Order: Hearings (4/9/2020) Order: Entrance Protocols (4/7/2020) Order: Entrance Protocols (San Antonio) (4/6/2020)

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	Order: Entrance Protocols (Austin) (4/3/2020) General Order: CARES Act (3/30/2020) Amended Order: Court Operations (3/24/2020) Additional Order: Court Operations (3/24/2020) Order: Hearings (3/24/2020) Order: Court Operations (3/20/2020) Order: Entrance Protocols (El Paso) (3/19/2020) Order: Grand Jury (3/16/2020) Order: Court Operations (3/13/2020)
Utah	COVID-19 Information Center Order 20-021: Court Operations (7/29/2020) General Order 20-020 (6/26/2020) Order 20-017: Court Operations (6/15/2020) Order 20-011: CARES Act (3/31/2020) Order 20-010: Criminal Proceedings (3/23/2020) Order 20-009: Court Proceedings (3/16/2020) Order 20-008: Entrance Protocols (3/12/2020)
Vermont	General Order 101 (8/4/2021) General Order 100 (6/23/2021) General Order 99 (6/22/2021) General Order 98 (5/21/2021) General Order 96 (3/26/2021) General Order 94 (1/4/2021) Order 93: CARES Act (9/25/2020) Order 92: CARES Act (6/24/2020) Order 91: Naturalizations (5/26/2020) Order 90: Court Operations (5/15/2020) Order 89: Court Operations (4/28/2020) Order 88: CARES Act (3/30/2020) Order 87: Court Operations (3/25/2020) Order 86: Court Operations (3/23/2020)

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Virgin Islands	Order: Court Operations (1/31/22) Order: Court Operations (11/1/2021) Order: Court Operations (8/30/2021) Order: Court Operations (7/29/2021) Order: Court Operations (7/3/2021) Order: Court Operations (6/30/2021) Order: Court Operations (5/31/2021) Order: Court Operations (4/30/2021) Order: Court Operations (4/4/2021) Order: Court Operations (3/31/2021) Order: Court Operations (2/12/2021) Order: Court Operations (1/15/2021) Order: Court Operations (1/4/2021) Order: Court Operations (12/12/2020) Order: Court Operations (10/31/2020) Order: CARES Act (10/6/2020) Order: Court Operations (9/30/2020) Order: Court Operations (8/31/2020) Order: Court Operations (7/14/2020) Order: CARES Act (7/8/2020) Order: Court Operations (6/12/2020) Order: Entrance Protocols (6/4/2020) Order: Court Operations (5/12/2020) Order: Teleconferencing (5/1/2020) Order 2020-0001: Court Operations (4/16/2020) Press Release (3/23/2020) Order: Court Operations (3/20/2020) Order 2020-MC-0001: Entrance Protocols (3/17/2020) Order: Court Operations (3/17/2020)

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Virginia Eastern	Coronavirus (COVID-19) Guidance General Order 21-15: Court Operations (12/30/21) General Order 21-13: Vaccination (8/20/2021) Order 2021-01: Court Operations (1/8/2021) Order 2020-24: Teleconferencing (12/18/2020) Order 2020-23: Court Operations (12/11/2020) Order 2020-22: Court Operations (11/16/2020) Order 2020-21: Court Operations (9/24/2020) Order 2020-20: Court Operations (7/7/2020) Order 2020-19: Court Operations (6/30/2020) Order 2020-18: Court Operations (6/26/2020) Order 2020-15: Courthouse Status (5/14/2020)
Virginia Western	Standing Order 2021-19: Criminal Proceedings (9/24/2021) Standing Order 2021-17: Vaccination Non-Mandatory with Protocols (9/9/2021) COVID-19 Information Ninth Amended Standing Order 2020-3 (8/4/2021) Standing Order 2021-16 (8/3/2021) Standing Order 2021-12: Court Operations (5/24/2021) Standing Order 2021-11: Court Operations (5/24/2021) Standing Order 2021-4 (Court Operations) (2/18/2021) Order 2020-15: Teleconferencing (12/22/2020) Order 2020-10 and 2020-14: Court Operations (12/3/2020) Order 2020-03: Naturalizations (11/20/2020) Order 2020-21: Court Operations (10/30/2020) Order: Naturalizations (10/9/2020) Order 2020-15: Teleconferencing (9/28/2020) Order 2020-3: Naturalizations (9/16/2020) Order: Court Operations (7/10/2020) Order 2020-15: Teleconference (6/26/2020) Order 2020-03: Naturalizations (6/11/2020) Order 2020-14: Recovery Plan (6/8/2020) Order: Naturalizations (5/20/2020) Order 2020-12: Teleconf/Videoconf (5/1/2020) Order 2020-11: PSR (Teleconf/Videoconf) (4/24/2020)

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Washington Eastern	COVID-19 Information General Order 2021-1 (1/14/2021) Order 20-10: Richland Courthouse Access (11/24/2020) Order 20-10: Douglas Federal Building (7/29/2020) Order 20-101-8: Court Operations (7/21/2020) Order 20-09: Douglas Federal Building (7/15/2020) Order 20-08: Douglas Federal Building (7/1/2020) Court Operations/Covid-19 Information Page Grand Jury/Jury Protection Measures Order 20-101-7: Court Operations (6/23/2020) Order 20-07: Douglas Courthouse (6/9/2020) Order 20-04: Richland Courthouse (6/1/2020) Order 20-101: Court Operations (5/29/2020) Order 20-04: Court Access - Face Coverings (5/21/2020) Order 20-03 Courthouse Access (5/13/2020) Order 20-101-5: Court Operations (5/11/2020) Order 20-02: Richland Courthouse (4/27/2020) Order 20-02: Douglas Federal Building (4/24/2020) Order 20-01: Court Operations (3/30/2020) Order 20-101-3: CARES Act (3/30/2020) Order 20-101-02: Court Operations (3/19/2020) Order 20-101-01: Court Operations (3/18/2020)
Washington Western	COVID-19 (Coronavirus) and Court Operations Order 18-2020 (12/30/2020) Order 17-2020: CARES Act (12/23/2020) Order 15-20 (10/2/2020)

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	Order 10-20: Safety Protocols (7/21/2020) Order 09-20: CARES Act (6/25/2020) Order 08-20: Court Operations to July 31, 2020 (5/13/2020) Order 07-20: Court Operations (4/13/2020) Order 05-20: CJA Panel (4/6/2020) Order 04-20: CARES Act (3/30/2020) Order 03-20: Criminal Proceedings (3/25/2020) Order 03-20: Criminal Proceedings (3/25/2020) Order 02-20: Court Operations (3/17/2020) Press Release (3/6/2020) Order 01-20: Court Operations (3/6/2020)
West Virginia Northern	Court Operations and COVID-19 Order 3:20-MC-28: Criminal Proceedings (9/25/2020) Order: CARES Act (9/25/2020) Order: Entrance Protocols (7/15/2020) Order: CARES Act (6/29/2020) Order: Entrance Protocols (6/2/2020) Order: Grand Jury (4/20/2020) Order: Criminal Proceedings (3/30/2020) Order: CJA (3/20/2020) Public Advisory re Court Operations (3/20/2020) Order: Detainees (3/13/2020) Order: Entrance Protocols (3/10/2020)
West Virginia Southern	Orders and Information Regarding COVID-19 Order #9: Court Operations (9/18/2020) Order #9: Court Operations (9/18/2020) Order #8: Court Operations (7/24/2020) Order #7: Court Operations (6/25/2020) Order 6: Recovery Plan (5/22/2020) Order #5: Court Operations (4/14/2020) General Order 4 Videoconferencing: Criminal Proceedings (3/30/2020) Order: Court Operations (3/23/2020)

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	Order 2-20-MC-00052: Entrance Protocols (3/18/2020) Order 20-MC-00052: Court Operations (3/13/2020)
Wisconsin Eastern	COVID-19 Information General Order 21-12 (8/11/2021) General Order 21-11: Grand Jury (7/2/2021) Order 20-18: Court Operations (7/1/2020) General Order 21-10: Court Operations (6/30/2021) Order 20-17: Telephonic Hearings (6/24/2020) Order 20-16: Court Operations (6/24/2020) Order 20-15: Entrance Protocols (6/15/2020) Order 20-13: Court Operations (6/8/2020) Order 20-12: Court Operations (5/28/2020) Order 20-11: Court Operations (5/28/2020) Order 20-10: Court Operations (4/24/2020) Gen Order 20-6: CARES Act (3/29/2020) Gen Order 20-5: CJA (3/25/20) Gen Order 20-4: Building Closure (3/23/2020) Order 20-2: Court Operations (3/16/2020) Order 20-3: Entrance Protocols (3/16/2020)
Wisconsin Western	Order 384 (6/1/2021) Order 380 (3/26/2021) Order 374 (12/23/2020) Order 373 (12/14/2020) Order 369 (9/24/2020) Order 368 (7/16/2020) Order 367 (11/10/2020) Order 365 (6/26/2020) Order 364 (4/20/2020) Order 363 (3/30/2020) Order 362: Speedy Trial (3/24/2020)

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Wyoming	General Order 21-05 (9/3/2021) General Order 21-04 Amended (7/30/2021) General Order 21-04 (6/7/2021) General Order 21-03 Amended (5/19/2021) General Order 21-02 (3/22/2021) General Order 20-15 (12/17/2020) General Order 20-10 (9/23/2020) Order 2020-09: Jury (7/15/2020) Order 20-08: CARES Act (6/26/2020) Order 20-07: Admin Forfeiture (5/7/2020) Order 20-06: Entrance Protocols (5/4/2020) Order 20-04: CARES Act (4/6/2020) Order 20-03: CARES Act (3/30/2020) General Order 20-02: Continuances (3/20/2020) Order 20-01: Entrance Protocols (3/16/2020) Memo (3/16/2020)

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Alabama Middle	Administrative Order 2021-08 (8/10/2021) Administrative Order 2021-06 (7/27/2021) Administrative Order 2020-10 (5/11/2020) Amended Order 2020-06 (Court Operations) (3/27/2020) Order 2020-05 (Court Operations) (3/16/2020) Notice re 341 Meetings (3/14/2020) Notice re Entrance Protocols (3/11/2020)
Alabama Northern	Order 21-02 (6/22/2021) Order 20-09 (4/21/2020)

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	Admin Order 20-06 (3/27/2020) Order 20-004: Court Operations (3/13/2020) Notic re Telephonic Hearings (3/13/2020)
Alabama Southern	Misc. Action No. 21-1000-KD (7/28/2021) AO 2020-09 (7/28/2020) AO 2020-08 (5/26/2020) AO 2020-06 (4/22/2020) Notice re Court Operations (3/23/2020) Order 2020-04 (Electronic Signatures) (3/23/2020) Order 2020-03 (Telephonic Hearings) (3/16/2020)
Alaska	COVID-19 Court Operations Order 2020-9: Court Operations (7/31/2020) Order 2020-7: Court Operations (5/29/2020) Order 2020-5: Interim Rule 1020 (4/27/2020) Order 2020-6 (4/27/2020) Order 2020-4: Court Operations (3/23/2020) Order 2020-3: Court Operations (3/20/2020) Notice re 341 Meetings
Arizona	Information Regarding COVID-19 and Court Operations Order 20-3: Second Extension (4/28/2020) Order 20-6: Interim Rule 1020 (4/21/2020) Order 20-5: Electronic Signatures (3/30/2020) Order 20-4: Entrance Protocols (3/18/2020) Order 20-3: Court Operations (3/18/2020) Announcement: Court Operations

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Arkansas Eastern & Western	General Order 41 (4/5/2021) Administrative Order (5/21/2021) Administrative Order (7/1/2020) Administrative Order (4/27/2020) Order: Electronic Signatures (4/3/2020) Order: Court Operations (3/16/2020)
California Central	Notice of Amended Vaccination and Testing Policy (2/3/2022) General Order 21-06: Vaccination Mandatory (10/1/2021) Coronavirus (COVID-19) and Court Operations Order 21-05: Phased Opening Revised (6/22/2021) Order 21-04: Court Operations (4/8/2021) General Order 21-03: Court Operations (3/19/2021) Order 21-02 (Emergency Closure) (1/29/2021) Order 21-01: Emergency Closure (1/7/2021) Order 20-12: Court Operations (12/8/2020) Order 20-11: Court Operations (11/27/2020) Order 2020-10: Entrance Protocols (10/9/2020) Order 2020-09: Phased Reopening (10/9/2020) Order 20-08: Entrance Protocols (9/28/2020) Order 20-07: Phased Reopening (9/25/2020) Amended Order 20-06: Phased Reopening (9/11/2020) Order 20-06: Phased Reopening (8/7/2020) Order 20-05: Phased Reopening (8/6/2020) Order 20-04: Phased Reopening (6/30/2020) Order 20-02: Third Amended Order (05/28/2020) Order 20-02: Amended Extension (4/14/2020) Amended Order 20-02: Court Operations (4/1/2020) Order 20-03: Deadlines (3/23/2020) Order 20-02: Court Operations (3/19/2020) Announcement (3/13/2020)
California Eastern	Order 20-01.1: Interim Rule 1020 (5/8/2020) Order 20-02: Deadlines - Amended (4/16/2020)

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	Order 20-02: Deadlines (3/30/2020) Notice re 341 Meetings (3/16/2020)
California Northern	Court Operations During COVID-19 Outbreak Order 41: Forbearance Notice (5/1/2020) Order 40: Amended (5/1/2020) Order 40: Deadlines (4/9/2020) Amended Order 39: Electronic Signatures (3/30/2020) Amended Order 38: Court Operations (3/30/2020) Order 39: Electronic Signatures (3/18/2020) Order 38: Court Operations (3/18/2020)
California Southern	Information Regarding Coronavirus Disease (COVID-19) and Court Operations Order 196: Interim Rule 1020 (5/1/2020) Amended Order 20-2: Electronic Signatures (4/6/2020) Order 20-3: Deadlines (3/25/2020) Order 20-2: Electronic Signatures (3/25/2020) Order 20-1: Court Operations (3/18/2020) Announcements Telephonic Hearings
Colorado	COVID-19 Information Announcement (3/17/2020) Order: Entrance Protocols (3/16/2020) Notice re 341 Meetings
Connecticut	General Orders and Guidance Regarding COVID-19 Order 4: Court Operations (4/24/2020) Order 3: Court Operations (3/27/2020) Order: Deadlines (3/26/2020)

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	Order: 341 Meetings (3/26/2020) Order: Court Operations (3/26/2020) Order 3: Court Operations (3/27/2020) Order: Electronic Signatures (3/23/2020) Order: Court Operations (3/16/2020) Order: Court Operations (3/12/2020) Order: Entrance Protocols (3/12/2020)
Delaware	Order: Hearings 8/11/2021 Order: Hearings 7/19/2021 Standing Order: Face Coverings 7/13/2021 Order: Hearings 6/4/2021 Order: Court Operations (8/21/2020) Order: Service (8/14/2020) Order: Court Operations (6/17/2020) Order: Court Proceedings (5/26/2020) Order: Court Proceedings (5/11/2020) Order: Court Proceedings (4/20/2020) Order: CARES Act (4/20/2020) Order: Hearings (3/31/2020) Order: CARES Act (3/27/2020) Order: Electronic Signatures (3/26/2020) Announcements (3/17/2020) Order: Court Operations (3/17/2020) Order: Hand Deliveries (3/13/2020) Notice
District of Columbia	Coronavirus (COVID-19) Response
Florida Middle	Order 2020-4 (Electronic Signatures) (3/23/2020) Order 2020-3 (Filings) (3/23/2020) Order 2020-2 (341 Meetings) (3/17/2020)

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Florida Northern	COVID-19 Court Operations Order 20-007: CARES Act (4/21/2020) Admin Order No. 20-006: Court Operations (3/20/2020) Admin Order No. 20-005: Filings (3/20/2020) Admin Order: Building Closure (3/20/2020) Order 20-004: Filing Dates (3/17/2020) Order 20-003: Court Operations (3/16/2020) Announcements (3/16/2020)
Florida Southern	Important Information Regarding Court Operations During COVID-19 Outbreak General Order 21-02: Vaccination (8/18/2021) Order 2020-07: Court Operations (3/25/2020) Order 2020-06: Court Operations (3/19/2020) Order 2020-05: Deadlines (3/18/2020) Announcements
Georgia Middle	Important Information Regarding Court Operations During COVID-19 Outbreak Admin Order 134: Telephonic Hearings (4/6/2020) Admin Order 129 Amended: Digital Signatures (4/2/2020) Admin Order 126 Amended: Telephonic Hearings (4/2/2020) Admin Order 132 (3/30/2020) Admin Order 130: Court Operations (3/23/2020) Order 128: Court Proceedings (3/19/2020) Order 127: Court Proceedings (3/18/2020) Order 126: Telephonic Hearings (3/18/2020) Order 125: 341 Meetings (3/18/2020) Order 124: 341 Meetings (316/2020) Announcement (3/12/2020) Order 127

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Georgia Northern	Important Information Regarding Court Operations During COVID-19 Outbreak Order 35-2020 Extending Order 33-2020: Filings (3/31/2020) Order 34-2020: Court Operations (3/25/2020) Order 33-2020: Electronic Signatures (3/17/2020) Order 32-2020: Filing Dates (3/16/2020) Order 31-2020: 341 Meetings (3/15/2020) Notice (3/12/2020) Announcement (3/9/2020) Entry Information
Georgia Southern	Information Regarding COVID-19 and Court Operations Notice re Court Operations (3/20/2020) Order 2020-2: Filings (3/19/2020) Amended Order 2020-1: 341 Meetings (3/18/2020)
Guam	General Orders Please refer to district court information.
Hawaii	Order Regarding Court Operations in Response to COVID-19 Pandemic (6/2/2020 Order: Interim Rule 1020 (4/28/2020) Order: Court Operations (4/16/2020) Order Regarding Court Operations in Response to COVID-19 Pandemic (3/23/302 Order: Electronic Signatures (3/20/2020) Order Regarding Court Operations in Response to COVID-19 Pandemic (3/17/202 Order: Court Operations (3/17/2020)

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Idaho	COVID-19 Information (8/2/2021) Order 366: Interim Rule 1020 (4/23/2020) Please refer to district court information.
Illinois Central	General Order Regarding COVID-19 Public Emergency (7/17/20) General Order 20-01 Fourth Amended Order (6/15/2020) General Order 20-01 Third Amended Order (5/21/2020) General Order 20-01 Second Amended Order (4/30/2020) General Order Regarding Extension of Deadlines (3/23/2020) Notice re Court Operations (3/19/2020) Amended General Order 20-21 (3/18/20) General Order 20-21 (3/13/20)
Illinois Northern	General Order 20-03 Third Amended (9/28/20) Order 20-05: Hearings (5/13/2020) Order 20-04: CARES Act (4/21/2020) Order 20-03: Court Operations (3/18/2020) Announcement (3/18/2020)
Illinois Southern	
Indiana Northern	General Orders Regarding Court Procedures During the COVID-19 Pandemic Notice re Court Procedures (9/28/2020) Order 20-05 (Hearings) (5/13/2020) Order 20-04 (CARES Act) (4/21/2020) Notice re Signature Requirements
Indiana Southern	General Order 2021-21 (8/2/2021) Front Counter Operations (7/1/2020)

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	Order 20-0008: CARES Act (6/16/2020) Order 20-0007: Interim Rule 1020 (4/21/2020) Order 20-0006: Court Operations (4/7/2020) Order 20-56001: 341 Meetings (4/2/2020) Order 20-0003: Filings (3/31/2020) Order 20-0005: Deadlines (3/31/2020) Order 20-0004: Telephonic Hearings (3/26/2020) Order 20-56001: Deadlines (3/18/2020) Order 20-0002: Electronic Signatures (3/18/2020) Court Operational Changes (3/16/2020) Announcement (3/16/2020)
Iowa Northern	General Order 20-08 (11/23/2020) Order 20-AO-0010-P: Entrance Protocols (7/29/2020) Order 20-03: Signature Requirements (4/13/2020) Notice re Court Operations (3/17/2020)
Iowa Southern	Orders and Guidance Related to the COVID-19 Outbreak Order 2020-3: Electronic Signature (4/9/2020) Order 2020-2: Court Operations (4/1/2020) Notice re Court Operations (3/17/2020)
Kansas	Standing Orders COVID-19 Updates Order 20-3: Notices (3/20/2020) Order 20-2: Electronic Signatures (3/19/2020) Order 20-1: 341 Meetings (3/19/2020)
Kentucky Eastern	Order 20-02: CARES Act (4/22/2020) Notice re Filings (3/30/2020) Notice re Continuances (3/20/2020)
Kentucky Western	General Orders January 1, 2020 to Present Day Order 2020-9: Court Operations (6/3/2020) Order 2020-8: CARES Act (4/22/2020) Order 2020-7: Court Operations (4/22/2020) Order 2020-6: Court Operations (3/27/2020) Order 2020-5: 341 Meetings (3/25/2020) Order 2020-4: Clerk's Office (3/21/2020)

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	Order 2020-3: Electronic Signatures (3/19/2020) Order 2020-2: Court Operations (3/13/2020)
Louisiana Eastern	Order 2020-2: Hearings (5/4/2020) Order 2020-7: CARES Act (4/22/2020) Order 2020-6: Filings (4/17/2020) General Order 2020-5: Deadlines (4/8/2020) Order 2020-2: Hearings (4/3/2020) General Order 2020-4: Local Rules (3/18/2020) Order 2020-2: Hearings (3/13/2020)
Louisiana Middle	Administrative Order 2021-7 (Vaccination Mandatory) (9/17/2021) Response to the COVID-19 Pandemic Order 2020-4: Videoconferencing (4/28/2020) Order 2020-3: CARES Act (4/22/2020) Notice re Filings (3/30/2020) Order 2020-2: Court Operations (3/27/2020) Order 2020-1: Electronic Signatures (3/24/2020)
Louisiana Western	Announcement from Judges Order 2020-4: Electronic Signatures (3/19/2020) Order 2020-3-1: Deadlines (3/19/2020) Order 2020-3: Court Operations (3/15/2020)
Maine	Ninth General Order (9/1/2021) Order: Court Operations (3/16/2020)
Maryland	Court Operations During Pandemic Standing Order 2021-10 (Vaccination Non-Mandatory with Protocols) (9/8/2021) Order 20-16: Deadlines (9/9/2020) Order 20-15: CARES Act (7/7/2020) Order 20-14: Court Proceedings (6/18/2020) Order 20-13: Fees (5/26/2020) Order 20-10 Mod. of Confirmed Plans: CARES Act (4/13/2020) Order 20-09: Deadlines (4/13/2020) Order 20-08: Deliveries (3/29/2020) Order 20-07: Telephonic Hearings (3/29/2020) Order 20-06: 341 Meetings (3/29/2020) Order 20-05: Electronic Signatures (3/22/2020)

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	Order 20-04: Court Operations (3/19/2020) Order 20-02: Court Operations (3/17/2020)
Massachusetts	Important Court Updates Due to COVID-19 Order 2020-7: Forbearance (6/10/2020) Order 2020-1: CARES Act (4/27/2020) Amended Standing Order 2020-2: Local Rules (4/2/2020) Standing Order 2020-5 (4/2/2020) Standing Order 2020-4 (3/30/2020) Standing Order 2020-2: Local Rules (3/17/2020) 2nd Amended Order 2020-3: Filings (3/30/2020) Notice re Building Closure (3/27/2020) Message from the Chief Judge: Court Operations (3/26/2020)
Michigan Eastern	Information Regarding Court Operations During COVID-19 Pandemic Order 20-07: CARES Act (5/6/2020) Order 20-06: Court Operations (4/6/2020) Notice re Telephonic 341 Meetings (3/30/2020) Notice re Filings (3/27/2020) Notice re Building Closure (3/25/2020) Notice re Filings (3/21/2020) Order 20-05: Electronic Signatures (3/19/2020) Order 20-04: Court Operations (3/16/2020)
Michigan Western	COVID-19 Notices Order 2020-4: Court Operations (6/1/2020) Order 2020-3: CARES Act (4/21/2020) COVID-19 Updates Order: 2020-20: Court Operations (3/23/2020)
Minnesota	Bankruptcy Court Operations During COVID-19 COVID-19 Updates Order 20-403: Electronic Signatures (3/23/2020)
Mississippi Northern	Protocols for Reopening Order: CARES Act (3/27/2020) Notice re Court Operations (3/19/2020) Standing Order: Electronic Signatures (3/1/2020)
Mississippi Southern	Special Orders Order: CARES Act (3/27/2020)

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	Notice re Court Operations Notice re Court Hearings Notice re 341 Meetings Notice re Entrance Protocols
Missouri Eastern	COVID-19 and Telephonic Hearing Information Notice: Public Counter Closure (3/24/2020) Order 20-4: Electronic Signatures (3/24/2020) Announcement: Drop Box Procedures (3/24/2020) Order 20-3: 341 Meetings (3/23/2020) Announcement: Telephonic Hearings Announcement: Entrance Protocols
Missouri Western	Please refer to district court information.
Montana	Court Operations Related to COVID-19 Order 20-39: Court Operations (12/2/2020) Order 20-10: Bankruptcy Operations (8/27/2020) Order 20-27: Bar Admission (8/7/2020) Order 20-25: Safety Measures (7/6/2020) Order 2020-8: Modify Cap 13 Plan (4/29/2020) Order 20-7: Pro Se (4/15/2020) Order 20-07: Pro Se Filings (4/15/2020) Order 20-06: Court Operations (4/15/2020) Order 2020-4-BPH: Court Operations (3/16/2020)
Nebraska	General Order 21-05 (6/21/2021) General Order 21-04 (5/27/2921 Order 2020-06: Court Proceedings (3/20/2020) Order 2020-05: Court Proceedings (3/16/2020) Order 2020-04: Court Proceedings (3/13/2020) Order 2020-03: Entrance Protocols (3/11/2020)
Nevada	Administrative Orders Order 2020-10: Interim Rule 1020 (4/22/2020) Order 2020-09: Court Operations (4/9/2020) Order 2020-08: Court Operations (3/26/2020) Order 2020-07: Electronic Signatures (3/25/2020) Announcement: Court Hearing Preparation (3/23/2020) Announcement: Court Operations (3/19/2020) Order 2020-5: Telephonic Hearings (3/19/2020)

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	Order: Filing Deadlines (3/18/2020) Order 2020-04: Court Operations (3/16/2020) Order 2020-03: Entrance Protocols (3/16/2020)
New Hampshire	COVID-19 and Court Operations Order: Court Operations (4/29/2020) Order: Court Operations (4/9/2020) Third General Order (4/2/2020) Fourth General Order (4/2/2020) Order: Court Operations (3/16/2020)
New Jersey	General Orders Order: Court Operations (1/4/2021) Order: Court Operations (10/30/2020) Order: Court Operations (9/8/2020) Order: Court Operations (7/31/2020) Order: Court Operations (6/1/2020) Order: Forbearance (5/5/2020) Order: Court Operations (5/1/2020) Order: Forebearance (5/1/2020) Order: CARES Act (5/1/2020) COVID-19 Updates Order: Court Operations (4/6/2020) Order: Court Operations (3/27/2020) Notice re Amended General Order (3/27/2020) Order 2020-5: Building Closure (3/26/2020) Order: Court Operations (3/19/2020)
New Mexico	Notice re 341 Meetings (3/16/2020) Announcement (3/12/2020)
New York Eastern	Inforrmation Regarding Court Operations During COVID-19 Pandemic Order 692: CARES Act Order 691: Electronic Signatures Order: Deadlines (4/17/2020) Announcement: Filing Procedures (3/24/2020) Notice re Clerk's Office Operations (3/24/2020)
New York Northern	Public Notices Order 20-06: Telephonic Hearings (8/13/2020) Order 20-06: Telephonic Hearings (6/9/2020)

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	Order 20-05: CARES Act (5/26/2020) Order 20-04: CARES Act (4/23/2020) COVID-19 Updates Notice re Telephonic Hearings (3/25/2020) Notice re Chambers Copies (3/23/2020) Notice re Clerk's Office Operations (3/20/2020) Order 20-03: Court Operations (3/17/2020)
New York Southern	General Orders and Guidance Created by COVID-19 Order M-549: Fees (5/13/2020) Order M-548: Fees (5/11/2020) Order M-546: CARES Act (4/23/2020) Order M-545:Court Operations (4/9/2020) Order M-544: Electronic Signatures (4/6/2020) Order M-543: Court Operations (3/20/2020) Order 542: Entrance Protocols (3/17/2020) Order 540: Entrance Protocols (3/12/2020) Entry Information (3/9/2020) Notice
New York Western	Court Coronavirus News and Updates Order: Court Proceedings (12/16/2020) Order: Court Proceedings (10/30/2020) Order: Court Proceedings (8/25/2020) Order: Court Proceedings, Olean NY (7/21/2020) Order: Court Proceedings, Mayville, NY (7/21/2020) Order: Court Proceedings (6/29/2020) Order: Recovery Plan (6/1/2020) Order: Court Proceedings (5/27/2020) Order: Court Proceedings (5/7/2020) Order: Telephonic Hearings (4/29/2020) Order: Court Operations (4/29/2020) Order 20-00001: Court Operations (4/3/2020) Order: Telephonic Hearings (3/26/2020) Order: Telephonic Hearings (3/24/2020) Order: Court Operations (3/24/2020) Order: Telephonic Hearings (3/20/2020) COVID-19 Updates

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North Carolina Eastern	Order: Signature Requirements (8/28/2020) Order re: Court Entry: Courthouse Access (7/8/2020) Order re: Debtor Signature Extension: Signature Requirements (6/24/2020) Order: 341 Meetings (3/31/2020) Notice re 341 Meetings (3/27/2020) Order: Court Operations (3/27/2020)
North Carolina Middle	Second Amended Standing Order: Court Operations (8/6/2021) Standing Order 12 (5/24/2021) Order: Recovery Plan (6/5/2020) Order: Court Operations (5/15/2020) Order: Courthouse Access (5/15/2020) Standing Order: re Interim Rule (4/21/2020) Order: Court Operations (3/26/2020) Order: Electronic Signatures (3/18/2020) Order: Court Operations (3/16/2020) Information
North Carolina Western	Updated COVID-19 Operating Order (8/23/2021) Updated COVID Operating Order (6/10/2021) Order: Court Operations (10/8/2020) Order: Court Operations (4/1/2020) Order: Electronic Signatures (3/19/2020) Directive (3/13/2020)
North Dakota	Administrative Order re: COVID-19 (6/21/2021) Order: Court Operations (3/30/2020) Order: Court Operations (3/20/2020)
Ohio Northern	Ninth Amended General Order No. 20-03 (7/23/2021) Eighth Amended Order 20-03: Filings (6/14/2021) Eighth Amended Order 20-02: Electronic Signatures (6/14/2021) Order 21-02: Court Reopening (6/14/2021) Seventh Amended Order 20-03: Filings (4/13/2021) Seventh Amended Order 20-02: Electronic Signatures (4/13/2021) Sixth Amended Order 20-03 (Filings) (2/22/2021) Sixth Amended Order 20-02 (Electronic Signatures) (2/22/2021) Order 20-03: Filings (12/2/2020) Order 20-02: Electronic Signatures (12/2/2020) Order 20-03: Filings (10/13/2020)

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	Order 20-02: Electronic Signatures (10/13/2020) Amended Order 20-03: Filings (7/23/2020) Amended Order 20-02: Electronic Signatures (7/23/2020) Order 20-03: Filings (6/1/2020) Order 20-02: Electronic Signatures (6/1/2020) Order 20-03: Filings (5/4/2020) Order 20-02: Electronic Signatures (5/4/2020) Order 20-04: CARES Act (4/24/2020) Order 20-03: Filings (3/23/2020) Order 20-02: Electronic Signatures (3/23/2020)
Ohio Southern	General Order 35-9 (7/19/2021) General Order 51-1 (7/1/2021) General Order 47-1 (10/22/2020) Order 35-8: Court Operations (9/17/2020) Order 44-1: Virtual Hearings (8/21/2020) Order 35-7: Court Operations (8/3/2020) Order 35-5: Court Operations (6/5/2020) Order 41-2: Court Operations (5/5/2020) Local Practice: Entrace Protocols (5/5/2020) Order 42-1: Chapter 13 Debtors (4/6/2020) Order 41-1: Filings (4/3/2020) Order 40-1 (Filing Deadlines) (3/25/2020) Order 37-2 (Electronic Signatures) (3/25/2020) Order 35-2 (Court Operations) (3/25/2020) Order 39-1 (Federal Income Tax) (3/24/2020) Order 36-1 (Filings) (3/19/2020) Order 35-1: Court Operations (3/13/2020) Notice (3/13/2020)
Oklahoma Eastern	Notice (3/16/2020) Notice re 341 Meetings (3/16/2020)
Oklahoma Northern	General Order 21-GO-04 (7/1/2021) General Order 21-GO-03 (5/10/2021) General Order 21-GO-02 (2/16/2021) General Order 21-GO-01 (2/8/2021 General Order 20-GO-09 (11/4/2020) General Order 20-GO-07 (6/17/2020) General Order 20-GO-05 (5/4/2020)

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	General Order 20-GO-04 (4/22/2020) Order 20-GO-08: Entrance Protocols (9/4/2020) Order 20-06: Entrance Protocols (6/1/2020) Order-03: Court Operations (4/20/2020) Order-02: Electronic Signatures (3/30/2020) Notice (3/13/2020)
Oklahoma Western	General Order 21-10 (5/28/2021) 2nd Amended Order: Telephonic Hearings (4/1/2020) Order 20-7: Electronic Signatures (3/26/2020) Amended Order 20-5: 341 Meetings (3/24/2020) Amended Order 20-6: Telephonic Hearings (3/24/2020) Order 20-5: 341 Meetings (3/16/2020) Notice re 341 Meetings (3/16/2020)
Oregon	Order 20-4: Interim Rule 1020 (4/24/2020) Order 20-3: Court Operations (3/27/2020) Order: Electronic Signatures (3/19/2020) Notice re Telephonic Hearings (3/17/2020) Notice re 341 Meetings (3/16/2020) Announcements
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Pennsylvania Middle	General Order 2021-06 (6/11/2021) Order: Court Operations (12/1/2020) Order: Court Proceedings (7/20/2020) Order: CARES Act (4/23/2020) Order: Forebearance (4/30/2020) Order: CARES Act (4/23/2020) Order 20-0004: Telephonic Hearings (4/17/2020) COVID-19 Related Information (4/17/2020)

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Wyoming	Order 20-02: Entrance Protocols (3/16/2020)

Courts of Special Jurisdiction

Court Name	Court Orders & Info
U.S. Court of Federal Claims	Coronavirus (COVID-19) Announcements Order: Court Proceedings (5/12/2020) Order: Filings (3/18/2020) Order: Entrance Protocols (3/16/2020)
U.S. Court of International Trade	Order re: Face Masks/Coverings and Screenings (8/2/2021) COVID-19 Updates

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby promulgate Rule 36 of section 202.70(g) of the Uniform Rules for the Supreme and County Courts (Rules of Practice for the Commercial Division), effective December 13, 2021, to read as follows (new material underlined):

Rule 36. Virtual Evidentiary Hearing or Non-jury Trial.

(a) If the requirements of paragraph (c) of this Rule are met, the court may, with the consent of the parties, conduct an evidentiary hearing or a non-jury trial utilizing video technology.

(b) If the requirements of paragraph (c) of this Rule are met, the court may, with the consent of the parties, permit a witness or party to participate in an evidentiary hearing or a non-jury trial utilizing video technology.

(c) The video technology used must enable:

i. a party and the party's counsel to communicate confidentially;

ii. documents, photos, and other things that are delivered to the court to be delivered to the remote participants;

iii. interpretation for a person of limited English proficiency;

iv. a verbatim record of the trial; and

v. public access to remote proceedings.

(d) This Rule does not address the issue of when all parties do not consent.

Chief Administrative Judge of the Courts

Date: October 19, 2021

AO/299/21

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby promulgate Rule 37 of section 202.70(g) of the Uniform Rules for the Supreme and County Courts (Rules of Practice for the Commercial Division) and add a new Appendix G (attached), effective December 15, 2021, to read as follows (new material underlined):

Rule 37. Remote Depositions.

(a) The court may, upon the consent of the parties or upon a motion showing good cause, order oral depositions by remote electronic means, subject to the limitations of this Rule.

(b) Considerations upon such a motion, and in support of a showing of good cause, shall include but not be limited to:

(1) The distance between the parties and the witness, including time and costs of travel by counsel and litigants and the witness to the proposed location for the deposition; and

(2) The safety of the parties and the witness, including whether counsel and litigants and the witness may safely convene in one location for the deposition; and

(3) Whether the witness is a party to the litigation; and

(4) The likely importance or significance of the testimony of the witness to the claims and defenses at issue in the litigation.

For the avoidance of doubt, the safety of the parties and the witness shall take priority over all other criteria.

(c) Remote depositions shall replicate, insofar as practical, in-person depositions and parties should endeavor to eliminate any potential for prejudice that may arise as a result of the remote format of the deposition. To that end, parties are encouraged to utilize the form protocol for remote deposition, which is reproduced as Appendix G to these rules, as a basis for reaching the parties' agreed protocol.

(d) No party shall challenge the validity of any oath or affirmation administered during a remote deposition on the grounds that

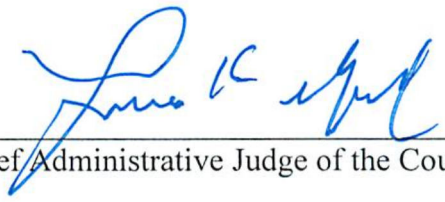
(1) the court reporter or officer is or might not be a notary public in the state where the witness is located; or,

(2) the court reporter or officer might not be physically present with the witness during the examination.

(e) Witnesses and defending attorneys shall have the right to review exhibits at the deposition independently to the same degree as if they were given paper copies.

(f) No waiver shall be inferred as to any testimony if the defending attorney was prohibited by technical problems from interposing a timely objection or instruction not to answer.

(g) Nothing in this rule is intended to: (i) address whether a remote witness is deemed "unavailable," within the meaning of CPLR 3117 and its interpretive case law, for the purposes of utilizing that witness' deposition at trial; or (ii) alter the Court's authority to compel testimony of non-party witnesses in accordance with New York law.



Chief Administrative Judge of the Courts

Date: December 7, 2021

AO/339/21

APPENDIX G

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

XXXX, Plaintiff(s), - against – XXXX, Defendant(s).	Index No. _____/____

STIPULATION AND [PROPOSED] ORDER CONCERNING PROTOCOL FOR CONDUCTING REMOTE DEPOSITIONS

The Plaintiff(s) and Defendant(s) (collectively, the "Parties") jointly stipulate to the following protocol for conducting depositions via remote means in the above-captioned manner:

1. All depositions shall be conducted remotely using videoconference technology, and each deposition shall be recorded, either by stenographic or video means.

2. Insofar as practicable, the remote deposition shall be similar to an in-person deposition.

3. The Party that notices the deposition shall contract with a court reporting service for court reporting, videoconference, and remote depositions services. An employee or employees of the service provider shall attend or be available at each remote deposition to record the deposition, troubleshoot any technological issues that may arise, and administer the virtual breakout rooms.

4. The Parties agree that these recorded remote depositions may be used at a trial or hearing to the same extent that an in-person deposition may be used at trial or hearing, and the Parties agree not to object to the use of these recordings on the basis that the deposition was taken remotely. The Parties reserve all other objections to the use of any deposition testimony at trial.

5. The deponent, court reporter, and counsel for the Parties may each participate in the videoconference deposition remotely and separately. Each person attending a deposition shall be clearly visible to all other participants, their statements shall be audible to all participants, and they should each use best efforts to ensure their environment is free from noise and distractions.

6. No counsel shall privately communicate with any deponent during questioning on the record, except for the purpose of determining whether a privilege should be asserted, and only after the witness has stated on the record that he or she needs to consult counsel regarding a question of privilege. Deponents shall shut off electronic devices, other than the devices that the deponent is using for the videoconferencing software and to display and access the exhibits, and shall refrain from all private communication during questioning on the record.

7. During breaks in the deposition, the Parties may use a breakout-room feature, which simulates a live breakout room through videoconference. Conversations in the breakout rooms shall not be recorded. The breakout rooms shall be established by the court reporting service prior to the deposition and controlled by the remote deposition or relevant service provider.

8. Remote depositions shall be recorded by stenographic means, and may also be video-recorded; but, the court reporter might not be physically present with the witness whose deposition is being taken. The Parties agree not to challenge the validity of any oath administered by the court reporter, even if the court reporter is not a notary public in the state where the deponent resides.

9. The court reporter will stenographically record the testimony, and the court reporter's transcript shall constitute the official record. If the deposition is to be video recorded,

the videographer will record the audio and video of the deposition and preserve the recording. The court reporter may be given a copy of the video recording and may review the recording to improve the accuracy of any written transcript. The court reporter shall mark and preserve exhibits used at the deposition.

10. The Parties agree that the court reporter is an "Officer" as defined by CPLR 3113(b) and shall be permitted to administer the oath to the witness via the videoconference. The deponent will be required to provide government-issued identification satisfactory to the court reporter and this identification must be legible on the video record, if the deposition is to be video recorded.

11. The Party that noticed the deposition shall be responsible for procuring a written transcript and any video record of the remote deposition. The Parties shall bear their own costs in obtaining a transcript and/or video record of the deposition or any real-time transcript functionality.

12. The Party that noticed the deposition shall provide the remote deposition or relevant service provider with a copy of this Stipulation and Order at least twenty-four hours in advance of the deposition.

13. At the beginning of each deposition, consistent with CPLR 3113(b), the videographer or stenographer shall "put the witness on oath" (CPLR 3113(b)) and begin the deposition with a statement on the record, consistent with 22 NYCRR 202.15(d), that shall include: (i) the officer's name and address; (ii) the name and address of the officer's employer; (iii) the date, time, and place (or method) of the deposition; (iv) the party on whose behalf the deposition is being taken; and (v) the identity of all persons present.

14. At the beginning of each segment of the deposition, consistent with 22 NYCRR 202.15(d), the videographer or stenographer shall begin that segment of the remote deposition by announcing the beginning and end of each segment of the remote deposition.

15. If the deposition is being video recorded, the videographer shall monitor the audio and video transmission and shall stop the record if he or she determines that any participant has been dropped from the remote deposition or is otherwise incapable of participating by reason of technical problems. If a videographer is not present, the monitor and/or court reporter shall stop the record as soon as he or she becomes aware that a participant has been dropped from the remote deposition or cannot participate by reason of technical problems.

16. The defending attorney shall make objections and interpose instructions not to answer in substantially the same manner as he or she would at an in-person deposition. If the defending attorney is unable to make objections and interpose instructions not to answer by reason of technical difficulties, such a failure to object or to instruct shall not be construed as waiver and the defending attorney shall have an opportunity to object or to instruct as soon as the technical problem has been remedied. Objections and instructions not to answer shall be regarded as timely if made as soon as practicable.

17. The Parties agree to work collaboratively and in good faith with the court reporting agency to assess each deponent's technological abilities and to troubleshoot any issues at least 48 hours in advance of the deposition so any adjustments can be made. Counsel and deponents may test remote deposition software before any remote deposition. The Parties also agree to work collaboratively to address and troubleshoot technological issues that arise during a deposition and make such provisions as are reasonable under the circumstances to address such issues. This provision shall not be interpreted to compel any Party to proceed with a deposition

where the deponent cannot hear or understand the other participants or where the participants cannot hear or understand the deponent. Any period on the record during which a deponent or questioner could not hear or understand the questions or answers due to technical difficulties shall not count toward time limitation under CPLR 3113(b).

18. Counsel shall use best efforts to ensure that they have sufficient technology to participate in a videoconference deposition (e.g., a webcam and computer or telephone audio and sufficient internet bandwidth to sustain the remote deposition). Counsel for the deponent shall likewise use best efforts to ensure that the deponent has such sufficient technology. In the case of non-party witnesses, counsel noticing the deposition shall supply any necessary technology that the deponent does not have.

19. The Parties agree that this Stipulation and Order applies to remote depositions of non-parties under CPLR 3101 and shall work in a collaborative manner in attempting to schedule remote depositions of non-parties. The Party noticing any non-party deposition shall provide this Stipulation and Order to counsel for any non-party under CPLR 3101 a reasonable time before the date of the deposition.

20. The Parties agree that any of the following methods for administering exhibits may be employed during a remote deposition, or a combination of one or more methods:

(i) Counsel noticing the deposition may choose to mail printed copies of documents that may be used during the deposition to the deponent, the deponent's counsel, counsel for other parties that will appear on the record, and the court reporter. In that event, noticing counsel shall so inform the recipients prior to mailing the documents and shall provide tracking information for the package. Such documents shall be delivered

by noon (local-time) the day before the deposition. Recipients shall confirm receipt of the package by electronic mail to Counsel noticing the deposition. If printed copies are mailed, every recipient of a mailed package shall keep the package sealed until the deposition begins and shall only unseal the package on the record, on video, and during the deposition when directed to do so by the counsel taking the deposition. Recipients shall proceed to open the documents and review the documents only upon the instruction of the noticing attorney. This same procedure shall apply to any physical copies of documents any other counsel intends to use for examining the witness.

(ii) Counsel noticing the deposition may share exhibits digitally, such as by e-mailing a compressed zip folder or sharing a link. The exhibits shall be shared to the deponent, the deponent's counsel, the other Party's counsel, and the court reporter, and any other attorneys who have appeared on the record at the deposition. Every recipient of a digital exhibit shall not open the digital exhibit until directed to do so by the counsel taking the deposition. If sending documents digitally, counsel will be mindful of file size limitations, which presumptively should be less than __ MB. Such file transfers shall be password-protected.

(iii) If the software for the videoconference supports uploading and sharing digital files in real time (e.g., such as the Chat feature on Zoom), then such function may be equivalently used to distribute exhibits to the deponent and participants in real time. Counsel appearing on the record at the

deposition and the court reporter shall confirm receipt of the documents to Counsel noticing the deposition. The method of transferring the documents shall be password-protected, and counsel taking the deposition shall supply the password immediately prior to the commencement of the deposition.

(iii) Regardless which method of document-sharing is used, the witness and the defending counsel shall have the right to private copies of the exhibits that allow the witness and defending counsel to independently and fully navigate the exhibit while the deposition is on the record.

Dated:

SO ORDERED:

_____

[_____, J.]

Justice of the Supreme Court of the State of New York

Stipulated to:

[ATTORNEY SIGNATURE BLOCKS]

Virtual Bench Trial

Protocols and Procedures

Hon. Norman St. George, J.S.C.
District Administrative Judge
10th Judicial District-Nassau County

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Overview

The Covid-19 pandemic has required all Courts across New York State to innovate and adapt in order to continue to provide the effective and efficient administration of justice and Access to Justice for all Court users consistent with the highest standards of Chief Judge DiFiore's Excellence Initiative. Our Courts have uniformly transitioned to Microsoft Teams as a platform to conduct oral arguments on motions, preliminary/status/compliance/pre-trial conferences, hearings, A.D.R. settlement conferences, inquests, criminal arraignments, and pleas all by virtual means in order to ensure the safety and health of all Court users.

New York State Courts have also utilized Microsoft Teams to facilitate Virtual Bench Trials. Virtual Bench Trials are, in all respects, identical to In-Person Courtroom Bench Trials in terms of the format, content and formality. However, certain modifications are necessary regarding the presentation of testimonial, documentary, and physical evidence in order to safeguard accuracy and ensure reliability.

Although these modifications are generally applicable to all types of Virtual Bench Trials in the various Courts, each Court should adapt the foregoing to their specific needs, requirements, and concerns. Included herein is a separate section that specifically addresses Virtual Criminal Bench Trial considerations. A Proposed Stipulation and Order for the parties to review and sign prior to the commencement of a Virtual Bench Trial is attached hereto as "Exhibit A".

The following guide demystifies the proceedings and presents a simple and practical roadmap to conducting a Virtual Bench Trial. It also informs all participants on what to expect. This guide has truly been a collaborative effort. These materials represent a collection of the Best Practices from all of the Judicial Districts throughout the State. We thank all of the Administrative Judges, the Presiding Judge of the Court of Claims, the Supervising Judges, the Trial Judges, the Bar Associations, the District Attorneys, the Public Defenders, and the Lawyers who contributed their suggestions, comments, and concerns to this compilation. Special Thanks to Chief Judge Janet DiFiore, Chief Administrative Judge Lawrence Marks, Deputy Chief Administrative Judge Vito Caruso, Deputy Chief Administrative Judge George Silver, and Deputy Chief Administrative Judge Edwina Mendelson for their outstanding leadership, assistance, and guidance throughout these difficult times.

Virtual Bench Trial Decorum

All participants shall recognize that a Virtual Bench Trial is a formal proceeding. Thus, all evidentiary rules and principles that guide In-Person Courtroom Trials remain applicable. Of equal importance are the disciplinary rules and requirements of civility amongst lawyers and litigants alike. Judges' Part Rules and procedures regarding the conduct of an In-Person Courtroom Trial should be followed to the extent practicable. All participants are to have proper attire, there should be no consumption of food or drink or smoking during the proceedings.

Judges, attorneys, witnesses, and participants should appear via both video and audio with their cameras always on and operational unless otherwise instructed. Counsel and witnesses are to attend the Virtual Bench Trial from quiet and appropriate locations without background distractions. All participants shall use best efforts to eliminate all visual and auditory distractions. All parties must display their actual backgrounds, which should always remain professional and dignified. The use of virtual backgrounds should be prohibited (blurred backgrounds may be considered if appropriate). As in In-Person Courtroom proceedings, only one person may speak at a time. When present, the Court Reporter (or FTR recording device where appropriate) is required to take down an accurate contemporaneous record of the proceeding. Therefore, participants shall not speak over one another and there should be no colloquies between Counsel during the Virtual Bench Trial. Non-speaking participants should always activate the mute microphone function.

Any and all objections must be made audibly. In addition, Counsel should physically raise their hands and/or use the "raise hand" function in Microsoft Teams. Once objections are resolved by the Court, exceptions will be duly noted on the record.

At any time during the proceeding, Counsel may request that the Virtual Bench Trial be paused to allow Counsel to consult with his/her client. If Counsel and the client are in different locations, the Court may permit the use of the Breakout Room feature on Microsoft Teams to facilitate this discussion. Upon a pause of the Virtual Bench Trial the Court should direct all parties to remain on mute and disable video; leave the Virtual Bench Trial and rejoin at a time certain; or provide other appropriate instructions to ensure that ex-parte communications among the Court, attorneys, parties and witnesses do not take place.

Safeguarding the Virtual Bench Trial

Virtual Bench Trials will be conducted via Microsoft Teams under the control of Court personnel. Since Microsoft Teams is a video-conferencing platform that transmits over the Internet, Court technology personnel have taken extensive measures to ensure the security of the platform. It is incumbent that all participants involved in the Virtual Bench Trial be instructed not to allow any non-participant or third party to gain unapproved entry to the Virtual Bench Trial. In addition, parties should be strongly encouraged to attend the Virtual Bench Trial via a secure password protected Internet connection, not a public WiFi connection.

Technical difficulties during the Trial may occur. Counsel, parties, and witnesses should exchange back-up contact information, such as cell phone numbers and/or e-mail addresses, with the Court prior to the Virtual Bench Trial and discuss a protocol on how to reconnect in case the Virtual Bench Trial itself or a party is disconnected, or other technical issues arise. If appropriate, the contact information for technology support should also be shared. All participants should immediately notify the Court if it appears anyone has dropped from the Virtual Bench Trial. At all times the Court will immediately take such steps as appropriate to ensure the fairness and integrity of the proceedings. The parties are expected to work cooperatively and professionally with the Court and with each other to resolve any technical issues that arise.

Maintaining Public Access

The Virtual Bench Trials should be live-streamed, both audio and video, to ensure public access. (Note, the live stream should be paused during bench conferences and other off the record discussions). In addition, upon specific application, the press and members of the public can be provided with a restricted Microsoft Teams link. Arrangements can also be made for remote access to the Virtual Bench Trial from a courthouse location where ample social distancing can be assured. Each of the Courthouses already have Kiosks set up for this purpose. To the extent possible, any live-streams and Microsoft Teams link should include a notice/banner prohibiting recording of the proceedings.

Pre-Trial Considerations

Since Virtual Bench Trials will be conducted using the Microsoft Teams platform, Judges presiding over Virtual Bench Trials must be familiar with the Microsoft Teams platform and should ensure that their staff and Courtroom Clerks

are familiar with the platform. A Courtroom Clerk must be present during all stages of the Virtual Bench Trial with audio and video connections in working order.

In selecting cases for a Virtual Bench Trial, it is recommended that Judges initially begin with cases that involve a single Plaintiff, a single Defendant, and a modest number of witnesses. Cases that are more complex, are anticipated to require weeks to complete, or where the testimony of a minor is required should be considered after the presiding Judge has already conducted some straightforward Virtual Bench Trials.

Once a case has been selected for a Virtual Bench Trial, the attorneys and the litigants must stipulate in writing to waive a Jury Trial (where authorized), and proceed via Virtual Bench Trial. Judiciary Law 2-b(3) provides inherent power and broad discretion to Courts to employ innovative procedures where necessary "to carry into effect the powers and jurisdiction possessed by it." Although this arguably authorizes a Court to proceed with Virtual Bench Trials (in Civil matters) without the consent of the parties, best practices recommend having the parties stipulate to the Virtual Bench Trial. Following the parties' execution of the written Stipulations, the Stipulations should be made part of the record at Trial as a Court Exhibit.

In cases where one of the litigants is proceeding Pro se, the Court must make proper inquiry concerning the Pro se litigant's ability to access the required computer hardware, the Microsoft Teams platform, and the Internet. Should the Pro se litigant advise the Court that he/she is not able to access the Virtual Bench Trial through appropriate means, the Court should work with its Clerk's Office or the Court's Help Center to provide the Pro se litigant with a safe, confidential, socially distanced environment at the Courthouse or other facility where the Pro se litigant may access and participate in the Virtual Bench Trial. Most Courts already have Pro se Kiosks available in the various Courthouses for this purpose.

Virtual Pre-Trial Conference

The Court should conduct a Virtual Pre-Trial Conference at least seven (7) to ten (10) days prior to the commencement of the Virtual Bench Trial. During the Pre-Trial Conference, the Court will address and resolve all issues regarding Exhibits, witnesses, demonstratives to be used at Trial, and Motions *In Limine*.

Prior to the Virtual Pre-Trial Conference, Counsel for the parties must confer with each other and make a good faith effort to agree on Exhibits that will be offered into evidence without objection and the redaction of such Exhibits as necessary. The parties must electronically submit agreed upon Exhibits and objections to the

introduction of Exhibits to the Court (at an e-mail address designated by the Court) at least forty-eight (48) hours prior to the Virtual Pre-Trial Conference. The Court will hear arguments on any objections during the Virtual Pre-Trial Conference and will rule on the objections to the contested Exhibits at the earliest possible time before the Virtual Bench Trial commences.

Counsel must confer with each other regarding the witnesses to be called and the order that they will be called prior to the Virtual Pre-Trial Conference. The parties must electronically submit agreed upon Witness Lists and objections to the calling of witnesses to the Court (at an e-mail address designated by the Court) at least forty-eight (48) hours prior to the Virtual Pre-Trial Conference. The Court shall expeditiously resolve all disputes related to the calling of witnesses prior to the commencement of the Virtual Bench Trial. The Court can continue to issue "So Ordered" subpoenas to secure the attendance of witnesses as may be requested by Counsel.

Similarly, all Motions *In Limine* should be made to the Court at least seven (7) to ten (10) days prior to the commencement of the Virtual Bench Trial. Motions *In Limine* will be discussed during the Virtual Pre-Trial Conference. As soon as possible before the Virtual Bench Trial, the Court will determine and expeditiously advise the parties which Motions *In Limine* will be resolved Pre-Trial and which motions will be referred to the Virtual Bench Trial.

Counsel are encouraged to stipulate to factual and evidentiary matters to the extent possible. Litigants should consider whether to stipulate in advance to waive the right to make a prima facie motion, motion for a directed verdict, to set aside the verdict and any other post-trial motions.

In Family Court or other Courts where the Family Court Act or other Acts and statutes mandate an immediate Hearing/Trial, the time requirements regarding the exchange of Trial Exhibits and Witness lists contained herein shall be modified accordingly or eliminated.

Opening Statements

Prior to the commencement of the Opening Statements, Counsel must confer with each other and make a good faith effort to agree upon any demonstratives to be used during the Opening Statement. The Court should be advised of the use of demonstratives during the Virtual Pre-Trial Conference. At a time to be specified by the Court, Counsel should e-mail the Court (at an e-mail address designated by the Court) copies of the demonstratives to be used in the Opening Statements for the

Court's approval. Upon Court approval, Counsel may e-mail demonstratives to the Court Reporter for inclusion in the official record.

The Court will allow Counsel to use the "share screen" function in Microsoft Teams to display Court-approved demonstratives during Opening Statements.

Exhibits

The Exhibits to be used at the Virtual Bench Trial should be submitted electronically to the Court (at an e-mail address designated by the Court), all Counsel, and the Court Reporter at a date and time to be directed by the Court. All Exhibits of more than one (1) page must be "Bates Stamped" in order to prevent any confusion as to which page of the Exhibit is being referred to. With the Courts approval, other pagination methods may be used. Once agreed to by the parties and approved by the Court, Counsel introducing the Exhibits must pre-mark them for identification prior to the Virtual Bench Trial. The Exhibits of Plaintiff/Petitioner/People shall be marked with numbers and the Exhibits of Defendant/Respondent/Defense shall be marked with letters.

If an Exhibit to be presented is something other than a document (i.e., a physical object), it must be submitted to the Court no less than fifteen (15) days prior to the Virtual Pre-Trial Conference. All Counsel, the parties and prospective witnesses will have an opportunity to view and photograph the physical Exhibit prior to the Virtual Pre-Trial Conference by appointment with the Court. Prior to the Virtual Pre-Trial Conference, Counsel for the parties must confer with each other and make a good faith effort to agree on the physical Exhibits that will be offered into evidence without objection. The parties must electronically submit a list of agreed upon physical Exhibits and objections to the introduction of the physical Exhibits to the Court (at an e-mail address designated by the Court) at least forty-eight (48) hours prior to the Virtual Pre-Trial Conference. The Court will hear arguments on any objections during the Virtual Pre-Trial Conference and will rule on the objections to the contested physical Exhibits at the earliest possible time before the Virtual Bench Trial commences. The parties may stipulate, or the Court may Order that a photograph or video of the physical Exhibit be used during the Virtual Bench Trial.

During the Virtual Bench Trial, where an Exhibit is offered into evidence and a proper foundation has been established, the Court will direct that the Exhibit be marked into evidence by the Court Reporter. The Court Reporter will make the appropriate notation of the admission on his/her copy of the Exhibit and properly notate the record. In Courts using a FTR recording device, the Courtroom Clerk will accomplish same.

In the event that an Exhibit is altered in any way during the Virtual Bench Trial (*e.g.*, written upon, highlighted, marked, enhanced, reduced/enlarged and/or zoomed in upon), the Exhibit will be saved at the time of the alteration and exchanged electronically with the Court and all Counsel in "actual size" immediately or as soon as practicable following the alteration of the Exhibit. The Exhibit will be exchanged in the same orientation, scale, and color format as altered during the Virtual Bench Trial.

Exhibits received into evidence shall be retained or returned pursuant to the Court's current procedures for retention/return of Exhibits.

Witness Testimony

The names, e-mail addresses and back-up telephone numbers of all prospective witnesses expected to be called during the course of the Virtual Bench Trial must be furnished to the Court at the Virtual Pre-Trial Conference. If any of the witnesses or the parties need a language interpreter, the Court must be advised accordingly at the Pre-Trial Conference so appropriate arrangements can be made. The Court will send the witness(es) the access link to Microsoft Teams for the Virtual Bench Trial. Counsel shall instruct all witnesses that they are to log onto the proceeding at the time of the commencement of the daily session and remain in the Microsoft Teams "lobby" area until called as a witness and admitted by the Court into the Virtual Bench Trial Courtroom. Alternatively, the Court can establish various login times for each witness which is at least a half hour before their testimony times.

Absent extenuating circumstances discussed with the Court in advance, all witnesses must give testimony with both audio and video on and operational. It is strongly recommended that Counsel and his/her witnesses run a test using the Microsoft Teams platform prior to the scheduled trial date.

Prior to their testimony, all witnesses must be instructed by Counsel, and should be admonished by the Court, that any recording of the Virtual Bench Trial by any individual other than the official Court Reporter (or FTR recording device where appropriate) is strictly prohibited. Any unauthorized recording of the Virtual Bench Trial shall be considered a violation of the Court's Order.

Witnesses must be instructed by Counsel, and should be admonished by the Court, that written or oral communications of any kind, via electronic means or otherwise, between a witness or party and Counsel for the witness during the Virtual Bench Trial testimony is strictly prohibited. Communications between the witness and Counsel shall be restricted as if the Virtual Bench Trial were being conducted

In-Person. Counsel and parties may not speak with a witness until the witness's testimony has been completed. Counsel must ensure that a remote witness is not being coached, assisted, or signaled in any way.

Witnesses must be instructed by Counsel, and should be admonished by the Court, that they are not permitted to read or refer to any Exhibit, image, document, or other writing of any kind (*e.g.*, notes, e-mails, texts, pdf's, or digital communications of any kind) during their Virtual Bench Trial testimony other than Exhibits, images, documents or other writing provided to them by Counsel in the course of direct or cross examination. In addition, there shall be no information available to the witness whether written or otherwise out of the sight of the Court. There shall be no other computer monitor, screen, TV screen, cell phone or the like in the room wherein the witness is testifying. The room that the witness is testifying from shall be displayed to the Court and all Counsel prior to the testimony beginning and periodically thereafter. Any document or other writing which the witness is permitted to refer to shall be published to the computer's camera being used by the witness.

Witnesses must be instructed by Counsel, and should be admonished by the Court, that no other individual may be present, either physically or electronically, in the same room as the witness or so near the witness as to be seen and/or heard by the witness. The witness should be advised, where appropriate, that exceptions can be made for individuals who are not a witness to the events under consideration at the Virtual Bench Trial if they are present only to assist the witness in the use of the computer equipment/camera or because the witness requires physical assistance due to a medical condition. The presence of any such party or person must be disclosed to the Court, all parties and their Counsel, and the Court Reporter. Once disclosed, the Court Reporter shall note the presence of the third party on the record. Additionally, identification of the individual should be presented on the record.

It is strongly recommended that the Court confirm with all witnesses all instructions given by Counsel.

Counsel who calls the witness for Direct Examination is responsible for ensuring the witness has a suitable location and access to suitable computer equipment and screen(s) that are necessary for the visual and audio nature of the proceedings and Exhibits/images shared, including the ability to highlight a document or alter it. It is important that where possible all witnesses have a substantially similar computer screen in both size and quality so that when an Exhibit is shown to them the witness shall each have the benefit of seeing the image on the screen in the same way. Unless specifically authorized by the Court in advance, witnesses shall not be permitted to testify from a cell phone, whether through the phone's camera and video features or via calling in to the Virtual Bench Trial. All

witnesses must appear on camera and be easily seen for the purpose of assessing credibility. A sample pre-testimony Witness Inquiry is attached hereto as "Exhibit B".

The Court, Court Reporter, Counsel, witnesses, and parties shall be in separate/remote locations participating via Microsoft Teams. Should a participant in the Virtual Bench Trial, including Counsel, choose to be in the same location as another participant, Counsel shall have a separate camera available for each individual so that the Court can see Counsel and all participants at all times simultaneously. Participants should not share the same camera or screen. No one participating in the Virtual Bench Trial should be off screen or turn their computer camera off without the express prior permission of the Court.

The Court Reporter, who must be physically located in the State of New York, will swear in the witnesses. In the event that a FTR recording device is being used, the Courtroom Clerk will swear in the witness. The identity of the witnesses must be confirmed prior to the administration of the Oath. Any objection to the administration of the Oath should be waived. Regarding witnesses that are testifying from an out of state location, Counsel should consider waiving the requirement, where appropriate, that the witness be sworn by an official located in the State in which that witness is present.

Sidebar Conferences

Should the need arise for any reason and at any time during the course of the Virtual Bench Trial, for Counsel and the Court to confer on any objections or any other matters, the Court may make use of the Breakout Room feature on Microsoft Teams so that the witness is not privy to the sidebar discussion. The Courtroom Clerk will remain on the main link to monitor the witness. Alternatively, the Court can direct that a cell phone conference call occurs with all parties muting their audio on the Microsoft Teams platform.

Closing Arguments

As with Opening Statements, it is recommended that Counsel confer and make a good faith effort to agree upon the use of any demonstratives during Closing Arguments prior to the Virtual Pre-Trial Conference. Any needed changes or additions to the demonstratives that may be required based upon the Virtual Bench Trial testimony or other factors must be approved by the Court prior to use and should be discussed during a Virtual Pre-Summation Conference. At a time specified by the Court, Counsel should e-mail the Court (at an e-mail address designated by

the Court) copies of any demonstratives to be used in the Closing Arguments for the Court's approval. In addition, during the Pre-Summation Conference the Court will discuss with Counsel the form of the Court's Verdict.

Record on Appeal

Only the official transcript of the Virtual Bench Trial as taken down by the Court Reporter, or FTR recording device where appropriate, including Exhibits marked into evidence, shall constitute the record for appeal.

Virtual Criminal Bench Trial Considerations

The Virtual Criminal Bench Trial should be conducted in the order required by the Criminal Procedure Law. Other than the following considerations, the general Virtual Bench Trial Protocols and Procedures contained herein apply to Virtual Criminal Bench Trials.

The additional considerations for Virtual Criminal Bench Trials are essential to protect the Constitutional rights of a Defendant. A Virtual Criminal Bench Trial may only proceed with the consent of the Defendant and his/her Counsel. Accordingly, it is recommended that all parties make an In-Person appearance prior to commencement of the Virtual Criminal Bench Trial for the express purpose of obtaining the Defendant's consent to proceed with a Virtual Criminal Bench Trial.

Initially, the Court must, on the record, explain to the Defendant that he/she would be waiving their right to a Jury Trial. The Defendant must waive that right In-Person and on the record and must also execute a Waiver of Jury Trial in writing. This form, once executed by the Defendant, is to be made a Court Exhibit.

Following the Waiver of the Jury Trial, the Court must explain to the Defendant that he/she has the right to an In-Person Trial, and, that he/she would also be waiving that right. The Court should instruct the Defendant on how the Virtual Criminal Bench Trial would be conducted. The Defendant, Defendant's Counsel and the People must state, on the record, that they are waiving an In-Person Bench Trial and consenting to a Virtual Criminal Bench Trial. All parties must execute the Waiver of In-Person Trial/Consent to a Virtual Bench Trial Form. This form, once executed by the parties, is to be made a Court Exhibit. Attached as "Exhibit C" is a Sample Waiver of In-Person Criminal Bench Trial Form with a Sample Inquiry.

Having obtained the necessary consents to proceed virtually, it is recommended that the Court conduct an In-Person Pre-Trial Conference. During the conference, it is recommended that all documentary evidence be pre-marked and inspected by the parties to accommodate the virtual exchange of Exhibits during the Virtual Criminal Bench Trial. With regard to physical evidence, the Court shall encourage the parties to make a good faith effort to stipulate to physical evidence being entered into evidence on consent, in advance, wherever possible. If possible, any chain of custody issues regarding physical evidence should be determined in advance of the Virtual Criminal Bench Trial. A Stipulation should be agreed upon to allow the documents to be displayed through Microsoft Teams and, once properly authenticated, entered into evidence during the Virtual Criminal Bench Trial. The provisions related to physical Exhibits referred to above should also be followed in Virtual Criminal Bench Trials.

On the first day of the Virtual Criminal Bench Trial, Defendant should again state on the record that he/she is waiving an In-Person Trial, consenting to a Virtual Criminal Bench Trial, and acknowledging that he/she signed the waiver of the right to an In-Person Trial and consents to a Virtual Criminal Bench Trial.

With regard to the Defendant's identification, to the extent that it is an uncontested issue, a Stipulation to that effect should have been reached prior to the commencement of the Virtual Criminal Bench Trial. If the Defendant's identification is a contested issue and the Defendant is wearing a face covering for health reasons during the Virtual Criminal Bench Trial (either due to proximity with Corrections' staff, if incarcerated, or because otherwise necessary), appropriate steps must be taken during the Virtual Criminal Bench Trial to permit the complaining witness to identify the Defendant during their testimony. Arrangements may be made in advance to have the Defendant lower his/her face covering during the identification process.

Of greatest significance during a Virtual Criminal Bench Trial is that a mechanism must be in place to ensure that Defense Counsel and the Defendant are able to privately confer and communicate at all times – before, during, and at the conclusion of the Virtual Criminal Bench Trial. Counsel and the Defendant should be permitted to meet using the Microsoft Teams Breakout Room feature during breaks or at any time requested. Regarding the need for real time conversations, Counsel and the Defendant may use cell phone audio or text communications with headphones. Provisions for such communications should be established during the In-Person Pre-Trial Conference.

In the event of technological difficulties causing a delay in the conduct of the Virtual Criminal Bench Trial, the Court will consider whether any party should be charged with any of the time arising therefrom.

Summary

Overall a Virtual Bench Trial is no different in sum or substance than an In-Person Courtroom Bench Trial. The challenges, as indicated above, relate to the presentation of witness testimony, documentary, and physical evidence. With careful attention, consideration, and discussion, these challenges can be effectively overcome.

We are grateful to the many Judges, Judicial Districts and Attorneys that provided their thoughts, concerns, and best practices regarding Virtual Bench Trials.

EXHIBIT A

_____ COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____ Plaintiff(s)/Petitioner(s), v. _____ Defendant(s)/Respondent(s).	Index No. **PROPOSED STIPULATION AND ORDER FOR VIRTUAL BENCH TRIAL PROTOCOLS AND PROCEDURES**

I. PROTOCOLS AND PROCEDURES

A. Parties Agreement: This Stipulation and Order is to be read in conjunction with the Protocols and Procedures implemented for Virtual Bench Trials in this Judicial District and annexed hereto. The Protocols and Procedures are incorporated by reference herein and are deemed agreed to by the parties upon execution of this Stipulation.

II. MAINTAINING THE DECORUM OF THE COURT

A. Rules of the Court: Counsel and the parties agree that the Virtual Bench Trial is in fact being conducted in a Virtual Courtroom and they should govern themselves accordingly. Counsel and the parties consent to observing the rules and procedures related to In-Person Courtroom Trials, including, without limitation, rules related to proper attire, the prohibition against the consumption of food or drink or smoking during the Virtual Bench Trial. Counsel and the parties agree that the Judges' Part Rules

regarding the conduct of an In-Person Trial should be followed to the extent practicable. Counsel and the parties shall use best efforts to eliminate all visual and auditory distractions.

B. No Colloquies. Counsel and the parties agree that as in In-person Courtroom Trials, only one party may speak at a time. Participants are not to speak over one another and there should be no colloquies between Counsel. Non-speaking participants should always activate the mute microphone function of Microsoft Teams.

C. Objections. Counsel acknowledge that any and all objections must be made audibly. In addition, Counsel will physically raise their hand and/or use the "raise hand" function in Microsoft Teams. Once objections are resolved by the Court, exceptions will be duly noted on the record.

III. PROHIBITION ON RECORDING

A. No Recording Permitted: Counsel and the parties acknowledge that as with In-Person Courtroom Trials, the Court Reporter (or FTR recording device where appropriate) must prepare an official recording of the proceeding and that any recording of a Court proceeding held by video or teleconference, including "screen-shots" or other visual or audio copying of a Virtual Bench Trial is strictly prohibited. Violation of these prohibitions will be deemed a violation of this Order and may result in sanctions as deemed appropriate by the Court.

IV. PRE-TRIAL CONSIDERATIONS

A. Microsoft Teams Platform: Counsel and the parties acknowledge that all Virtual Bench Trials will be conducted using the Microsoft Teams platform. Counsel, the parties and witnesses must all be familiar with the Microsoft Teams Platform. Counsel

confirm that it is incumbent on them to ensure all participants are familiar with the platform.

B. Pro se Litigants: Pro se litigants agree that they are subject to the same requirements for accessing the Virtual Bench Trial and must have the required computer hardware, access to the Microsoft Teams Platform, and the Internet. The Pro se litigant must advise the Court if he/she is not able to access the Virtual Bench Trial through the appropriate means. The Court will then work with its Clerk's Office or the Court's Help Center to provide the Pro se litigant with a safe, confidential, socially distanced environment at the Courthouse or other facility where the Pro se litigant may access and participate in the Virtual Bench Trial.

C. Virtual Pre-Trial Conference: The Court will conduct a Virtual Pre-Trial Conference at least seven (7) to ten (10) days prior to the commencement of the Virtual Bench Trial. At the Virtual Pre-Trial Conference all issues regarding Exhibits, witnesses, demonstratives to be used at Trial, and Motions *In Limine* will be discussed and resolved by the Court.

D. Motions *In Limine*: Counsel agree that Motions *In Limine* will be made to the Court at least seven (7) to ten (10) days prior to the commencement of the Virtual Bench Trial and discussed with the Court during the Pre-Trial Conference. As soon as possible before the Virtual Bench Trial, the Court will determine and expeditiously advise the parties which Motions *In Limine* will be resolved Pre-Trial and which motions will be referred to the Virtual Bench Trial.

E. Stipulations to Facts: Counsel agree that they will, where possible, stipulate to factual and evidentiary matters to the extent possible. Litigants should consider whether to stipulate in advance to waive the right to make a prima facie motion, motion for a directed verdict, to set aside the verdict, and any other post-trial motions.

V. OPENING STATEMENTS

A. Use of Demonstratives: Prior to the commencement of the Opening Statements, Counsel agree that they will confer with each other and make a good faith effort to agree upon any demonstratives to be used during the Opening Statement. Counsel will advise the Court on the use of demonstratives during the Virtual Pre-Trial Conference. At a date and time to be specified by the Court, Counsel should e-mail the Court (at an e-mail address designated by the Court) copies of the demonstratives to be used in the Opening Statements for the Court's approval. Upon Court approval, Counsel may e-mail demonstratives to the Court Reporter for inclusion in the official record. The Court will allow Counsel to use the "share screen" function in Microsoft Teams to display Court-approved demonstratives during Opening Statements.

VI. EXHIBITS

A. Electronic Submission of Documentary Exhibits: Prior to the Virtual Pre-Trial Conference, Counsel acknowledge that they must confer with each other and make a good faith effort to agree on the Exhibits that will be offered into evidence without objection and the redaction of such Exhibits as necessary. Counsel must electronically submit (at an e-mail address designated by the Court) agreed upon Exhibits and objections to the introduction of Exhibits to the Court at least forty-eight (48) hours prior to the Virtual Pre-Trial Conference. The Court will hear arguments on any objections during the Virtual Pre-Trial Conference and will rule on the objections to the contested Exhibits at the earliest possible time before the Virtual Bench Trial commences.

1. **Form of Documentary Exhibits.** All Exhibits of more than one (1) page must be "Bates Stamped" in order to prevent any confusion as to which page of the Exhibit is being referred to.
2. **Marking Documentary Exhibits for Identification.** Once consented to by Counsel and the parties and approved by the Court, Counsel introducing the Exhibits may pre-mark them for identification prior to the Virtual Bench Trial. The Exhibits of Plaintiff/Petitioner/People shall be marked with numbers and the Exhibits of Defendant/Respondent/Defense shall be marked with letters. Once a documentary Exhibit has been marked for identification, it must be resubmitted to the Court (at an e-mail address designated by the Court) for use during the Virtual Bench Trial.
3. **Marking Documentary Exhibits into Evidence.** Counsel agree where a proper foundation has been established and an Exhibit is offered into Evidence, the Court will direct that the Exhibit be marked into evidence by the Court Reporter. The Court Reporter will make the appropriate notation of the admission on his/her copy of the Exhibit and properly notate the record. In Courts using a FTR recording device, the Courtroom Clerk will accomplish same.

B. Physical Exhibits: Counsel acknowledge that if an Exhibit to be presented is something other than a document (a physical object), it must be submitted to the Court no less than fifteen (15) days prior to the Virtual Pre-Trial Conference. Counsel, the parties and prospective witnesses will have an opportunity to view and photograph the physical Exhibit prior to the Virtual Pre-Trial Conference by appointment with the Court. Prior to the Virtual Pre-Trial Conference, Counsel must confer with each other and make a good faith effort to agree on the physical Exhibits

that will be offered into evidence without objection. Counsel must electronically submit a list of agreed upon physical Exhibits and objections to the introduction of the physical Exhibits to the Court (at an e-mail address designated by the Court) at least forty-eight (48) hours prior to the Virtual Pre-Trial Conference. The Court will hear arguments on any objections during the Virtual Pre-Trial Conference and will rule on the objections to the contested physical Exhibits at the earliest possible time before the Virtual Bench Trial commences. Counsel may stipulate, or the Court may Order, that a photograph or video of the physical Exhibit be used during the Virtual Bench Trial.

C. Alteration of Exhibits: Counsel acknowledge that in the event that an Exhibit is altered in some way during the Virtual Bench Trial (*e.g.*, written upon, highlighted, marked, enhanced, reduced/enlarged and/or zoomed in upon), the Exhibit will be saved at the time of the alteration and exchanged with the Court and all Counsel in "actual size" as soon as practicable following the alteration of the Exhibit. The Exhibit will be exchanged in the same orientation, scale, and color format as altered during the Virtual Bench Trial.

D. Return of Exhibits: Counsel agree that Exhibits received into evidence shall be retained or returned pursuant to the Court's current procedures for retention/return of Exhibits.

VII. WITNESSES

A. Witness Lists: Counsel shall agree, to the extent possible, on the witnesses to be called and the order they will be called prior to the Virtual Pre-Trial Conference. Counsel shall electronically submit agreed upon Witness Lists and objections to the calling of witnesses to the Court (at an e-mail address designated by the Court) at

least forty-eight (48) hours prior to the Virtual Pre-Trial Conference. The Court shall expeditiously resolve all disputes related to the calling of witnesses prior to the commencement of the Virtual Bench Trial.

B. Subpoenas Ad Testificandum: The Court may issue "So Ordered" subpoenas to secure the attendance of witnesses at the Virtual Bench Trial as may be requested by any party.

C. Witness Contact Information: Counsel agree to provide the names, e-mail addresses and back-up telephone numbers of all prospective witnesses expected to be called during the course of the Virtual Bench Trial. The contact information must be furnished to the Court at the Virtual Pre-Trial Conference.

D. Language Access: Counsel must advise the Court during the Virtual Pre-Trial Conference if any of the witnesses or the parties need a language interpreter so appropriate arrangements can be made.

E. Witness Access to Virtual Courtroom: Counsel and the parties acknowledge that the Court will send the witness(es) the access link to Microsoft Teams for the Virtual Bench Trial. Counsel shall instruct all witnesses that they are to log onto the proceeding at the time of the commencement of the daily session and remain in the Microsoft Teams "lobby" area until called as a witness and admitted by the Court into the Virtual Bench Trial Courtroom. Alternatively, the Court can establish various login times for each witness which is at least a half hour before their testimony times. Absent extenuating circumstances discussed with the Court in advance, all witnesses must give testimony with both audio and video on and operational. It is strongly recommended that Counsel and his/her witnesses run a test using the Microsoft Teams platform prior to the scheduled trial date.

F. **Witness Advisory on Recording:** Counsel will instruct all witnesses prior to their testimony that any recording of the Virtual Bench Trial by any individual other than the official Court Reporter (or FTR device where appropriate) is strictly prohibited. Any unauthorized recording of the Virtual Bench Trial shall be considered a violation of the Court's Order.

G. **Prohibition on Communications:** Counsel will instruct all witnesses prior to their testimony that written or oral communications of any kind, via electronic means or otherwise, between a witness or party and Counsel for the witness during the Virtual Bench Trial testimony is strictly prohibited. Communications between the witness and Counsel shall be restricted as if the Virtual Bench Trial were being conducted In-Person. Counsel and parties may not speak with a witness until the witness's testimony has been completed. Counsel agree to ensure that a remote witness is not being coached, assisted, or signaled in any way.

H. **Prohibition on Use of Documents:** Counsel will instruct all witnesses prior to their testimony that they are not permitted to read or refer to any Exhibit, image, document, or other writing of any kind (*e.g.*, notes, e-mails, texts, pdf's, or digital communications of any kind) during their Virtual Bench Trial testimony other than Exhibits, images, documents or other writing provided to them by Counsel in the course of direct or cross examination. In addition, there shall be no information available to the witness whether written or otherwise out of the sight of the Court. There shall be no other computer monitor, screen, TV screen, cell phone or the like in the room wherein the witness is testifying. The room that the witness is testifying from shall be displayed to the Court and all Counsel prior to the testimony beginning and periodically thereafter. Any document or other writing which the witness is

permitted to refer to shall be published to the computer's camera being used by the witness.

I. **Prohibition on Third Parties Presence During Testimony:** Counsel will instruct all witnesses prior to their testimony that no other individual may be present, either physically or electronically, in the same room as the witness or so near the witness as to be seen and/or heard by the witness. The witness should be advised, where appropriate, that exceptions can be made for individuals who are not a witness to the events under consideration at the Virtual Bench Trial if they are needed to assist the witness in the use of the computer equipment/camera or because the witness required physical assistance due to a medical condition. The presence of any such party or person must be disclosed to the Court, all parties and their Counsel, and the Court Reporter.

J. **Proper Witness Equipment:** Counsel agree that the party who calls a witness for Direct Examination is responsible for ensuring the witness has a suitable location and access to suitable computer equipment and screen(s) that are necessary for the visual and audio nature of the proceedings and Exhibits/images shared, including the ability to highlight a document or alter it. It is important that all witnesses have a substantially similar computer screen in both size and quality so that when an Exhibit is shown to them the witness shall each have the benefit of seeing the image on the screen in the same way. Unless specifically authorized by the Court in advance, witnesses shall not be permitted to testify from a cell phone, whether through the phone's camera and video features or via calling in to the Virtual Bench Trial. All witnesses must appear on camera and be easily seen for the purpose of assessing credibility.

K. Participation from a Remote Location: Counsel and the parties acknowledge that the Court, Court Reporter, Counsel, witnesses, and parties shall be in separate/remote locations participating via Microsoft Teams. Should a participant in the Virtual Bench Trial, including Counsel, choose to be in the same location as another participant, Counsel shall have a separate camera available for each individual so that the Court can simultaneously see Counsel and all participants at all times. Participants should not share the same camera or screen. No one participating in the Virtual Bench Trial should be off screen or turn their computer camera off without the prior express permission of the Court.

L. Administration of the Oath: Counsel agree that the Court Reporter, who must be physically located in the State of New York, will swear in the witnesses. In the event that a FTR recording device is being used, the Courtroom Clerk will swear in the witness. The identity of the witnesses must be confirmed prior to the administration of the Oath. Any objection to the administration of the Oath is waived. Regarding witnesses that are testifying from an out of state location, Counsel should consider waiving the requirement, where appropriate, that the witness be sworn by an official located in the State in which that witness is present.

VIII. SIDEBAR CONFERENCES

A. Confidentiality of Sidebars: Counsel agree that should the need arise at any time during the course of the Virtual Bench Trial, for Counsel and the Court to confer on any objections or other matters, the Court may make use of the Breakout Room feature on Microsoft Teams so that the witness is not privy to the sidebar discussion. The Courtroom Clerk will remain on the main link to monitor the witness.

Alternatively, the Court can direct that a cell phone conference call occurs with all parties muting their audio on the Microsoft Teams platform.

IX. CLOSING ARGUMENTS

A. Use of Demonstratives: Counsel agree to consult with each other and make a good faith effort to agree upon the use of any demonstratives at the Closing Argument prior to the Virtual Pre-Trial Conference. Any needed changes or additions to the demonstratives that may be required based upon the Virtual Bench Trial testimony or other factors must be approved by the Court prior to use. A Pre-Summation Conference will be conducted to address such issues. At a time and place to be specified by the Court, Counsel should e-mail the Court copies of any demonstratives to be used in the Closing Arguments for the Court's approval. The Court will allow Counsel to use the "share screen" function in Microsoft Teams to display Court-approved demonstratives during Closing Arguments.

X. RECORD ON APPEAL

A. Official Record: The parties acknowledge that only the official transcript of the Virtual Bench Trial as taken down by the Court Reporter, or FTR recording device where appropriate, including Exhibits marked into evidence, shall constitute the record for appeal.

XI. TECHNOLOGICAL CONSIDERATIONS DURING THE TRIAL

A. How to Join: Each attorney, witness, and party who plans to attend any portion of the Virtual Bench Trial will receive login credentials from the Court. Such credentials shall not be shared with anyone other than Counsel, the parties, and witnesses.

B. Breakout Rooms: The Court may use a Virtual Breakout Room for bench conferences during the Virtual Bench Trial. Counsel may request that the bench conference be transcribed. Nevertheless, discussions that take place in the Breakout Room will not be transcribed unless ordered by the Court. With the approval of the Court, Breakout Rooms may also be used for Attorney/Client conferences during the Trial. Breakout Rooms will not be used for any other purpose unless Ordered by the Court.

C. Addressing Technological Difficulties: Any Counsel, party, or witness who is disconnected from the videoconference or experiences some other technical failure shall use best efforts to promptly re-establish the connection and shall take no action which threatens the integrity of the proceeding (*e.g.*, communications with a third party related to anything other than resolving the technical issue). If the connection cannot be re-established within approximately five minutes, the Court may take steps to "pause" the Virtual Bench Trial. If the Court deems it unfair to any party to continue the Virtual Bench Trial because of a technical failure, the Court may postpone or terminate the proceedings at any time and take such other steps as may be necessary to ensure the fairness and integrity of the proceedings.

[STIPULATED BY AND THROUGH COUNSEL OF RECORD]

DATED: _____

_____

Attorneys for Plaintiff(s)/Petitioner(s)

DATED: _____

_____

Attorneys for Defendant(s)/Respondents(s)

[PURSUANT TO STIPULATION, IT IS] SO ORDERED.

DATED: _____

_____

Judge

EXHIBIT B

Sample Witness Inquiry

1. Is anyone present in the room with you?
2. Do you agree to keep others out of the room?
3. Is there anyone present who can prompt you?
4. Is there anyone available electronically or in any manner who can prompt you? Will you identify to the Court anyone who does or attempts to do so?
5. Do you agree that you are not to confer or consult with anyone by any means (in person, electronically, telephonically, text, e-mail, etc.) regarding any of my questions or any of your responses?
6. Do you have any documents or photographs in front of you? If yes, please identify such documents.
7. Should any new or additional document or photographs become available, do you agree to make the Court aware of it?
8. Do you agree to look into the camera while contemplating and answering the questions posed to you?
9. Do you understand that this virtual proceeding is a formal court appearance and all of the rules and decorum of the court are in full force and effect and must be adhered to and followed?
10. Do you understand that there shall be no video or audio recording of the proceeding other than that by the official court reporter?
11. Do you understand that you shall not broadcast, stream or reproduce any video or audio of the virtual proceeding?

EXHIBIT C

SAMPLE DEFENDANT WAIVER OF IN – PERSON BENCH TRIAL FORM

COURT OF THE STATE OF NEW YORK
COUNTY OF

----------x

THE PEOPLE OF THE STATE OF NEW YORK,

Waiver of In-Person Bench Trial

Docket No. CR-

-against-

Defendant(s)

----------x

I, the defendant in this case, having been charged by way of information with the crime(s) of:

as specified in the above-numbered Docket No., and having been informed of my right to be tried by way of an In-Person Bench Trial, hereby, in open court, waive my right to an In-Person Bench Trial and consent to be tried by the Court in a virtual electronic manner.

_____

Defendant

_____

Attorney for the Defendant

SO ORDERED:

_____

Judge

SAMPLE WAIVER INQUIRY AND CONSENT TO A VIRTUAL BENCH TRIAL

I understand that all the parties have indicated that they wish to proceed with this Bench Trial by Virtual means.

Mr./Ms. (Defendant), I need to advise you that the law gives you the right to have this bench trial conducted In-Person, where the attorneys, any witnesses and you would be required to be present in this Courtroom In-Person for the trial proceedings.

The Court can conduct the trial in a virtual manner using Microsoft Teams whereby all parties would appear electronically and not In-Person.

If you wish to proceed with this trial virtually by electronic means using Microsoft Teams, it can be done only with your consent.

Do you wish to waive your right to an In-Person Bench Trial and have your Bench Trial be conducted by Virtual means whereby you, your attorney, the witnesses and the Court will only appear virtually?

Have you had the chance to discuss this waiver and consent with your attorney?

Are you waiving your right to an In-Person Bench Trial voluntarily?

Is anyone forcing, threatening, or coercing you to waive your right to an In-Person Bench Trial?

Do you consent to have your Bench Trial conducted by virtual electronic means?

Finally, for your waiver to be acceptable, you must sign in Court a writing expressly stating that you waive your right to an In-Person Bench Trial and Consent to the Bench Trial being conducted by virtual electronic means.

Please execute the waiver now.

I have before me an executed waiver, by Defendant _____, of an In-Person Bench Trial which will be marked as Court Exhibit _____.

Agreement was signed. In light of this genuine dispute, a breach of fiduciary duty cannot serve as an independent reason to grant summary judgment against Plaintiff's breach of contract claim, and summary judgment must be denied as to Defendant's counterclaim.

CONCLUSION

For the reasons set forth above, Defendant's motion for summary judgment on Plaintiff's breach of contract claim is GRANTED. Defendant's motion for summary judgment in favor of her own counterclaim for breach of a fiduciary duty is DENIED.

The Clerk of Court is directed to terminate the motion at docket entry 429. Defendant is hereby ORDERED to file a letter proposing next steps concerning her counterclaim on or before **July 29, 2020**.

SO ORDERED.

Jodi ROUVIERE, et al., Plaintiffs,

v.

DEPUY ORTHOPAEDICS, INC. et al., Defendants.

1:18-cv-04814 (LJL) (SDA)

United States District Court, S.D. New York.

Signed July 11, 2020

Background: In patient's medical device product liability case against manufacturer of components contained in allegedly defective hip implant that patient received, purportedly causing patient injuries, patient filed letter motion seeking to compel corporate representatives of manufacturer to appear in-person for a deposition or, in the alternative, to extend discovery deadline until an in-person deposition of those representatives could be conducted.

Holdings: The District Court, Stewart D. Aaron, United States Magistrate Judge, held that the Court would deny patient's letter motion.

Motion denied.

1. Federal Civil Procedure ⚿1381

The decision to grant or deny an application for deposition to be taken via telephone or other remote means is left to the discretion of the court, which must balance claims of prejudice and those of hardship and conduct a careful weighing of the relevant facts. Fed. R. Civ. P. 30(b)(4).

2. Federal Civil Procedure ⚿1381

In patient's medical device product liability case against manufacturer of components contained in allegedly defective hip implant that patient received, purportedly causing patient injuries, the District Court would decline to either order in-person depositions of manufacturer's corporate representatives or extend discovery deadline until in-person depositions could be conducted; risk of COVID-19 infection via in-person deposition posed significant hardship on manufacturer, there was little prejudice to patient in holding deposition by video conference, there was no basis to believe that conditions requiring a remote deposition to be taken, namely COVID-19 pandemic, would not continue for foreseeable future, and the Court refused to indefinitely delay completion of discovery. Fed. R. Civ. P. 30(b)(4), 30(b)(6).

Andre A. Rouviere, Law Offices of Andre A. Rouviere Law Offices of Andre A. Rouviere, Coral Gables, FL, for Plaintiffs.

Andre Rouviere, pro se.

James Francis Murdica, Barnes & Thornburg LLP, New York, NY, Joel Thaddeus Larson, Jr., Barnes & Thornburg LLP, Indianapolis, ID, Joseph G. Eaton, Barnes & Thornburg, Indianapolis, IN, for Defendant DePuy Orthopaedics, Inc.

Paul Edward Asfendis, Gibbons P.C., New York, NY, for Defendant Howmedica Osteonics Corporation.

OPINION AND ORDER

STEWART D. AARON, United States Magistrate Judge:

Before the Court is a Letter Motion by Plaintiffs, Jodi Rouviere and Andre Rouviere (collectively, "Plaintiffs"), filed on July 7, 2020, to compel corporate representative(s) of Defendant Howmedica Osteonics Corporation ("Howmedica"), doing business as Stryker Orthopaedics, to appear in person for a deposition, pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, to extend the discovery deadline until an in-person deposition of Howmedica's corporate representative(s) can be conducted. (Pls.' 7/7/20 Ltr. Mot., ECF No. 135.)[1] For the following reasons, Plaintiffs' Letter Motion is DENIED.

BACKGROUND

This is a medical device product liability case that was commenced on May 31, 2018 arising from injuries allegedly sustained by Plaintiff Jodi Rouviere after receiving a purportedly defective hip implant containing components manufactured by Howmedica and another defendant, Defendant DePuy Orthopaedics, Inc. ("DePuy"). (*See* Compl., ECF No. 1, ¶ 1; Am. Compl., ECF No. 26, ¶ 1.) On January 15, 2019, a Case Management Plan and Scheduling Order was entered (Case Mgt. Plan, ECF No. 58), and discovery commenced in early 2019.[2]

Plaintiffs' Letter Motion that currently is before the Court relates to one of several discovery disputes that has required court intervention in this case. For example, on June 1, 2020, DePuy filed a Letter Motion, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, for a protective order with respect to certain of Plaintiffs' Rule 30(b)(6) deposition categories that DePuy contended were improper and burdensome. (DePuy 5/26/20 Ltr. Mot., ECF No. 108.) By Opinion and Order, dated June 10, 2020, this Court granted in part and denied in part DePuy's Letter Motion and set forth the disputed categories as to which testimony must be provided by the DePuy corporate representative(s). *See Rouviere v. DePuy Orthopaedics, Inc.*, 2020 WL 2999229, at *6 (S.D.N.Y. June 10, 2020). After the Court issued its Opinion and Order relating to the DePuy Rule 30(b)(6) deposition topics, Howmedica and Plaintiffs reached agreement as to the topics for the Howmedica Rule 30(b)(6) deposition, which were approved by the Court on June 10, 2020. (*See* 6/10/20 Order, ECF No. 120.)

1. In deciding the Letter Motion, the Court has reviewed and considered, in addition to Plaintiffs' Letter Motion, Howmedica's Letter Response (Howmedica 7/9/20 Resp., ECF No. 138) and Plaintiffs' Letter Reply. (Pls.' 7/10/20 Reply, ECF No. 139.)

2. Although Rule 5(d)(1)(A) provides that Rule 26(a) disclosures and discovery requests and responses are not to be filed with the Court "until they are used in the proceeding or the court orders filing" (*see* Fed. R. Civ. P. 5(d)(1)(A)), Plaintiffs filed their Rule 26(a) disclosures and their discovery requests and responses in February and March 2019. (*See* ECF Nos. 59-64.)

As of early June 2020, this Court already had granted the parties three extensions of the discovery deadlines. On March 23, 2020, the Court had granted the parties' joint request for a 90-day extension of the discovery deadlines due to the coronavirus pandemic, which was the third extension. (3/23/20 Order, ECF No. 106.) On June 16, 2020, Plaintiffs filed a Letter Motion for another extension of the discovery deadlines (Pls.' 6/16/20 Ltr. Mot., ECF No. 124), which Defendants opposed. (Howmedica 6/18/20 Resp., ECF No. 125; DePuy 6/19/20 Resp., ECF No. 126.) By Order, dated June 22, 2020, the Court granted in part and denied in part Plaintiffs' Letter Motion, and fact discovery is due to close on August 21, 2020. (6/22/20 Order, ECF No. 128.) The June 22 Order states, as follows:

> This case has been pending for over two years. In granting a discovery extension in October 2019, the Court stated that "[t]he Parties are encouraged to work diligently to complete discovery within the revised time line as set forth above. Any further extensions will be granted only for good cause shown" (ECF No. 93). Then, in granting another discovery extension in January 2020, the Court stated that "NO FURTHER EXTENSIONS SHALL BE GRANTED EXCEPT IN EXIGENT CIRCUMSTANCES AND THEN ONLY FOR A LIMITED PURPOSE" (ECF No. 100). However, due to the COVID-19 pandemic, the Court in March 2020 granted a request made jointly by all parties for an additional 90-day extension (ECF No. 106). In the circumstances presented, the Court in its discretion grants one final extension. Any discovery not taken in the time periods set forth herein shall be deemed to be waived.
>
> Fact depositions shall be completed by August 21, 2020, Plaintiffs' expert disclosures shall be made by September 21, 2020, the deposition of Plaintiffs' experts shall be completed by October 21, 2020, Defendants' expert disclosures shall be made by November 20, 2020, the deposition of Defendants' experts shall be completed by December 23, 2020 and the parties shall jointly advise the Court whether they would like to be referred for mediation no later than January 15, 2021.
>
> Pursuant to Fed. R. Civ. P. 30(b)(3) and (b)(4), all depositions in this action may be taken via telephone, videoconference, or other remote means, and may be recorded by any reliable audio or audiovisual means. This Order does not dispense with the requirements set forth in Fed. R. Civ. P. 30(b)(5), including the requirement that, unless the parties stipulate otherwise, the deposition be "conducted before an officer appointed or designated under Rule 28," and that the deponent be placed under oath by that officer. For avoidance of doubt, a deposition will be deemed to have been conducted "before" an officer so long as that officer attends the deposition via the same remote means (e.g., telephone conference call or video conference) used to connect all other remote participants, and so long as all participants (including the officer) can clearly hear and be heard by all other participants.

(*Id.*)

In their Letter Motion now before the Court, Plaintiffs seek to compel corporate representative(s) of Howmedica to appear in person for deposition, or, in the alternative, to extend the discovery deadline until an in-person deposition of Howmedica's corporate representative(s) can be conducted. (Pls.' 7/7/20 Ltr. Mot. at 1.) Plaintiffs state that they have rented a recreational vehicle and that they intend to drive it from their home state of Florida to

New Jersey in order to take the Howmedica deposition in person. (*See id.* at 1-2.) Howmedica opposes Plaintiffs' Letter Motion, and argues that Howmedica's witness and counsel would "place their health at risk by attending an in-person deposition with the Florida plaintiffs," noting that all travelers from Florida are subject to 14-day quarantine in New Jersey, and advocate for a video deposition. (*See* Howmedica Resp. at 1-3.) In reply, Plaintiffs restate their arguments and "request the Court either order the [Howmedica] witness to appear for an in-person deposition on the date cleared for deposition or extend the deadline for this one witness until the deposition of [Howmedica]'s corporate witness(es) can be conducted in person." (Pls.' Reply at 2.)

LEGAL STANDARDS

[1] Rule 30(b)(4) of the Federal Rules of Civil Procedure provides that "[t]he parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means." Fed. R. Civ. P. 30(b)(4). "Since Rule 30(b)(4) does not specify the standards to be considered in determining whether to grant a request [for a remote] deposition . . ., the decision to grant or deny such an application is left to the discretion of the Court, which must balance claims of prejudice and those of hardship . . . and conduct a careful weighing of the relevant facts." *RP Family, Inc. v. Commonwealth Land Title Ins. Co.*, No. 10-CV-01149 (DLI) (CLP), 2011 WL 6020154, at *3 (E.D.N.Y. Nov. 30, 2011) (citations & internal quotation marks omitted); *see also* 2 *Civil Practice in the Southern District of New York* § 17:3 (2d ed. 2020) ("While Rule 30(b)(4) does not specify the standard for evaluating motions to have depositions conducted remotely, courts generally consider the hardship on the party to be deposed, and the prejudice to the party seeking the deposition.").

ANALYSIS

[2] Conducting court proceedings remotely in the Southern District of New York has become the "new normal" since the advent of the public health emergency created by the spread of the coronavirus and COVID-19. Indeed, Chief Judge McMahon currently is conducting a bench trial via Zoom in a patent case in our Court. *See* D. Siegal, *Ferring And Serenity's SDNY Patent Trial Kicks Off Over Zoom*, Law360 (Jul. 6, 2020).

So too, conducting depositions remotely is becoming the "new normal." *See In re Broiler Chicken Antitrust Litig.*, No. 16-CV-08637, 2020 WL 3469166, at *5 (N.D. Ill. June 25, 2020) ("Courts are beginning to recognize that a 'new normal' has taken hold throughout the country in the wake of the COVID-19 pandemic that may necessitate the taking of remote depositions unless litigation is going to come to an indefinite halt until there is a cure or a vaccine for COVID-19." (citing cases)). "The more recent court decisions [permitting remote depositions during the pandemic] build on pre-pandemic case law that liberally allowed for and encouraged remote depositions as the technology for taking depositions in that way has improved significantly over time." *Id.* (citing cases).

Against this backdrop, the Court considers the hardship imposed upon Howmedica if its Rule 30(b)(6) deposition were held in person and the potential prejudice to Plaintiffs if the deposition were held by videoconference. The hardship that would be caused to Howmedica's witness(es) and its counsel by an in-person deposition is obvious. There is a significant health risk to Howmedica's representatives (and to Plaintiffs' counsel as well) if the deposition

were to proceed in person. COVID-19 "is a potentially fatal illness with the ability to spread through asymptomatic or pre-symptomatic carriers, with no approved cure, treatment, or vaccine, and unlike in other countries, new cases here are plateauing (or, in some areas, rising) rather than plummeting." *Joffe v. King & Spalding LLP*, No. 17-CV-03392 (VEC), 2020 WL 3453452, at *7 (S.D.N.Y. June 24, 2020) (footnote omitted). "[T]he minimum distance to prevent transmission of COVID-19 may vary depending on environmental conditions—and ... the oft-repeated six-feet rule may not be sufficient in a high-risk environment, such as an indoor setting with prolonged exposure." *Id.* (footnote omitted). Moreover, "social distancing does not guarantee a safe deposition environment." *Id.* Thus, holding a deposition in a room with a witness, counsel and a stenographer present would place everyone in the room at risk. Indeed, Plaintiffs themselves recognize the risk involved. (*See* Pls.' Reply at 1-2 (arguing that Plaintiffs have been "forced into a desperate, risky action at the defendants' behest").)

The Court next considers the potential prejudice to Plaintiffs if the Howmedica Rule 30(b)(6) deposition is held remotely by videoconference. The only prejudice Plaintiffs articulate in their submissions is that the deposition will be "document intensive" and "document laden." (Pls.' 7/7/20 Ltr. Mot. at 1-2; Pls.' 7/10/20 Reply at 2.) However, this is not an obstacle to a successful remote videoconference deposition. "[C]ourts have found that exhibits can be managed in remote depositions by sending Bates-stamped exhibits to deponents prior to the depositions or using modern videoconference technology to share documents and images quickly and conveniently." *United States for Use & Benefit of Chen v. K.O.O. Constr., Inc.*, 106 Fed. R. Serv. 3d 1383, 445 F.Supp.3d 1055, 1057 (S.D. Cal. 2020) (citing cases). Moreover, there are training and informational videos available online and vendors who host videoconferenced depositions are available to communicate with Plaintiffs' counsel to ensure that they are comfortable with the process of taking a remote deposition. *See Grano v. Sodexo Mgmt., Inc.*, No. 18-CV-01818 (GPC) (BLM), 335 F.R.D. 411, 415 (S.D. Cal. Apr. 24, 2020) ("There are numerous resources and training opportunities available throughout the legal community to assist Sodexo's counsel in the operation and utilization of the new technology.").

Notwithstanding the foregoing, the Court recognizes that there may be delays during the deposition in the handling of exhibits by the witness and counsel. To ameliorate any prejudice caused by such delays, the Court hereby grants Plaintiff an extra hour to conduct Howmedica's Rule 30(b)(6) deposition. Thus, the duration of the deposition shall be no longer than eight hours, rather than the seven hours allotted by Rule 30(d)(1).

The only other potential prejudice to Plaintiffs by proceeding remotely is that the examiner will not be physically present to interact with, and observe the demeanor of, the deponent. However, a remote deposition by its nature is not conducted face-to-face. If the lack of being physically present with the witness were enough prejudice to defeat the holding of a remote deposition, then Rule 30(b)(4) would be rendered meaningless. *See Robert Smalls Inc. v. Hamilton*, No. 09-CV-07171 (DAB) (JLC), 2010 WL 2541177, at *4 (S.D.N.Y. June 10, 2010) ("accepting Plaintiffs' arguments absent a particularized showing of prejudice 'would be tantamount to repealing [Fed. R. Civ. P. 30(b)(4)]' " (citation omitted)); *see also Usov v. Lazar*, No. 13-CV-00818, 2015 WL 5052497, at *2

(S.D.N.Y. Aug. 25, 2015) ("remote depositions are 'a presumptively valid means of discovery' " (citations omitted)).

In addition, in the unique circumstances presented by the COVID-19 pandemic, holding a deposition by videoconference actually would provide a better opportunity for Plaintiffs' counsel to observe the demeanor of the witness. If an in-person deposition were to be held in New Jersey, as Plaintiffs propose, then those in attendance at the deposition would need to wear masks. New Jersey Governor Murphy's Executive Order No. 163, dated July 8, 2020, which requires masks to be worn *outdoors* if social distancing cannot be achieved, reiterates the prior requirement that masks must be worn indoors in commercial office spaces when individuals are in prolonged proximity to one another. *See* N.J. Gov. Exec. Order No. 163, available at https://nj.gov/infobank/eo/056murphy/pdf/EO-163.pdf ("For indoor commercial spaces that are not open to members of the public, such as office buildings, those spaces must have policies that at a minimum, require individuals to wear face coverings when in prolonged proximity to others."). The witness's wearing of a mask eliminates many of the advantages of observing the witness at an in-person deposition; however, if the witness were to be deposed remotely from home, the witness would not need to wear a mask, giving Plaintiffs' counsel the opportunity to observe the full face of the witness. *See Shockey v. Huhtamaki, Inc.*, 280 F.R.D. 598, 602 (D. Kan. 2012) ("Taking the depositions via videoconferencing, as proposed by Plaintiffs here, addresses Defendant's objection that the deponent's nonverbal responses and demeanor cannot be observed.").

Plaintiffs' alternative request to adjourn the deadline for completion of fact discovery until the Howmedica Rule 30(b)(6) deposition can be taken in person is unworkable and an attempt to reargue Plaintiffs' prior motion for an extension of time that the Court only granted in part. There is no basis to believe that the current conditions that require a remote deposition to be taken will not continue for the foreseeable future, and the Court declines to indefinitely delay the completion of discovery in this case. *See In re Broiler Chicken Antitrust Litig.*, 2020 WL 3469166, at *8 ("Recent statements by public health officials about the staying power of COVID-19 . . . belie Defendants' speculation that things may be so different in the Fall as to render remote depositions in this or any other case unnecessary, or at least less likely."). The Court finds that having the Howmedica Rule 30(b)(6) deposition proceed remotely by videoconference will accomplish the just, speedy and inexpensive determination of this case. *See* Fed. R. Civ. P. 1 (Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"); *see also Sinceno v. Riverside Church in City of New York*, No. 18-CV-02156 (LJL), 2020 WL 1302053, at *1 (S.D.N.Y. Mar. 18, 2020) (authorizing remote depositions "[i]n order to protect public health while promoting the 'just, speedy, and inexpensive determination of every action and proceeding' " (citation omitted)).

The Court has carefully weighed the relevant facts. Based upon the hardship that would be imposed upon Howmedica by an in-person deposition and the relative lack of prejudice to Plaintiffs in holding a remote deposition by videoconference, the Court, in its discretion, denies Plaintiffs' Letter Motion. The Howmedica deposition shall proceed by videoconference and shall be completed by August 21, 2020.

Due to the greater expenses that will be incurred in taking the Howmedica Rule

30(b)(6) deposition by videoconference, the Court, in its discretion, allocates the additional expenses associated with taking a remote deposition by videoconference equally between Howmedica and Plaintiffs. *See* Fed. R. Civ. P. 26(c)(1)(b) ("The court may, for good cause, issue an order to protect a party or person from . . . undue . . . expense, including . . . specifying . . . the allocation of expenses . . . ."). Although Plaintiffs are the ones taking the deposition, they are incurring greater expenses by being compelled to take the deposition by remote means. As such, the Court finds that there is good cause to allocate the increased expenses associated with taking the deposition in this manner. Plaintiffs and Howmedica shall meet and confer to identify a suitable firm to host and administer the remote deposition at reasonable expense. They also shall seek to agree upon the amount of expenses that are incurred over and above what normally would have been expended had the deposition been taken in person and thus the amount of additional expenses that will be shared between Plaintiffs and Howmedica. If they are unable to agree, the Court shall determine the allocation based upon a joint submission made by the parties setting forth the parties' respective positions.

CONCLUSION

For the foregoing reasons, Plaintiffs' Letter Motion (ECF No. 135) is DENIED. The deposition of Howmedica's corporate representative(s) shall be taken by videoconference no later than August 21, 2020, and shall not exceed eight hours in duration. Plaintiffs and Howmedica shall share the additional expenses of taking the deposition remotely by videoconference, as set forth above.

SO ORDERED.

UNITED STATES of America

v.

Lance GREEN

No. 3:19-CR-233

United States District Court,
M.D. Pennsylvania.

Filed 07/09/2020

Background: Defendant was indicted on charges of prohibited person in possession of a firearm and possession of a firearm with an obliterated serial number. Defendant moved to dismiss for violation of Speedy Trial Act and Sixth Amendment.

Holdings: The District Court, Robert D. Mariani, J., held that:

(1) government's pretrial motion to set trial date was not motion resulting in exclusion of time under Speedy Trial Act;

(2) seriousness of charges weighed in favor of dismissal without prejudice for statutory speedy trial violation;

(3) facts and circumstances that led to dismissal of charges weighed in favor of dismissal without prejudice for statutory speedy trial violation;

(4) impact of reprosecution on administration of Act and administration of justice factor weighed in favor of dismissal without prejudice for statutory speedy trial violation;

(5) delay of over 2 1/2 years was sufficient to trigger full inquiry under *Barker* factors;

(6) defendant delayed in asserting his speedy trial rights, as weighed against finding that his Sixth Amendment rights were violated; and

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4-27-2021

Unmuted: Solutions to Safeguard Constitutional Rights in Virtual Courtrooms and How Technology Can Expand Access to Quality Counsel and Transparency in the Criminal Justice System

Matthew Bender

VILLANOVA LAW REVIEW

VOLUME 66 2021 NUMBER 1

Articles

UNMUTED: SOLUTIONS TO SAFEGUARD CONSTITUTIONAL RIGHTS IN VIRTUAL COURTROOMS AND HOW TECHNOLOGY CAN EXPAND ACCESS TO QUALITY COUNSEL AND TRANSPARENCY IN THE CRIMINAL JUSTICE SYSTEM

MATTHEW BENDER*

ABSTRACT

A defendant's fundamental right to a public trial, and the press and community's separate right to watch court, has been threatened by the shift to virtual hearings. These independent constitutional rights can be in harmony in some cases and clash in others. They cannot be incompatible.

Public interest in criminal justice transparency is increasingly crystallized, but courts have often become more opaque, which jeopardizes First and Sixth Amendment rights. This Article addresses the conflict and confronts a key question: how can we be assured that remote and virtual hearings like Zoom arraignments or trials guarantee the same rights as traditional court hearings? Instead of rejecting virtual criminal hearings outright, I offer new proposals for how virtual courtrooms can safeguard constitutional rights. I question the prevailing belief that criminal defendants should always reject virtual trials. Virtual trials may lead to better outcomes for some defendants than traditional trials, especially during the

* Clinical Instructor and Professor, University of Arkansas School of Law. J.D., University of Michigan Law School. Many, many thanks to Associate Dean and Professor, Tiffany Murphy, for her reviews, comments, and guidance. I also want to thank Michigan Law Professor Eve Primus for helpfully challenging my arguments, which led to important refinement. Drug Court Public Defender Brooke Smith deserves appreciation for her encouragement and detailed explanation of the benefits of virtual court for her clients. I should mention journalist Andrew Epperson for explaining how local news stations cover criminal courts. I am also grateful to Jon Comstock, Deputy Public Defender Paul Teufel, and defense attorney Brian Altman for mooting ideas, along with recent law school graduates Nicholas Linn, Anna Van Der Like, and Alex Carroll for their help and edits. The many front line public defenders who provided feedback and suggestions also deserve acknowledgement.

ongoing pandemic. Beyond preserving rights in a virtual courtroom, the Article explores ways technology can improve the criminal justice system.

Through an analysis of existing indigent defense and First Amendment scholarship, I address the myth that traditional court decorum should trump open court and virtual hearings. Judicial legitimacy and transparency may benefit when criminal cases are accessible on virtual platforms or livestreamed. Transparency can help safeguard defendants' rights and improve indigent clients' representation and outcomes. Instead of disrupting the courtroom—whether a hearing is virtual or traditional—convenient public access helps a community learn more about the criminal justice system and evaluate cases, judges, and attorneys.

These proposals provide a framework for virtual litigation and show how technology can be leveraged for a more equitable criminal justice system. Livestreams and virtual or remote hearings can improve the right of representation for indigent defendants by increasing access to quality counsel, reducing costs, creating a more competitive legal market, and expanding a client's choice of attorneys.

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INTRODUCTION

ON June 1, 2020, Avion Hunter was arrested during a Black Lives Matter police brutality protest.[1] At his arraignment on June 10, 2020, the courthouse denied his mother Tanisha Brown from entering to watch her son's arraignment and told her remote viewing was impossible.[2] Avion is only twenty-four and has no criminal history.[3] After ten days of detention, Ms. Brown had expected to see her son appear in court. She was there with friends and family members who wanted to show support, see Avion, and ensure his rights were protected.[4] At a typical arraignment, Ms. Brown would learn her son's charges and potentially testify about his ties to the community, his likelihood of appearance at future court dates, his ability to pay money bail, or her ability to act as a third-party custodian.[5]

Ms. Brown was denied access based on a local court order from March 23, 2020, which prevented "access to any and all courthouses . . . to those persons required to appear in person for a court hearing" and denied public and press access to all court proceedings.[6] On June 26, 2020, she became one of five named plaintiffs in a civil lawsuit brought by the ACLU of Southern California and the First Amendment Coalition requesting safe public access and a viable way to watch criminal court.[7]

The lawsuit resulted from a March 25, 2020, letter from the First Amendment Coalition, which many California civil liberties groups co-signed.[8] The lawsuit challenged what the First Amendment Coalition's executive director called, "widespread instances, to put it most bluntly, of court secrecy."[9] The letter requested the Supreme Court of California issue guidance to lower courts on the specifics of meaningful public access

1. Complaint for Injunctive and Declaratory Relief at 7, 20, Am. Civil Liberties Union of So. Cal. v. Harber-Pickens, No. 1 20-cv-00889 (E.D. Cal. 2020).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 7, 20; *see also* CAL. CONST. art. I, §§ 12, 28; CAL. R. CRIM. P. 4.105; CAL. PENAL CODE § 1272.1 (Deering 2020) (enumerating the state's bail procedures and release factors, including ability to pay, risk of flight, criminal history, and ties to the community).

6. Superior Court of the State of California, in and for the County of Kern, Miscellaneous Order No. STO-20-005 (Mar. 23, 2020) (quoted and depicted in Complaint for Injunctive and Declaratory Relief, *supra* note 1, at 4–5).

7. Complaint for Injunctive and Declaratory Relief, *supra* note 1.

8. Letter from David Snyder, Exec. Dir., First Amendment Coal., to the Honorable Tani G. Cantil-Sakauye, Chief Justice, Cal. Supreme Court, Public Access to Court Proceedings and Records Amid COVID-19 Crisis (Mar. 25, 2020) (on file with First Amendment Coalition).

9. David Lieb, *Courts Straining to Balance Public Health With Public Access*, ASSOCIATED PRESS (June 28, 2020), https://apnews.com/article/18547f90185b353c29fdbc5dffc137f7 [permalink unavailable] (discussing courts that have denied public access including New York City, and courts that have allowed YouTube livestreams, such as ones in Chicago).

to hearings, criminal proceedings, and court records.[10] While the courthouse denied Ms. Brown from watching her son's arraignment, lower courts in other parts of California were permitting public access to virtual hearings and livestreaming criminal proceedings, including first appearances and arraignments, on YouTube.[11]

On the same day Ms. Brown's lawsuit was filed in California, defense attorneys and prosecutors in Minneapolis argued a motion on whether the court should publically broadcast criminal hearings for the four police officers charged with murdering George Floyd.[12] Defense attorneys claimed that public broadcasting would ensure a fair trial, while prosecuting attorneys—and ultimately, the presiding judge—maintained that public broadcasting of the case would obstruct selecting an impartial jury.[13]

The COVID-19 pandemic has required courts to quickly shift to remote and virtual hearings. Many courts have denied public access as they host criminal court hearings as restricted virtual proceedings. The current renegotiation of criminal court rules and norms has created discomfort for courts and has created new concerns.[14] While the pandemic continues, protests have increased after the murder of George Floyd.[15] The renewed interest for transparency and change in the criminal justice system has created a paradox, as courts have too often become less transparent.

Criminal court hearings implicate the public's First Amendment rights to view court proceedings and a defendant's Sixth Amendment right to a public criminal hearing.[16] The press and public have pursued their right to watch criminal court hearings as described in this Article's

10. *See* Letter from Snyder, *supra* note 8; Complaint for Injunctive and Declaratory Relief, *supra* note 1, at 13–15; *see also* Shelly Banjo, *Digital Courtrooms Put Justice on YouTube, Zoom*, BLOOMBERG (Apr. 7, 2020, 6:45 AM), https://www.bloomberg.com/news/newsletters/2020-04-07/digital-courtrooms-put-justice-on-youtube-zoom [https://perma.cc/3BBS-ZUBQ] (discussing the variety of virtual software used by courts, the ease of access, and how virtual livestreams or public access eliminate the inconvenience of watching court).

11. *See* Complaint for Injunctive and Declaratory Relief, *supra* note 1, at 12–13 (citing occurrences of California state courts permitting virtual hearings within the brief).

12. Order Regarding Audiovisual Coverage, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. 4th Jud. Dist. June 26, 2020).

13. Chao Xiong & Stephanie Montemayor, *Judge Denies Audiovisual Coverage of Hearings for Former Officers Charged in George Floyd Killing*, MINN. STAR TRIB. (June 26, 2020, 9:57 PM), https://www.startribune.com/judge-denies-audiovisual-coverage-of-hearings-for-former-officers-charged-in-george-floyd-killing/571503602/ [https://perma.cc/58G2-VUHN].

14. *See generally* Colleen Shanahan et al., Essay, *COVID, Crisis, and Courts*, 99 TEX. L. REV. ONLINE 10 (2020) (discussing civil cases in state courts, the burden of the COVID-19 pandemic, and opportunities for courts and legislatures to become more transparent and flexible to address civil litigation problems).

15. *See infra* note 137 and accompanying text.

16. *See* Presley v. Georgia, 558 U.S. 209, 211–12 (2010) ("[T]he public trial right rest upon two different provisions of the Bill of Rights . . . ."); *see also* Nixon v. Warner Commc'ns, 435 U.S. 589, 608–11 (1978) (construing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and stating that the press's First Amendment right to

case studies. Among the goals of open courts are increasing the accountability and quality of attorneys, making the public more engaged, and providing an informed check on the judiciary and criminal justice systems.[17]

Defense attorneys have voiced discontent with virtual hearings and have noted, as one of the leading defense practice journals describes, COVID-19's "next victim" is defendants' rights.[18] The prevailing wisdom is that criminal defendants have a right to physically face witnesses, and in many ways, "virtual criminal trials cannot overcome key constitutional hurdles."[19] As the National Association of Criminal Defense Lawyers stated, "[r]emedial measures such as virtual or 'Zoom' trials offend the [C]onstitution."[20] Consequently, some criminal defense attorneys are avoiding virtual trials and insisting on *literal*, face-to-face testimony.[21]

While appellate courts have not ruled on the constitutionality of virtual trials,[22] the pandemic has forced many trial courts to use virtual, pretrial hearings and to begin virtual jury trials.[23] COVID-19 safety

attend a trial was satisfied by their ability to attend and report on the historical case due to the Sixth Amendment's guarantee of a public trial).

17. *See* Potter Stewart, Assos. Justice, U.S. Supreme Court, Address at Yale Law School (Nov. 2, 1974) (Justice Stewart stated, "[t]he primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches"), *reprinted in* Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).

18. Dubin Research & Consulting, *COVID-19's Next Victim? The Rights of the Accused*, CHAMPION, NAT'L ASS'N CRIM. DEF. LAW., May 2020, at 24–49 ("By requiring reluctant and distracted jurors to perform their key functions during a pandemic, many states are unwittingly undermining the justice system by risking mistrials and faulty verdicts."); *see also* Melanie Wilson, *The Pandemic Juror*, 77 WASH. & LEE L. REV. ONLINE 65, 78–85 (2020) (noting it is callous to expose jurors to COVID-19 and in-person trials may lead to less representative juries, faulty verdicts, and unnecessary mistrials).

19. Dubin Research & Consulting, *supra* note 18, at 26–39.

20. NACDL EXEC. COMM., NAT'L ASS'N CRIM. DEF. LAW., CRIMINAL COURT REOPENING AND PUBLIC HEALTH IN THE COVID-19 ERA 9 (2020) (stating that a virtual hearing compromises a defendant's right to be physically present at trial, impairs jury selection, and prevents effective investigation and an attorney-client relationship); *see* Jenia I. Turner, *Remote Criminal Justice*, TEX. TECH L. REV. (forthcoming 2021) (finding in a survey of around 200 public defenders in Texas that defense attorneys tend to believe virtual hearings harm clients); *see also* Janna Adelstein, *Courts Continue to Adapt to Covid-19*, BRENNAN CTR. (Sept. 10, 2020), https://www.brennancenter.org/our-work/analysis-opinion/courts-continue-adapt-covid-19 [https://perma.cc/28AU-XSEL] (cautioning against widespread adoption of virtual hearings and arguing for more research and stakeholder engagement before expanding the adoption of virtual court hearings).

21. *See generally* Dubin Research & Consulting, *supra* note 20.

22. The possible exception to this would be in Michigan where the Supreme Court of Michigan has ruled that the only exception to in-person confrontation is for child witnesses. *See* People v. Jemison, 952 N.W.2d 394, 355–56 (Mich. 2020) (citing Crawford v. Washington, 541 U.S. 36 (2004)).

23. Texas held the first Zoom criminal jury trial where it purchased iPads for jurors with technology issues and completed a traffic ticket trial. *See* Justin Juvenal, *Justice by Zoom: Frozen Video, a Cat—And Finally a Verdict*, WASH. POST (Aug. 12, 2020, 11:03 AM), https://www.washingtonpost.com/local/legal-issues/justice-by-zoom-

precautions still require participants to wear masks, stand behind plexiglass, complete health screenings, and practice social distancing when in-person trials are held.[24] Articles highlighting the danger of holding trials during the pandemic have not proposed solutions to the concerns of prolonged detention, pressure to plead cases, and the tolling of time for speedy trial.[25]

While contrarian, virtual hearings and trials may often be in a defendant's best interest during the pandemic so long as virtual hearings replicate constitutional safeguards and preserve rights. But how can we be assured that remote and virtual hearings on Zoom have the same guarantees as the present system?

One of these protections is the right to a public trial.[26] This is where the press and public's *shared and independent* First Amendment right to view court proceedings intersects with a defendant's *exclusive* Sixth

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frozen-video-a-cat—and-finally-a-verdict/2020/08/12/3e073c56-dbd3-11ea-8051-d5f887d73381_story.html [https://perma.cc/QK3X-DLY7] (discussing the judge's statements that jurors said they would have avoided showing up and that "[t]his type of proceeding probably won't be appropriate for serious cases at this time, but I think this trial shows jury trial by videoconference is something that merits further study, especially during this pandemic," and defense counsel's view is that they "think there are obstacles that need to be overcome, but not walls stopping this technology").

24. Some courts have taken these worries into account. New Hampshire, for instance, created an extensive jury trial protocol in August. *See State Court Trial Plan*, N.H. JUD. BRANCH (2020), https://www.courts.state.nh.us/aoc/State-Court-Jury-Trial-Plan.pdf [https://perma.cc/D43D-Q5K3] (stating New Hampshire's guidelines that include summoning extra jurors, screening their health, reading additional instructions, and mandating face shields); *see also* Robert Patrick, *Federal Court in St. Louis to Start Jury Trials, With Coronavirus Precautions in Place*, ST. LOUIS POST-DISPATCH (July 10, 2020), https://www.stltoday.com/news/local/crime-and-courts/federal-court-in-st-louis-to-start-jury-trials-with-coronavirus-precautions-in-place/article_9bfd2974-051c-5a56-97bb-0dc9cb382700.html [permalink unavailable] (discussing concerns jurors will be worried about contagion and mask and social distancing restrictions will affect testimony).

25. Wilson, *supra* note 18, at 86 (proposing wearing masks and social distancing, and arguing that "pausing all . . . jury trials is a reasonable approach"); *see also* Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158, 173–74 (2020) (suggesting wearing uniform masks in court as a safety precaution may check biases and the unscientific judgments fact finders make about credibility); Susan Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFFALO L. REV. 1275 (2020) (providing a normative evaluation of virtual trials, including thorough analysis of scholarship demonstrating demeanor evidence is of little practical use); Turner, *supra* note 20 (surveying practitioners in Texas and suggesting a cautious approach to expanding the use of virtual hearings once the pandemic concludes).

26. *See, e.g.*, Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596, 606 (1982) ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole."); *see also* Jocelyn Simonson, *The Criminal Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2177 (2014) (discussing the importance of public access because "audiences affect the behavior of government actors inside the courtroom, helping to define the proceedings through their presence").

Amendment right to a public trial.[27] Often these rights amplify one another, but they can also clash. This raises a new question to answer: how do we balance the public's right to be informed and a defendant's right to a public trial when critical stages of a court case happen virtually?

Drawing on existing scholarship, clinical education during the pandemic, and extensive experience litigating criminal cases, this Article proposes practical strategies for practitioners and courts to address this problem.[28] Contemporary trial experiments and pending cases are studied to evaluate the benefits of current technology to defendants and courts. The impact of convenient public access is reevaluated through the lens of modern technology.[29]

Previous articles about public access or technology's role in criminal courtrooms considered technology from a generation ago[30] and evaluated

27. *See* Press-Enterprise Co. v. Superior Court of Cal. (*Press-Enterprise II*), 478 U.S. 1, 7 (1986) ("The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness.").

28. I do not want to discount concerns about virtual hearings and trials. My goal is to evaluate these problems from a practitioner's perspective and offer guidance for holding constitutionally sufficient virtual hearings or trials in the best way possible during the pandemic. I recognize that virtual hearings present challenges. I have had successful virtual hearings during the pandemic where evidence was easily admitted and testimony was clear, and I have had in-person hearings in the past where technology failed. Many problems in the criminal justice system, such as bias or juror attention, predate the pandemic and are replicated in virtual hearings. I also want to recognize that in many places, people are detained pretrial, face difficulty appearing in-person for court, or lack quality legal representation because of their location, income, or burdens placed on public defenders. Using virtual technology has made it easier to communicate with detained or incarcerated clients, and present testimony from people in different parts of the country. In just one case in our criminal defense clinic, Zoom jail "visits" have allowed speaking with a client more frequently, better document competency issues by recording attorney-client interactions, and have made it easier to call family members as witnesses who live across the country for pretrial hearings.

29. Interestingly, a past argument that virtual communication was inferior relied in part on the lack of adoption by people and businesses. Obviously, this has changed. *See* Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1060–61 (2004) ("A telling measure of the deficiency of videoconferencing is its failure to become the common business practice it was predicted to be. Videoconferencing was energetically promoted as a substitute for in-person meetings but has not achieved common use. . . . The reason is that the two mediums are not fully equivalent.").

30. *See, e.g.*, Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 869–70 (2010) (finding that bail hearings held by closed circuit television in Cook County between 1999–2009 led to worse outcomes for defendants); Nancy T. Gardner, Note, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 MICH. L. REV. 475 (1985); Christo Lassiter, *TV or Not TV—That Is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928 (1996); Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1004–08 (2004) (discussing technological constraints and the lack of adequate technology for the justice system); Shelly Rosenfeld, *Will Cameras in the Courtroom Lead to More Law and Order? A Case for Broadcast Access to Judicial Proceedings*, 6 AMER. UNIV. CRIM. L. BR. 12 (2010); Clara Tuma, *Open Courts: How Cameras in Courts Help Keep the System*

the influence of video in contexts such as immigration hearings.[31] They have considered the influence of commercialized broadcasts like CourtTV[32] and have debated broadcasting legislative sessions and Supreme Court arguments.[33] A new look at technology's impact is needed, especially in the context of the current pandemic.

Scholars have commented on concerns that court broadcasts (or in modern terms, livestreams) may influence how witnesses, judges, and lawyers behave, damage court decorum, or invade defendants' privacy.[34] Other academics have more skeptically opined that shrouding the justice system in mystery may lead to poor or incompetent judges evading scrutiny and receiving unjustified respect (and often receiving uninformed votes where judges are elected).[35] As one scholar said, "[t]he symbols and

Honest, 49 CLEV. ST. L. REV. 417 (2001); Elizabeth Wiggins, *What We Know and What We Don't Know About the Effects of Courtroom Technology*, WM. & MARY BILL RIGHTS J. 731, 737–38 (2004) (discussing how voice frequencies can be altered by phone lines and videoconferencing, which may affect credibility judgments by decision makers).

31. *See, e.g.*, Ingrid Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 942–49 (2015) (noting the dissatisfaction of immigration attorneys and litigants—including pro-se litigations, which are more common in immigration cases—with video hearings, as well as the possible explanations for differences between in-person and video hearings that are indirect effects of remote hearings such as reduced willingness to participate, communication, and public access); Frank Walsh & Edward Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 278 (2008) (discussing the implications of video technology on immigration cases and arguing the absence of physical presence violates the Due Process clause while noting its efficiency).

32. *See* MARJORIE COHN & DAVID DOW, CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE (1998); David Harris, *The Appearance of Justice, Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 794–96 (1993); Alex Kozinski & Robert Johnson, *Of Cameras and Courtrooms*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1107 (2010).

33. *See* Kyu Ho Youm, *Cameras in the Courtroom in the Twenty-First Century: The U.S. Supreme Court Learning From Abroad?*, 2012 BYU L. REV. 1989; *see also* Lili Levi, *Professionalism, Oversight and Institution-Balancing: The Supreme Court's Second Best Plan For Political Debate on Television*, 18 YALE J. ON REG. 315, 326–28 (2001) (discussing the benefits of public access in the realm of political debate).

34. *See* Estes v. Texas, 381 U.S. 532, 578–80 (1965) (Warren, C.J., concurring); *see also* David Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 918 (2017) (discussing how concerns about privacy has curtailed electronic public access); Paul Coppock, Note, *Doors to Remain Open During Business Hours: Maintaining the Media's (and Public's) First Amendment Right of Access in the Face of Changing Technology*, 58 S.D. L. REV. 319, 334–35 (2013) (discussing judges who have speculated that court broadcasts will alter how people behave and hurt court decorum). *See generally* David Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L.J. 1807, 1897 (2015) (evaluating where sensitive information appears in court records).

35. *See* Harris, *supra* note 32; *see also* Chance Cochran, Note, *Hear No Evil: How Permissive Rules on the Creation and Use of Courtroom Audio Recordings Can Increase Judicial Accountability*, 33 GEO. J. LEGAL ETHICS 423, 423–25 (2020) (discussing dearth of scholarship on public access to courtroom audio, the implication of increased access for holding judges accountable, and preserving judges' autonomy).

rituals of courts may hide significant systematic injustices behind undeserved dignity and respect."[36]

Virtual hearings and court livestreams may become more common as technology adoption expands and becomes a reality in many places.[37] Technology is a tool, but it is not an antidote without court and attorney buy-in.[38] The problems of indigent defense[39] and advocacy gaps for low-income clients[40] have been rigorously examined by academics. Only a few pilot programs, however, have studied how old technology impacted legal representation[41] or analyzed how public observation through broadcasts affected court hearings.[42] Until now, it has not been possible to consider the ways current technology may improve the quality of indigent defense and lead to better client outcomes.

Beyond addressing current issues affecting criminal cases, virtual technology is evaluated in this Article to see if it can help solve fundamental problems in indigent defense and promote transparency in the justice system. One focus is on how convenient public access through livestreaming court hearings improves the justice system's legitimacy. A second focus is how virtual and remote hearings can expand the right to representation for indigent defendants and improve the quality of defense counsel. With

36. Harris, *supra* note 32, at 795.

37. I use the term virtual hearings to mean the same as a remote hearing. To me, these terms are largely interchangeable at this point, although a remote hearing would include telephonic hearings as well.

38. *See, e.g.*, Lucy Lang, *Virtual Criminal Justice May Make the System More Equitable*, WIRED (July 1, 2020, 9:00 AM), https://www.wired.com/story/opinion-virtual-criminal-justice-may-make-the-system-more-equitable/ [https://perma.cc/NY7L-FKU6] ("Not taking action today would be more than a missed opportunity—it would be an injustice to the millions of Americans who could benefit from a justice system built for the modern era.").

39. *See, e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006); Norman Lefstein, *On Legal Aid & Indigent Defendants, Executive Summary and Recommendations: Securing Reasonable Caseloads*, ABA STANDING COMM. (2012); *see also* Samantha Jaffe, Note, *"It's Not You, It's Your Caseload": Using* Cronic *to Solve Indigent Defense Underfunding*, 116 MICH. L. REV. 1465 (2018) (discussing how the excessive caseloads for public defenders create a condition where deficient assistance of counsel is inevitable).

40. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/Q485-BB3X]; *see also* Lisa Pruitt et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15 (2018).

41. *See* RICHARD ZORZA, VIDEOCONFERENCING FOR ACCESS TO JUSTICE: AN EVALUATION OF A MONTANA EXPERIMENT (2007), https://docplayer.net/3126017-Videoconferencing-for-access-to-justice-an-evaluation-of-the-montana-experiment-final-report.html [permalink unavailable].

42. *See* MOLLY JOHNSON ET AL., FED. JUD. CTR. TO THE COURT ADMIN. & CASE MGMT. COMM. OF THE U.S., VIDEO RECORDING COURTROOM PROCEEDINGS IN UNITED STATES DISTRICT COURTS: REPORT ON A PILOT PROJECT (2016), https://t.ly/ZWz7 [https://perma.cc/FN2N-3ZJV]; CONG. RESEARCH SERV., R44514, VIDEO BROADCASTING FROM FEDERAL COURTS: ISSUES FOR CONGRESS (2019).

appropriate precautions, the benefits of virtual hearings can create a more responsive, alert, and equitable criminal justice system.

While the change was sudden, the day courthouse doors fully reopen cannot be forecast and will likely vary among states and regions. In the short term, courts must abide by constitutional principles and create functioning, virtual, remote justice systems. On a longer timeline, courts can adopt technology and experiment with virtual and remote hearings to improve transparency, flexibility, and equal justice.

This Article proceeds in six parts. Part I overviews the constitutional guidance governing public access. Part II considers contemporary approaches by courts to virtual access and livestreams, and selectively surveys some jurisdictions' approaches (focusing on Texas, Arkansas, Minnesota, and California case studies to highlight approaches and evaluate their outcomes and constitutional adequacy). Part III considers practical ways to protect defendants' rights when criminal cases proceed virtually. Part IV evaluates the influence of virtual court hearings and livestreams on judicial legitimacy and transparency. Part V discusses how virtual and remote hearings can improve indigent defense, especially for underserved areas, and provide courts and parties with savings and flexibility. The Article concludes with suggestions for more efficient courts and public defender systems.

I. A BRIEF HISTORY OF PUBLIC ACCESS AND COURT BROADCASTS

The Sixth Amendment right to counsel attaches to all phases of criminal cases.[43] A defendant's right to a public trial includes preliminary hearings.[44] The Supreme Court has also held that the press and public have a similar, independent right under the First Amendment to attend all criminal proceedings in both federal and state courts.[45] Similarly, courts must accommodate public attendance at criminal hearings, and closures are

43. *See, e.g.*, Rothgery v. Gillespie County, 554 U.S. 191, 198 (2008) (holding the right to counsel attaches at the initial appearance, such as where bail is set and probable cause based on a police officer's statement is determined, and does not require a prosecutor to be present or even informed); McNeil v. Wisconsin, 501 U.S. 171, 180–81 (1991) ("The Sixth Amendment right to counsel attaches at the first formal proceeding against an accused . . . .").

44. *See* Presley v. Georgia, 558 U.S. 209, 212 (2010) (holding the right to a public trial extended to jury selection); *see also* Waller v. Georgia, 467 U.S. 39, 48 (1984) (holding the Sixth Amendment right to a public trial extends to pretrial hearings, and stating "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public"); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492–93 (1975) (discussing that a criminal case is a public event and even sensitive information in the public record may be broadcast).

45. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575–76 (1980) (establishing that the First Amendment guarantees the public a right of access to judicial proceedings).

subject to strict scrutiny.[46] A limitation on public access should be rare because a "presumption of openness" must be overcome to deny public access.[47] Specific judicial findings must show that "closure is essential to preserve higher values and is narrowly tailored to serve that interest."[48] In some instances, an inadequately justified closure of court proceedings constitutes structural error, requiring automatic reversal and the granting of a new trial.[49]

A. *The Early Focus on Disruptions from Broadcasting Limited Public Access*

Public access to court cases predates the United States and is enshrined in the Bill of Rights.[50] Courts, however, initially resisted cameras, famously so, during the Hauptmann trial in 1935 when Bruno Hauptmann was tried in New Jersey for kidnapping and killing Charles Lindbergh's infant son.[51] At the time, television technology was new and created a broadcasting sensation.[52] Courts responded after the case with broadcast blackouts.[53]

By 1965, all federal courts and forty-seven state courts had banned television cameras in the courtroom—federal courts had further banned radio and video broadcasting of criminal trials by arguing Federal Rule of

46. *See* Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596, 606–07 (1982); *see also Waller*, 467 U.S. at 47 ("The need for an open proceeding may be particularly strong with respect to suppression hearings."). *But see* United States v. Osborne, 68 F.3d 94, 98–99 (5th Cir. 1995) (distinguishing *Waller* and holding that protection of the minor witness from emotional harm was a substantial reason justifying the courtroom's partial closure).

47. Press-Enterprise Co. v. Superior Court of Cal. (*Press-Enterprise I*), 464 U.S. 501, 510 (1984); *see also Richmond Newspapers*, 448 U.S. at 573 ("From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.").

48. *Press-Enterprise I*, 464 U.S. at 510; *see also* Press-Enterprise Co. v. Superior Court of Cal. (*Press-Enterprise II*), 478 U.S. 1, 3–4 (1986) (holding a preliminary hearing shall not be closed unless there is a substantial probability a defendant will be prejudiced by publicity that closure would prevent, and reasonable alternatives to closure cannot adequately protect the right and rejecting California's reasonable likelihood test).

49. *See, e.g.*, *Presley*, 558 U.S. at 212–15; *Waller*, 467 U.S. at 48.

50. *See generally* Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) ("[E]very citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.").

51. *See* State v. Hauptmann, 180 A. 809 (N.J. 1935).

52. *See* Daniel Stepniak, *Technology and Public Access to Audio-Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions*, 12 WM. & MARY BILL RIGHTS J. 791, 793–95 (2004) (discussing *Hauptmann*, and commenting that the notorious camera interference may be apocryphal).

53. The ABA adopted Canon 35, which said, "the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted." Am. Bar Ass'n, *Canons of Judicial Ethics*, 62 ANN. REP. AM. B. ASS'N 1123, 1134–35 (1937).

Criminal Procedure Rule 53 prevented that access.[54] In *Estes v. Texas*,[55] the Supreme Court held the disruption of a media broadcast violated a defendant's due process rights, and public access did not extend to a reporter's right to broadcast.[56] Interestingly, Justice Harlan in his concurrence remarked, "the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process."[57]

The Court's perception of broadcasting trials had changed by 1981 when it held in *Chandler v. Florida*[58] that television broadcast of a criminal trial was not a per se due process violation.[59] Following the decision, the American Bar Association (ABA) and state courts gradually crafted guidelines to allow public access and broadcast of criminal trials.[60] Along with *Chandler*, in *Richmond Newspapers v. Virginia*,[61] the Court addressed the benefits of a public trial for defendants.[62] Although a First Amendment case, the Court explained that an open trial is more likely to be conducted fairly, participants are more inclined to honesty, and community outrage and concern tends to be channeled away from "vengeful 'self-help.'"[63]

B. *The Court Emphasizes the Importance of Public Access and Eventually Allows Broadcasts*

Chandler departed from the reasoning in past cases, which curbed video broadcasts.[64] *Chandler* also analyzed public access from the perspective of a defendant's Sixth Amendment right to a public trial, and the Court concluded a public trial often is an important benefit.[65] It recognized a "defendant's right to a verdict based solely upon the evidence and the relevant law" but found "courts have developed a range of curative devices to prevent publicity about a trial from infecting jury deliberations."[66]

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54. Stepniak, *supra* 52, at 795.

55. 381 U.S. 532 (1965).

56. *Id.* at 546–47, 565.

57. *Id.* at 595 (Harlan, J., concurring).

58. 449 U.S. 560 (1981).

59. *Id.* at 576 ("[M]any of the negative factors found in *Estes*—cumbersome equipment, cables, distracting lighting, numerous camera technicians—are less substantial factors today than they were at that time.").

60. *See* CODE OF JUDICIAL CONDUCT CANON 3A(7) (AM. BAR ASS'N 1982). Canon 3A(7) was quickly eliminated for being too restrictive. ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, REPORT TO THE HOUSE OF DELEGATES § III (1990).

61. 448 U.S. 555 (1980).

62. *See id.* at 569–71.

63. *Id.*

64. Chandler v. Florida, 449 U.S. 560, 577 (1981) (distinguishing *Estes v. Texas*, 381 U.S. 532 (1965)).

65. *Id.*

66. *Id.* at 574 (citing Neb. Press Ass'n v. Stuart, 427 U.S. 539, 563–65 (1976)).

The Court expanded on its analysis in *Globe Newspaper v. Superior Court for Norfolk County*,[67] where it held that closing a criminal trial to the public must be rare, and the decision is subject to strict scrutiny analysis.[68] The Court based its decision on the fact that "[p]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole."[69] Expanding upon *Globe Newspaper*, the Court held in *Press-Enterprise Co. v. Superior Court of California* (*Press-Enterprise I*)[70] that before a court closes a criminal hearing it must show "[the] presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[71] The findings must be adequately articulated, and a court must consider alternatives to closure.[72]

In *Waller v. Georgia*,[73] the Court articulated a test for closing a criminal hearing over a defendant's objection.[74]

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.[75]

In *Press-Enterprise Co. v. Superior Court of California* (*Press-Enterprise II*),[76] the Court created an experience and logic test to determine whether First Amendment rights attach to a pretrial criminal proceeding.[77] Applying the test, the Court ruled that the First Amendment applied to pretrial hearings.[78] A preliminary hearing can be closed only if there is a substantial probability of prejudice to the defendant as a result of publicity.[79] There must also be no reasonable alternatives that exist to protect the defendant's rights.[80] The Court noted, "the absence of a jury, long recognized as 'an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge,' makes the

67. 457 U.S. 596 (1982).
68. *Id.* at 606–07.
69. *Id.* at 606.
70. 464 U.S. 501 (1984).
71. *Id.* at 510.
72. *Id.* at 511 (holding the trial court failed to consider alternative to closing jury selection that would adequately have protected the interests of the jurors its order was meant to safeguard).
73. 467 U.S. 39 (1984)
74. *See id.*
75. *Id.* at 48.
76. 478 U.S. 1 (1986).
77. *See id.* at 13–14.
78. *Id.*
79. *Id.*
80. *Id.* at 14.

importance of public access to a preliminary hearing even more significant."[81]

II. THE UNPLANNED SHIFT TO VIRTUAL HEARINGS

Courts have faced new challenges during the COVID-19 pandemic.[82] Before the pandemic, federal courts prohibited broadcasting criminal trials.[83] On March 27, 2020, a provision in the CARES Act authorized federal courts to conduct "video teleconferencing, or telephone conferencing if video conferencing is not reasonably available in a host of criminal proceedings."[84] This included detention hearings, initial appearances, preliminary hearings, waivers of indictment, arraignments, misdemeanor pleas and sentences.

Many federal courts began to host court proceedings virtually, often using the Zoom Webinar format. On April 3, 2020, the Administrative Office of the United States Courts provided revised guidance, announcing

> [m]edia organizations and the public will be able to access certain criminal proceedings conducted by videoconference or teleconference for the duration of the coronavirus (COVID-19) crisis. . . . This authorization is interpreted to permit courts to include the usual participants and observers of such proceedings by remote access.[85]

Many federal courts allow public access to virtual hearings upon a timely request while others impose restrictions.[86] Several appellate courts are

81. *Id.* at 12–13 (citation omitted) (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

82. Responses in other countries have been similar. *See, e.g.*, Kate Puddister & Tamara A. Small, *Trial by Zoom? The Response to Covid-19 by Canada's Courts*, 53 CAN. J POLIT. SCI. 373 (2020)

83. Broadcast coverage of criminal trials is prohibited in federal court. *See* FED. R. CRIM. PRO. 53. Some appellate courts, such as the Ninth Circuit, have allowed television broadcasting of high-profile appellate cases. *See, e.g.*, *Live! Broadcasting High-Profile Appeals Reignites Cameras in the Courtroom Debate*, REP. COMMITTEE FOR FREEDOM PRESS (Winter 2011), https://www.rcfp.org/journals/the-news-media-and-the-law-winter-2011/live-broadcasting-high-prof/ [https://perma.cc/9R8X-Y3TB].

84. Coronavirus Economic Stabilization (CARES) Act of 2020, Pub. L. 116-136 § 15002(b) (codified as 15 U.S.C. § 116 (2018)).

85. Press Release, U.S. Courts, Judiciary Provides Public, Media Access to Electronic Court Proceedings (Apr. 3, 2020), https://www.uscourts.gov/news/2020/04/03/judiciary-provides-public-media-access-electronic-court-proceedings#:~:text=judiciary%20Provides%20Public%2C%20Media%20Access%20to%20Electronic%20Court%20Proceedings,-Published%20onApril&text=media%20organizations%20and%20the%20public,guidance%20provided%20to%20federal%20courts [https://perma.cc/W6XY-D2EC].

86. *See* Revised Public Notice, U.S. District Court Northern District of N.Y. (Apr. 15, 2020). *But cf.* U.S. District Court for the District of R.I., Amending General Order Regarding Criminal Matters During Coronavirus Pandemic (Mar. 30, 2020) (allowing public access but only permitting telephone hearings based on the "unavailability of reliable and available video conferencing"); Standing Order No.

livestreaming cases on their YouTube channels, while some district courts are permitting access to livestreams hosted by the court itself.[87] The future use of virtual criminal hearings is receiving reconsideration.[88]

Like the federal court system, many state courts have moved to telephone or virtual hearings due to health concerns and courtroom capacity constraints. State courts have experimented with different approaches. In Cook County, Illinois, courts have permitted YouTube broadcasts of court proceedings. Courts in some areas of California have allowed YouTube streams with an easy to find YouTube Channel.[89] Where YouTube streams exist, the broadcasts are usually only streamed, not saved, and comments are disabled.[90] Approaches among state courts to virtual hearings and public access are neither uniform nor always clear.[91]

A. *A Comparison of Access Bans: Kern County, California and Washington County, Arkansas*[92]

Even before the move to virtual hearings, the public's ability to watch a criminal case is logistically difficult to see in-person. Almost all cases and courtroom decisions go unnoticed.[93] So, most people pay little attention to cases beyond news coverage. The shift to virtual proceedings can make

20-20, *In re* Public and Media Access to Judicial Proceedings During COVID-19 Pandemic (D.D.C. Apr. 8, 2020) (providing no guidance in a standing order other than to prohibit recording or rebroadcasting and threatening sanctions).

87. General Order, *In Re*: Public Access to Video or Teleconference Hearings, No. 2:20-mc-3910-ECM (M.D. Ala. Apr. 4, 2020).

88. *See* Pub. L. 116-136 § 15002(b)(1) (stating courts may find that use of virtual proceedings creates more efficiency without meaningfully sacrificing fair process). The House Judiciary Subcommittee has also addressed best practices for virtual court proceedings. *See* House Comm. on the Judiciary, *Federal Courts During the Covid-19 Pandemic: Best Practices, Opportunities for Innovation, and Lessons for the Future* (June 25, 2020), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=3053 [https://perma.cc/T3UA-639Y].

89. *See* CaliforniaCourts, YOUTUBE, https://www.youtube.com/c/CaliforniaCourts/channels [https://perma.cc/H8BF-52WM] (last visited Jan. 20, 2021).

90. *See, e.g.*, David Struett, *Court TV: Cook County Livestreaming Court Proceedings During Coronavirus Pandemic*, CHI. SUN TIMES (Apr. 15, 2020, 12:09 PM), https://chicago.suntimes.com/2020/4/15/21222214/cook-county-circuit-court-livestream-youtube-proceedings-coronavirus-pandemic [https://perma.cc/T3MB-45J8].

91. *See generally* Shanahan et al., *supra* note 14, at 4 (noting courts gave "more than 6,000 orders modifying the functioning of state civil courts, representing remarkable action in a very short period of time").

92. I selected Arkansas as one jurisdiction to examine because it is where I practice. The vague standards of the rule have created confusion in many counties and have resulted in judges prohibiting public access to criminal hearings during the COVID-19 pandemic. Many of the issues are similar to the ones present in Kern County, California.

93. *See, e.g.*, Eagly, *supra* note 31, at 994–1001 (discussing the harms of immigration video hearings without public access and a court watch movement to remedy the lack of transparency); Bryce Covert, *The Court Watch Movement Wants to Expose the 'House of Cards,'* APPEAL (July 16, 2018), https://theappeal.org/court-watch-accountability-movement/ [https://perma.cc/5JEW-PF2W].

public access more convenient. Rightfully, many courts have avoided constitutional problems by using virtual hearings as an opportunity to make public access more convenient, but some courts have switched to virtual court during the pandemic and prohibited meaningful public access.[94]

Beyond violating constitutional rights, obstructing public access makes monitoring or easily participating in court hearings difficult or impossible, and transparency projects have been placed on standby.[95] The presence of workable judicial guidance and administrative rules seems to help maintain open criminal hearings and public access. Even when existing administrative rules do not address public access or a public criminal hearing, constitutional guarantees apply.

A criminal case can be restricted or closed only if the court finds a substantial likelihood of prejudice to a defendant, and denying public access is the least restrictive means to safeguard the defendant's right to a fair trial.[96] Yet, courts in some states have restricted public access to proceedings—even when ostensibly acknowledging constitutional rights.

Tanisha Brown's frustration with exclusion from her son's arraignment highlights the direct and personal effects of a public access ban. Along with Tanisha, other plaintiffs in the lawsuit were denied access to watch preliminary hearings and jury trials involving their family members, and volunteers for Court Watch—a program that monitors court proceedings to promote accountability—were excluded from watching preliminary hearings.[97]

Ms. Brown's lawsuit challenged Kern County Court's standing order, which restricted "access to any and all courthouses . . . to those persons required to appear in person for a court hearing," and banned all public and press access.[98] The Kern County court stated its order was narrowly

94. *See generally supra* notes 88–91.

95. The lack of public access to virtual court proceedings is not unique to Arkansas. *See, e.g.*, Jamiles Lartey, *The Judge Will See You on Zoom, but the Public Is Mostly Left Out*, MARSHALL PROJECT (Apr. 13, 2020, 6:00 AM), https://www.themarshallproject.org/2020/04/13/the-judge-will-see-you-on-zoom-but-the-public-is-mostly-left-out [https://perma.cc/JEX9-ZHYB].

96. *See supra* notes 43–48 (discussing Supreme Court case law on the intersection of the First and the Sixth Amendment)

97. *See* Complaint for Injunctive and Declaratory Relief, *supra* note 1, at 4, 6, 17–19; *see also* Simonson, *supra* note 26, at 2179–90 (arguing that public participation like Court Watch programs are crucial for democratic criminal justice, to uncover power imbalances, to expose structural harms, and to hold court proceedings accountable through their presence); *see also* Wilson, *supra* note 18, at 89 (discussing that excluding the public from criminal trials raises concerns the justice system is not working properly); Beth Schwartapfel, *The Prosecutors: Court Watch NYC Is The Latest Local Group Monitoring the Criminal Justice System As It Happens*, MARSHALL PROJECT (Feb. 26, 2018, 10:00 PM), https://www.themarshallproject.org/2018/02/26/the-prosecutors [https://perma.cc/S3VN-LFT8] ("Open courts are one of the great hallmarks of our justice system and we welcome the engagement and public accountability that court observers provide . . . .").

98. Complaint for Injunctive and Declaratory Relief, *supra* note 1, at 3 (alteration in original) (internal quotation marks omitted).

tailored to serve the state of California's compelling interest in public health and safety, and suggested that no less restrictive alternative existed.[99] The complaint filed by the ACLU and First Amendment Coalition noted, however, that nearby counties had implemented less restrictive means such as allowing remote YouTube access.

After Ms. Brown was denied access to her son's arraignment, Kern County amended its standing order to permit limited access through permission from the court or an attorney of record.[100] Kern County later created a process for remote and virtual public access through the GoToMeetings program, but it continued to deny access to some proceedings, such as voir dire, and did not maintain information on how to access virtual attendance on its website.[101]

In Washington County, Arkansas, the people detained, their families, and reform advocates face the same problem as Ms. Brown. The lack of public access to first appearance hearings is especially prejudicial in Arkansas because of the systemic denial of counsel at bail hearings. In many counties in Arkansas, appointed counsel is not present at an indigent defendant's first appearance, which occurs within seventy-two hours of detention.[102] The first appearance is the initial opportunity for defendants to address their bail and reasons for release, and the lack of counsel prejudices defendants.[103]

Even where public defenders are present to make bail arguments, they often lack time and resources to meet with clients and adequately develop release and bail factors for these hearings. Consequently, arguments at first appearances are hurried, and conflicts are prominent. While this problem predates COVID-19, the shift to virtual hearings has caused new problems because the local rules applied to virtual hearings preclude meaningful public access or participation from witnesses.

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99. *Id.*

100. *Id.* at 4.

101. *Id.* at 6–7.

102. *See generally* ARK. R. CRIM. P. 8–9.

103. In Washington County, Arkansas, staff from the full-time public defender's office typically meet with clients the morning of the first appearance hearings (locally called an 8.1 hearing where a public defender is appointed only for bail arguments for people detained), which are combined with arraignment hearings for both people who are detained and released, at about 8:00 a.m. (arraignments occur two to four weeks later where the public defender's office is officially appointed to represent indigent clients). Bail hearings and arraignments begin at about 9:30 a.m. The county prosecutor's office works with judges to docket arraignments and traditionally schedules about twenty-five per day. The number of defendants with first appearance hearings fluctuates based on arrest volume. Normally, there are between twenty to fifty people. Bail arguments may be considered at both a first appearance and an arraignment. The public defender usually staffs two attorneys and three or four staff members or student volunteers to meet and counsel indigent defendants. In many regions, indigent clients do not receive counsel at initial hearings, even in large Arkansas counties like Faulkner and Benton. *See generally* ARK. R. CRIM. P. 8–9.

In Arkansas, the use of cameras, tape recorders, cell phones, or other equipment to "broadcast, record, photograph, e-mail, blog, tweet, text, post, or transmit by any other means except as may be allowed by the court" during court proceedings is governed by Administrative Order No. 6.[104] Administrative Order 6, however, was last updated in 2011 before virtual hearings in the state, and even before the state's implementation of an electronic filing system. It also conflicts with the state's criminal procedure rules on public access.[105]

Under Administrative Order 6, Arkansas courts may allow broadcasting, recording, and photography under certain conditions.[106] The only additional guidance is an Emergency Order dated June 11, 2020, from the Arkansas Supreme Court stating "[c]riminal jury trials shall be conducted in person, except that voir dire may be conducted by videoconference by agreement of the parties."[107] The Arkansas order does not address pretrial hearings, guidelines for if a party objects, public access, or how to conduct virtual, traditional, or hybrid hearings.

Arkansas' rule suffers from several failures that have provided cover for judges to prohibit public access. Administrative Order 6 mentions objections but does not define a timeline for notice or clarify when an objection must be raised. This allows a judge to have unchecked discretion to rule that notice is not timely or that an objection should be sustained. There is also no standard of review in either the rule or case law. This vagueness allows judges to prohibit broadcasting by livestreaming or virtual public access if one party objects and to sua sponte prohibit public access by finding that any notice of a broadcast is not timely. At a minimum, a timeline, a balancing test to weigh objections, constitutionally valid language, and a standard of review are all needed for the rule to be functional.

In the absence of a workable rule, many Arkansas courts have prohibited public access to the disadvantage of defendants and the public. When approached about allowing public access to virtual first appearance and arraignment hearings, a local district judge who handles almost one-third of first appearances and arraignments in Washington County—one of the

104. Ark. Admin. Order No. 6 (2011).

105. Under section 77(b) of the Arkansas Rules of Civil Procedure, "[a]ll trials and hearings shall be public except as otherwise provided by law," and pursuant to Ark. Code Ann. 16-13-222, trial courts are open to the public with the exception of adoption hearings, juvenile matters, and domestic relations cases. ARK. R. CIV. P. 77(b).

106. *Compare* Ark. Admin. Order No. 6, *with* CAL. R. CT. 1.150. California judges must consider nineteen factors to determine if a broadcast is permitted. Rule 1.150 tells judges to consider "[a]ny other factor the judge deems relevant" and, among other factors, the need for maintaining public trust in the judicial system and public access, but categorically prohibits broadcasting jury selection. CAL. R. CT. 1.150.

107. *In re* Response to the COVID-19 Pandemic, 2020 Ark. 249, at *2 (June 11, 2020) (per curiam).

State's largest judicial districts—responded in a public email on June 1, 2020:

> As I understand it, the Circuit Judges are conducting most of their hearings, whether criminal or otherwise, by Zoom. . . . It is probably the most practical way for them to continue to move their dockets along and provide some public access, however imperfect. . . .
>
> Balancing public safety, efficient Court operation, and access to the public has been tricky, and I welcome any suggestions anyone may have to make it better.
>
> Public access to these proceedings is very important to me, both personally and professionally. The Judicial Branch is, to me, the most complicated and misunderstood branch of government. It is important to me that people see what we do so that they can not only understand the process, but also understand the reasons why we do what we do. I want people to understand why I make the decisions I make. More access gives people a better chance to do that.
>
> I will make an effort to find a way to both give electronic access to anyone who wants it, and to address the problems that have arisen so far. . . . Again, it's important to me to make these hearings, and every hearing, publicly available, and any suggestions you may have will certainly be considered.[108]

In his email, Washington County Judge Nations' enthusiasm for transparency and public education is noteworthy. Attempting to establish a solution, community members responded with suggestions for using Zoom's Webinar software, including suggestions to identify sources of funding. In response, the group of judges who handle almost all first appearances, arraignments, and bail hearings replied on June 4, 2020:

> Judge Jones, Judge Harper and I have spent several hours this week working on this problem. . . .
>
> We do not have this Webinar service, and therefore we think we cannot currently provide access to our Zoom hearings without everyone who is watching appearing on the screen. . . . This is a big problem for us, because it impairs our ability to clearly see the faces of everyone when we are on gallery view.

108. E-mail from the Honorable Graham Nations, Dist. Judge, Wash. Cty., Ark., to Sarah Moore, Ark. Justice Reform Coal. (June 1, 2020, 8:02 AM) (on file with author), https://t.ly/sOlR [permalink unavailable].

> *Seeing facial expressions is a big part of what we do, and is integral to making decisions in these cases. We are given such a small window of time and such scant information when we make bond decisions that every piece of information we can get is crucial. Facial expressions, body language, and non-verbal communication have a huge bearing on these cases. These things can and do sway decisions in first appearance hearings.* Judge Jones, Judge Harper, and I are not comfortable with any circumstance that will make that part of our job harder.
>
> We also have a degree of concern about allowing [uneven] access to these meetings to only a few people this way. . . . That lack of uniformity also bothers us. We are not insensitive to your plight. . . .
>
> While it's important to us that the public has access (for reasons I've stated previously), we cannot allow that access to impair our ability to make decisions. . . . [I]f we had the ability with our current state-provided system to allow the public to view proceedings online without hampering our view of defendants and lawyers, we would let you do it that way. . . . Maybe . . . someone can find a way to use Zoom Conferencing and make it available to public viewing without impairing our view of the defendants and lawyers in these cases.[109]

Beyond acknowledging the assembly-line structure of first appearance and bail hearings, the judges' decision superseded First and Sixth Amendment rights for judicial economy. Judge Nations' graphic emphasis on needing to see "[f]acial expressions, body language, and non-verbal communication" to make decisions is interesting—his evaluation is based more on heuristics than appropriate release factors.[110] This is in spite of research that shows algorithms are better at predicting defendants' danger on release than judges.[111] Studies have also shown that a judge's psychological biases, such as the quality of a defendant's clothing, lead to different bail determinations for similarly situated defendants.[112] On the other hand,

109. E-mail from the Honorable Graham Nations, Dist. Judge, Wash. Cty., Ark., to Sarah Moore, Ark. Justice Reform Coal. (June 4, 2020, 6:26 PM) (on file with author) (emphasis added).

110. *Compare id.*, *with* ARK. R. CRIM. P. 8–9 (codifying the state's bail and release factors and nature of first appearance hearings); *see also* Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235 (2018) (discussing how high bails, which lead to pretrial detention, incentivizes pleas and are a significant factor in the nation's increase in mass incarceration).

111. *See, e.g.*, Meghan Stevenson, *Assessing Risk Assessments in Action*, 103 MINN. L. REV. 303 (2018) (surveying research on risk assessment tools such as algorithms that arguably reduce incarceration and recidivism); *see also* Jon Kleinberg et al., *Human Decisions and Machine Predictions*, 133 Q. J. ECON. 237, 270–71 (2018) (finding statistical tools are better at predicting future offenders than judges).

112. *See, e.g.*, Wiseman, *supra* note 110, at 267 (citing Mitchell P. Pines, *An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation*, 9 COLUM.

research has found the hearing format did not affect the success rate of immigration relief in immigration hearings.[113]

The letter indicates, though, that with an unobstructed image, the judge can ascertain his *important* release factors. When a detainee's physical appearance, however, has such a *huge bearing* on release and bail decisions that the concern overrides constitutional rights, public observation of first appearance proceedings is essential.[114] If a judge's approach to setting bail relies on appearance, it creates anxiety that overt or implicit biases may be affecting outcomes.[115]

The local public access colloquy concluded in a final mail reply from the district judges on June 11, 2020, following the county government's decision to livestream one morning's first appearance, arraignment, and bail hearings on YouTube:

> After conferring with Judge Nations, Judge Harper, Judge Threet and Judge Bryan, we are in agreement that that [sic] the broadcast of our court proceedings are [sic] a possible violation of Supreme Court Administrative Order Six. We were not conferred with before that decision was made. We have decided that the proceedings will continue to be available for viewing live in the

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J.L. & SOC. PROBS. 394, 408 (1973)). Studies have also examined the issues of video hearings in the immigration context, finding mostly negative outcomes for people's immigration cases; but these hearings involved detained individuals, early adoption, and assembly-line justice. *See* Eagly, *supra* note 31, at 972–77 (examining the difference between video and in-person immigration hearings and attorneys' negative views of videoconference hearings).

113. *See* Eagly, *supra* note 31, at 983–88 (discussing these findings only in the context of uniform immigration hearings, and recognizing that outcomes did go down when video hearings were implemented likely because of litigants' willingness to participate by pursuing claims, in part because of attorneys' perceptions of success, the added complexity pro se litigants faced, and the difficulty of attorney–client communication for detainees at immigration facilities).

114. Bias in pretrial detention and bail decisions has been identified as a contributor to racial inequality and increased incarceration. *See* Brandon P. Martinez et al., *Time, Money, and Punishment: Institutional Racial-Ethnic Inequalities in Pretrial Detention and Case Outcomes*, 66(6-7) J. RES. CRIME & DELINQ. 837 (2020); *see also* Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments,* 60 J.L. & ECON. 529 (2017) (finding higher pretrial detention rates explain forty percent of the black-white gap in rates of being sentenced to prison and twenty-eight percent of the Hispanic-white gap); Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471 (2016) (finding that detention on money bail, which affects nearly half a million people in the United States, causes a twelve percent rise in the likelihood of conviction, and a six- to nine-percent rise in recidivism); Eagly, *supra* note 31, at 974 n.184 (noting immigration judges are trained not to base decisions on heuristics because nonverbal demeanor varies widely across cultures).

115. Consider a straightforward definition of racial bias, "[it] is not merely a simplistic hatred. It is, more often, broad sympathy toward some and broader skepticism toward others." TA-NEHISI COATES, WE WERE EIGHT YEARS IN POWER: AN AMERICAN TRAGEDY 123–24 (2017).

> quorum court room and the county will insure [sic] that anyone will have access as long as they conform to the precautions needed as a result of Covid. This will conform to that administrative rule, constitutional requirements and basic fairness to those defendants who appear and all who which [sic] to observe.[116]

The basis of the judges' decision is unclear—the virtual hearings were already arguably broadcast (albeit without public access) and involved legitimate public interest. So, in the absence of a workable rule, the judges declared that timely notice of a public access request, or notice of the YouTube broadcast, was insufficient. It is not clear which ground the judges relied on.[117] This finding occurred in the absence of any party's objection and overlooked that a lack of an objection would make notice moot.

The Washington County judges' decision is legally dubious and corrosive to the legitimacy of first appearance and bail hearings in their courts.[118] From a First Amendment perspective, it freezes speech by prohibiting access.[119] As for following constitutional rules, the judges did not identify a substantial probability that a defendant would be prejudiced by public access, or make any findings on the existence or lack of reasonable alternatives to protect defendants' rights.[120] Before effectively closing the hearings to the public (without hearing any objections), the judges failed to articulate an overriding interest that a defendant was likely to be

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116. E-mail from the Honorable Clinton Jones, Dist. Judge, Wash. Cty., Ark., to Sarah Moore, Ark. Justice Reform Coal., & the Honorable John Threet, Dist. Judge, Wash. Cty., Ark. (June 11, 2020, 3:47 PM) (on file with author), https://t.ly/sOlR [permalink unavailable].

117. *Compare id.*, *with* FRANZ KAFKA, THE TRIAL 161–62 (John R. Williams trans., Woodsworth ed. 2009) (1925) (describing, in the Parable of the Gatekeeper, how a person who believes the law should be accessible to everyone experiences impossible difficulties trying to access the law—considered the source of supreme authority and truth—and is obstructed with a series of doors guarded by a series of even more fearsome doorkeepers).

118. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) ("Jeremy Bentham not only recognized the therapeutic value of open justice but regarded it as the keystone: 'Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.'" (quoting JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827))).

119. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) ("A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."); *see also* Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) (holding a criminal case is a public event and sensitive information can be broadcast).

120. *See* Press-Enterprise Co. v. Superior Court (*Press-Enterprise II*), 478 U.S. 1, 13–14 (1986).

prejudiced, did not determine that the closure was not overly broad, and did not consider reasonable alternatives to closure.[121]

The restriction on public first appearances and arraignments arguably denied defendants their Sixth Amendment right to a public trial.[122] Although the judges restricted a right that benefits both defendants and the public, they did not make specific findings for limiting public access, and they impermissibly burden-shifted the responsibility to defendants and the public to identify reasonable alternatives.[123] This defies the Supreme Court's holding that "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials."[124]

Beyond improperly restricting public hearings, the Washington County judges placed defense attorneys in a predicament. For most court proceedings, an administrative policy would be useful so that defense attorneys can discuss it with their clients. Without guidance, the likely solution is for defense attorneys to discuss the option of a public hearing or trial with clients, and litigate their clients' Sixth Amendment right to a public trial.

Meanwhile, public advocacy organizations continued to request access and wrote for guidance from the Arkansas Supreme Court in a letter dated June 15, 2020:

> We are writing to respectfully ask the Court to issue guidance for all our state courts to use in maintaining public access to court proceedings during Covid-19, given that courts have been advised to limit the number of attendees and many judges are holding court proceedings virtually. We feel this is important to maintain public access via virtual attendance to court . . . . Specific guidance would help our state courts comply with Administrative Rule No. 6 while following the current emergency guidelines issued by this Court and still allow the public to have access to the courts.[125]

No response was received. Soon after, in an order dated July 21, 2020, an Arkansas trial court in Benton County set a jury trial to begin on July 29, 2020 despite vague judicial guidance.[126] The trial court ordered all peo-

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121. *See, e.g.*, Waller v. Georgia, 467 U.S. 39, 48 (1984) (describing the judicial findings required to close a court proceeding to the public).

122. *See* Presley v. Georgia, 558 U.S. 209, 215 (2010).

123. *See id.*; *Waller*, 467 U.S. at 48; *Press-Enterprise II*, 478 U.S. at 13–14; Press-Enterprise Co. v. Superior Court (*Press-Enterprise I*), 464 U.S. 501, 510 (1984); Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596, 606 (1982).

124. *See Presley*, 558 U.S. at 215.

125. Letter from the Ark. Justice Reform Coal. to Marty Sullivan, Dir., Ark. Supreme Court (June 15, 2020) (on file with author), https://t.ly/sOlR [permalink unavailable].

126. *See* Order Scheduling Jury Trial, State v. Duffy, No. 04CR-19-2936 (Ark. Cir. July 22, 2020).

ple in the courtroom to wear masks.[127] The defendant objected to a six-person jury panel and virtual jury selection using the GoToMeetings virtual software.[128] The court sustained the defendant's objection on the jury size but overruled the defendant's voir dire objection, and it ordered virtual selection of a jury in three-person panels in one-hour shifts.[129] Finally, the defendant's motion to allow a witness to testify virtually was granted without objection from the state.[130]

The case demonstrates a defendant's interest in using virtual testimony in a hybrid trial. The court, however, laid a foundation for a complicated trial where everyone would wear masks and showcased problems with the Arkansas Supreme Court's June trial guidance order. After continuing the case while tolling speedy trial for months, the circuit court set a trial date for a week later without any consideration of the prejudice of an in-person trial, or the court's ability to summon a constitutionally valid jury venire. Neither the judge nor the parties discussed an alternative venue to allow social distancing.

The defendant quickly petitioned for an expedited writ of mandamus and requested a temporary stay on July 24, 2020, stating, among other grounds, the circuit court violated the June 11 Arkansas Supreme Court order that said, "voir dire may be conducted by videoconference by agreement of the parties."[131] The petition also argued that the court's order effectively denied the defendant adequate assistance of counsel.[132] The defendant argued that the court's chosen voir dire format violated his Sixth Amendment right to an impartial jury, contending the court had impaired drawing a jury from "fair [and accurate] cross section" of the community by excluding jurors with low-incomes or inadequate technology.[133] The defendant also construed the court's jury selection format as a sua sponte addition of an unlawful juror qualification requirement.[134]

The Arkansas Supreme Court responded with a one-paragraph order granting the defendant's petition on July 27, 2020. The order did not provide further guidance, other than stating:

> [Justice] Womack . . . would order a writ of prohibition to stop the voir dire over the Defendant's objection and give the circuit court discretion to either move forward with in-person voir dire

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Expedited Petition for Writ of Mandamus at 4–5, Duffy v. State, No. CR 20-469 (Ark. July 24, 2020).

132. *Id.* at 10–12 (citing numerous cases on IAC issues from *Powell v. Alabama*, 287 U.S. 45 (1932) to *United States v. Cronic*, 466 U.S. 648, 659–60 (1984)).

133. *Id.* at 6–9.

134. *Id.* (first citing ARK. CODE ANN. § 16-31-101 (2003); then citing Berghuis v. Smith, 559 U.S. 314, 319 (2010); and then citing Duren v. Missouri, 439 U.S. 357 (1979)).

> on schedule if they are able to do so in compliance with the regulations or[ ] alternatively[ ] to continue the case to a later date while tolling speedy trial.[135]

The Arkansas Supreme Court's decision to grant a stay avoided a crisis in this case, but it did not improve on the guidance in their current trial order. Potentially more troubling, the only glimpse into future guidance came from one Justice Womack, whose opinion would preclude virtual voir dire if one party objects while tolling speedy trial. This creates a scenario where the state's objection to virtual voir dire could force defendants to choose between an indefinite continuance and an in-person trial. Defense attorneys need to make a record by objecting to continuances that toll speed trial and by advocating for reasonable trial accommodations, such as (1) larger trial venue; (2) additional time to question jurors during virtual voir dire; or (3) virtual testimony.

Both Kern County and Washington County ignored constitutional concerns because of judicial preferences, not technology. Overly discretionary or vague rules help create a criminal justice system dictated by judges' whims. The Kern County and Washington County examples are not outliers. They are case studies of state courts failing because of insufficient judicial guidance and trial courts ignoring fundamental rights.[136]

B. *A National Concern: Public Access to the George Floyd Case*

The George Floyd killing and criminal case where four officers are charged with violent offenses in Hennepin County, Minnesota, has demonstrated the increased public attention on the criminal justice system and has sparked renewed demand for judicial and law enforcement transparency.[137] The case has also demonstrated significant public access concerns because of its extraordinary national attention. The broadcasting debate in the case shows serious differences between states' public access guidelines and highlights a situation where there is tremendous public interest in monitoring a case.

Minnesota's administrative broadcast rule balances the First and Sixth Amendment rights as competing interests.[138] The court rules are struc-

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135. Formal Order, Duffy v. State, No. CR-20-249 (Ark. July 24, 2020) (issuing an unsigned order with a signed, dissenting, text-only decision from Justice Womack).

136. Additional examples include New York City courts, which have allowed limited physical access to hearings and requests for one-time video links for criminal hearings, and New Orleans courts, which are conducting bail and other pretrial hearings using Zoom and have published online instructions for contacting judges to request links to watch criminal hearings. *See* Lieb, *supra* note 9.

137. *See* Wesley Lowery, *Why Minneapolis Was the Breaking Point*, ATLANTIC, https://www.theatlantic.com/politics/archive/2020/06/hemse-lowery-george-floyd-minneapolis-black-lives/612391/ [https://perma.cc/G5LF-FLN2] (last updated June 12, 2020, 4:45 PM).

138. *See* MINN. GEN. R. OF PRAC. 4 (2020).

tured to safeguard due process rights by preventing the public, which includes prospective jurors, from accessing information that would not be available to the jury. Minnesota Rule 4.01 states, "no visual or audio recordings, except the recording made as the official court record, shall be taken . . . during a trial or hearing of any case or special proceeding incident to a trial or hearing."[139] Rule 4.02(d) provides some exceptions for criminal cases so long as all parties consent, but it prohibits any recording of jurors, witnesses who object prior to testifying, and hearings or arguments outside the presence of a jury.[140] The rule defines hearings or arguments outside the presence of a jury to include all pretrial hearings such as suppression hearings or motions in limine.[141]

Judge Peter A. Cahill, presiding over the case of the four defendants charged with George Floyd's murder, denied a motion by journalists for video or audio coverage.[142] The state objected, but none of the defendants agreed and instead argued their constitutional right to a fair and public trial would be enhanced by broadcasts of the pretrial hearings.[143] Judge Cahill banned any pretrial broadcasts, citing Rule 4.02(d)(v) and Rule 4.02(d), which requires all parties to consent to such broadcasting.[144] His ruling simply stated that a pretrial broadcast when combined with the "substantial pretrial coverage" would "risk tainting a potential . . . jury pool."[145] On July 9, 2020, Judge Cahill issued a gag order finding that "continuing pretrial publicity in this case . . . will increase the risk of tainting a potential jury pool and will impair all parties' rights to a fair trial," which was vacated on July 22.[146]

Judge Cahill's struggle to balance pretrial publicity with public access in a nationally followed case is not new.[147] Post-*Estes*, however, courts have

139. *See id.* R. 4.01.

140. *See id.* R. 4.02(d).

141. *Id.*

142. *See* Order, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. 4th Jud. Dist. June 26, 2020) [https://perma.cc/BX2S-HUNT].

143. *Id.; see also* Riham Feshir, *"Judge Rules Against Audio and Video Coverage in Floyd Killing Case for Now,"* MINN. PUB. RADIO (June 26, 2020, 1:42 AM), https://www.mprnews.org/story/2020/06/26/four-excops-charged-in-floyd-killing-want-media-coverage-of-court-hearings [https://perma.cc/88HX-32BX] ("'The defendants argue that this relief is necessary to provide the defendants with a fair trial,' wrote Thomas Plunkett, who is representing former officer J. Alexander Kueng 'and to assure an open hearing in light of the ongoing pandemic.'").

144. *Id.*

145. *Id.*

146. Gag Order, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. 4th Jud. Dist. July 9, 2020), https://t.ly/A9ru [permalink unavailable]; Order Vacating Gag Order, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. 4th Jud. Dist. July 22, 2020).

147. *Cf.* Sheppard v. Maxwell, 384 U.S. 333, 361–63 (1966) (holding, in an older case, that extensive pretrial publicity violated the defendant's due process rights, and the trial court should have "insulate[d] [the defendant] from reporters and photographers" with gag orders for witnesses (citing Estes v. Texas, 381 U.S. 532, 545–46 (1965))).

found a terse and general analysis like Judge Cahill's order as insufficient to restrict press and public access. For instance, in *Nebraska Press Association v. Stuart*,[148] a trial judge issued an order to reporters to not publish or broadcast incriminating information about the defendant pretrial.[149] Reversing the verdict because the trial judge's findings were deficient, the Supreme Court stated the trial judge's concern about pretrial publicity affecting the jury venire was valid, but the trial court's finding of harm was speculative, its decision neglected to consider less restrictive alternatives, and its gag order was unlikely to prevent news from spreading anyway.[150] Observing that "pretrial publicity[,] even pervasive, adverse publicity does not inevitably lead to an unfair trial," the Court said:

> It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it.[151]

Like in *Nebraska Press Association*, the Supreme Court has not tolerated trial courts closing pretrial hearings to the public except in rare cases.[152]

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest . . . along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.[153]

Linking the First Amendment right of public access and the Sixth Amendment right to a public trial, the Supreme Court in *Waller* reflected that "[our] cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant."[154] In *Waller*, the Court reversed the trial court for closing a suppression hearing, remarking the need for public access to a suppression hearing is "particularly strong" because "[t]he public in general also has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scru-

148. 427 U.S. 539 (1976).

149. *See id.* at 542–43.

150. *Id.* at 566–67.

151. *Id.* at 554, 567.

152. *See, e.g.*, Waller v. Georgia, 467 U.S. 39, 45, 48 (1984).

153. Press-Enterprise Co. v. Superior Court of Cal. (*Press-Enterprise I*), 464 U.S. 501, 510 (1984).

154. *Waller*, 467 U.S. at 46 (alteration in original) (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979)).

tiny."[155] Similarly, in *Presley v. Georgia*,[156] the Court declared a defendant's right to a public trial includes permitting family members access to watch jury selection. The Court held:

> Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. Nothing in the record shows that the trial court could not have accommodated the public at Presley's trial. Without knowing the precise circumstances, some possibilities include reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members.[157]

From these cases, we know courts bear the burden of developing reasonable alternatives to closing the courtroom, and the defendant has no burden to propose alternatives.[158] Beyond this, the Supreme Court has rejected the argument that a generic concern that jurors may be influenced by public access is sufficient to close a courtroom.[159] "If broad concerns . . . were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public . . . almost as a matter of course."[160]

Public interest reflects importance. A community's or the nation's desire to see a fair, effective, and transparent criminal justice system signifies its conscience. As the Court observed in *Chandler*, "[a] case attracts a high level of public attention because of its intrinsic interest to the public and the manner of reporting the event. The risk of juror prejudice is present in any publication of a trial."[161] The open court debate in Minnesota highlights the fundamental importance of public access and a public trial. Closing or restricting access to a criminal case of such magnitude encourages skepticism and creates legitimate worry that the criminal justice system will not work.[162] In this case study, it is also futile when the nation is saying George Floyd's name.

155. *Id.* at 47.
156. 558 U.S. 209 (2010).
157. *Id.* at 215.
158. *See id.*; *Press-Enterprise I*, 464 U.S. at 510.
159. *See Presley*, 558 U.S. at 215.
160. *Id.*
161. Chandler v. Florida, 449 U.S. 560, 575 (1981).
162. *See infra* discussion in Part IV.

C. *The Texas Trial Experiments—The First Virtual Civil Trial and Experimental Auditorium Criminal Trials*

In May 2020, Collin County, Texas piloted a virtual Zoom trial for a civil, non-binding case.[163] Jury selection and the trial were virtual and livestreamed on YouTube.[164] The case involved a one-day trial over an insurance dispute, which was specifically chosen as a low-stakes case for the experiment.[165] In a statement to the National Center for State Courts, the Judge Emily Miskel, who presided, described the trial:

> I was pleasantly surprised to learn how much the jurors liked this. They were enthusiastic about it. And jurors who had served on traditional juries in the past said there were things they preferred about remote jury service. They said it was more respectful of their time, and the witnesses and exhibits were easier to see. The jurors were more enthusiastically positive than any other group I've talked to, more so than attorneys and judges.
>
> Remote jury trials may have a future. We could also consider a hybrid approach to jury service during the pandemic. We may find that portions of a jury trial may be safer to do remotely than in a courtroom.
>
> We also may find that remote court proceedings play a role in access to justice. In Texas, we have rural counties where no attorneys happen to live—and I know that's true in many other states—so this technology can play a role in connecting attorneys with people who need them.[166]

While Judge Miskel identified the potential future of virtual hearings and several people who benefit, reports from the media were less enthusiastic.

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163. *See* Jake Bleiberg, *Texas Court Holds First US Jury Trial Via Videoconferencing*, ASSOCIATED PRESS (May 22, 2020), https://apnews.com/article/e434e2df6e0b09fba1a32ec3fcf4670a [permalink unavailable].

164. *Id.*

165. *Id.* Florida courts have also established a pilot project for five counties to hold virtual trials and have held one experimental civil jury trial with jury selection by Zoom and testimony by traditional courts with all participants wearing masks. *See* Liane Morejon & Andrea Torres, *Historic Shift to 'Virtual' Miami-Dade Court Continues With 1st Civil Jury Selection on Zoom*, LOCAL 10 NEWS (July 9, 2020, 6:26 PM), https://www.local10.com/news/local/2020/07/09/historic-shift-to-virtual-miami-dade-court-continues-with-1st-civil-jury-selection-on-zoom/ [https://perma.cc/9CRR-JLDV]; *see also* Glenn A. Grant, *Virtual Grand Juries?*, LAW.COM: N.J. L.J. (June 16, 2020, 10:30 AM), https://www.law.com/njlawjournal/2020/06/16/virtual-grand-juries/?slreturn=20210021213603 [https://perma.cc/3CMY-W4CH] (commenting on New Jersey's virtual grand jury design).

166. *Stories from Inside the Courts: Judge Emily Miskel*, NAT'L CTR. FOR ST. CTS., https://www.ncsc.org/newsroom/public-health-emergency/newsletters/from-inside-the-courts/judge-emily-miskel [https://perma.cc/RVD6-9QUQ] (last visited Feb. 2, 2021).

Jurors appeared distracted at times, and there were video glitches during testimony.[167]

Following the pilot trial, the Supreme Court of Texas issued specific guidance on public access noting the "presumption of openness," and that "improper or unjustified closure of court proceedings constitutes structural error, requiring 'automatic reversal and the grant of a new trial.'"[168] The Court's guidance further stated:

> It is the court's affirmative burden to ensure meaningful and unfettered access to court proceedings. In fulfilling this burden, the court must take all reasonable measures necessary to ensure public access. Lack of access to a single hearing (suppression), or even a portion of a single hearing (voir dire), is enough to mandate reversal and a new trial. . . . [I]t is the court's burden to ensure public access to each hearing and take reasonable measures to remove barriers . . . [C]ourts must find a practical and effective way to enable public access to virtual court proceedings . . . .
>
> Under the standards established by the United States Supreme Court, the protective measures employed must be limited to those necessary to protect an overriding interest and no broader. . . . For this reason, no standing order or global rule for closure of specific categories of hearings may be preemptively issued by a court without running afoul of the requirement to provide the public with access to court proceedings. The court should not close the entirety of a hearing from public view in order to protect a single witness or topic of testimony. Because the court must apply only the least restrictive measures to protect the overriding interest, only specific portions of a hearing or trial that meet this exacting burden may be conducted outside of the public view, and that only in rare cases.[169]

The pilot trial, while demonstrating concerns with juror attention, shows a virtual trial is possible, especially if best practices for courtroom management are used. Texas, however, has not proceeded with a virtual criminal

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167. *See* Charles Scudder, *In a Test Case, Collin County Jury Renders Verdict on Zoom for the First Time; Too Risky for a Full Trial?*, DALL. MORNING NEWS (May 22, 2020, 11:35 AM), https://www.dallasnews.com/news/courts/2020/05/22/in-a-test-case-collin-county-jury-meets-on-zoom-for-the-first-time-but-some-lawyers-say-its-too-risky-for-real-trial/ [https://perma.cc/KK9N-CPTF].

168. TEX. OFF. CT. ADMIN., BACKGROUND AND LEGAL STANDARDS—PUBLIC RIGHT TO ACCESS TO REMOTE HEARINGS DURING COVID-19 PANDEMIC 2 (2020), https://www.txcourts.gov/media/1447316/public-right-to-access-to-remote-hearings-during-covid-19-pandemic.pdf [https://perma.cc/T4NX-P5YR] (quoting *In re* A.J.S., 442 S.W.3d 562 (Tex. App. Ct. 2014)).

169. *Id.* (footnotes omitted) (stating the constitutional rules that must be followed).

trial. Instead, Texas courts have held in-person, criminal trials in large venues like school auditoriums.[170] This format creates different problems. For instance, jurors may not be able to view evidence, hear testimony, be as likely to pay attention, or even show up during a pandemic.

After the first auditorium trial, the public defender who tried the case shared that she felt the jurors could not hear her speak and she was forced to shout.[171] She said, "[i]t was the most stressful trial I personally have been through," and noted that, "for the first time ever, she cried during her closing argument. 'I was just drained, and exhausted.'"[172] Based on reports of in-person trial experiments during the pandemic, defense attorneys should consider whether a traditional trial is best for their client, or if using virtual technology would be better. The choice should be up to the defendants. As Judge Miskel said, "[y]ou shouldn't need government permission to exercise your right to a public court hearing."[173]

III. MAKING VIRTUAL HEARINGS AND TRIALS FUNCTIONAL AND CONSTITUTIONAL

Virtual hearings must be compatible with public access and a defendant's right to a public trial. Especially for trials, but for all hearings, a virtual hearing must provide the constitutional safeguards of a traditional hearing. The major concerns voiced about virtual hearings are: (1) virtual hearings do not fulfill the guarantees required by the Confrontation Clause; (2) they impair paneling and selecting a jury; and (3) they are inherently inferior by affecting how participants behave, by being unreliable, and by failing to preserve the decorum of the court, attorney–client communication, or the privacy of participants.[174]

170. *See* Angela Morris, *Order In The Courtroom: Texas Courts Venture Into Unusual Spaces Amid Pandemic*, LAW.COM: TEX. LAW. (July 23, 2020, 7:17 PM), https://www.law.com/texaslawyer/2020/07/23/order-in-the-auditorium-texas-courts-venture-into-unusual-spaces-amid-pandemic/ [https://perma.cc/AQV2-9SVT].

171. *Id.*

172. *Id. Compare* Willard Shepard, *Miami-Dade Court Holds State's First Virtual Jury Trial Amid Pandemic*, NBC MIAMI (July 14, 2020, 7:03 PM), https://www.nbcmiami.com/news/local/hems-dade-court-holds-states-first-virtual-jury-trial-amid-pandemic/2262205/ [https://perma.cc/47SS-94LZ] (stating the plaintiff testified while wearing a mask while the judge, jury, and attorneys were behind plexiglass in Florida's pilot civil trial where Zoom was used only for jury selection), *with* Rachel Lean, *Verdict Is In: Online Trials, Jury Selection Work in Broward*, LAW.COM: DAILY BUS. REV. (July 20, 2020, 1:37 PM), https://www.law.com/dailybusinessreview/2020/07/20/verdict-is-in-online-trials-jury-selection-work-in-broward/#:~:text=Broward%20Circuit%20has%20been%20testing,amid%20the%20COVID%2D19%20pandemic [https://perma.cc/5ZVE-D45Q] (highlighting the statement by Chief Judge Jack Tuter of the Broward Circuit Court in Florida: "There is no doubt in my mind jury trials can be conducted via a video platform" (internal quotation marks omitted)).

173. Banjo, *supra* note 10.

174. *See supra* notes 18–21 and accompanying text; *see also* Eagly, *supra* note 31, at 988–94 (discussing difficulty with attorney–client communication with de-

These concerns, while valid, overlook that court formats do not have to be binary. The benefits of a virtual hearing or trial and convenient public access may outweigh the difficulties of using new formats. There are many options to resolve concerns.[175] Most routine criminal court hearings can be done virtually, and remote and virtual hearings are tools that should be more common and permanent options.

Defense attorneys who treat a virtual hearing as inherently deficient may end up avoiding counseling clients on whether a public, virtual hearing is a better option, especially during the pandemic. Many defendants are currently, or soon will be, choosing between a virtual or modified in-person court proceeding, or waiting in jail through the pandemic. Depending on the case and the defendant, a virtual proceeding may be superior to a traditional one in the short-term. Clients are harmed when defense attorneys unreasonably prolong their detention or court case. Defense attorneys also risk waiving reversible issues if they do not consider new litigation issues created by virtual hearings and the pandemic. Yet the defense bar's consensus is that most virtual hearings should be evaded.[176]

Courts across the country are forcing defendants to choose (or deciding for them) if, when, and how their case is litigated. Defendants will need their attorneys to be equipped to offer guidance. Defense attorneys must develop strategies to effectively litigate cases on a virtual platform, make appellate records to preserve new issues for appellate review, and advocate for the format or courtroom structure that benefits their clients.

A. *First Appearances and Bail Hearings*

Because of the consequences and prejudice from pretrial detention, and the struggle of public defenders to provide adequate counsel, virtual preliminary hearings receive academic and public attention.[177] In *Hamil-*

tainees in immigration cases and communication between prosecutors and immigration counsel when video hearings are the only form of communication and happen in an assembly-line style).

175. For example, hybrid hearings where some witnesses testify virtually can work. Courts already allow some form of hybrid testimony when parties agree, such as allowing crime lab witnesses to testify virtually. *See, e.g.*, *supra* note 107 and accompanying text; *see also* Turner, *supra* note 20, at 12–14; Bridget Murphy, *Psychologist Testifies in First 'Hybrid' Criminal Trial in Nassau Court*, NEWSDAY (July 14, 2020, 7:53 PM), https://www.newsday.com/news/health/coronavirus/coronavirus-nassau-courts-murder-trial-virtual-1.46875987 [https://perma.cc/DN8G-A4XW].

176. Dubin Research & Consulting, *supra* note 18, at 26–39; *see also supra* note 20 and accompanying text (discussing the opinions of defense attorneys about pandemic trials).

177. *See, e.g.*, Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399 (2017) (examining the social and penal costs of pretrial detention and recommending restructuring the pretrial detention system); Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417 (2016) (discussing the problems with money bail including incentives judges have to detain defendants, issues with indigent defense at bail hearings, and proposals for bail reform).

ton v. Alabama,[178] the Supreme Court recognized the critical nature of pretrial proceedings, writing that absent or inadequate counsel at the arraignment stage can affect the whole trial.[179] In other words, deficient or absent defense counsel at the first appearance can be a per se inadequate assistance of counsel violation subject to a more favorable standard of post-conviction review for defendants.[180] In response, families and advocacy groups have focused on transparency and access to critical pretrial hearings.[181] For instance, Court Watch programs, such as the one described in the ACLU and First Amendment lawsuit for Tanisha Brown, often focus on first appearance and bail proceedings.[182]

Concerns with virtual hearings often stem from courts using outdated video technology that distorts viewing or is low-quality, holding assembly-line proceedings,[183] not permitting defense witnesses, or preventing adequate communication with defense counsel.[184] Past studies have shown some harm from video hearings to defendants, but the studies evaluated cases with low quality technology and no public access.[185] The primary study showing bad outcomes is a review of bail hearings circa 1999 in Cook County, Illinois.

In a 2010 study, researchers examined data from 645,000 defendants who had their cases heard at two different times: (1) eight years prior to beginning bail hearings by video in 1999; and (2) eight years following

178. 368 U.S. 52 (1961).

179. *See id.* at 54–55; *see also* Satterwhite v. Texas, 486 U.S. 249, 256 (1988) (citing examples of when counsel deficiencies are so fundamental they are subject to automatic reversal).

180. *See* Rothgery v. Gillespie County, 554 U.S. 191, 198 (2008); *see also* Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. 1581, 1613–20 (2020) (discussing how some errors such as the absence of counsel at first appearance proceedings may at times be, depending on the state system and procedures used, a pervasive, systemic error that permits claims of ineffective assistance of counsel under the more permissive standard from *United States v. Chronic*, 466 U.S. 648 (1984)).

181. Pretrial detainees are especially affected by the 2020 pandemic because of emergency orders continuing arraignments and cases and the heightened risk of contagion in jails. *See, e.g.*, Holly Yan, *Prisons and Jails Across the US Are Turning into 'Petri Dishes' for Coronavirus. Deputies Are Falling Ill, Too*, CNN (Apr. 10, 2020, 9:49 AM), https://www.cnn.com/2020/04/09/us/coronavirus-jails-prisons/index.html [https://perma.cc/R2QQ-BGNJ]; *see also* KAFKA, *supra* note 117, at 7 ("And you don't know how long these cases can last, especially recently!").

182. *See supra* note 97 and accompanying text.

183. Often referred to as a "cattlecall," which while common, is a dehumanizing term.

184. *See* Bryce Covert, *Video Hearings: The Choice 'Between Efficiency and Rights,'* APPEAL (June 5, 2019), https://theappeal.org/video-hearings-the-choice-between-efficiency-and-rights/ [https://perma.cc/9JRN-4AWQ].

185. *See generally* Bandes & Feigenson, *supra* note 25 (discussing attorney opinions on demeanor evidence), *see also supra* notes 30–31 and accompanying text (research discussing the harms of video hearings using older technology in immigration hearings and at first appearances); *infra* note 230 (discussing research on video testimony from child witnesses).

courts' decisions to use video.[186] The study found that bail set during video court was higher than bail set for people with in-person hearings.[187] Explanations for why bail increased included rudimentary technology, poor access to attorneys before the hearings, and lack of public access, which prohibited testimony by family members.[188] One law professor who coauthored the study described the Cook County courts approach at the time as follows:

> The video feed of the defendants was black-and-white, shaky, and difficult to see. If a defendant wanted to address anyone in the room upstairs there was a phone he could pick up, but given the speed with which the cases moved that "didn't remotely happen," [the law professor] said. "It was just jaw-dropping the way the video . . . made the person on the video screen seem like not a real person."[189]

Improved technology can only reduce perception bias, not eliminate concerns. Consider the common argument that only a person's face is visible in a virtual hearing or that the image is too small. This is usually the case in video chatting, but testimony using a webcam placed at a distance allows a person to be fully in the frame and allows viewers to evaluate body language. Others have pointed out that fact finders may not perceive demeanor the same because of how people interact with video technology. For instance, a speaker may look at the screen instead of the camera, use a bad camera angle or background, or pause before speaking.[190] These are valid concerns, but many of them are remedied through experience, using quality technology, and either instructions or attorney advocacy. Perception bias can be handled the same way attorneys already handle bias, by identifying and addressing the issue through argument, motion practice, jury instructions, and education. Scholars have also pointed out that social distancing in courtrooms may affect viewing evidence and testimony as well.[191]

Even with current technology, First and Sixth Amendment rights can clash when a defendant does not want to be publicly seen on webcam or a livestream. Attorneys can object, but the standard is rigorous for closing a

186. *See* Diamond et al., *supra* note 30, at 898.

187. *Id.*

188. *See id.* at 898–902; *see also* Poulin, *supra* note 30, at 1144–45 (commenting reliance on remote hearings at first appearances precludes building an attorney-client relationship). While I agree with Poulin, the nature of assembly-line first appearances by itself is a significant obstacle to attorney–client relationship building and the issue is not technology but time. Plenty of my clients have noted they feel there is an ability to develop a rapport and trust through virtual meetings, and client communication is often done by phone or text.

189. Covert, *supra* note 184.

190. *See* Bandes & Feigenson, *supra* note 25, 1294–95.

191. *See* Wilson, *supra* note 18, at 90 (noting seating configurations in large auditoriums may also disrupt jurors view of the trial).

hearing. Convenient public access will lead to slightly more public exposure for defendants. A criminal defendant's right to privacy or request to close a trial is subject to the public's First Amendment right to view criminal court cases.[192] In reality, privacy for defendants is already low. When people are arrested, they are usually exposed by online mug shots and arrest logs, and convictions are public.[193]

Consider the reasons a defendant would wish to avoid public exposure. First appearances often show people with acute mental illness or substance use issues in a poor light. The public will see people who may be acquitted, those entering a diversion program, or those who will have their record eventually sealed.[194] These are legitimate worries, and attorneys should object, but in most cases these grounds are not sufficient to meet the constitutional test for denying public access. In *Nixon v. Warner Communications*,[195] the Supreme Court discussed that while the Sixth Amendment guarantee of a public trial belongs to the accused, the guarantee of a public trial assures the public and press access.[196]

While courts should be respectful of privacy concerns for people who are vulnerable or may be able to seal their arrest or case records, the answer is not infringing on the First Amendment. The most practical way to address privacy concerns is to limit courts to a livestream or publicly archive court hearings for only a short time period, while prohibiting third-party recording.[197] This serves the public interest in education and transparency while mitigating the harms in a less restrictive way than banning livestreams or virtual access.

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192. *See* Presley v. Georgia, 558 U.S. 209, 212 (2010); *see also* Press-Enterprise Co. v. Superior Court of Cal. (*Press-Enterprise II*), 478 U.S. 1, 13–14 (1986); Press-Enterprise Co. v. Superior Court of Cal. (*Press-Enterprise I*), 464 U.S. 501, 510 (1984). *Cf.* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975) ("[P]olitical institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish.").

193. *See Access to Mugshots Gets Close Look Across the Country*, REPORTERS COMM. FOR FREEDOM PRESS, https://www.rcfp.org/journals/news-media-and-law-summer-2014/access-mug-shots-gets-close/ [https://perma.cc/XX4J-QEK7] (last visited Jan. 23, 2021); *see also* Chris Carola, *Mug Shot Proposal Pits Privacy Versus Right to Know*, ASSOCIATED PRESS (Feb. 19, 2019), https://apnews.com/article/5e48d07e739e4b198c0f45feb470f73d [https://perma.cc/FN8S-5XTM] (discussing civil liberty groups' objections to limiting public information about arrests and the price people pay extortive companies to have their booking photos removed).

194. Witnesses also have significant privacy concerns. Safeguarding a witness against possible reprisal, or preventing embarrassment and emotional disturbance to the witness, have been reasons given to exclude the public from watching a criminal case. Virtual technology is an option to provide physical distance for a witness and protect their privacy through using technology tools, such as obscuring voice or appearance on livestreams, and pseudonyms to provide some anonymity to witnesses.

195. 435 U.S. 589 (1978).

196. *See id.* at 610.

197. Violations can be enforced through contempt sanctions.

In many cases, convenient public access and the right to a public trial are compatible and benefit clients by enhancing institutional accountability and transparency. The public can evaluate the quality of the criminal justice system, which often includes deficiencies that are not widely known.[198] These structural problems are addressable when they can be identified. With convenient public access and the subsequent enhancement of transparency, common problems such as the absence of counsel at preliminary proceedings, excessive public defender caseloads, and sentencing disparities are more likely to improve.[199]

B. *Managing Virtual Dockets and Pretrial Hearings*

A judge's ability to control a virtual courtroom is different, but not necessarily more difficult. Virtual software, like Zoom, includes tools such as private breakout rooms for bench discussions or private sidebars, disabling chat, and waiting rooms. For hearings with testimony, a judge can mute parties or jurors. The public can be restricted to viewing through a webinar feature, like on Zoom, or a livestream, like on YouTube, to prevent interruptions.

Virtual hearings and public observation are most likely to affect judges and attorneys—the people already comfortable with a traditional court atmosphere. Some judges have speculated that a court livestream or broadcast will encourage attorney theatrics or reduce public confidence in the criminal justice system. Part of the resistance to transparency, especially from attorneys, is probably from self-interest—attorneys want to avoid scrutiny, and judges may worry their decisions will be second-guessed.

The research tells a different story. The most recent broadcast pilot program in federal courts ran from 2011 to 2015.[200] Judges were surveyed before the program and expressed mixed opinions about whether the pilot program would affect their court.[201] The judges stated cameras in the courtroom might distract witnesses, motivate attorneys to prepare better, and prompt more courteous behavior from attorneys.[202] After the federal pilot program concluded, however, most judges and attorneys responded that most of the negative changes they expected were small or non-existent.[203] Judges also reported some positive effects—34% of the judges thought broadcasts made attorneys moderately more courteous.[204]

198. *See* Jaffe, *supra* note 39, at 1475–76 (stating that public defenders in Atlanta have on average fifty-nine minutes to spend on a case; defenders in Detroit have only thirty-two minutes per case; and defenders in New Orleans have only seven minutes per case).

199. *See* Primus, *supra* note 180, at 1613–20.

200. JOHNSON ET AL., *supra* note 42, at 1.

201. *See id.* at 6–7.

202. *Id.* at 23, 26 tbl.10.

203. *Id.* at 27.

204. *Id.* at app. § D-7.

The open question is whether convenient public access incentivizes better attorney preparation, encourages judicial accountability, or improves defendants' outcomes in reality or just in theory. Convenient public access may make judges more susceptible to public opinion.[205] This may be especially true for elected judges. Arguably, elected judges should be responsive to public opinion or at least held publicly accountable.[206] In some cases, elected judges may enjoy the platform of a livestreamed trial. Similarly, transparency should increase prosecutor accountability, whose role is to represent their community and be responsive to their community's views.

Judges have mentioned the burden of a preliminary hearing to rule on pretrial motions if there is an objection to virtual testimony or livestreaming. Most cases, however, are not contested through extensive litigation.[207] For the cases that are litigated, rulings on pretrial issues related to virtual testimony or livestreaming would be only one of many motions in limine that a judge would address before a trial.

Evidence from the federal pilot program of courtroom broadcasts is again compelling. The study's final analysis found that on average, judges "are likely to be favorable in their views of video recording."[208] The 2016 report found that the greatest demand on judges was notifying parties and obtaining consent.[209] The administrative demands of the program were lower in courts that standardized notice and consent procedures.[210] The primary modifications suggested by judges were changing to an "opt-out" system rather than an "opt-in" system, which avoided the need to obtain consent from all parties and instead place the duty on parties to object.[211]

Traditional concern about judicial respect is really a belief disguised as a worry that the perception of judicial inerrancy is more important than qualified and professional judges; as a result, the myth exists that decorum suffers from public access and community engagement. Symbols and pageantry are important, but accountability and adaptation are too. Preserving the solemnity and dignity of trial judges does not outweigh

205. *See generally* Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 325–26 (1992).

206. Studies of C-SPAN and C-SPAN 2 found an increase in speeches and speaking filibusters, but these findings are probably not translatable to criminal court where most people are not elected. *See generally* Franklin G. Mixon Jr. et al., *Has Legislative Television Changed Legislative Behavior?: C-SPAN2 and the Frequency of Senate Filibustering*, 115 PUB. CHOICE 139 (2003); Franklin G. Mixon Jr. et al., *Gavel-to-Gavel Congressional Television Coverage as Political Advertising: The Impact of C-SPAN on Legislative Sessions*, 39 ECON. INQUIRY 351 (2001).

207. *See infra* discussion on pleas in Part IV.

208. JOHNSON ET AL., *supra* note 42, at pmbl. Viii.

209. *Id.* at pmbl. X.

210. *Id.*

211. *Id.* at pmbl. ix.

constitutional rights or institutional accountability.[212] Respect for the criminal justice system and a judge comes from the community's knowledge and awareness, not mystery.[213]

An informed public should increase accountability, improve attorney quality, and improve defendants' outcomes.[214] Even if viewership numbers are low, the ability for the public to conveniently watch court and criminal cases is more important than the number of viewers. A small audience can be a lookout and notify the press or community about injustices.

C. *Virtual Voir Dire and Jury Trials*

Summoning a fair and representative jury, seating *attentive* jurors who can easily examine the evidence, and complying with the Confrontation Clause's requirements are what concern attorneys the most.

1. *Virtual Trials Can Be Fair and Functional*

Virtual trials are a recent possibility. While technology is not problem proof, the ability to evaluate testimony and view evidence has significantly improved, and virtual presentations can be enhanced with quality camera placement, lighting, and reliable internet speed.[215] Attorneys can train

212. *See generally* Harris, *supra* note 32, at 789–90 ("[T]he availability of accurate information necessary for intelligent voting translates into something more—accountability for our institutions.").

213. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980); Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596, 606 (1982).

214. *See id.*

215. High-speed internet is essential for virtual hearings. Most people have access to high-speed internet available for detained defendants, and jails also can provide high-speed internet access. *See infra* note 287. This is not to say that a smartphone is sufficient for a defendant to appear for a trial, but it should be sufficient for a brief check in with the court for a continuance. In our clinic, we sometimes conduct interviews with clients and they appear on their smart phone. Similarly, the local drug courts let people check in for court using their smartphone and attorneys report being able to evaluate a participant's conduct and sobriety and sanctions have been effective. Where quality is absent or costs are restrictive, courts can provide virtual terminals in a courthouse or public places like a library. *See infra* notes 288–90 and accompanying text. Some public school systems have also recently implemented free, high-speed internet programs for low-income students, which is a model courts can follow on a smaller scale for jurors or indigent defendants. *See, e.g.*, Vera Castaneda, *Spectrum and Other Providers Offer Free Internet for Students at Home*, L.A. TIMES (Mar. 20, 2020, 3:49 PM), https://www.latimes.com/socal/glendale-news-press/news/story/2020-03-20/spectrum-and-other-internet-providers-offer-free-internet-for-students-at-home [https://perma.cc/Z9U3-SDH6]; *see also* Lauren Camera, *Disconnected and Disadvantaged: Schools Race to Give Students Access*, U.S. NEWS (Apr. 1, 2020), https://www.usnews.com/news/education-news/articles/2020-04-01/schools-rush-to-get-students-internet-access-during-coronavirus-pandemic [permalink unavailable] (discussing the nationwide trend to expand internet access so students can attend virtual classrooms, and how the absence of internet access disproportionately impacts children of color—"37% of American Indian and Alaska Native children lack

on software, and judges can experiment with best practices.[216] As long as the pandemic continues, attorneys should consider that the alternatives—placing people in close proximity while wearing masks or behind plexiglass barriers—create a situation that is likely to increase juror prejudice, decrease jury deliberation time, and obstruct everyone from seeing expressions or hearing testimony.[217]

For a virtual hearing, administrative problems are similar, but management is different. For example, a judge needs to allow parties to speak but also control noise pollution. Virtual software allows a judge to manage noise and allow contemporaneous objections. Attorneys can be left unmuted by a judge but control their own mute buttons. As a backup, a limited chat feature can be left open to permit objections in the event a judge might mute a party. Attorneys and the judge could, alternatively, be present in the courtroom while jurors and witnesses are remote, or defense counsel and attorneys could be in the same physical space while appearing virtually.[218] There are many ways to manage a virtual hearing depending on the case and a judge's preferences.

Attorneys can also talk privately with defendants in virtual breakout or meeting rooms during a normal status hearing or during a trial recess.[219] These software tools allow the meeting host to separate the defendant and attorney into a separate session and rejoin the group after a private conference. Privacy settings in breakout rooms or chats can protect confidentiality and privacy. Using breakout rooms for virtual bench conferences may not add more time as compared to attorneys approaching a judge to discuss objections.

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access to the internet, 19% of black children and 17% of Hispanic children compared to 12% of white children and Asian children").

216. *See generally* STATE COURT ADMIN. OFFICE, MICHIGAN TRIAL COURTS VIRTUAL COURTROOM STANDARDS AND GUIDELINES, https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR_stds.pdf [https://perma.cc/5VLTBLZ7] (last updated Aug. 4, 2020); *see also* House Comm. on the Judiciary, *supra* note 88.

217. *See* Wilson, *supra* note 18, at 79–80 (commenting jurors during a pandemic are likely to "show up angry, scared, distracted, or all three," and arguing this scenario could benefit either the defense or the prosecution); *see also* Alana Richer, *Courts Get Creative to Restart Trials amid Pandemic*, ASSOCIATED PRESS (July 15, 2020), https://apnews.com/article/77a45ff4332687ccc63877f118e4d7bb [https://perma.cc/GD5M-CY3C] (discussing measures in trial courts such as plexiglass and concerns of infection).

218. This would be my preferred approach to a virtual trial to allow constant attorney–client interaction. During the pandemic, however, I have been able to communicate with clients by text or chat using a different platform than the judge and appeared using the same room as clients. Possibly determining if a virtual objection was contemporaneous could be easier for an appellate court because the objection would presumably be time stamped. While some attorneys may struggle with moving to a virtual format, many should have experience with virtual conferencing.

219. *See supra* note 218.

Once a jury is empaneled, the major difference in testimony and evidence presentation between traditional and virtual court is the format. In the Texas virtual trial experiment, jurors were bothered by household distractions (although that was a non-binding civil case which may have played a role in their lack of attention). Instructing jurors to pay attention and having a method to keep jurors' faces viewable on a screen may increase attention. Distracted or zoned-out jurors are not unique to virtual trials. Trial attorneys already pay close attention to jurors. Many have vivid memories of seeing wandering eyes, yawns, and blank stares. Attorneys can handle these issues just like in a traditional trial. If a juror seems especially distracted, a party can notify the judge and ask that the juror be questioned about paying attention.

Technology solutions can improve presenting evidence to jurors. Kiosks and court technology loans can supplement internet access issues, which is the threshold issue.[220] Technology can help jurors see or hear testimony better than in traditional trials. A juror can adjust their volume if they cannot hear well and can use screensharing and magnification features to see exhibits better. Admitted exhibits can be sent to a jury electronically through a link, and jurors can deliberate virtually.

Internet connections or glitches, of course, can affect a juror's ability to hear facts and arguments. Potential solutions include (1) adding jury instructions that mandate that jurors let the court know if their connection is disrupted, (2) polling the jury to see if a juror missed any testimony after each witness, and (3) either allowing re-examination or replaying recorded testimony.[221]

2. *Virtual Trials Can Allow Meaningful Confrontation as Constitutionally Required*

Attorneys are accustomed to in-person testimony, but the Confrontation Clause embodies only a "*preference* for face-to-face confrontation."[222] Confrontation may be limited to satisfy sufficiently important interests.[223] For instance, in *Maryland v. Craig*,[224] the Supreme Court allowed a defendant a constitutionally sufficient opportunity to test a child witness's credi-

220. *See generally* Angela Morris, *Now Trending: 'Zoom Kiosks' to Breach Digital Divide Between Public and Remote Courts*, LAW.COM: TEX. LAW. (May 29, 2020, 3:11 PM), https://www.law.com/texaslawyer/2020/05/29/now-trending-zoom-kiosks-to-breach-digital-divide-between-public-and-remote-courts/ [https://perma.cc/P8TB-NQ3F].

221. This is not to say jurors should be permitted to endlessly watch replays of testimony; only that if a virtual trial is implemented, these are potential solutions. A judge should use discretion to prevent any potential abuses of replaying by a juror. This worry could make allowing re-examination a better solution than replaying testimony.

222. Maryland v. Craig, 497 U.S. 836, 849 (1990) (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)).

223. *Id.* at 849–51.

224. 497 U.S. 836 (1990).

bility and substance of testimony before the jury, after defendant's counsel cross-examined the child witness and revealed her general demeanor.[225] The Court held:

> That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in *Coy*, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.[226]

Using the Court's test from *Craig*, if a defendant objects to virtual testimony, a court should evaluate whether there is an important public policy interest and the testimony's reliability. Even when the *Craig* test is not met, a defendant may benefit from choosing or allowing virtual testimony. Often, pretrial hearings involve only a few witnesses or testimony on limited issues. A defendant may prefer to proceed with a virtual hearing instead of sitting in pretrial detention while their case is rescheduled. In this sense, virtual hearings and trials should improve a defendant's outcome.[227]

Defense attorneys often demand in-person testimony based on the received wisdom that jurors and judges can evaluate testimony better when they can physically observe a witness.[228] Just as the belief in demeanor evidence has been questioned,[229] research shows defendants may benefit from virtual testimony. One frequently cited study comparing credibility judgments between in-person and televised child testimony concludes that the format affected viewers' assessment of a witness's credibility. For example, mock jurors in one study rated child witnesses who testified in-person as more accurate, intelligent, attractive, and honest than children who testified on closed-circuit television.[230]

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225. *See id.* at 851–54.

226. *Id.* at 850 (first citing Coy v. Iowa, 487 U.S. 1012, 1021 (1988); then citing *Coy*, 487 U.S. at 1025 (O'Connor, J., concurring)).

227. From the prosecution perspective, virtual testimony may encourage prosecution witnesses to testify in some situations. Often this technology is already used for juvenile victims by allowing them to testify by video even when a criminal hearing or trial is in-person. In a general sense, it allows witnesses the option to not be in the physical courtroom, which can be intimidating, and it makes it easier for witnesses by avoiding traveling to court for the preliminary hearings. Virtual hearings also allow witnesses to not sit around waiting for their turn to testify.

228. *See* Dubin Research & Consulting, *supra* note 18, at 26–39; *see also supra* note 20.

229. *See generally* Bandes & Feigenson, *supra* note 25.

230. *See* Holly K. Orcutt et al., *Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials*, 25 LAW & HUM. BEHAV. 339 (2001); *see also* Bandes & Feigenson, *supra* note 25, at 1318–19, 1342 (speculating that the lack of physical presence may lead to less empathy and

These studies, though, are decades old. Current technology and its adoption by more people, along with quality camera placement and connection speeds, can allow people's body language and facial expressions to be evaluated. A more recent study questioning jury instructions on credibility determined that

> [t]he idea that nonverbal behavior is revealing about deception is a myth. Two factors probably contribute to this myth about the importance of nonverbal behavior in lie detection. First, people often overestimate the importance of nonverbal behavior in the exchange of information. . . . The second factor that may contribute to the myth about the importance of nonverbal behavior in lie detection is the idea that behavior is more difficult to control than speech.[231]

Even with research that shows people are not good at determining credibility, the belief in human lie detection is persistent.[232] Studies demonstrate that judges and juries should not depend on social or nonverbal cues to evaluate credibility.[233] Analysis of immigration decisions reveals that, despite attorney discomfort with the process, outcomes may not be

citing the recent experiences of people who felt virtual court did not seem real, such as person whose divorce was adjudicated in a Zoom hearings); Gail S. Goodman et al., *Face-to-Face Confrontation: Effects of Closed Circuit Technology on Children's Eyewitness Testimony*, 22 LAW. & HUM. BEHAV. 165 (1998) (discussing that in a experiment of child testimony to mock jurors, jurors ability to determine the accuracy of testimony was not diminished by closed-circuit video testimony, but showed some bias by jurors toward the testimony based on perceptions of demeanor confidence). *But see* Eagly, *supra* note 31, at 976–77 ("Research conducted primarily on remote child victim testimony in simulated criminal trials has found that televised testimony has no observable effect on jury verdicts."). To be sure, a virtual chat and an in-person chat are not the same just as a virtual and a physical hug are not the same, but the concern is whether virtual testimony is adequate. As for court experiences not feeling "real," that is common. I have had many times as a trial lawyer where clients have said what is happening does not feel real. Most experiences in a courtroom are abnormal in comparison to the rest of life.

231. Aldert Vrij & Jeannine Turgeon, *Evaluating Credibility of Witnesses—Are We Instructing Jurors on Invalid Factors?*, 11 J. TORT L. 231, 237–38 (2018); *see also* Rocksheng Zhong, *Judging Remorse*, 39 N.Y.U. REV. L. & SOC. CHANGE 133, 145, 155–60 (2015) (finding in an empirical study of Connecticut judges that judges were inconsistent with their confidence in evaluating remorse or how they interpreted verbal and nonverbal cues).

232. *See* Bandes & Feigenson, *supra* note 25, at 1284–85, 1293 n.48 (critiquing the belief in the reliability of demeanor evidence as based on widely held fallacies, and noting the problem may be exacerbated by virtual hearings despite improving technology in some ways and reduced in other ways); *see also* Lauren Kirchner, *How Fair is Zoom Justice?*, MARKUP (June 9, 2020, 10:00 AM), https://themarkup.org/coronavirus/2020/06/09/how-fair-is-zoom-justice [https://perma.cc/LP3V-EY95] (noting media critiques of virtual court, including the dehumanizing aspect of video court). *But see* Eagly, *supra* note 31, at 978–84 (addressing how immigration video hearings affected detained litigants feeling of fairness and the dehumanizing effect while noting the conditions of confinement contributed to these responses).

233. *See* Bandes & Feigenson, *supra* note 25, at 1286–87 ("What is believable depends as well as on the assumptions and biases of the fact-finder who is evaluat-

affected by technology as much as perceived.[234] For instance, one immigration attorney noted, "I can't think of any case that I've handled where I could say that [televideo] might have made a difference," and an immigration judge explained "judges are taught to focus on the content of testimony rather than nonverbal cues, video does not make a difference because 'you really watch a person on that screen and you really pretty much can hear them the same way you can hear them [in person].'"[235] In a recent essay discussing mask wearing and its impact on demeanor, one scholar commented, "[d]emeanor is understood to be a guide to a witness's credibility in the sense that we can 'read' it for clues to a person's truthfulness. Probing behind this assumption reveals it to be both culturally mediated and without basis in science, rather than reflecting a truism about human beings."[236]

Still, many defense attorneys and judges emphasize the need for proximity believing they can assess credibility by observing appearances and nonverbal actions.[237] As Judge Nations shared in Washington County, Arkansas, for example, he believes he can determine a defendant's bail, in part, on how a defendant appears through current virtual technology.[238] While Judge Nation may not be considering the appropriate factors, he is determined to observe defendants' appearances, even if, as Judge Richard Posner remarked, "[j]udges fool themselves if they think they can infer sincerity from rhetoric and demeanor."[239]

Whether a trial is virtual or traditional, and as long as the pandemic continues, criminal courts are in unexplored territory, and attorneys have to adapt as advocates.[240] Preserving a record in either scenario will require new issues to be litigated, and avoiding a virtual trial does not, by

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ing a witness—whether a story seems believable will depend on whether it resonates with a fact-finder's experience of the world." (footnote omitted)).

234. *See* Eagly, *supra* note 31, at 973–74.

235. *Id.* at 972, 974 (alterations in original) (footnote omitted) (first internal quotation marks omitted) (first quoting Telephone Interview #18 with Partner, Small-Size Law Firm (Aug. 21, 2013) (on file with author); then quoting Telephone Interview #48 with Representative, Nat'l Ass'n of Immigration Judges (Jan. 21, 2014) (on file with author)).

236. Simon-Kerr, *supra* note 25, at 161.

237. *See supra* notes 18–21. *But see* M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 321 (2018) ("Accurately assessing nonverbal behavior, however, is difficult. We erroneously assume that certain expressions, postures, and gestures have universal meaning.").

238. *See* E-mail from the Honorable Graham Nations, *supra* note 109.

239. United States v. Wells, 154 F.3d 412, 414 (7th Cir. 1998) *cited by* Bandes & Feigenson, *supra* note 25, at 1284 n.19.

240. Briefly, this includes advocating or making a record on appeal through motion practice for a number of issues, including tolling of a speedy-trial, court set-up, client placement, Confrontation Clause concerns, assurance that jurors are from a fair and accurate cross-section of the community, and objections to excused jurors during jury venire. Consider the simple example of a trial where the defendant objected to either a virtual or traditional hearing on confrontation grounds. A motion in limine would need be filed, an attorney needs to proffer alternatives,

itself, lead to meaningful confrontation.[241] The defense bar consensus that virtual trials are inferior does not apply to every case.[242] Defense attorneys need to consult with clients and consider a virtual or hybrid approach to be effective counsel.

3. *Virtual Jury Trials Can Meet Constitutional Requirements and Possibly Improve Jury Diversity and Deliberation*

As long as a jury reflects a fair and accurate cross section of a defendant's community and complies with jury qualification rules, it meets the Constitution's initial threshold.[243] A jury still has to be attentive, and voir dire has to be meaningful for a virtual jury trial to fulfill due process standards and safeguard rights as well as a traditional trial.

Jurors do not volunteer for court, and voir dire of highly personal matters—for instance, a juror's experience with substance use or sexual abuse—is highly sensitive.[244] In the Arkansas example, the state supreme court's administrative rules and guidance on criminal jury trials seem counterintuitive.[245] The most difficult part of a trial in a virtual format is voir dire. And a quality jury selection in most cases would require extensive use of private breakout rooms to ask sensitive questions, and additional time for conversations with potential jurors.

This is again where a defendant's strategic interest in limiting public access may conflict with the public's First Amendment right to public access. Few attorneys want to ask jurors personal and sensitive questions in a public, virtual format. Effective voir dire, if done virtually, would require significant use of breakout rooms. Courts have rejected most arguments

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and the attorney needs to object contemporaneously with each witness and move for a mistrial to make an adequate appellate record.

241. Wearing masks, social distancing, and plexiglass barriers may violate the confrontation clause more than virtual examination. The obstruction from masks and barriers disrupts sound and non-verbal behaviors too. *See supra* note 24; *see also* Dubin Research & Consulting, *supra* note 18, at 26–39; *see also supra* note 20 (discussing the opinions of defense attorneys about pandemic trials).

242. *Cf.* Dubin Research & Consulting, *supra* note 18, at 26–39; *supra* note 20.

243. *See generally* Taylor v. Louisiana, 419 U.S. 522 (1975) (a representative cross-section of the community is fundamental to the jury trial guaranteed by the Sixth Amendment, that such requirement is violated by the systematic exclusion of women from jury panels); *see also* Nina W. Chernoff, *No Record, No Rights: Discovery & the Fair Cross-Section Guarantee*, 101 IOWA L. REV. 1719, 1755–60 (2016) (discussing the varieties of states that fail to ensure a constitutional jury); Wilson, *supra* note 18, at 82–85 (noting surveys that show Black, indigenous, and people of color (BIPOC) and Democrats are more likely to be concerned about COVID-19, which implicates the diversity of a jury panel).

244. *See* Wilson, *supra* note 18, at 67 (discussing how voir dire requires jurors to discuss sensitive information); *see also* CONG. RESEARCH SERV., *supra* note 42, at 20 (citing Steven D. Zansberg, *The Public's Right of Access to Juror Information Loses More Ground*, COMM. LAW., Winter 2000, at 11–15).

245. *See supra* note 104.

that exclude the public from jury selection,[246] and exclusion over a defendant's objection is reversible error.[247] A solution is for the court to allow public virtual jury selection but restrict public access to sensitive conversations with breakout rooms, which mimics how courts conduct traditional trials.

Every trial attorney worries a juror might watch or hear about evidence not admitted, view proffered testimony, or learn about rulings on objections. Jurors are already vulnerable to hearing about information outside the purview of the jury from media and courtroom attendees.[248] At least two ways exist to protect defendants in such instances.

The first is to expand on jury instructions to further mandate jurors not to discuss the trial with others or watch any coverage while empaneled, and add more alternative jurors if one does not obey the instructions. The second is to restrict livestream and virtual access while a trial is in progress. This can be done by livestreaming only the parts of the trial already before a jury or requiring registration of viewers who want to watch the trial and levy a penalty for recording. Rules against third-party recordings can be enforced by contempt penalties just like other violations are sanctioned.

An unexplored question is how jurors' behavior may change in a virtual format. Some jurors may feel more comfortable in a virtual situation; while most people have used Facetime or Skype to speak with family and friends, and many have implemented Zoom and Microsoft Teams in their workplace, a courtroom is a strange and often intimidating place to people unfamiliar with the justice system. Jurors may consider the consequences of their decisions the same, feel less irritation toward parties for summoning them for duty, or spend less time examining the defendant who will be off camera.[249]

Even though a virtual jury trial can be functional and protect constitutional rights, some questions cannot yet be answered. One compelling question is how virtual jury rooms may affect deliberations. Will jurors deliberate longer if they are not physically enclosed or feel less pressure to compromise? We do not know, which is why virtual jury trials—while

246. *See, e.g.,* Press-Enterprise Co. v. Superior Court of Cal. (*Press-Enterprise I*), 464 U.S. 501, 509–10 (1984).

247. *See, e.g.*, Presley v. Georgia, 558 U.S. 209, 216 (2010).

248. *See, e.g.,* Chandler v. Florida, 449 U.S. 560, 575 (1981).

249. The presence of a defendant during a virtual trial deserves discussion. Presumably a defendant will not be in constant view like a traditional trial. This significantly eases the defense attorney's burden to constantly monitor a client's demeanor. On the other hand, defendants need access to communicate with their attorney during the trial through either being next to their attorney or having an ability to confidentially chat on a platform. Courts must also safeguard a detained defendant from any signifier of being in custody, including where they are located during a trial. Also consider, the irritation jurors summoned to an in-person trial during a pandemic may feel. *See* Wilson, *supra* note 18, at 74–77 (describing the health risks and inconveniences that jurors summoned for in-person jury trials face from voir dire to deliberation).

promising—should currently be optional, not mandated.[250] While many questions are currently impossible to answer, courts can become more responsive, efficient, and fair by allowing a remote or virtual option for hearings or testimony.

IV. PUBLIC ACCESS CAN INCREASE LEGITIMACY AND TRANSPARENCY

Public access to the courts promotes democratic competency in the public. This, in turn, helps citizens engage in better institutions and enables reform because information supports effective self-government.[251] Convenient public access to courtrooms lets the people gain a greater understanding of the judicial system and local cases.[252] It also provides the public with a portal into the criminal justice system that does not exist when courtrooms are cloistered. "[A] trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place."[253]

The current status of public access, however, has been described as "[a] room [that] is open to the public, but this is effectively a quasi-secret proceeding. For the vast majority of the population—those lacking the time or resources to travel to this out-of-the-way destination—the trial will be experienced, if at all, via second-hand accounts in the press."[254] Noting the "community therapeutic value" of openness, the Supreme Court has said, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[255]

Beyond due process, the *appearance* of fairness is also important. The public's ability to be alerted when the justice system is deficient is critical

250. Ideally, lower level cases should be tried first while virtual trials are a necessity due to the pandemic to allow approaches and outcomes to be studied. Other scholars have suggested a different approach of trying only the most serious cases in-person. *See id.* at 95 ("As an initial matter, only serious charges should be tried during the pandemic."). This argument is based on the logic that if a jury must encounter higher risks of COVID-19 exposure, the stakes of the case had better be high too. I must admit I do not agree with the logic of trying the most serious cases when concerns about the representativeness of juries and juror attention are at the highest or agree that plea bargaining can alleviate some of the concerns. This also neglects the concern that people with non-serious cases who are in-custody are disproportionately affected by postponing trials.

251. *See* Ardia, *Court Transparency and the First Amendment*, *supra* note 34, at 839–40.

252. *See* Rosenfeld, *supra* note 30, at 19; *see also* Tuma, *supra* note 30, at 419–20 (stating that the benefits of filming courtroom proceedings far outweigh the risks given that modern technology is minimally intrusive).

253. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 578 (1980).

254. Kozinski & Johnson, *supra* note 32, at 1109 (describing a camera free courtroom as an apocryphal judicial "Garden of Eden"); *see also* Simonson, *supra* note 26, at 2177 (noting the exclusion of the public from criminal cases).

255. *Richmond Newspapers*, 448 U.S. at 570, 572.

to hold the judicial branch accountable and essential to its legitimacy.[256] An unjust system, or the widespread perception of injustice, diminishes the moral force and authority of the justice system.[257]

Many criminal justice systems encourage broad public access.[258] One example comes from international tribunals. When prosecuting war crimes in the former Yugoslavia, the tribunal administrators deemed public involvement essential. The tribunal staff advocated for cameras because "cameras enabled the workings of the court . . . to be revealed to the international community."[259] Reflecting on the extensive history of open criminal trials in English and American jurisprudence, the Supreme Court emphasized:

> [T]he significant community therapeutic value of public trials was recognized: when a shocking crime occurs, a community reaction of outrage and public protest often follows, and thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," which can best be provided by allowing people to observe such process. From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, it must be concluded that

256. *See* Harris, *supra* note 32 (discussing how procedural television shows and commercial court broadcasts erode the public's awareness of the justice system and set unrealistic expectations).

257. *See Richmond Newspapers*, 448 U.S. at 567 ("Indeed, when in the mid-1600's the Virginia Assembly felt that the respect due the courts was 'by the clamorous unmannerlynes of the people lost, and order, gravity and decorum which should manifest the authority of a court in the court it selfe neglected,' the response was not to restrict the openness of the trials to the public, but instead to prescribe rules for the conduct of those attending them." (citing and quoting ARTHUR SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 132 (1930))); *see also* LEO TOLSTOY, WAR AND PEACE 960–61 (Richard Pevear & Larissa Volokhonsky trans., Vintage Books reprt. ed. 2011) (1836) (describing the Napoleonic tribunal "[w]ith . . . [the] precision and definiteness which is supposedly above human weakness, and with which the accused are usually treated, Pierre, like the others, was questioned . . . . These questions, . . . like all questions asked at trials, were aimed at only furnishing that channel down which the judges wished the answers of the accused to flow, leading him to the desired goal, that is incrimination. . . . Pierre experienced the same thing than any accused man experiences in any court: perplexity as to why all these questions were being asked him.").

258. *See* Youm, *supra* note 33, at 2025 ("[T]elevision, as a medium, has the power to place the public inside the court room and actually observe the proceedings. If openness is the objective, this is about as good as it can get." (internal quotation marks omitted) (quoting Beverly McLachlin, *The Relationship Between the Courts and the News Media*, *in* THE COURTS AND THE MEDIA: CHALLENGES IN THE ERA OF DIGITAL AND SOCIAL MEDIA 32 (Patrick Keyzer et al. eds., 2012))).

259. *Id.* (quoting Paul Mason, *Reflections of International Law in Popular Culture: Justice Seen to be Done? Electronic Broadcast Coverage of the International Criminal Tribunal for the Former Yugoslavia*, 2 J. INT'L MEDIA & ENT. L. 210, 213 (2001)).

> a presumption of openness inheres in the very nature of a criminal trial under this Nation's system of justice.[260]

While criminal trials have evolved, a belief persists that public viewership will sensationalize cases.[261] A long-standing argument against broadcasting criminal cases is that it can misinform the public and distort the facts of a trial. This concern is more valid when courtroom broadcasts are commercialized.[262] This worry, by itself, is constitutionally insufficient to restrict public access.[263]

Convenient and broad public access offers unexplored benefits to the criminal justice system. It allows the community access but avoids selection or editorial bias. It also allows the public to monitor cases at a time when the Fourth Estate is financially struggling to fill any reporting gaps.[264] A court livestream provides a complete and accurate image of the criminal justice system. This counteracts inaccurate stereotypes and exposes attorneys and judges to public scrutiny.[265]

Modern technology and media consumption have fostered an expectation that more complete information about a news event will be readily available online. Primary source documents and raw video footage of political proceedings or newsworthy events are often available on the internet, therefore contributing to the sense that information about today's current events does not have to be mediated by the press. Thus, the contemporary "cameras-in-the-courtroom" debate today may be framed in part to improve direct public access to information about court proceedings.[266]

Livestreaming criminal court as a public service, similar to CSPAN, allows a broader audience to conveniently watch unedited court proceed-

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260. *Richmond Newspapers*, 448 U.S. at 556 (quoting Offutt v. United States, 384 U.S. 11, 14 (1954)).

261. *See supra* note 34 and accompanying text.

262. *See* Harris, *supra* note 32, at 821–25 (discussing the negative aspects of CourtTV, which, while countering scripted court dramas, glamorized litigation and had selection bias).

263. Chandler v. Florida, 449 U.S. 560, 575 (1981).

264. *See* Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) ("The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."); *see also* Cochran, *supra* note 35, at 431 ("[O]ver 65 million Americans live in counties with only one local newspaper—or none at all." (internal quotation marks omitted) (quoting Clara Hendrickson, *Local Journalism in Crisis: Why America Must Revive Its Local Newsrooms*, BROOKINGS INST. (Nov. 12, 2019), https://www.brookings.edu/research/local-journalism-in-crisis-why-america-must-revive-its-local-newsrooms/ [https://perma.cc/6XGW-VMXH])).

265. *See* Harris, *supra* note 32 at 826–27 (noting concept of "Community Court TV" would allow viewers an objective look at their local court system, judges, and the seriousness and type of proceedings in their community).

266. *See* CONG. RESEARCH SERV., *supra* note 42.

ings.[267] This mitigates unrealistic expectations created by television procedurals and entertainment court shows. Convenient access lets people access the primary source. This enhances legitimacy, especially in a media environment where snapshots of court are printed in papers or broadcast on the news, which may be out of context or lead to public distrust if people cannot access the full proceeding. Convenient public access should affect the criminal justice system, but a claim that public viewing causes harm is speculation.[268] A typical court day probably will not be a ratings sensation. A livestream should not be entertainment. It should be documentary.

Pleas are prosaic, and objections in real life are different than on scripted dramas (although criminal court hearings can sometimes be entertaining as well as informative). A livestream allows viewers such as family, friends, and students to easily view proceedings.[269] Livestreaming also allows attorneys and students to observe judges and cases to improve their knowledge and skill Most importantly, a livestream allows the community to follow high profile cases when interest piques.

This interest is not hypothetical. Public interest in the Minnesota case where George Floyd was murdered is an example of considerable and national public interest. Even where cases are not national news, the press, families, and justice advocates routinely watch court (when they can) to track cases, gather data, and report on injustices. These goals are why the press has sought access in Minnesota, and why Court Watch and advocacy groups have demanded their right to watch criminal courts in California and Arkansas.

Livestreaming court proceedings can benefit more people than just the press or justice advocates. Convenient access to court cases can expand community knowledge. Research shows that more convenient public access increases overall viewership.[270] In a federal pilot program of courtroom broadcasts, "[a] majority of the participating judges and attorneys surveyed thought that video broadcasts of court proceedings increased public access or education to a moderate or great extent."[271] The study found that numerous surveyed viewers "stated that they watched the video due to a general interest in proceedings or for an educational rea-

267. *See generally* Levi, *supra* note 33, at 326–28 (discussing the public benefits of open access in the realm of political debate).

268. *See* CONG. RESEARCH SERV., *supra* note 42, at 22 n.117 (citing COHN & DOW, *supra* note 32, at 62).

269. *Id.* at 18. ("[I]t is often argued that the public would benefit from the improved openness and transparency that videos of the court would bring. By seeing inside the courtroom, observing full arguments, and seeing the norms court participants follow, the public may better understand the judicial process.").

270. *See id.* at 11.

271. *Id.* at 11.

son."[272] Community engagement serves the criminal justice system's goal to achieve justice, and civic knowledge supports reform.

Through transparency and knowledge, the public can be engaged and empowered to hold courts and attorneys accountable. An interested voter can assess a prosecutor's approach to a case, a prospective client can evaluate a possible attorney, and justice reform organizations can track case outcomes and measure performances. A livestream may also be recorded for training or education opportunities (with court permission and likely without public archival). Similarly, viewers interested in what is shown on the news or social media can investigate the source material by watching the livestreams. In this sense, court livestreams (or any form of convenient public access) increases legitimacy, strengthens accountability, and helps the public be informed and engage with the criminal justice system.

Sometimes what is boring shows what is broken.[273] In a system defined by "The Pathological Politics of Criminal Law," criminal justice has devolved too often into a system defined by prosecutorial power.[274] This is shown by the evolution of the criminal justice system into a plea system.[275] Across the country, "ninety-four percent of state convictions are the result of guilty pleas."[276] Public attention can restore accountability in a plea bargaining system where media coverage and public attendance is usually absent.[277]

There are many explanations for the prominence of pleas. Pleas may be mundane, but their prominence is important. Public exposure can cast a light into the shade of daily plea hearings. A compelling explanation for the phenomenon is that a defendant wants the lowest sentence, while a prosecutor aims for a sentence based on their personal case evaluation or an office policy. This leads to a system based on plea negotiations and charge bargaining.[278] A typical negotiation involves prosecutors "trad[ing] away 'extra' years of incarceration the defendant desperately

272. *Id.* In 2014, of 21,530 people who viewed a pilot program recording, 258 viewers completed a survey. *Id.*

273. *See* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1306 (2018) (describing how charge bargaining drives mass incarceration through a "subconstitutional state law of criminal procedure").

274. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 579–80 (2001).

275. *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548–50 (2004) (discussing the plea bargain as a broken "settlement market" that favors prosecutors that has dynamically changed the criminal justice system).

276. Lafler v. Cooper, 566 U.S. 156, 170 (2012); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2466 n.9 (2004) ("In 2000, of approximately 924,700 felony convictions in state courts, about 879,200 (95%) were by guilty plea.").

277. *See generally* Simonson, *supra* note 26 (discussing how public access can provide accountability in a system where jury trials are rare).

278. *See* Crespo, *supra* note 273, at 1310–16.

wants to avoid but that the prosecutor doesn't particularly value."[279] With high sentencing ranges for most cases, prosecutors can leverage charge bargaining to extract guilty pleas.[280] The methods used to achieve guilty pleas, crimes chosen for prosecution, sentences imposed, and people convicted become visible when public observation is possible.

Unlike the current plea system, the goals of the justice system are exalted. In the justice system, cases are not prosecuted only on behalf of victims, but in the interest of society because a crime is committed against the community when a law is broken.[281] Society uses language in charging documents such as, against the peace and dignity of a state. There is sometimes a literal victim of a crime, but protecting a community's sense of security, fairness, and justice is frequently a higher goal of criminal justice.

Similarly, sentencing factors include deterrence, and heinous offenses are publicly condemned. When covering the public multi-month trial of a war criminal and *genocidaire* as a journalist, Hannah Arendt commented, "[t]he very monstrousness of the events is 'minimized'" when a trial is conducted by only a limited tribunal.[282] She observed that broadcasting the crime and the perpetrator's trial is essential to allow a community to grieve, heal, and also remember the need to prevent future offenses.[283]

If the purpose of a justice system includes achieving community justice and deterring crime, meeting these goals is easier when criminal proceedings are public and community engagement is convenient. The tradition of encouraging the public to view important cases exists because justice requires community participation and acknowledgment. Beyond improving transparency, encouraging better attorneys, and increasing public officials' accountability, the justice system's broader societal significance is accomplished when the community can watch.

V. REMOTE AND VIRTUAL HEARINGS CAN IMPROVE THE QUALITY OF INDIGENT DEFENSE

Even when virtual hearings are no longer a pandemic necessity, virtual and remote hearings can replace some physical court appearances and be used as an option more frequently. The essential requirement is that virtual hearings still ensure access and fairness.[284] The argument that there is no substitute for evaluating in-person testimony in a remote, vir-

279. *Id.* at 1312.

280. *Id.* at 1310–16.

281. *See generally* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 570–71 (1980).

282. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 270 (Penguin Books 5th ed. 2006) (1963).

283. *See id.*

284. *See generally* James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241 (2012).

tual hearing is based on anecdotes—not studies—and neglects the significant improvement in technology.

Courts and policy makers should not ignore the difficulties of conducting remote and virtual hearings in some areas. Dependable internet access is a concern for virtual trials. Many Americans, especially in rural areas, lack reliable, high-speed internet connection—not to mention sufficient technology.[285] These issues disproportionately impact poorer Americans and can skew the jury pool. Even when internet access and sufficient technology exists, connections may lag or slow, which can cause jurors to miss important moments. Poor internet access or technology should be a factor in considering whether a virtual trial or remote testimony is appropriate, but it should not be a bar.

The areas with poor internet access are often the most rural or low-income—usually the areas where defendants and courts would benefit the most from virtual hearings.[286] The substantial cost savings to governments from virtual hearings could be used to provide technology and expand high-speed internet access. Internet access is also not completely absent in most places or out of reach for indigent clients. A study conducted by the Pew Research Center found that eighty-one percent of Americans have a smartphone, which indicates wide access to virtual platforms.[287] As long as technology and internet access is available, attending a court hearing can be done by downloading an app and logging into a virtual hearing.

Courts can modify the conditions of the virtual hearing to make reasonable accommodations, such as limiting virtual hearings to preliminary hearings or allowing witnesses or counsel to appear virtually. Remote access for jurors can provide adequate technology as well by setting up terminals or providing technology and internet access for the duration of the trial. Texas has set up virtual Zoom kiosks in courthouses.[288] Other states have added kiosks to attend virtual court in libraries, conference centers, and other public spaces.[289]

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285. Monica Anderson et al., *10% of Americans Don't Use the Internet. Who Are They?*, PEW RES. CTR. (Apr. 22, 2019), https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/ [https://perma.cc/BT3V-89PG].

286. *See* ZORZA, *supra* note 41; *see also* Pruitt et al., *supra* note 40, at 51–52, 52 n.155; *see also* Katheryn Hayes Tucker, *Rural Lawyer Shortage Concerns Leaders of the Legal Profession; Access to Justice: The Rural Lawyer Gap*, LAW.COM: DAILY REP. (Jan. 8, 2015, 6:00 PM), https://www.law.com/dailyreportonline/almID/1202714375765/Rural-Lawyer-Shortage-Concerns-Leaders-of-the-Legal-Profession./ [https://perma.cc/7ATM-7TLQ] (discussing the access to counsel challenges in rural areas).

287. *See id.*

288. *See* Morris, *supra* note 220.

289. *Id.*

The limited research on how technology improves representation has focused on expanding legal aid.[290] From these studies, it appears virtual and remote hearings can help expand the quality of representation for indigent defendants.

A. *Expanding Quality Representation for Low-Income Defendants*

The failure of indigent defense is well-known. There are many egregious examples, such as Missouri's public defender implementing a waitlist or the public defender's office in Broward County, Florida, implementing an office policy in 2005 that attorneys could not advise clients to plead guilty without meaningful client contact.[291] In 2004, the ABA review of indigent defense found that "[o]verall, our hearings support the disturbing conclusion that thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation."[292]

Technology and virtual hearings can help with overloaded public defender offices and expand the reach and specialization of attorneys for indigent clients. Technology directly helps clients by making it easier to attend court dates and communicate with attorneys. It also allows attorneys to work more efficiently and effectively.[293]

Virtual hearings should not, ideally, be the new normal, but they can allow more flexibility and expand access to quality representation. Courts and attorneys gain flexibility, save time, and reduce cost. Attorneys may also practice more easily in underserved areas without living there. All of these benefits improve the quality of indigent defense.

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290. *See* ZORZA, *supra* note 41; *see also* Pruitt et al., *supra* note 40, at 51–52, 52 n.155 (discussing successful legal aid efforts to reach rural California residents using video technology).

291. *See* Backus & Marcus, *supra* note 39, at 1033–34.

292. Zachary Zurek, *Gideon's Promise: Can the Michigan Indigent Defense Commission Act Fix the State's Broken Indigent Defense Delivery System*, 61 WAYNE L. REV. 123, 126 n.24 (2015).

293. Virtual hearings have made it easier to attend multiple short hearings in one day in different courts. There have been several times during the pandemic when I attended two Zoom dockets on the same morning. Virtual hearings have also expanded the geographic range where I can effectively represent clients. Similarly, meeting with clients, especially clients who are detained or in prison, is also much easier and more meaningful with videoconferencing than by phone. These benefits were predicted before technology caught up and can help attorneys with large caseloads, especially public defenders. *See* Poulin, *supra* note 30, at 1166 (commenting on the "relaxed and effective informal communication" virtual communication allows and arguing "[t]he courts should make videoconferencing available to defendants and their attorneys to enhance the interaction between incarcerated defendants and their counsel, which is often characterized by neglect and disengagement").

1. *Virtual and Remote Court Hearings Can Reduce Assembly-Line Justice*

A familiar proposal to solve the indigent defense crisis is to increase participation from the private bar.[294] Principle Two of the ABA's Ten Principles of a Public Defense Delivery System says, in aspiration, "[w]here the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar."[295] Poor representation often happens because of high caseloads and the reluctance of quality attorneys to work in underserved areas.[296] Many underserved areas include small communities and indigent residents, thus, compounding these problems. Sustaining a local private practice is nearly impossible.[297] So attorneys—public and private—perpetuate the advocacy gap by avoiding high need areas.

The cost savings from virtual hearings can be passed on to paying clients, and attorneys can expand their practice region. This allows clients greater choice because the pool of realistically available attorneys is larger, and the savings potentially lower the cost of an attorney, as the market becomes more competitive and overhead is reduced. A possible benefit is a reduction in public defender caseloads—either because private attorneys lower their rates, begin practicing in more areas, or become more likely to accept pro bono cases. The flexibility of remote and virtual hearings allows attorneys with experience—such as attorneys with juvenile cases or trial practice in a larger area—to work in specialized units with greater ease.

Economists have endlessly studied the issue of whether cost savings are passed on to consumers.[298] The answer is often based on the industry and the industry culture. Legal representation includes ethical duties and voluntary guidelines of pro bono service.[299] Realistically reducing the costs of representation will incentivize only some attorneys to voluntarily lower costs or take more pro bono cases—sometimes a small effort can have a big impact.[300] Enhancing the size of a criminal defense legal mar-

294. Tucker, *supra* note 288.

295. AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002).

296. *See generally supra* note 39 (highlight public defender caseloads).

297. *See* Tucker, *supra* note 288.

298. This is called cost pass through in economics and describes what happens when a business changes the prices of its products or services when their costs change. *See generally* Sam Peltzman, *Prices Rise Faster than They Fall*, 108 J. POL. ECON. 466 (2000) (discussing a phenomenon where prices are twice as likely to rise as they are to fall, but falling prices when cost savings occur is a sign of a competitive market).

299. ABA Model Rule 6.1 says private attorneys should provide fifty hours of pro bono services each year. *See* MODEL RULES OF PROF'L RESPONSIBILITY r. 6.1 (AM. BAR. ASS'N 2019).

300. The benefit of even a small amount of pro bono or low bono services can have incredible symbolic significance. In indigent defense, the presence of pro bono counsel increases attorney morale, changes the static nature created when the same prosecutors and defense attorneys jousting in the same courtrooms while

ket and reducing overhead costs, similarly, can create competition, which theoretically reduces prices and likely increases client choice.[301]

2. *Expanding Indigent Legal Representation Through New Technology Can Help Shrink Legal Deserts*

Quality legal representation is linked with pay and location. The absence of adequate indigent defense is apparent in areas with a low attorney-to-population ratio—considered legal deserts. These areas are often rural.[302] Studies show indigent rural residents are half as likely to receive legal aid assistance as urban residents.[303] Inadequate public defense systems have contributed to higher rural jail populations (which have risen over 400% between 1970 and 2013 while some urban jail population rates have fallen) and mass incarceration.[304]

Beyond the lack of attorneys in underserved areas, most legal aid and public defender models rely on some form of local funding, which often means the poorest regions receive the fewest resources.[305] For public defender funding, sixteen states fund indigent defense primarily at the county level, while Pennsylvania and Utah fund it entirely at the county level.[306] Twenty-eight states fully fund indigent defense with state revenue while another four are primarily state funded.[307]

In 2007, Montana Legal Services (MLSA) published a report of the Montana Video Experiment.[308] The study concluded that the use of video court increased access to justice in the legal aid context. It also found that although appearance and participation by video were not the same as in-person appearance, in most cases, the benefits outweighed the problems:

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adding new ideas, and increases the sense of respect for work that sometimes feels like a Sisyphean task.

301. *See* Peltzman, *supra* note 298.

302. *See* Pruitt et al., *supra* note 40, at 19.

303. LEGAL SERVICES CORP., *supra* note 40.

304. *See* JACOB KANG-BROWN & RAM SUBRAMANIAN, VERA INSTITUTE OF JUSTICE, OUT OF SIGHT: THE GROWTH OF JAILS IN RURAL AMERICA 9, 11 (2017).

305. A few notable exceptions, like Missouri, have completely state funded public defender systems. In Arkansas, where I currently practice, a division of statutory responsibilities means the state public defender commission pays for employee salaries, but counties pay for overhead expenses like office space, technology, and training. In reality, wealthier counties provide much better technology and benefits and also supplement the number of state funded attorney and staff positions with additional county funded positions. For a description of several public defender funding models, see JENNIFER SAUBERMANN & ROBERT SPANGENBERG, THE SPANGENBERG GRP., STATE INDIGENT DEFENSE COMMISSIONS 2-4 (2006); *see also* Backus & Marcus, *supra* note 39, at 1046–53.

306. *See* THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 54 (2009); *see also* SAUBERMANN & SPANGENBERG, *supra* note 305, at 5.

307. See THE CONSTITUTION PROJECT, *supra* note 306.

308. ZORZA, *supra* note 41, at 1.

> Put most simply, when it occurs, the use of video court appearances by MLSA attorneys and pro bono lawyers means that those who would otherwise be forced to appear without lawyers have the benefit of counsel. Moreover, the use of video appearance technology means that legal aid has a presence in counties from which they would be absent if video were not there as an option. For the courts and other agencies, the technology is resulting in reduced costs and increased ability to schedule and control the courtroom schedule. However, the technology is used much less frequently within the legal aid environment than had initially been hoped, and must be used with some caution.[309]

The study found a significant impact in how videoconferencing "transformed the discussion about access to justice so that resources and need are now perceived and analyzed statewide."[310] Overall improvements included better judicial control of calendars, cost savings, and the ability to increase indigent representation and pro bono representation.[311] Downsides included attorneys needing to become comfortable to virtual hearings and new technology.[312]

The Montana experience is not an outlier. In a separate study of rural legal deserts, contributors noted that common areas of need among rural families were family and health law, immigration advocacy, and eviction defense.[313] Successful legal outreach often involved linking rural areas to urban attorneys through technology.[314]

While researchers have proposed and studied technology solutions for access to justice for legal aid, the lack of regional parity in indigent defense has mostly escaped focus.[315] Where there is a regional gap in representation, the primary solution has been to incentivize attorneys to move to underserved areas for short periods of time through fellowships.[316]

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309. *Id.* at 12.

310. *Id.* at 14.

311. *Id.* at 15–16.

312. *Id.* at 17–22.

313. *See* Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 223–24 (2010) (discussing that an equal protection violation is a viable claim when significant regional indigent defense underfunding prevents adequate representation).

314. *See* Pruitt et al., *supra* note 40 at 51–52, 52 n.155 (noting successful legal aid efforts to reach rural California residents).

315. *See* Pruitt & Colgan, *supra* note 313.

316. *See* Pruitt et al., *supra* note 40, at 105–13 (describing a legal fellowship recruitment program in South Dakota that recruited fifteen attorneys, some to areas with effectively no criminal defense attorneys).

B. *Technology Can Help Improve Systemic Problems and Reduce Costs*

Virtual hearings can save attorneys, witnesses, and defendants time, and make court appearances and testimony more convenient. Typically, defendants and their attorneys (and prosecutors) have to appear multiple times in court to resolve even simple cases. Each court date requires waiting for the judge to call the case, and attendance can be expensive both financially and in time.

In a normal status hearing, attorneys lose time waiting for court to end, which means public defenders are wasting time instead of working on clients' cases. The drain of court delays also discourages private attorneys from taking pro bono cases. Another major benefit for indigent defendants is how virtual testimony allows witnesses who would be financially prohibited from traveling or missing work to testify. A virtual testimony option increases flexibility and lowers obstacles.

For a defendant, especially one who is low-income, a court appearance can mean missing work (and often pay), possibly finding childcare, and arranging or paying for transportation. These problems compound one another, especially for people at the margins. Even small costs are obstacles for people close to the poverty line and are unnecessary for status hearings where cases are reset to a new court date. Over time, the costs of work absences, arranging for childcare, or transportation can become oppressive. In many cases, it eventually leads to a defendant failing to appear for court—which means a new arrest and detention that is often accompanied by a job loss, eviction, additional childcare issues, or a higher bail—all of which contribute to poverty, social costs, and mass incarceration.

For routine court appearances, virtual hearings can reduce the cost of appearing for court, lower failure to appear rates (which can reduce pretrial detention and incarceration), and give attorneys, especially public defenders, more time to work on cases. When testimony is needed, virtual hearings or—at least—virtual testimony can help low-income witnesses appear for court and allows other witnesses to avoid being sequestered until their time to testify.

Similarly, jurors with obstacles—e.g., school conflicts, geographic conflicts, or an inability to miss work travel—can participate easier. The burden of adding alternate jurors, using an enhanced jury pool, or changing venues is reduced when jury participation is easier. Most importantly, virtual jury service—if implemented in a way that is less demanding on jurors—can result in a more fair and accurate cross-section in a jury venire. Jurors are often excused when they explain that they cannot miss work, have childcare issues, travel frequently, or are students, which results in a more homogenous jury pool—typically older, wealthier, or retired individuals.

Remote, virtual hearings also allow attorneys to appear in more distant places. The flexibility comes from reduced travel expenses, recovered

time, and overhead savings. In place where courts have experimented with remote technology, such as Nebraska, groups such as law enforcement transport, translators, and attendees have benefitted from cost savings; further, technology has helped mitigate the loss in judges and attorneys as people move from rural to urban areas.[317]

Assessing the program, one judge with a juvenile docket commented on the need for virtual court technology for short hearings with high production costs. "It costs each of the counties that have to pay the detention bills a ton of money . . . . The sheriff has to drive four hours and 200 miles for a five-minute deal. It really stretches the budgets, and it's something that video technology would help resolve."[318] Communities may consider using the savings to reinvest in other community programs, save money, or use funds to booster holistic criminal justice solutions.

In a practical example, virtual and remote technology has supported participants in specialty courts such as drug and veterans treatment courts.[319] They allow for courts to have updates from clients in treatment centers, while getting to observe the client and speak to the treatment staff. This allows for more control over long-term treatment plans. Program evaluators can be present at more court hearings than ever before, allowing them to have a more accurate picture of the progress of the court. Friends and family members can more easily attend hearings of incarcerated clients and give insight on the best course of action. Clients who are doing well can attend status hearings, quickly give updates, or ask questions without missing work, obtaining childcare, or finding transportation.

Transcription benefits from virtual technologies also include: (1) cost and time savings for court reporters or staff who take notes, (2) a quick reference guide for attorneys and judges, (3) a preliminary alternative while a certified transcript, if needed, is prepared, and (4) the allowance an immediate review of issues or trials for error.[320]

C. *Toward Better Indigent Defense*

Currently, in many states, the most experienced public defenders are spread out between offices or concentrated in the areas of a state that are most desirable. A broader use of virtual hearings could allow public de-

317. Grant Schulte, *Rural Judges Turning to Video Technology*, LINCOLN J. STAR, https://journalstar.com/news/state-and-regional/govt-and-politics/rural-judges-turning-to-video-technology/article_63c7b812-8f0f-5d11-9323-49370b790c37.html [https://perma.cc/E6H9-XY7J] (last updated Jan. 31, 2017).

318. *Id.* (internal quotation marks omitted).

319. The drug court in Washington County, Arkansas has used Zoom for most of their hearings during the pandemic. It plans to implement virtual hearings more in the future because it saves participants and staff's time and reduces failure to appear rates.

320. Zoom, the most common virtual court technology, provides contemporaneous transcriptions. So does a YouTube livestream.

fender's offices to create specialty trial teams that would allow for better representation, especially on more serious cases.[321] Remote hearings can also allow for experimentation with client and public defender matching based on either skill set or client choice.[322]

While novel, allowing some degree of client choice is a potential evaluation tool for deficient public defenders. It is also consistent with the reasoning in *Gideon v. Wainwright*[323] that "there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses" as proof that "lawyers in criminal courts are necessities, not luxuries."[324] One of the universal experiences of public defenders is the worry of being labeled an obstructionist for litigating issues. Conflicts are inherent in representing so many clients—goodwill is exhausted on one client at the expense of another, and institutional politics discourage litigation.

This is not an excuse, but it is a reality for many public defenders, and anything that protects public defenders from judges or institutional consequences for zealous litigation promotes better indigent defense. In areas with public defenders appointed by courts or commissions, client selection can allow public defenders to operate with greater independence from judges or politically appointed commissioners. Even in states that have full-time offices, public defense organizations often use some form of appointment for conflicts and appellate attorneys.[325]

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321. For example, public defenders across a state can coordinate more easily on serious felonies, and trial teams can include defenders with expertise in certain cases with unique problems or scientific issues. Possibly, public defender retention may increase if offices can pool resources, allow attorneys with children to access court from home more often, and let attorneys and investigators work more collaboratively across offices. *Compare* Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769 (2016) (identifying issues in public defender systems and suggesting structural and cultural solutions to achieve better representation for indigent defendants), *with* Memorandum from Gregg Parrish to Ark. Pub. Def. Comm'n Pers., COVID 19 Return (Oct. 9, 2020) (on file with author) (mandating all employees of the Arkansas State Public Defender System return to work in-person, without accommodations for health or childcare, during the pandemic and requesting prompt notification of the expected retirements and resignations due to the public defender commission's chosen policy).

322. In some places, public defender services have experimented with allowing clients to choose their public defender, which is common in commonwealth nations. Scotland found this practice increases a client's trust in their representation. *See* Lefstein, *supra* note 39, at 32.

323. 372 U.S. 335 (1963).

324. *Id.* at 344.

325. This concept admittedly has a flaw in the obvious situation where a lot of clients request a few high-quality attorneys, which can be remedied by policies such as an attorney is only available as a choice if the attorney's caseload allows it. The proposed solution also raises an information asymmetry issue—will clients select the best attorneys? In my experience, clients share detailed information about attorneys. One of the first hurdles to overcome as a public defender when building an attorney-client relationship is addressing the client's lack of choice.

CONCLUSION

In the keynote address of a 2010 ABA conference, Laurie Robinson, at the time the Assistant Attorney General for the DOJ's Office of Justice Programs, commented, "Justice Felix Frankfurter *had written* . . . 'the history of liberty [is] largely . . . [the] history of [the] observance of procedural safeguards.' Sometimes, our highest ideals fail to play out amid unwarranted fear and old habits."[326]

The pandemic has forced courts to implement new approaches and break habits. While the shift to virtual and remote hearings will inevitably involve trial and error, constitutional rights can be preserved in a virtual courtroom—but it needs cooperation from a judicial system that has traditionally embraced technology with reluctance.

Even when courts fully reopen, virtual court hearings and convenient public access are part of the justice system's evolution. The pandemic expanded courts' use of virtual hearings. Technology for virtual hearings is already essential to a functioning judiciary. Reasonable judicial management can address privacy concerns without limiting public access. The proposals in this paper can also accommodate judges, attorneys, jurors, and clients. Importantly, the framework identified can preserve First and Sixth Amendment rights and due process guarantees.

Embracing livestreams and using virtual, remote hearings and testimony can create a more equitable and better functioning court system. Courtroom livestreams promote judicial legitimacy, transparency, and accountability. Virtual tools can also increase the quality of representation and outcomes for indigent or lower-income defendants. Technology can be a patch or a blueprint to a better criminal justice system.

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326. Laurie Robinson, Assistant Att'y Gen., Office of Justice Programs, U.S. Dep't of Justice, Keynote Address at the National Public Defense Symposium (May 20, 2010), *reprinted in* 7 TENN. J.L. & POL'Y (SPECIAL ISSUE) 25, 34 (2010) (alterations in original) (footnotes omitted) (quoting McNabb v. United States, 318 U.S. 332, 347 (1943)).