



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, pdfs, 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 _____.



Neutral

As of: April 6, 2021 6:41 PM Z

Rodriguez v Montefiore Med. Ctr.

Supreme Court of New York, Bronx County

December 23, 2020, Decided

22467/2019E

Reporter

139 N.Y.S.3d 510 *; 2020 N.Y. Misc. LEXIS 10798 **; 2020 NY Slip Op 20349 ***; 2020 WL 7689633

[**1] Erica Rodriguez, as Administratrix of the Estate of EDELMIRO RODRIGUEZ, Plaintiff, against Montefiore Medical Center, JOPAL BRONX, LLC, d/b/a WORKMEN'S CIRCLE MULTICARE CENTER and ARCHCARE SENIOR LIFE, Defendants.

Notice: THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE PRINTED OFFICIAL REPORTS.

Prior History: *Rodriguez v. Montefiore Med. Ctr.*, 2019 N.Y. Misc. LEXIS 8427 (N.Y. Sup. Ct., July 26, 2019)

Core Terms

deposition, remote, deponent, pandemic, bill of particulars, coronavirus, parties, courts, in-person, cross motion, defendants', malpractice, discovery, numbers, confer

Case Summary

Overview

HOLDINGS: [1]-In an administratrix's negligence and medical malpractice action, a medical center was ordered to conduct its depositions remotely because CPLR 3103(a) allowed orders regulating the use of remote depositions, and in light of the ongoing coronavirus pandemic, in-person depositions would have presented an undue hardship, and would not limit the ascertainment of demeanor and candor; [2]-The medical center and a multicare center were not entitled to compel an amended bill of particulars evidentiary or expert opinion matters or where answers were otherwise adequate, but she was directed to amend her responses to identify certain individuals relevant to her claims prior filing her note of issue and certificate of readiness, and to further particularize her Public Health Law § 2801-d claim, if presently able to do so.

Outcome

Motion to compel remote depositions granted; motion to compel amended bill of particulars granted in part.

LexisNexis® Headnotes

Civil Procedure > ... > Methods of Discovery > Depositions > Oral Depositions

Civil Procedure > ... > Discovery > Methods of Discovery > Stipulations

Civil Procedure > ... > Methods of
Discovery > Depositions > Written Depositions

HN1 [↓] **Depositions, Oral Depositions**

The provisions of the CPLR governing depositions are founded on the assumption that depositions will be conducted in person; however, the parties to a given action may stipulate to conduct a deposition remotely. CPLR 3113[d].

Civil Procedure > Discovery &
Disclosure > Discovery > Protective Orders

HN2 [↓] **Discovery, Protective Orders**

The general rule under CPLR 3110 and 3113 that, absent a stipulation to the contrary, depositions will take place in person is not rigid. CPLR 3103(a) permits a court to make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

Civil Procedure > Discovery &
Disclosure > Discovery > Misconduct During
Discovery

Civil Procedure > ... > Methods of
Discovery > Depositions > Written Depositions

Civil Procedure > ... > Methods of
Discovery > Depositions > Oral Depositions

HN3 [↓] **Discovery, Misconduct During Discovery**

A court can compel a remote deposition if the party seeking such a deposition demonstrates that appearing for an in-person deposition would present an undue hardship, and the personal and public health dangers posed by the coronavirus pandemic present an undue hardship. If the COVID-19 pandemic has proved anything, it is the usefulness (if not preferability) of conducting matters via video. Employing CPLR 3103(a) to compel remote depositions during the coronavirus pandemic is consistent with the spirits of both Chief Administrative Judge of the Courts Admin. Order No. 129/20 (June 22, 2020), and CPLR 104.

Civil Procedure > ... > Discovery > Methods of
Discovery > Depositions

Governments > Courts > Authority to Adjudicate

HN4 [↓] **Methods of Discovery, Depositions**

Authority for the court's power to compel parties to conduct a remote deposition is provided by Judiciary Law § 2-b, which authorizes a court to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it. Under Judiciary Law § 2-b, courts may fashion necessary procedures consistent with constitutional, statutory, and decisional law.

Civil Procedure > ... > Methods of
Discovery > Depositions > Oral Depositions

HN5 [↓] **Depositions, Oral Depositions**

With respect to a party's argument that a remote deposition will limit opposing counsel's ability to ascertain the demeanor and candor of the deponent, courts acknowledge that counsel's assessment of a deponent's credibility is an important component of the litigation process, assisting counsel in gauging the strength of his or her case and that of the adversary. A remote deposition is a virtue in this regard during a pandemic because it allows a deponent to testify without a mask if the deponent can do so safely, an eventuality that could not occur at an in-person deposition conducted during a pandemic. Moreover, given the state of the technology used to facilitate and conduct remote depositions (and on-going improvements made thereto), counsel should have a reasonable opportunity to evaluate the credibility of a deponent.

Civil Procedure > Discovery &
Disclosure > Discovery > Misconduct During
Discovery

HN6 [↓] **Discovery, Misconduct During Discovery**

A party's apprehension concerning innovative discovery techniques must, subject to the various protections afforded by the law, yield to the realities of coronavirus-era litigation, lest resolution of litigants' rights and

obligations be unnecessarily and unjustly delayed.

Judges: John R. Higgitt, J.S.C.

Healthcare Law > Healthcare Litigation > Actions
Against Healthcare Workers > Doctors & Physicians

Opinion by: John R. Higgitt

HN7 **Actions Against Healthcare Workers,
Doctors & Physicians**

A bill of particulars in a medical malpractice action must provide a general statement of the acts or omissions constituting the alleged negligence, such that defendants are placed on notice of plaintiff's theories of liability, thereby limiting the proof and preventing surprise. Courts apprehend no beneficial reason to put a plaintiff in a malpractice action (who most often is less likely than the defendant to have knowledge of proper surgical procedures, medicines and tests) to a greater burden than plaintiffs in other types of personal injury actions.

Opinion

[*511] John R. Higgitt, J.

Plaintiff's motion raises an issue with which New York State trial courts have been grappling since this past spring: whether to compel parties to conduct remote depositions. For the reasons that follow, the court compels the defendants to conduct the depositions in this action remotely, subject to any further protective order or orders the court may issue.

Healthcare Law > ... > Actions Against
Facilities > Facility Liability > Nursing Facilities

On February 28, 2019, plaintiff commenced this action to recover damages for personal injuries sustained by her decedent. Plaintiff asserted causes of action for negligence and medical malpractice, and under *Public Health Law article 28*.

HN8 **Facility Liability, Nursing Facilities**

The basis of a *Public Health Law § 2801-d* claim is the deprivation of a right conferred by contract, statute, regulation, code or rule.

A preliminary conference was held on October 16, 2019, and the order generated at that conference stated that plaintiff's **[*512]** deposition was to occur on or **[**2]** before January 17, 2020. Plaintiff's deposition did not occur by that date. A discovery conference on January 29, 2020 yielded a so-ordered stipulation among the parties; the dates for the various party depositions were to be set at the next discovery conference, which was scheduled for March 18, 2020. Due to the onset of the coronavirus pandemic, that conference did not take place, and depositions have not occurred.

Counsel: **[**1]** Luis A. Umana, Esq., Sinel & Olesen, PLLC, New York, NY, for plaintiff.

Esther S. Widowki, Esq., Widowski Law Group, LLP, New York, NY, for defendant Montefiore Medical Center.

Plaintiff seeks to compel defendants to conduct depositions by remote video **[***2]** conferencing. Plaintiff argues that depositions have not occurred, and that in-person depositions are not appropriate in light of the on-going coronavirus pandemic. Pointing to various e-mails sent by her counsel to defendants' attorneys, plaintiff contends that she attempted to schedule her remote deposition, but defendants declined to proceed with it. Plaintiff argues that *CPLR 3103* (the protective-order statute) authorizes the court to compel remote depositions under the unprecedented public health circumstances occasioned by the coronavirus pandemic, and that recent administrative orders issued by the Chief Administrative Judge strongly encourage

Katherine V. Charles, Esq., Sheeley LLP, New York, NY, for defendant Jopal Bronx, LLC (d/b/a Workmen's Circle Multicare Center).

Maureen M. Arciero, Esq., Regenbaum Arciero McMillan & Burgess, P.C., New Windsor, NY, for defendant ArchCare Senior Life.

parties to civil suits to conduct matters by remote platforms. **[**3]** Moreover, plaintiff identifies a number of unreported trial court decisions and orders compelling remote depositions, as well as federal court decisions doing so.

Defendant Montefiore Medical Center ("Montefiore") cross-moves to compel plaintiff to serve an amended bill of particulars as to it, arguing that the bill of particulars served by plaintiff was not sufficiently responsive to a number of demanded particulars (specifically, demand numbers 3, 6, 7, and 28-31), and that Montefiore could not adequately defend the action without a more detailed bill of particulars. With respect to plaintiff's motion to compel defendants to conduct the depositions remotely, defendant Montefiore maintains that conducting plaintiff's deposition remotely provides "the opportunity for plaintiff's counsel to inappropriately coach the witness, and limit[s] defense counsel's ability to ascertain the demeanor and candor of the witness." Defendant Montefiore notes that the various New York State court and federal court decisions cited by plaintiff are not binding on this court. At bottom, defendant Montefiore wants in-person depositions.¹

Defendant Jopal Bronx, LLC (d/b/a Workmen's Circle Multicare Center) **[**4]** ("Jopal") cross-moves to compel plaintiff to serve an amended bill of particulars as to it, arguing (like defendant Montefiore) that the bill of particulars served by plaintiff was insufficient. Defendants Jopal and ArchCare Senior Life oppose plaintiff's motion for the reasons articulated by defendant Montefiore.

Remote Depositions

Prior to the onset of the coronavirus pandemic, the overwhelming majority of depositions taken in conjunction with civil actions pending in New York State courts were conducted in-person. **HN1** The provisions of the CPLR governing depositions are

¹ Defendant Montefiore correctly observes that plaintiff's motion was not accompanied by an affirmation of good faith (see **22 NYCRR 202.7(c)**); however, in light of the contents of plaintiff's affirmation in support of her motion and the exhibits submitted therewith, the court will not deny the motion on the ground that plaintiff failed to submit a separate good-faith affirmation (see *Encalada v Riverside Retail, LLC*, **175 AD3d 467, 468-469, 107 N.Y.S.3d 124 [2d Dept 2019]; *Cuprill v Citywide Towing & Auto Repair Servs.*, **149 AD3d 442, 442, 49 N.Y.S.3d 624 [1st Dept 2017]).****

founded on the assumption that depositions will be conducted in person (see, e.g., *CPLR 3110, 3113*); however, the parties to **[*513]** a given action may stipulate to conduct a deposition remotely (see *CPLR 3113(d)*). That the deposition-regulating provisions of the CPLR are based on that assumption is unremarkable because most of those provisions were part of the original version of the CPLR, which took effect on September 1, 1963.

HN2 But the general rule under *CPLR 3110* and *3113* that, absent a stipulation to the contrary, depositions will take place in person is not rigid. *CPLR 3103(a)* permits a court to "make a **[**3]** protective order denying, limiting, conditioning or regulating the use **[**5]** of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." Before the outbreak of the coronavirus pandemic, several courts and commentators had concluded that, under *CPLR 3103(a)*, a court had the discretionary power to compel a remote deposition over a party's objection (see *Gabriel v Johnston's L.P. Gas Service, Inc.*, **98 AD3d 168, 947 N.Y.S.2d 716 [4th Dept 2012]**; *Yu Hui Chen v Chen Li Zhi*, **81 AD3d 818, 916 N.Y.S.2d 525 [2d Dept 2011]**; *Rogovin v Rogovin*, **3 AD3d 352, 770 N.Y.S.2d 342 [1st Dept 2004]**; Siegel & Connors, *New York Practice* §§ 353, 355 [6th ed]; Connors, *Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3113*, C3113:8). The courts that so concluded required the party seeking the remote deposition to demonstrate that the party would encounter an undue hardship if the party had to submit to an in-person deposition in New York State (see *Gabriel v Johnston's L.P. Gas Service, Inc.*, *supra*; *Yu Hui Chen v Chen Li Zhi*, *supra*; see also *Rogovin v Rogovin*, *supra*). The case law on the subject was sparse, reflecting the infrequency with which parties sought to compel remote depositions.

In the wake of the coronavirus pandemic, that which was once extraordinary has become routine. Over the past nine months, numerous courts have addressed the issue of whether a court can and should compel a party, over his or her objection, to submit to or otherwise participate in a remote deposition. **HN3** Applying the principles **[**6]** that developed prior to the pandemic's outbreak, courts have repeatedly concluded (1) that a court can compel a remote deposition if the party seeking such a deposition demonstrates that appearing for an in-person deposition would present an undue hardship, and (2) that the personal and public health

dangers posed by the coronavirus pandemic present an undue hardship (see *Bynes v New York City Health & Hosps. Corp.*, 2020 WL 6380601 [Sup Ct, New York County 2020]; *Disbrow v Metropolitan Transp. Auth.*, 2020 WL 5521070 [Sup Ct, New York County 2020]; *Goldstein v Berenbaun*, 2020 WL 5209508 [Sup Ct, New York County 2020]; *Fineman v Qureshi*, 2020 N.Y. Misc. LEXIS 5707, 2020 WL 5088199 [Sup Ct, New York County 2020]; *Fields v MTA Bus Co.*, 69 Misc. 3d 632, 129 N.Y.S.3d 319 [Sup Ct, Westchester County 2020]; *Chase-Morris v Tubby*, 69 Misc 3d 349, 130 N.Y.S.3d 599 [Sup Ct, Westchester County 2020]; *Johnson v Time Warner Cable New York City, LLC*, 2020 N.Y. Misc. LEXIS 2323, 2020 WL 2769117 [Sup Ct, New York County 2020]; see also Siegel & Connors, New York Practice § 356 [Dec. 2020 Supplement]; see generally *Jones v Memorial Sloan Kettering Cancer Ctr.*, 186 AD3d 1851, 1852, 131 N.Y.S.3d 421 n [3d Dept 2020] ["We cannot help but take note that if the COVID-19 pandemic has proved anything, it is the usefulness (if not preferability) of conducting matters via video."]; cf *Bell v Stoddart*, 2020 NYLJ LEXIS 1115, 2020 WL 4390588 [Sup Ct, Bronx County 2020]).² [*514] Employing *CPLR 3103(a)* to compel remote depositions during the coronavirus pandemic is consistent with the spirits of both the relevant administrative order of [*4] the Chief Administrative Judge of the Courts (Administrative Order 129/20 [June 22, 2020] ["In light of the ongoing coronavirus public health emergency, counsel and litigants are strongly encouraged to pursue discovery in cooperative fashion and to employ remote technology in discovery whenever possible"]) and *CPLR 104* ("The civil practice law and rules shall be liberally

construed to secure the just, [*7] speedy and inexpensive determination of every civil judicial proceeding").³

Here, plaintiff has demonstrated that, in light of the ongoing coronavirus pandemic, appearances for in-person depositions would present an undue hardship, and that the depositions ought to be conducted remotely.

Defendants' objections to conducting depositions remotely are not persuasive. Defendants' concern that plaintiff's counsel may inappropriately coach plaintiff during her deposition is, at this point, unfounded. Defendants point to no words or deeds by plaintiff or her attorney that suggest that plaintiff's counsel would engage in such chicanery. However, to assuage defendants' concern, the court will direct (1) that no individual (except for a court reporter, plaintiff's counsel or both) be physically present in the same room as plaintiff during her deposition; (2) that plaintiff is prohibited from communicating with anyone in any manner during her deposition except for the individuals participating in her deposition; (3) that plaintiff's counsel's communications with plaintiff during her deposition be limited to subjects appropriate under 22 NYCRR part 221; (4) that, prior to initiating any private communication [*8] with plaintiff during her deposition, plaintiff's counsel must first announce his or her intention to do so; and (5) that, at all times during her deposition, plaintiff and her counsel be visible on screen [*15] (whether together in the same room or in separate physical locations) (see generally *Dennis v JP*

² The determination of the courts that the personal and public health dangers posed by the coronavirus present an undue hardship is, of course, well founded. As one federal judge sitting in the Southern District of New York has stated,

"COVID-19 is a potentially fatal illness with the ability to spread through asymptomatic or pre-symptomatic carriers, and new cases here are plateauing (or, in some areas, rising) rather than plummeting. The minimum distance to prevent transmission of COVID-19 may vary depending on environmental conditions—and ... the oft-repeated six-foot rule may not be sufficient in a high-risk environment, such as an indoor setting with prolonged exposure. Moreover, social distancing does not guarantee a safe deposition environment. Thus, holding a deposition in a room with a witness, counsel and a stenographer present would place everyone in the room at risk" (*Rouviere v DePuy Orthopaedics, Inc.*, 471 F Supp 3d 571, 575 [2020] [internal quotation marks, brackets, and citations omitted]).

³ *HN4* [↑] Additional authority for the court's power to compel parties to conduct a remote deposition is provided by *Judiciary Law § 2-b*, which authorizes a court "to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it" (see *People v Wrotten*, 14 NY3d 33, 37, 923 N.E.2d 1099, 896 N.Y.S.2d 711 [2009] [under *Judiciary Law § 2-b*, "courts may fashion necessary procedures consistent with constitutional, statutory, and decisional law"]; see also *Wyona Apts., LLC v Ramirez*, Misc 3d , 2020 NY Slip Op 20309 [Civil Court, New York County 2020] [employing *Judiciary Law § 2-b* to direct remote trial]; *CC v AR*, 69 Misc 3d 983, 133 N.Y.S.3d 200 [Sup Ct, Kings County 2020] [employing *Judiciary Law § 2-b* to direct matrimonial hearing in which one of the remedies sought was criminal contempt]; *Cicccone v One West 64th St., Inc.*, 69 Misc 3d 585, 132 N.Y.S.3d 261 [Sup Ct, New York County 2020] [employing *Judiciary Law § 2-b* to direct remote attorneys' fees hearing], order amended 2020 WL 6325719 [Sup Ct, New York County 2020]).

Morgan Chase & Co., 2020 US Dist Lexis 179395, *9-10 [SDNY 2020].

HNS With respect to defendants' argument that a remote deposition will "limit defense counsel's ability to ascertain the demeanor and candor of [plaintiff]," the court acknowledges that counsel's assessment of a deponent's credibility is an important component of the litigation process, assisting counsel in gauging the strength of his or her case and that of the adversary. A remote deposition is a virtue in this regard because it allows a deponent to testify without a mask if the deponent can do so safely, an eventuality that could not occur at an in-person deposition conducted during a pandemic (see Fields v MTA Bus Co., 69 Misc 3d at 637-638; Chase-Morris v Tubby, 69 Misc 3d at 354-356; Rouviere v DePuy Orthopedics, Inc., 471 F Supp 3d at 575-576). Moreover, given the state of the technology used to facilitate and conduct remote *****5** depositions (and on-going improvements made thereto), counsel should have a reasonable opportunity to evaluate the credibility of a deponent (see generally Ciccone v One West 64th St., Inc., 69 Misc 3d at 592 ["given advances in technology, the near-instantaneous transmission ****9** of video testimony permits the court [at a remote hearing] to see the live witness along with his [or her] hesitation, his [or her] doubts, his [or her] variations of language, his [or her] confidence or precipitancy, and his [or her] calmness or consideration"] [internal quotation marks omitted]).⁴

HNS Ultimately, a party's apprehension concerning innovative discovery techniques must, subject to the various protections afforded by the law, yield to the realities of coronavirus-era litigation, lest resolution of litigants' rights and obligations be unnecessarily and unjustly delayed.⁵

⁴ While no defendant has objected to plaintiff's motion on the ground that a defendant lacks access to the technological devices and services necessary to conduct a remote deposition (or the capacity to use such devices and services), the court notes that suitable devices and appropriate services are widely available and often user-friendly (see generally Wyona Apts., LLC v Ramirez, Misc 3d at , 2020 N.Y. Misc. LEXIS 9295, 2020 NY Slip Op 20309, * 4-5; Ciccone v One West 64th St., Inc., 69 Misc 3d at 595).

⁵ Of course, should a bona fide issue arise during plaintiff's remote deposition regarding the scope or quality of the deposition, or one or more individual's conduct thereat, a number of potential remedies are available under the law, including ordering a further deposition under CPLR 3124,

Prior to plaintiff's deposition, the parties are to confer regarding the various procedural and logistical issues that must be negotiated in advance of the deposition (see generally CPLR 3113[d]; Report of the Commercial and Federal Litigation section of the New York State Bar Association, Virtual Depositions — Can't Look Back Now [<https://nysba.org/app/uploads/2020/02/NYSBA-ComFed-Virtual-Depositions-10-28-20-Final-.pdf>, last accessed on Dec. 23, 2020]; Dennis v JP Morgan Chase & Co., supra).⁶ Working in ***516** good faith, the parties are to resolve as many anticipated issues as they can before appearing for a pre-deposition conference, the purpose of ****10** which will be to confirm that the parties are prepared to proceed effectively with plaintiff's deposition. All depositions in this action are to be conducted remotely, subject to the parameters specified above, and to any further protective order or orders issued by the court.

Bills of Particulars

HNT Regarding the cross motions of defendants Montefiore and Jopal seeking relief relevant to plaintiff's bills of particulars, "[a] bill of particulars in a medical malpractice action must provide a general statement of the acts or omissions constituting the alleged negligence," such that defendants are placed on notice of plaintiff's theories of liability, thereby limiting the proof and preventing surprise (Shanoff v Golyan, 139 AD3d 932, 934, 34 N.Y.S.3d 78 [2d Dept 2016] [internal *****6** quotation marks and citations omitted]; see Monzon v Chiaramonte, 140 AD3d 1126, 1129, 35 N.Y.S.3d 371 [2d Dept 2016]; Contreras v Adeyemi, 102 AD3d 720, 722, 958 N.Y.S.2d 430 [2d Dept 2013]; Felock v Albany Medical Ctr. Hosp., 258 AD2d 772, 773-774, 685 N.Y.S.2d 844 [3d Dept 1999]; see also Cirelli v Victory Memorial Hosp., 45 AD2d 856, 856, 358 N.Y.S.2d 537 [2d Dept 1974] ["We apprehend no beneficial reason to put the plaintiff in a malpractice action (who most often is less likely than the defendant to have knowledge of proper surgical procedures,

affording relief under CPLR 3126, issuing a protective order suppressing part or all of the deposition under CPLR 3103(c), and imposing frivolity sanctions under 22 NYCRR part 130.

⁶ Such issues include, but are not limited to, the date on which plaintiff's deposition will occur; the video-conferencing platform the parties will use to conduct the deposition; who will be "invited" to the deposition; the manner in which exhibits will be used during the deposition; the manner in which the oath will be administered to plaintiff; and whether the deposition will be recorded and, if so, how it will be recorded.

medicines and tests) to a greater burden than plaintiffs in other types of personal injury actions." [internal quotation marks omitted]).

In light of those guiding principles, the court concludes that defendant Montefiore is not entitled to relief [**11] at this time with respect to plaintiff's bill of particulars. The demands to which defendant Montefiore desires amended responses (demand numbers 3, 6, 7, and 28-31) seek largely evidentiary matter or expert opinion (see *Patterson v Jewish Hosp. and Med. Ctr.*, 94 Misc 2d 680, 405 N.Y.S.2d 194 [Sup Ct. Kings County 1978], *affd* 65 A.D.2d 553, 409 N.Y.S.2d 124 [2d Dept 1979]; see also *Colwin v Katz*, 90 AD3d 516, 934 N.Y.S.2d 309 [1st Dept 2011]), and plaintiff's responses to demand numbers 3, 6, and 29-31 were adequate. Regarding demand numbers 7 and 28, which ask plaintiff to identify certain individuals relevant to plaintiff's claims (see generally *Brusco v St. Clare's Hosp. and Health Ctr.*, 128 AD2d 390, 512 N.Y.S.2d 675 [1st Dept 1987]), plaintiff is directed to amend her responses to those demands prior to the filing of the note of issue and certificate of readiness.

To the extent defendant Jopal complains that plaintiff's bill of particulars as to it failed to provide sufficient specificity regarding the nature of the acts and omissions underlying plaintiff's medical malpractice and negligence claims against it, that complaint is without merit (see *Monzon v Chiaramonte*, *supra*). **HN8** Because the basis of a Public Health Law § 2801-d claim is the deprivation of a right conferred by contract, statute, regulation, code or rule (see *Henry v Sunrise Manor Ctr. for Nursing & Rehabilitation*, 147 A.D.3d 739, 46 N.Y.S.3d 649 [2d Dept 2017]), yet plaintiff's response to demand number 3 of defendant Jopal is focused largely on plaintiff's claims of malpractice and negligence, plaintiff is to amend her response to demand number 3 to further particularize [**12] her § 2801-d claim. If plaintiff is presently unable to do so because she lacks information relevant to that demand, she should follow the procedure outline in *Micarelli v Fleiss* (219 AD2d 469, 631 N.Y.S.2d 159 [1st Dept 1995]).

Accordingly, it is hereby

[*517] ORDERED, that plaintiff's motion to compel defendants to conduct depositions remotely is granted; and it is further

ORDERED, that, within 20 days after service on defendants of a copy of this decision and order with notice of entry thereof, counsel are to confer regarding

the various procedural and logistical issues that must be negotiated in advance of plaintiff's remote deposition, and work in good faith to resolve all such issues; and it is further

ORDERED, that plaintiff's counsel is to notify the court by e-mail immediately after counsel have conferred on and resolved such issues so that the court can schedule a remote, pre-deposition conference; and it is further,

ORDERED, that, within 30 days after the pre-deposition conference with the court, the parties are to conduct plaintiff's remote deposition; and it is further,

ORDERED, that, within 10 days after the completion of plaintiff's deposition, counsel are to confer and work in good faith to set a schedule for the remote depositions of the defendant-deponents, [**13] and conduct the defendant-deponents' depositions in accordance with any such schedule; and it is further,

ORDERED, that, absent a stipulation among the parties to the contrary, the following [***7] rules will govern each remote deposition: (1) except for a court reporter, the deponent's counsel, or both, no individual is permitted to be physically present in the same room as the deponent during his or her deposition; (2) the deponent is prohibited from communicating with anyone in any manner during his or her deposition except for the individuals participating in the deposition; (3) the deponent's counsel's communications with the deponent during his or her deposition are to be limited to subjects appropriate under 22 NYCRR part 221; (4) prior to initiating any private communication with the deponent during his or her deposition, the deponent's counsel must first announce his or her intention to do so; and (5) at all times during his or her deposition, the deponent and his or her counsel must be visible on screen (whether together in the same room or in separate physical locations); and it is further,

ORDERED, that, the cross motion of defendant Montefiore Medical Center is granted to the extent that, prior to [**14] the filing of the note of issue and certificate of readiness, plaintiff is directed to amend her responses to demand numbers 7 and 28 of Montefiore's demand for bill of particulars; and it is further,

ORDERED, that the cross motion of defendant Montefiore Medical Center is otherwise denied; and it is further,

ORDERED that the cross motion of defendant Jopal Bronx, LLC (d/b/a Workmen's Circle Multicare Center) is

granted to the extent that, within 20 days after service upon her of a copy of this decision and order with notice of entry thereof, plaintiff is directed to amend her response to demand number 3 of Jopal's demand for bill of particulars to further particularize her Public Health Law § 2801-d claim; and it is further,

ORDERED, that the cross motion of defendant Jopal Bronx, LLC (d/b/a Workmen's Circle Multicare Center) is otherwise denied.

This constitutes the decision and order of the court.

Dated: December 23, 2020

John R. Higgitt, J.S.C.

End of Document

At a term of the Family Court of the State of New York, held in and for the County of New York, at 60 Lafayette Street, New York, NY 10013, on October 28, 2020.

**FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

-----	X	
In the Matter of a Guardianship Proceeding	:	
Haydee F.,	:	
	:	
Petitioner	:	DECISION ON MOTIONS
- against -	:	
	:	Docket No. G-15246-19
ACS-NY,	:	G-15249-19
Catherine D.,	:	
	:	
Respondents.	:	
-----	X	
		Ref. Pamela Scheininger
		Part 43

-----	X
In the Matter of a Guardianship Proceeding	:
Jessica Gill,	:
	:
Petitioner	:
- against -	:
	:
ACS-NY,	:
Catherine D.	:
Martin F.,	:
	:
Respondents.	X

PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT, AN APPEAL FROM THIS ORDER MUST BE TAKEN WITHIN 30 DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, 35 DAYS FROM THE DATE OF MAILING OF THE ORDER TO APPELLANT BY THE CLERK OF COURT, OR 30 DAYS AFTER SERVICE BY A PARTY OR THE ATTORNEY FOR THE CHILD UPON THE APPELLANT, WHICHEVER IS EARLIEST.

This decision comes in response to three cases in which one or more parties has objected to participating in a contested virtual hearing in New York County Family Court. In compliance with New York State Governor Andrew Cuomo’s Executive Order and Administrative Orders from Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence Marks, hearings in Family Court are currently taking place virtually, via Skype for Business and/or Microsoft Teams.

In the instant case, an Article Ten petition was filed against respondent parents, Catherine D. and Martin F. on July 7, 2016 as to four subject children, including the two subject children at issue in the present case, Aracelis D. (dob 1/21/10) and Katalaya F. (dob 7/6/10). A fact finding order of neglect was entered against Catherine D. on January 24, 2017 based on her submission to the jurisdiction of the court pursuant to Family Court Act §1051(a) and on March 10, 2017, an order of disposition was entered against Ms. D. releasing the children to her care pursuant to Family Court Act §1054 on terms and conditions. With respect to Martin F., an order was issued adjourning his Article Ten case in contemplation of dismissal on March 28, 2017.

On September 7, 2017, the Commissioner of Social Services filed a petition alleging that Mr. F. had violated the terms of the adjournment in contemplation of dismissal. On March 1, 2018 the Commissioner filed a petition to modify the dispositional order and place the subject children in the care of the Commissioner. The children were subsequently placed with the Commissioner in two separate kinship foster homes.

On August 12, 2019, the permanency goal for Aracelis and Katalaya was changed from return to parent to placement with a fit and willing relative, On December 23, 2019, Jessica G. filed a kinship guardianship petition as to the child, Catalaya F. and Haydee F. filed a guardianship petition as to the child, Aracelis. Issue was joined on that case on February 26, 2020. The matter was set down for a hearing on May 6, 2020.

Due to the global COVID-19 pandemic, this guardianship case did not go forward on May 6, 2020 and it was not until August 26, 2020 that the case was held in Virtual Court for a permanency hearing. The guardianship hearing was scheduled for October 26, 2020. Counsel for Ms. D. and Mr. F. objected to holding the guardianship hearing virtually and each filed a motion for an adjournment until an in-person hearing could be held. The attorney for the petitioner, attorney for the Commissioner and attorney for the child each filed affirmations in opposition to the motions.

It goes without saying that these are unprecedented times. A global pandemic of this nature has not been experienced in over a century and none of us could have anticipated the extent and the length of the impact of COVID-19. Indeed, standing here today, we cannot know how long this pandemic will last and the full extent of its devastation.

Family Court carries a heavy burden. We are the court to which people turn when they are experiencing domestic violence, when they need financial support to ensure the health and well-being of their children, when the State must protect a child from abuse or neglect, when a parent is denied access to a child and when a child is in need of a permanent home and a forever family. Family Court jurists (and indeed, jurists in all of our courts) have been working steadily through this pandemic, initially through Virtual Parts limited to “essential matters” then also through Virtual Chambers, and finally through expanded Virtual Parts which provide greater capacity to hear matters beyond those which fall strictly within the category of “essential.”

Currently, in compliance with Family Court protocols and procedures, jurists are able to hear permanency hearings and custody and guardianship cases which commenced prior to March 2020. Matters which may be heard and the number of Virtual Parts available to hear such cases have increased steadily as the New York City Family Court operations expand. There is still no certainty as to when regular, daily in-person hearings will resume in New York City Family Court.

With respect to practices and protocols which have been communicated by Administrative Judge of the Family Court, Judge Jeannette Ruiz, or Supervising Judge of Manhattan Family Court, Judge Karen Lupuloff, those practices and protocols, though accurate at the time of their making, have been fluid and ever-changing. Every day, Family Court pushes itself to be more open and available to the people who need us and practices and protocols are under constant review and evolving in order to meet those needs.

With respect to the court's authority to hear virtual cases, as stated by Judge Jeffery Sunshine in *C.C. v. A.R.*, 2020 Slip Op 29245 at *6 (Sup Ct. Kings Co. 2020):

“Pursuant to New York Judiciary Law §2-b(3), the Court has the power ‘to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.’ This authority is vested in the Courts by the New York State Constitution which permits courts latitude to adopt procedures not specified in the statutes where such procedures are consistent with general practice as provided by the law. (NY Const Art VI, 30, see also *People v Ricardo*, 73 NY2d 228, 232 [1989]).”

In his decision, Judge Sunshine cited *People v. Wrotten*, 14 NY3d, 33, 37 (2009) where the Court of Appeals “ruled that the Court “does not need the consent of the parties to fashion “innovative procedures” where “necessary” to effectuate the power and jurisdiction of the Court.” *Id* at *6. In *People v. Wrotten*, the Court of Appeals held that live televised testimony is to be used in “exceptional circumstances” as “necessary.” *People v. Wrotten*, 14 NY3d 33, (2009). Judge Sunshine further wrote that: “As the Court of Appeals has noted again and again, “in this imperfect world, the right of a defendant to a fair appeal, or for that matter, a fair trial, does not necessarily guarantee him a perfect trial or a perfect appeal.” (*People v. Rivera*, 39 NY2d 519, 523 [1976]; see also *People v. Harris*, 57 NY2d 335 [1982]; *People v. Parris*, 4 [*8] NY3d 41 [2004]).” *Id* at *7.

Similarly, in *Ciccone v. One 64th St., Inc.*, 2020 Slip Op 20220 (Sup. Ct. NY Co. 2020), Judge Gerald Lebovits held that “the Court of Appeals and the Appellate Division, First Department, have repeatedly held that one such [innovative] procedure that courts may employ, albeit in exceptional circumstances, is the use of video testimony...” *Ciccone* at *2

Judge Lebovits further noted that:

“The federal trial courts considering the issue have acknowledged that “[c]onducting a trial by videoconference is certainly not the same as conducting a trial where witnesses testify in the same room as the factfinder,” and that “[c]ertain features of testimony useful to evaluating credibility and persuasiveness, such as the immediacy of a living person can be lost by video technology.” *Matter of RFC & RESCAP Liquidating Trust Action* (444 F Supp 3d 967, 970 [D Minn. Mar 13, 2020] [internal quotation marks omitted].) At the same time, these courts have found that given “advances in technology,” “the near instantaneous transmission of video testimony” permits the court “to see the live witness along with his hesitation, his doubts, his variations of language, his confidence or precipitancy, and his calmness or consideration.” (*Id.* [internal quotation marks and alteration omitted]; accord *Gould Elec. Inc. v. Livingston County Rd. Commn.* (2020 WL 3717792, at 6 [ED Mich June 30, 2020 [same]; *United States v. Donziger* (2020 WL 5152162, at *3 n 4 [SD NY Aug. 31, 2020]).” *Id* at *3-4.

He added that:

“Federal court have also found that given the “unprecedented nature of the circumstances faced by our society at present” due to the COVID-19 pandemic, compelling reasons exist to conduct trials virtually. (*Flores v Town of Islip* (2020 WL5211052 at *2 [ED NY Sept. 1,2020]; accord RFC, 444 F Supp 3d at 972 [concluding that COVID-19’s unexpected natures, rapid spread, and potential risk establish good cause for remote testimony”].) And given the court closures required by the pandemic, “the months’ long delay that has resulted” and the continuing lack of clarity about when it will be safe to resume normal in-person operations, the courts have concluded that “it is ‘absolutely preferable’ to conduct the bench trial via such ‘contemporaneous transmission’...rather than to delay the trial indefinitely.” (*Argonaut Ins. Co. v Manetta Enters., Inc.* (2020 WL 3104033, at *2 [ED NY June 11, 2020], quoting RFC, 44 Supp 3d at 927.)” Id at *4.

Specifically, in the context of a virtual custody hearing, Justice Tandra L. Dawson ruled that a custody trial would proceed virtually over the objections of counsel stating:

“While the court is cognizant of the limitations and inherent difficulty involved in conducting virtual hearings, counsels’ objection do not set forth a prejudicial basis to further delay the hearing. Given the unpredictable nature of the COVID-19 pandemic it is unknown when court operations will return to normal in-person procedures, particularly given a resurgence is anticipated, if not already occurring, with multiple travel bans and advisories in effect. The court is mindful that compelling in-person attendance, in a courtroom, could subject vulnerable individuals to an increased risk of harm. Virtual technology would remove that risk.” *A.S. v N.S.*, 2020 NY Slip Op 20161 (Sup Ct, NY Co. 2020).

In addressing this issue, it bears mention that there are New York statutes which expressly allow for testimony by telephone, audio-visual or other electronic means. For example, under the Uniform Interstate Family Support Act (UIFSA), “In any proceeding under this article, the court may permit a party or a witness to be deposed or to testify by telephone, audio-visual means, or other electronic means at a designated family court or other location.” See N. Y. Fam Ct Act §531-a (1). Also, under the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA), “A court of this state may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this state shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony and the procedures to be followed by the persons taking such deposition or testimony. Any such testimony or deposition shall be recorded and preserved for transcription.” See N.Y. Domestic Relations Law §75-j(2). Long before the exceptional circumstances created by COVID-19, considerations of time and money led the New York State Legislature to adopt electronic testimony (including telephone testimony) as a reliable and competent means of conducting a hearing.

According to the Pew Research Center, as of February 7, 2019, 96% of all Americans owned a cell phone with 81% of all Americans owning a smart phone.

<https://www.pewresearch.org/internet/fact-sheet/mobile/>. Though this study demonstrated variability based on race, gender, age, income and rural vs. urban dwellers, no group dropped below 91% in cell phone ownership or 71% in smart phone ownership (other than those over 65

years of age and those who had not yet graduated high school which both reported at 53% in smart phone ownership). *Id.* Simply put, as of 2019, almost all Americans owned cell phones and the vast majority of them owned smart phones. The technologies being employed to conduct virtual hearings in Family Court are accessible via phone or smartphone and are readily available to anyone who owns either a cell phone or smart phone.

With respect to arguments by counsel for Ms. D. that electronic testimony is unreliable or prejudicial, we note that the studies cited in support of such an argument are all at least ten years old, with some dated as early as the 1980's. It goes without saying that the electronic testimony that was available in 2010 and earlier is not the electronic testimony that is available today. During COVID-19, courts across this country have become virtual, as have businesses, law firms, doctor's offices, schools and universities. People are relying on platforms such as Zoom, Skype for Business and Microsoft Teams to conduct multi-billion dollar deals, educate students, conduct hearings and save lives. We are able to rely on these platforms because they are easy to access and they work.

Given these considerations and the fact that electronic testimony has long been utilized in Family Court, this Court find arguments by counsel for the parents that electronic testimony is unreliable and/or prejudicial to be unpersuasive. The court is no less able to make credibility findings in hearings which are conducted virtually than in hearings conducted in person.

With respect to the interest of the State in conducting these hearing in a timely manner, it must be noted that the hearings in question here are all related to Article Ten proceedings and being sought in an effort to achieve permanency for the children involved. The court and the State are seeking to conduct these virtual hearings because without a determination as to the permanency hearings, custody and guardianship cases, these children will continue to languish in a state of uncertainly and instability. The Adoption and Safe Families Act states: "(C) if continuation of reasonable efforts of the type described in subparagraph (B) is determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child." Public Law 105-80, 105th Congress, Section 101. We are acutely aware of the deleterious impact of delayed permanency on the psychological and emotional health of children in foster care. "Paramount in the lives of these children is their need for continuity with their primary attachment figures and a sense of permanence that is enhanced when placement is stable." *Pediatrics* November 2000, 106 (5) 1145-1150; DOI: <https://doi.org/10.1542/peds.106.5.1145>. Moreover, "[c]hildren who have experienced abuse or neglect have a heightened need for permanency, security, and emotional constancy and are, therefore, at great risk because of the inconsistencies in their lives and the foster care system. Every effort should be made to rapidly establish a permanent placement for the child." *Id.*

Unless and until a child is adopted, returned to a parent or placed in a permanent home with a fit and willing relative through a final order of custody or guardianship, permanency has not been achieved. Foster care agencies will continue to conduct home visits and interview these children, court ordered visits with parents will continue to take place at the foster care agencies or other locations, and the home will continue to be under the stress associated with frequent court appearances. Moreover, in the cases before us, the parties are engaged in litigation over what the permanency plan should be for the children. Without a hearing and determination of these matters, it is impossible to know what these children's future looks like or to make any

assurances. These children are struggling with insecurity and uncertainty and suffering from the associated social, emotional and psychological stressors that this insecurity and uncertainty brings. Arguments that a parent's right to the trial of their choosing outweighs a child's right to permanency in their lives is not persuasive.

Similarly, the arguments made by counsel for the parents as to ineffective assistance of counsel are unpersuasive. The attorneys in these cases would have ample opportunity to meet with their clients in person, masked and socially distanced or via phone or teleconference. Attorneys are able to participate fully in virtual hearings, directing and cross-examining witnesses and making objections and applications as appropriate. If there is a problem with the technology and a witness or attorney cannot hear or be heard, the hearing can be stopped until the issue is addressed. If the issue cannot be addressed that day, another hearing date can be chosen. During the hearing, attorneys and clients can communicate via text or email, they can ask for breaks and/or to go off the record in order to consult further. Adjournments can be granted between direct and cross examination and after each party has rested in order to allow for further consultation.

While it is true that a party may be more comfortable sitting next to their attorney and better able to participate in the process, our world has moved online and people have adapted, continuing to attend classes, see doctors and therapists, and visit with family and friends. Nothing takes the place of in-person contact but in these unprecedented times, Family Court must continue to meet the needs of its families. As stated by Judge Sunshine, a litigant has the right to a fair trial not a perfect trial. With the protections listed above put into place, fair trials occur.

This having all been said, in the instant matter, the court does find that in this contested virtual guardianship hearing, the witnesses must testify via video rather than telephone. Counsel have made valid arguments to the Court as to the potential unreliability of telephone testimony, including the inability to know whether a witness is reading from notes or another source, and whether the witness is in the presence of someone who is coaching them or preventing them from testifying truthfully. Further, counsel for the parents are persuasive in their arguments that it is challenging to make accurate credibility findings when one cannot see a witness's face and facial expressions and that testimony via telephone would place a hindrance on an attorney's ability to engage in fully effective advocacy.

Accordingly, parties are directed to provide the court and counsel with witness lists within two weeks with information as to whether each witness will be able to testify via video, and if not, an explanation as to why not. The court can then make inquiry and issue orders to address challenges with internet access and video capability. We are mindful that in the cases before us, it is likely that while agency personnel may have ready access to computers and internet, parents and foster parents may not. Given the availability of foster care agencies and their resources, there are any number of ways to ensure that all parties may appear via video. These hearing will then proceed via Skype for Business and/or Microsoft Teams. An application for a limited number of participants to appear virtually, from a monitor specifically set up for such person in our courthouse, while others appear virtually from law offices and other locations, may also be made for this Court's consideration.

This matter is adjourned to November 9, 2020 at 2:00 p.m. in Part 43 for a virtual court appearance via Microsoft Teams.

Dated: October 28, 2020
New York, NY

Pamela Scheininger, Court Attorney Referee

At an IAS Part 5G of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of September, 2020.

-----X

C. C.,
Plaintiff,

- against -

Index No.: REDACTED

DECISION & ORDER
Motion Seq. #33

A. R.,
Defendant.

-----X

The following papers numbered 1 to 2 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____ <u>1,</u>
Opposing Affidavits (Affirmations) _____	_____ <u>2,</u>
Reply Affidavits (Affirmations) _____	
Other _____	

Maria Coffinas, Esq.
Attorney for Plaintiff
Coffinas & Lusthaus PC
186 Joralemon Street, Suite 910
Brooklyn, New York 11201

Daniel Nottes, Esq.
Attorney for Defendant
Cassin & Cassin LLP
711 Third Avenue, 20th Floor
New York, New York 10017

P R E S E N T:
HON. JEFFREY S. SUNSHINE, Justice.

Introduction

This Court determines that pursuant to Judiciary Law Section 2-(b)3 a court of competent jurisdiction has the authority to order a trial or hearing to proceed virtually

over the objections of a party even where one of the remedies sought is criminal contempt.

This is a proceeding continuing in the midst of an ongoing pandemic emergency *inter alia* to hold plaintiff-husband in civil and criminal contempt after having been found to have engaged in spoliation of evidence and violation of automatic orders related to the installation of and attempted deletion of iPhone spyware and to consider sanctions against defendant for alleged perjury for making a false affidavit to this Court regarding her knowledge about that spyware.

On September 22, 2020, plaintiff-husband, moved by e-filed order to show cause [motion sequence # 33] requesting the following relief: “1) vacating the virtual hearing scheduled for September 30th from 10:00 a.m. to 1:00 p.m. and October 1, 2020, 2:00 p.m. to 4:30 p.m. on the basis that proceeding with a virtual hearing is severely prejudicial to Plaintiff; and 2) postponing an in-person hearing until the Unified Court System determines the most effective protocols and best practices to safeguard the health and safety of litigants and attorneys for in-person matrimonial trials at the Kings County Courthouse and specifically authorizes such trials to take place; and 3) Such other and further relief as may seem just and proper. The Court heard oral argument on September 25, 2020.¹

¹ Defendant appeared for oral argument but plaintiff did not. Plaintiff’s counsel waived plaintiff’s appearance on the record and oral argument proceeded.

Procedural History

This Court has written numerous detailed decisions related to the spyware issue and those written decisions, including the facts and procedural history detailed therein, must be read in conjunction with this decision.

This Court expended vast judicial resources related to plaintiff's actions related to his use of spyware, his invocation of his Fifth Amendment privilege and his subsequent spoliation of evidence. The culminating effect of plaintiff's actions resulted in the Court by written decision, *inter alia*, striking plaintiff's pleadings as to certain equitable distribution relief not related to the children. Those written decisions must be read in conjunction with this decision as they fully outline the procedural history details of this protracted litigation.

The Court notes that throughout this litigation plaintiff asserted his Fifth Amendment right in regards to all questions related to his use of spyware ; however, after this Court struck his pleadings in the February 5, 2018 decision (58 Misc3d 1221(A) and after the Court issued the financial decision after trial (September 17, 2019), plaintiff subsequently conceded in a sworn affidavit dated November 18, 2019 that he had repeatedly installed and used various spyware applications to monitor and "listen in" on the wife in support of an application to reopen discovery based upon his allegation that defendant knew about his use of spyware during the marriage and that she made a false

affidavit to this Court regarding that knowledge. Plaintiff now asserts that the defendant all along knew he had installed the spyware equipment and that she herself has now committed perjury.

At this time, all issues between the parties except for the cross-applications seeking awards of counsel fees, defendant's application that the Court hold plaintiff in both civil and criminal contempt and the issue of whether sanctions against defendant are warranted (*see* C.C. v. A.R., 66 Misc.3d 1211(A) [January 14, 2020]) are resolved.

The hearing on these remaining limited issues commenced before this Court on March 4, 2020: defendant represented by counsel and plaintiff was appearing *pro se*. During this litigation, plaintiff has been represented by two (2) attorneys. This is the third time plaintiff has retained his current counsel to represent him in this matter.

During the evidentiary hearing on March 4, 2020, numerous exhibits of evidence were admitted into evidence. At the conclusion of the proceeding that day a dispute arose as to the admissibility of portions of a notebook that plaintiff had included in his list of proposed evidence. Pending a determination as to the admissibility of the notebook in its entirety or just the pages selected by the plaintiff the Court took custody of the notebook. The matter was adjourned to March 20, 2020. On March 16, 2020, in response to the COVID-19 crisis, the Unified Court System in-person court proceedings were temporarily limited to "essential" matters. On March 19, 2020, one day before the

scheduled continuation of the evidentiary hearing, plaintiff once again re-retained his current counsel for the third time in this litigation.

On June 5, 2020, this Court conducted a virtual status conference in this matter. During that conference, there was a discussion related to the logistics of proceeding. Based upon that discussion, the Court informed counsel that any objections to appearing virtually must be made in a timely manner so as not to further delay the conclusion of this matter. The matter was adjourned, on consent, to continue the evidentiary hearing on September 30, 2020 and October 1, 2020 either in-person or virtually depending on the protocols in place for the Courts inside the City of New York.

1) Plaintiff Objects to Proceeding In-Person or Virtually

Plaintiff's counsel criticizes the court system over the initial actions taken in March 2020 regarding the pandemic emergency which resulted in the cessation of in court operations except for essential applications and affirms that she is "willing to appear for an in-person continuation of the hearing in this case **only after I am satisfied** that the best practices are in place at the courthouse to ensure my client's and my health and safety [*emphasis added*]" and that "[u]ntil that time, the continued hearing in this matter should be postponed." At the same time, she also affirms that she believes this Court is prohibited from virtually continuing the ongoing evidentiary hearing.

2) Evidence Objection To Virtual Appearance

Plaintiff's counsel incorrectly asserts that the Kings County Courthouse is and has been "closed" due to the pandemic and that she has been, in effect, prohibited from reviewing the evidence admitted on March 4, 2020, including the "notebook", prior to her being re-retained and, as such, it would be prejudicial to plaintiff to continue the evidentiary hearing. Plaintiff's counsel argues in her affirmation in support of the order to show cause that this notebook "contains a critical page of evidence" despite her repeated representations that she has not seen this notebook. She affirms that she is "willing to review that journal in the courthouse if I am granted permission to enter the courthouse in order to do so, however *only after being assured that my health will be safeguarded [emphasis added].*" It is unclear what assurances plaintiff's counsel seeks in addition to the Unified Court System's protocols which are already in place. These are the same protocols that have been in place for months throughout the pandemic emergency as this Court has been performing its duties from the courthouse.

Plaintiff's counsel contends that even if she was able to examine the notebook in advance she would "have no way of entering it in evidence during a virtual hearing", if it was accepted into evidence by the Court, because the notebook itself is physically in the courthouse.

3) Criminal Contempt Objection To Virtual Appearance

Plaintiff's counsel cites *dicta* from a decision issued by a court of concurrent jurisdiction in support of her proposition that this Court is not permitted to conduct a

virtual hearing on the issue of criminal contempt inasmuch as it could result in a party being imprisoned.

Defendant-wife's counsel's affirmation, dated September 23, 2020 stated that he and his client "take no position on the relief sought in Plaintiff's motion, [A.R.] is desirous of bringing this case to resolution in the safest manner possible for the benefit of everyone involved..."

The Law

Safety Measures For In-Person Proceedings/Review of Evidence

The Court notes that court staff, including Justices of the Supreme Court, chambers staff, part clerks, court officers, clerical staff, maintenance personnel and other employees of the court system in Kings County Supreme Court, have been working in the courthouse, observing those established protocols, for months. There have been proceedings conducted in the courthouse on a limited basis and jurors have been summoned for petit jury trials to commence in the next few weeks. While keeping foot traffic at a minimum the Court has provided methods for physical access to the Courthouse to the public on a case-by-case basis.

These are unprecedented times: fortunately, global pandemics have not been commonly faced in New York. All aspects of social infrastructure and daily-life face the challenging task of mindfully restarting in-person operations. There are Administrative Orders available on the Court website which provide guidance and instructions regarding court operations and safety protocols. When there is an individual who tests positive in a courthouse a public notification is made on the website. The Courts are open to serve the people of New York State through a

hybrid of virtual and increasingly in-person proceedings, which were regionally adapted to take into account different regions of the State. These protocols and Administrative Orders were disseminated and posted to the New York State Court website.

The authority and autonomy of the Unified Court System to establish and implement the appropriate measures for in-person court proceedings was recently recognized by the Southern District of New York Federal Court in *Bronx Defenders v Office of Court Administration* (2020 WL 4340967 [S.D.N.Y, July 28, 2020]. In *Bronx Defenders*, plaintiff challenged the Uniform Court System determination that in-person proceedings could resume and sought an injunction from the Federal Court to halt in-person appearances in New York City Criminal Court. That application was denied and the case was dismissed with a finding by the Southern District of New York Federal Court that the Federal Courts:

...cannot, dictate if, when, and how state criminal courts reopen or schedule in-person appearances. To do so would violate fundamental principals of comity and federalism, and would result in federal supervision of state procedures and proceedings in direct contradiction of *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)” (2020 WL 4340967 at *1).

Similarly, it is not within the purview of a litigant or counsel to assess whether the protocols established are adequate; however, neither is plaintiff nor his counsel, under the facts and circumstances presented, required to appear in-person for the conclusion of the trial. The Court notes that plaintiff has every interest in seeking to delay the resolution of this matter inasmuch as he faces possible incarceration.

This Court has previously made arrangements for others to conduct in-person review of documents in the courthouse that observe social distancing and all protocol guideline procedures

adopted by the Unified Court System. The Court notes that it is not the purvey of this Court nor of plaintiff to deem the protocols established and adopted by the Uniform Court System as “sufficient” or not: nor is there a need for plaintiff to reach that determination because there is no requirement for plaintiff to appear in-person. Virtual proceedings are available precisely to fit these situations. To hold otherwise: to deem that any individual could be arbitrarily left to determine for him or herself that she did not believe that courthouses were safe would, in effect, grant any litigant *carte blanc* to postpone – indefinitely – any proceeding in which he or she did not want to appear. Certainly, such an outcome will not stand. This case need not be an exception.

Examination of Evidence

Plaintiff and plaintiff’s counsel, knowing about the notebook, chose not to even request an opportunity to review, in person, the record and evidence of this evidentiary hearing. Only, on the eve of the continued hearing, did plaintiff formally raise the issue despite this date being selected nearly three (3) months ago. Under the existing protocols in Kings County Supreme Court, arrangements could have been made for in-person review of a case file in a proper way.

Plaintiff’s counsel’s contention that the notebook’s location in the courthouse bars her, logistically, from offering it into evidence is unfounded. If plaintiff’s counsel seeks to admit it into evidence and if the Court grants that application there is no logistical impediment to the notebook being marked into evidence inasmuch as the notebook is, as plaintiff’s counsel points out, already in the courtroom. This Court is, and has been, working in the courthouse for many months and therefore there is no logistical impediment to this Court marking said item into

evidence if such a ruling is made.² This part is participating in the Evidence Pilot program, which was announced in Chief Judge Janet DiFiore’s broadcast on September 28, 2020.

Criminal Contempt Not A Bar To A Virtual Hearing

Plaintiff’s counsel cites no binding authority on this Court, nor is this Court aware of any, that would prohibit this Court from continuing with the evidentiary hearing on the issue of criminal contempt under the facts and circumstances presented.³

Pursuant to New York Judiciary Law 2-b(3), the Court has the power “to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.” This authority is vested in the Courts by the New York State Constitution which permits courts latitude to adopt procedures not specified in the statutes where such procedures are consistent with general practice as provided by the law (NY Const, Art VI, 30; *see also People v Ricardo B.*, 73 NY2d 228, 232 [1989]).

² In the capacity of Statewide Coordinating Judge for Matrimonial Cases, this Court is spearheading an evidence pilot project which will utilize the NYSCEF e-filing system for uploading evidence separately by attorneys for identification and with court permission for *in camera* inspection. After hearing objections, or on consent, the Court may number the documents and move them into evidence. There are drop down menus for court exhibits and judicial notice as well as witness and evidence lists. There is also a drop down menu for submission of evidence for in camera inspection of documents with court permission. Documents can even be introduced and shared in real time for purposes of impeachment during cross-examination. Additionally, evidence previously admitted can be uploaded into the virtual platform and shared with counsel and/or shown to parties/witnesses using screen sharing as needed during the proceeding. The Court notes that had this application been made timely, the evidence could have been made available virtually to counsel and the parties months ago for virtual review. Plaintiff’s failure to make this request has not prejudiced him: it threatened to prejudiced the defendant and to waste judicial resources.

³ This Court does not adopt the *dicta* proffered in *S.C. v. Y.L.* 2020 NY Misc LEXIS 2267 [Cooper, J.].

The Court of Appeals upheld this authority in *People v Wrotten* where it ruled that the Court does not need the consent of parties to fashion “innovative procedures” where “necessary” to effectuate the powers and jurisdiction of the Court (14 NY3d 33, 37 [2009]). In *People v. Wrotten*, defendant was indicted with first-degree assault and two counts of robbery in the first degree: the Court permitted the complaining witness to testify by live two-way video technology.⁴ Similar to plaintiff in the case before this Court, the defendant in *People v. Wrotten* faced the possibility of imprisonment yet the Court of Appeals still found that there was no prejudice to defendant not being able to confront the complainant in-person where complainant appeared by live two-way television feed. As such, in the case at bar, plaintiff’s contention that this Court is *prohibited* from virtually continuing the evidentiary hearing based upon his possible imprisonment if he is found guilty of criminal contempt is unavailing.

The Court further notes that, while not dispositive of this issue, the technology available at this time exceeds the technology available when *People v Wrotten* was decided in 2009.⁵⁶ In fact, even prior to *People v Wrotten* decision, the United States Supreme Court had determined that even a one-way live, closed-circuit television testimony could satisfy the Confrontation

⁴ In *People v Wrotten*, defendant was a home health aid and complainant was a 83-year old man who alleged that defendant hit him from behind with a hammer and demanded money. Complainant suffered five head wounds and two broken fingers. Defendant in that matter faced imprisonment.

⁵ As early as 1990, the Court of Appeals has upheld the use of two-way televised testimony (*see People v Cintron*, 75 NY2d 249 [1990]). Certainly the technology available today far exceeds that available in 1990.

⁶ Given that technology and its various uses have been central in this litigation, it is notable that the first generation iPhone was released in June 2007, less than two (2) years before *People v Wrotten* was decided. Certainly with the many advances in technology in the intervening years the Court is even more equipped to provide virtual proceedings today than it was in 1990 (*People v Cintron*) or 2009 (*People v Wrotten*).

Clause of the Federal Constitution under certain circumstances (*Maryland v Craig*, 497 US 836, 850 [1990]) and where the essential safeguards of testimonial reliability were present, specifically, where evidence presented against a criminal defendant was subject to rigorous testing in the context of an adversary proceeding before the trier of fact (*Maryland v. Craig* 497 US at 845; *see also People v Wrotten*, 14 NY3d at 39).

In the case at bar, plaintiff has not alleged that a virtual proceeding as available to him before his Court would not satisfy the elements of testimony under oath, the opportunity for contemporaneous cross-examination, the opportunity for the judge and parties to view the witness's demeanor as he or she testifies and preservation of a record of the witness's testimony (*see generally Maryland v. Craig* 497 US at 851; *see also People v Wrotten*, 14 NY3d at 39).⁷

In *People v Wrotten*, the New York Court of Appeals noted that live televised testimony is an exceptional procedure to be used "...in exceptional circumstances" as "necessary". This Court finds that this global pandemic is an "exceptional circumstance" allowing this Court to proceed on all aspects of this proceeding, including the issue of criminal contempt, by virtual means. The Court also finds that plaintiff himself has created the "necessary" element, as detailed in *People v Wrotten*, by declining the opportunity to participate in an in-person proceeding.

As detailed herein-above, there is no judicial prohibition on this Court continuing the ongoing evidentiary hearing on the issues presented, including criminal contempt, by virtual means.

⁷ Numerous additional federal cases are cited in *People v Wrotten* where live video testimony has been permitted under a variety of circumstances.

This Court is aware that this is a challenging time with uncertainty for everyone and that it may be perceived by some that a virtual proceeding is not a perfect scenario; however, there are no perfect trials whether in-person or virtually. As the Court of Appeals has noted again and again, "...in this imperfect world, the right of a defendant to a fair appeal, or for that matter a fair trial, does not necessarily guarantee him a perfect trial or a perfect appeal" (*People v. Rivera*, 39 NY2d 519, 523 [1976]; *see also People v. Harris*, 57 NY2d 335 [1982]; *People v Parris*, 4 NY3d 41 [2004]).

Defendant represents that she is prepared to appear in-person or virtually on September 30, 2020 but that she desire this matter to come to a conclusion. Plaintiff asserts that he objects to any means of concluding this proceeding. As much as plaintiff resists a final determination on these issues, defendant is also entitled to a conclusion of this matter. This Court will not allow plaintiff to prolong this litigation.

Under the unique facts and circumstances presented, this Court will not direct this plaintiff to participate in an in-person proceeding; however, this Court has found no binding authority that would prohibit this Court from proceed with the virtual proceeding.

This Court will not abide plaintiff's attempt to use a global pandemic as a sword and a shield to further delay the resolution of this proceeding.

To provide for an in-person review of the notebook, counsel shall contact chambers so that arrangement can be made for counsel and plaintiff, if he so desires, to enter the Courthouse at a time agreed upon between 10:00 AM and 12 PM on Thursday October 1, 2020. A courtroom on the second floor is available so that there is no need to

use an elevator. The plaintiff may bring hand sanitizer or use the newly installed dispensers that are located in the building. Counsel and her client must wear proper face masks at all times when in the courthouse and they may wear gloves when handling the notebook. If defendant wishes to examine the notebook again he may also make arrangements with chambers staff. The Court is also as an accommodation willing to make copies of the notebook for both sides when appropriate.

To accommodate this review, the trial will be delayed one (1) day: it will recommence virtually on October 1, 2020 at 2:15 PM by the Teams platform. This one (1) day postponement will also provide counsel additional time to review the current pilot protocols for offering and submitting evidence and the notebook.

While breakout rooms for Teams are not yet operational, the Court will accommodate reasonable requests for opportunities for counsel to speak with clients privately via telephone or for a side bar with the Court without clients present. The Teams platform allows parties and counsel to see each other and the Court simultaneously

There is no doubt that all of our lives have been impacted by the events around us; however, there are viable alternatives and that is to continue virtually – that provides additional safeguards to all involved. The defendant’s right to conclude cannot be subjugated to plaintiff’s unreasonable position that this Court must indefinitely postpone any continuation of the on-going trial. The Court is willing to accommodate the

plaintiff's counsel as to in person proceeding in a courtroom under these circumstances but will not allow her and her client to oppose any virtual proceeding.

ENTER FORTHWITH:



Hon. Jeffrey S. Sunshine
Justice

HON. JEFFREY S. SUNSHINE
J.S.C.



Neutral

As of: April 6, 2021 6:46 PM Z

Goldstein v Berenbaum

Supreme Court of New York, New York County

September 20, 2020, Decided

805291/2018

Reporter

2020 N.Y. Misc. LEXIS 11375 *; 2020 NY Slip Op 34426(U) **

Opinion

[1]** JEFFREY MAURICE GOLDSTEIN and KELLIE GOLDSTEIN - v - RACHEL MARIE BERENBAUM, D.C., SAADIA AKHTAR, M.D., PADDEN GLOCKA, M.D., MOUNT SINAI BETH ISRAEL MEDICAL CENTER and MANHATTAN SPORTS THERAPY, Index No. 805291/2018

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Prior History: Goldstein v. Berenbaum, 2020 N.Y. Misc. LEXIS 5473 (N.Y. Sup. Ct., Sept. 1, 2020)

Core Terms

depositions, discovery, undue hardship, defendants', Authorizations

Judges: **[*1]** PRESENT: Hon. GEORGE J. SILVER, Justice Supreme Court.

Opinion by: GEORGE J. SILVER

Upon the foregoing papers, it is ordered that these motions are decided in accordance with the annexed decision and order of the court.

Dated: September 1, 2020

Hon. /s/ George J. Silver

GEORGE J. SILVER, J.S.C.

[2]** HON. GEORGE J. SILVER:

There are two motions before the court here. In the first, plaintiff JEFFREY MAURICE GOLDSTEIN ("plaintiff") seeks to (1) compel defendants to appear for remote, virtual depositions; and (2) compel defendant Mount Sinai Beth Israel Medical Center to provide a copy of the table of contents for its Emergency Department Policy and Procedure Manual that was in effect at the time of the alleged incident.

In the second motion, defendants Rachel Marie Berenbaum D.C ("Dr. Berenbaum") and Madison Avenue Chiropractic (collectively hereinafter "Kaufman defendants") seek to compel plaintiff to provide outstanding discovery in advance of any depositions of their clients.

For the reasons discussed below, plaintiff's motion is granted to the extent that plaintiff may take the virtual deposition one of the Kaufman defendants, Dr. Berenbaum, and denied to the extent that the depositions of defendants Saadia **[*2]** Akhtar, M.D. ("Dr. Akhtar") and Padden Glocka ("Dr. Glocka") shall not proceed virtually at this time. In addition, the Kaufman defendants' motion to compel discovery from plaintiff is granted.

BACKGROUND

This is an action to recover damages related to an alleged negligent evaluation and treatment of a stroke suffered by plaintiff. On December 2, 2017, plaintiff presented to the emergency department ("ED") of Mount Sinai Beth Israel Medical Center ("MSBI") with complaints of facial numbness and neck pain on plaintiff's left side, and unsteadiness during a morning shower. During his time in the ED, plaintiff complained of some tightness around his left eye. Plaintiff subsequently left the ED, and later had a recommended MRI completed by his private neurologist. The next morning, plaintiff complained of new symptoms and returned to the ED, where he was diagnosed with a stroke.

[**3] DISCUSSION

1. Plaintiff's Motion to Compel Depositions of Remote Witnesses

Plaintiff seeks to compel defendants to appear for remote, virtual depositions. In seeking that relief, plaintiff argues that discovery must continue, without interruption, notwithstanding the challenges posed by the COVID-19 pandemic. Plaintiff [****3**] also argues that requiring in-person depositions would create an undue hardship, and underscores that both the CLPR and case law from courts across New York endorse the utilization of virtual depositions.

In response, defendants argue that forcing defendants to sit for virtual depositions would create an undue hardship by elevating levels of stress and interfering with defendants' professional responsibilities. Defendants further argue that in view of the general preference for having attorneys present with their clients during depositions, imposing virtual depositions would force attorneys and their clients to compromise their safety as a way to ensure adequate representation.

CPLR §3103(a) dictates that a court may "regulat[e] the use of any disclosure device" to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." Whether or not a party may testify virtually by video "is left to the trial court's discretion" (Am. Bank Note Corp v. Daniele, 81 AD3d 500, 501, 916 N.Y.S.2d 112 [1st Dept 2011]). If a party seeks to conduct a deposition in a method

other than in person, the party is required to demonstrate that appearing in person would create "undue hardship" (LaRusso v. Brookstone, Inc., 52 AD3d 576, 577, 860 N.Y.S.2d 179 [2d Dept 2008]). Indeed, it is also the case that courts across the [****4**] state have compelled parties to sit for virtual depositions (see Johnson v. Time Warner Cable N.Y. City, LLC 2020 N.Y. Misc. LEXIS 2323, [Kalish, J.] [May 28, 2020] [Sup. Ct. New York Cnty Index No.: 155531/2017] ["to delay discovery until a vaccine is available or the pandemic has otherwise abated would be unacceptable"]; Arner v. Derf Cab Corp. [Silvera, J.] 2020 N.Y. Misc. LEXIS 4209, [May 14, 2020] [Sup. Ct. New York Cnty Index No.: 151731/19] [defendants ordered to appear for virtual depositions]; Stern v. New York & Presbyt. Hosp. 2020 N.Y. Misc. LEXIS 5662, [Edwards, J.] [June 1, 2020] [Sup. Ct. Kings Cnty Index No.: 510384/2018] [virtual depositions ordered in a medical malpractice case]).

Here, it is undeniable that forcing a party to appear for an in-person deposition would create an undue hardship considering the circumstances surrounding the ongoing pandemic. Indeed, the present pandemic presents a perfect example of when virtual depositions should be utilized. The question then becomes whether forcing defendants to appear for virtual depositions is, in and of itself, also an undue hardship in light of the general preference to have attorneys present with their clients during depositions.

Here, the court finds that it would not be an [****5**] undue hardship for Dr. Berenbaum to appear for a virtual deposition. Dr. Berenbaum is a chiropractor who does not directly treat COVID-19 patients. Her appearance for a remote deposition would not add to the stress of her professional responsibilities. Even so, to alleviate the fear of insufficient representation, the court proposes that defendants utilize a courtroom in the courthouse so that attorney and client can be present together in a socially distant, sanitized environment. If the parties elect to avail themselves of this option, the court will arrange for the deposition to be conducted in a courtroom, and the parties will have [****4**] to inform the court of their preference to proceed as such at the next conference. Based on these considerations, and others, the court directs that Dr. Berenbaum's deposition proceed.

Dr. Akhtar and Dr. Glocka's situation, however, is entirely different. Both Dr. Akhtar and Dr. Glocka are directly treating COVID-19 patients and both currently reside out-of-state. Requiring these physicians to sit for

virtual depositions at this juncture would only add to the stress of their professional responsibilities. In consideration of that challenge, the court [*6] has determined that requiring Dr. Akhtar and Dr. Glocka to sit for virtual depositions would create an undue hardship. As such, their depositions will not proceed virtually at this time.

Separately, defendant MSBI is directed to provide a copy of the table of contents for its Emergency Department Policy and Procedure Manual that was in effect at the time of the alleged incident within forty-five (45) days of this decision and order. Defendant MSBI has made no showing that the same is privileged pursuant to Public Health Law §2805-m(2) and Education Law §6527 (see Logue v. Velez, 92 NY2d 13, 17, 699 N.E.2d 365, 677 NYS2d 6 [1998]; Rivera v. City of New York, 3 AD3d 486, 769 N.Y.S.2d 752 [2d Dept. 2004]). As such, plaintiff's application for a copy of the table of contents is granted.

2. Defendant KRB's Motion to Compel Discovery from Plaintiff

In support of their separate motion, the Kaufman defendants claim that plaintiff has failed to respond to many of the discovery requests that they have made. The list of discovery items that the Kaufman defendants claim plaintiff has not responded to is lengthy. Specifically, the Kaufman defendants wish to compel responses on the following discovery items: (1) Amended Bills of Particulars addressing the objections asserted in our letter dated February; (2) a response to the Demand for Authorizations dated August 30, 2019; (3) a [*7] complete response to the Demand for Authorizations dated November 8, 2019; (4) a response to the Demand for Authorizations dated December 27, 2019; (5) a response to Defendant's letter dated January 28, 2020; (6) a complete response to the Demand for Authorizations dated April 17, 2020; (7) unrestricted authorizations for Plaintiff's employers; and (8) a response to the good faith letter dated June 24, 2020, and all letters that preceded it.

In response to the Kaufman defendants' argument, plaintiff contends that plaintiff has not willfully withheld discovery from the Kaufman defendants. Rather, plaintiff submits that plaintiff simply has not received many of the Kaufman defendants' discovery demands, and therefore could not have responded to items that plaintiff never acquired.

CPLR §3101(a) dictates that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The terms "material and necessary" have been applied liberally by courts in New York (see Allen v Cromwell-Collier Pub. Co., 21 NY2d 403, 406, 235 N.E.2d 430, 288 N.Y.S.2d 449 [1968]). Furthermore, CPLR §3124 allows a party seeking discovery to move to compel a nonperforming party to provide said discovery.

Here, there is no doubt that many of the discovery requests made by defendants [*8] are both material and necessary and that without them, the Kaufman defendants will be severely prejudiced. As such, the Kaufman defendants are entitled to responses from plaintiff with respect to the [*5] aforementioned demands before any depositions can take place. Accordingly, the court directs that plaintiff provide responses to the Kaufman defendants' discovery demands within forty-five (45) days of this decision and order.

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion is granted to the extent that the deposition of Dr. Berenbaum shall proceed virtually; and it is further

ORDERED that plaintiff's motion is denied, with leave to renew, to the extent that the depositions of Dr. Akhtar and Dr. Glocka shall not proceed virtually at this time; and it is further

ORDERED that defendant MSBI is directed to provide a copy of the table of contents for its Emergency Department Policy and Procedure Manual that was in effect at the time of the alleged incident within forty-five (45) days of this decision and order; and it is further

ORDERED that the Kaufman defendants' motion is granted to the extent that plaintiff is directed to respond to the abovementioned outstanding discovery [*9] demands within forty-five (45) days of this decision and order; and it is further

ORDERED that the parties are directed to appear for a compliance conference via a virtual conference on October 7, 2020 at 10:30 AM, at which time the date for the virtual deposition of Dr. Berenbaum will be scheduled.

This constitutes the decision and order of the court.

Dated: September 1, 2020

Mary Kavanagh

/s/ George J. Silver

GEORGE J. SILVER, J.S.C.

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