

#### **Presents**

#### **Virtual Trials: From Judges' Perspectives**

April 28, 2021 6:00 pm - 8:00 pm

Presenters: Hon. Richard A. Dollinger

Hon. Doris M. Gonzalez Hon. Cheryl A. Joseph Hon. Nancy Quinn Koba Hon. Ellen M. Spodek

## "Believable Evidence in the Virtual Trial"

April 28, 2021

Via Zoom

Hon. Richard A. Dollinger

New York Court of Claims

**Acting Supreme Court Justice** 

7<sup>th</sup> Judicial District

### THE CURRENT PARADIGM — IN-COURT TRIALS

- Evidentiary hearings and trials are live events, conducted in dedicated spaces to which members of the public and the press generally have access, at which litigants appear at the same time and participate; evidence, especially testimony, is presented; and decisions are publicly and formally pronounced.
- Participants can observe one other as they variously testify, argue, watch, and listen.
- The liveness, momentousness, and visibility of hearings and trials are all components of the familiar metaphors of the courtroom as stage and the trial as theater, which remind us that an audience--in the courtroom gallery or watching at home--is always at least notionally part of the performance as well.

## FACTORS TO CONSIDER IN REMOTE/VIDEO FAMILY LAW MATTERS

- 1. Importance of Demeanor Evidence
- 2. Credibility Assessments in Contested Cases
- 3. Is remote testimony inherently less reliable?
- 4. Impact on the Litigant who is "not live"
- 5. Public Confidence in the Remote Hearing via Video
- 6. Confidence in the Courts does it extend to family matters?
- 7. Judicial Steps to Minimize any Impact
- 8. Documents, Physical Evidence, Demonstrations? How to.

## Demeanor Evidence – The "key" to a trial?

- The centrality of demeanor evidence in the U.S. system is the product of a number of sources: textual guarantees like the Sixth Amendment's Confrontation Clause and the Federal Rules of Civil Procedure, the common-law tradition of an open courtroom and its attendant rituals, the folk-knowledge belief that demeanor is a reliable indicator of credibility, and faith in the "elusive" power of "sense impressions."
- A similar spectrum of text-based rules, norms and rituals, beliefs about human behavior, and mysticism underlies much of courtroom practice. Courtrooms, in the words of the late legal and literary scholar Robert Ferguson, aim to create "'an aura,' a mystique of authenticity and legitimacy."
- When proceedings are forced onto Zoom, Webex, or other virtual platforms, much if not all of that mystique or aura is likely to be stripped away.

### DEMEANOR IN FAMILY LAW – DECISIVE?

- This preference for in-court proceedings has been intimately tied to a belief that personal observation is essential to the ability to evaluate demeanor, and to a belief in the importance of demeanor in the assessment of credibility and character.
- Demeanor evidence "relies heavily on the interpretation of facial expression and body language." This evidence is especially probative in family law cases, where there are direct conflicts in testimony.
- Access to witnesses' demeanor is viewed as an aspect of fairness to the
  parents and as a sign of respect for their dignity: a parent deserves to be
  able to hear, see, and cross-examine the other parent and related
  witnesses. It is also an article of faith that access to demeanor helps
  decision-makers assess witnesses' credibility and thus advances the core
  value of accurate judgment, especially in family cases where the only
  witnesses may be the litigants.

## The Prevailing Consensus – MASKS AND DEMEANOR

- As one defense attorney grappling with the use of surgical masks in the courtroom recently stated:
- "[I]f witnesses or jurors are allowed to wear masks, it could obscure key nonverbal cues during testimony and jury selection. 'We need to be able to see someone's face in order to judge their credibility' . . . . "

## Demeanor = Credibility?

- The issue of discerning truth, the overwhelming weight of social science research debunks the common-sense belief that demeanor is a reliable cue to credibility. In general, people, including judges, are much less accurate than they think they are when they seek to use witnesses' demeanor to differentiate truthful from untruthful testimony.
- But the larger problem is that although most jurists and scholars focus on "truthfulness" or "credibility" as if they are freestanding, measurable traits, the use of demeanor evidence in practice is much broader.

## DEMEANOR = BELIEVEABILITY?

- What is *believable depends as well as on the assumptions and biases of the fact-finder* who is evaluating the witness--whether a story seems believable will depend on whether it resonates with the fact-finder's experience of the world. This factor may be especially accurate in family law cases if the testimony comports with the fact-finder's life experience.
- The Judge's Rape Victims Study -- Calhoun et al., Victim Emotional Response: Effects on Social Reaction to Victims of Rape, 20 BRIT. J. SOC. PSYCHOL. 17 (1981) (more emotional rape victim deemed more credible); Winkel & Koppelaar, Rape Victims' Style of Self-Presentation and Secondary Victimization by the Environment: An Experiment, 6 J. INTERPERS. VIOLENCE 29 (1991)

## DEMEANOR = INTENTION?

- Even though there is no evidence that remorse can be accurately assessed via facial expressions, jurors tend to believe they are well equipped to make just such an evaluation in a matter of life or death.
- Nor are judges and the media exempt from these beliefs.
- Indeed, studies show that judges and other fact-finders employ cues to complex states like remorse in an inconsistent or even contradictory manner, so that one judge may rely on a given behavior as indicative of remorse while another believes the same behavior indicates lack of remorse.

## Remote Testimony – Does it Change?

- Witnesses in proceedings on Zoom are also likely to testify differently than they would in physical courtrooms for half a dozen other reasons, none of which bode well for judges' and jurors' construals of their demeanor. How is a judge to know?
- Impact on "The Up Close and Personal" camera?
- One judge reported after conducting a summary jury trial in a civil matter, the attorneys conducting voir dire were surprised that the online view provided even more information about juror demeanor that they would have had in court. "Online . . . 'you see the whole face, eyebrow twitches, and panel members are way more relaxed' sitting at home, instead of in a courtroom."

### REMOTE WITNESSES AND THE TRIER OF FACT

- The increased cognitive demands of participating in an extended Zoom proceeding and possibly the lesser drama in a videoconferenced as opposed to a physically co-present trial may reduce judges' ability to pay attention to whatever they take to be demeanor evidence.
- The trier of facts ability to concentrate on a given witness or party may be further impaired by the simultaneous appearance on the interface of other participants (including themselves), offering a constant source of distraction, in an array that may shift, sometimes without notice, as persons are dropped or added.
- This increased mental effort that judges must allocate to what they are doing in the virtual courtroom may itself bias their impressions of witnesses' and parties' demeanors – steps to avoid?

## SUBLIMINAL/UNCONSCIOUS IMPACTS OF REMOTE WITNESSES – THE WWE EFFECT

- Crucially, judges may be unaware of how these features of the videoconferencing medium are influencing their evaluations and decisions. Instead, they will intuitively think that they are perceiving others' facial expressions, tones of voice, and postures "as they really are." This is naïve realism.
- Judges may discount or ignore the extent to which the demeanors that witnesses and parties are displaying are due to the situation in which those witnesses and parties find themselves--not just in court but in court on Zoom, talking to their computer screens and aware of other participants only as multiple head-and-upper-torso images in the interface.

### CAN JUDGES RELY ON DEMEANOR EVIDENCE?

- If our legal culture continues to privilege physical courtrooms for the demeanor evidence they afford, and views virtual courts with suspicion until they can yield equivalent displays, it ought to be on a firmer basis than a mystical faith in the "elusive and incommunicable imponderable" nature of demeanor evidence.
- As mentioned above, the overwhelming weight of social science research debunks the common-sense belief that demeanor is a reliable cue to credibility.

### TIME TO REVIEW ALL DEMEANOR EVIDENCE?

- There is much to be learned about how virtual proceedings affect the presentation and interpretation of demeanor evidence. Perhaps more to the point, there is still a vast amount to be learned about the presentation and interpretation of demeanor evidence in traditional courtrooms.
- For a central, largely unquestioned tenet of the common-law system, and one that exercises enormous influence over decisions about property, liberty, and even life, demeanor evidence has been resting on its laurels for far too long.

## REMOTE HEARINGS – IMAPCT ON THE LITIGANT

- Tiana Clark, a woman who recently got divorced on Zoom, wrote that what should have been a momentous experience seemed not fully real:
- My virtual divorce felt dreamlike -- weeks later, I sometimes wonder whether it really happened. So much of dreaming feels like you're trying to grab the hem of something that dissipates right in front of you. Videoconferencing has the same effect, inducing an exhausting sense of placelessness. . . . [Despite the procedure's legal efficacy], I still felt like I missed something.
- Tiana Clark, The Surreal Anticlimax of Getting Divorced over Videoconference, WASH. POST (June 23, 2020), https://www.washingtonpost.com/outlook/2020/06/23/surreal-anticlimax-getting-divorced-over-videoconference/.

## UNCERTAINTY OVER THE IMPACT?

- The current pandemic squarely presents the question whether physical proximity in a public courtroom is a necessary condition for a family member or child who wishes to make their presence felt and communicate their stress, disappointment or pain.
- Virtual proceedings can disinhibit as well as inhibit emotional expression. Though the lack of immediacy might feel less immersive to the unwilling participant, it might also feel less coercive.
- We simply don't know enough yet about how the move to virtual platforms may affect the sorts of strong emotions that family members or children often express during family disputes or what decision-makers and others feel when hearing them.

## PUBLIC CONFIDENCE IN VIDEO

- As one New Zealand judge has written: "One must express some concern that if the court process is not seen as relevant to modern technologies and modern means of communication, where then will lie the respect for the Rule of Law?"
- This judge also posited of "digital natives" (persons born after about 1985) in particular: "Their attitude towards the symbolism of the court is that the court is a place where the requirement to be physically present at a certain place for the disposal of court business may be seen as laughable, particularly when there are other systems that are available."
- Courts and Covid 19: Delivering the Rule of Law in a Time of Crisis, THE IT COUNTRY JUSTICE (Mar. 26, 2020) https://theitcountreyjustice.wordpress.com/2020/03/26/courts-and-covid-19-delivering-the-rule-of-law-in-a-time-of-crisis/.

# FEDERAL – AND STATE --COURTS ARE JUMPING IN –

WITH BOTH FEET

## Xcoal Energy & Res. v. Bluestone Energy Sales Corp., 2020 U.S. Dist. LEXIS 1497 (D. Del. 2020)

- While Defendants continue to raise vague and conclusory assertions that due process rights require the trial to be held in person, they cite no authority for their position, and as Plaintiff correctly observes courts are regularly determining that, in light of the ongoing pandemic, taking testimony remotely is sometimes the best available (and adequate) option. See Fed. R. Civ. P. 43(a) ("At trial, the witnesses' testimony must be taken in open court, . . . . [However, for] good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.");
- The Court believes (and is every day observing) that able counsel can effectively examine witnesses without being in the same room, providing the Court the evidence it needs to make necessary factual findings, including credibility assessments.

# "Sensitive proceedings" – Same for Family Courts?

The Court predicts that because this case does involve "sensitive" and "intimate" topics, all parties—plaintiff, defendants and jurors alike—will be more comfortable, forthcoming and candid outside a massive, sterile, imposing federal courtroom. Indeed, judges who have conducted remote criminal proceedings note that allocution is typically more productive, informative and helpful because the very nature of Zoom technology is more intimate (their words, not mine) than a typical courtroom experience. In short, the sensitive subject matter of this litigation does not make it unsuitable for remote trial proceedings.

Xcoal Energy et al v. Bluestone Energy Sales, supra

## Ritz Enters. v. V., 2020 Fla. Cir. LEXIS 845 (Fla. Cir Ct. 2020)

- DOES VIDEO GIVE THE COURT A BETTER VIEW OF A WITNESS?
- The Court has now conducted many hours of hearings using Zoom and has found that the credibility of witnesses can be evaluated using video. In fact, because the witnesses are facing the camera the Court can see their reactions up close and from straight on as opposed to the typical side view from the witness stand which pre-COVID and now with social distancing has been and will be from much further away.

## Bonilla v State of New York 2021 N.Y. Misc. LEXIS 329 (Ct. Cl. 2021)

- Under <u>Judicial Law § 2-b(3)</u>, "[a] court of record has power to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it." Long before anyone had heard the words "COVID-19" or "social distancing," trial courts used this authority to conduct proceedings by remote means, and appellate courts consistently upheld that authority.
- The pandemic has presented courts with a Hobson's Choice between exposing the public and bar to a deadly and highly contagious disease through conducting in-person trials on the one hand, and greatly delaying access to the courts on the other. Virtual proceedings have presented a way out of this dilemma, allowing the legal process to move forward without endangering the health of the participants.

## Bonilla v State of New York

• All courts confronted with the question during the past year have found it both permissible and advisable to compel a party to participate in virtual proceedings (see <u>C.C.</u>, supra [contempt hearing]; <u>Wyona Apartments LLC</u>, supra [landlord-tenant trial]; <u>Ciccone v One W. 64th St., Inc.</u>, 69 Misc. 3d 585, 132 N.Y.S.3d 261, 2020 WL 6325719 [Sup Ct, NY Cty 2020] [evidentiary hearing]; <u>A.S. v N.S.</u>, 68 Misc 3d 767, 128 N.Y.S.3d 435 [Sup Ct, NY Cty 2020] [custody trial]; see also Rodriguez v Montefiore Med. Ctr., 2020 N.Y. Misc. LEXIS 10798, 2020 WL 7689633 [Sup Ct, Bx Cty Dec 23, 2020] [citing numerous cases directing that depositions be conducted virtually during pandemic]; 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 the preference) of conducting matters via video"]). As the Court put it in <u>Wynona Apartments LLC</u>, supra: "There can be little dispute that the state of the current COVID-19 pandemic sweeping the nation justifies conducting the instant trial by virtual means" (2020 NY Slip Op 20309, at \*4).

## Bonilla v State of New York

- Improvements in video technology now facilitate transmission of virtual images that are clear and closeup, and allow for sufficient consideration of a witness's demeanor . . . while "[c]ertain features of testimony useful to evaluating credibility and persuasiveness . . . can be lost with video technology, and the ability to observe demeanor, central to the fact-finding process, may be lessened", advances in video technology "permit[] the jury [or, in a bench trial, 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"])
- See also <u>C.C. v. A.R.</u>, 2020 NYLJ LEXIS 1623 (Sup. Ct. Kings Cty 2020)(Sunshine, J.)(handling virtual contempt trial)

## Practical Tips for Virtual Bench Trials I

- 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."
- Some notes from the JI
  - All Motions In Limine should be made to the Court at least seven (7) to ten (10) days prior to commencement.
  - Pre-trial witnesses and exhibits pre-marking? Needed? Upload to NYSCEF. NYSCEF Number is better?
  - Display actual backgrounds on screens no virtual backgrounds
  - Use of the raised hand for objections? Use voice instead.
  - Use of break –out Rooms?

### PRACTICAL TIPS FOR VIRTUAL BENCH TRIALS II

- Physical exhibits exhibits and obejctions electronically submitted at least 48 hours beforehand
- Use of the lobby for sequestration?
- No recording by any party.
- No cell phone testimony: must be from a computer unless Court authorizes.
- Restrict hand/facial gestures or comments. No review of documents without admission. No cell phone videos.
- Disclosure of all parties in the rooms.
- Sidebars in breakout rooms?
- See materials for possible stipulated bench trial order.

#### WBASNY'S COLLABORATIVE LAW COMMITTEE

Co-Chairs: Cassandra Johnson, Court Attorney Referee, Queens Co., Supreme Court Kathleen Donelli, Esq., Goldschmidt & Genovese, LLP

#### <u>Virtual Trials: From Judges' Perspectives</u>

April 28, 2021 6:00 p.m - 8:00 p.m.

#### **SPEAKERS:**

Hon. Doris M. Gonzalez, JSC Administrative Justice, Civil Matters Bronx Co., Supreme Court Hon. Richard A. Dollinger, AJSC Supervising Justice, Matrimonial Part Monroe Co., Supreme Court

Hon. Cheryl A. Joseph, AJSC Supervising Justice, Matrimonial Part Suffolk Co., Supreme Court Hon. Nancy Quinn Koba, JSC Westchester Co., Supreme Court

Hon. Ellen Spodek, JSC Kings Co., Supreme Court

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#### What Is Collaborative Law?

<u>Collaborative Law: Resolving Matrimonial and Civil Disputes</u> <u>Without Court Intervention Through Interest-Based Negotiations</u>

Collaborative Law is a way of practicing law whereby the attorneys for both parties to a dispute agree to assist their clients in problem solving, resolving conflict and reaching agreement using cooperative strategies rather than adversarial techniques and litigation. The focus in collaborative law is on finding the common interests and highest priorities of the parties. The goal of the process is to develop effective relationships, solve problems jointly and prevent a court battle. In order to achieve a durable settlement in each situation, collaborative law may use a team approach and call upon the assistance of other non-legal professionals, such as financial specialists and mental health professionals.

Stuart Webb, a family lawyer from Minneapolis, Minnesota, originated the movement of collaborative family law in 1990. By 2000, the ideology had spread to matrimonial bars throughout the country with overwhelming numbers of family law conferences emphasizing collaborative law as an important new tool for resolving divorce/family issues. The collaborative law model produces particularly well thought-out agreements compared to the results of other settlement modalities, because of the commitment to settlement from the start of the negotiation process, rather than at the end of or ancillary to litigation. When the sole agenda is settlement (not court based resolution), and when the sole measure of lawyer success is achieving a durable agreement, the degree of creativity and positive problem solving often increases.

#### **CASELAW ON VIRTUAL COURT APPEARANCES**

#### I. COVID-19 Cases

#### A. Virtual Depositions

<u>Chase-Morris v. Tubby</u>, 69 Misc. 3d 349, 130 N.Y.S.3d 599, 130 N.Y.S.3d 599 at 601, 605 (Supreme Ct., Westchester Co., August 3, 2020) (Lefkowitz, J.)

The court ordered that all depositions be held by video conference and rejected defendant's counsel's argument that plaintiff's deposition "should wait until the COVID-19 health emergency was over and in-person depositions could be held."

#### Accord:

Rodriguez v. Montefiore Med. Ctr., 2020 N.Y. Misc. LEXIS 10798; 2020 NY Slip Op 20349; 2020 WL 7689633 (Supreme Ct., Bronx Co., December 23, 2020)
Fields v. MTA Bus Co., 129 N.Y.S. 3d 319 (Supreme Ct., Westchester Co., August 17, 2020)

#### B. Virtual Fee Hearing

<u>Ciccone v. One W. 64th St., Inc.</u>, 69 Misc. 3d 585, 132 N.Y.S.3d 261 (Supreme Ct., New York Co., September 4, 2020) (Lebovits, J.)

It was both necessary and appropriate to require the parties to participate in the hearing conducted by video conference by the Special Referee to determine the amount of reasonable attorney fees. The Special Referee was able to make a proper, informed recommendation on the fee to be awarded, sufficiently protected the parties' due-process rights, and prevented the fees issue from continuing to languish for months to come.

#### C. Virtual Trial or Hearing

#### Affirmed

Stephanie E. v. Efrain G., 139 N.Y.S. 3d 538, 2021 N.Y. App. Div. LEXIS 1288, 2021 NY Slip Op 01230, 2021 WL 785292 (1st Dept. 2021).

"Despite the fact that the parties' testimony, as necessitated by the Covid-19 pandemic, occurred telephonically," the Appellate Division affirmed the Family Court's determination that the respondent committed a family offense, that he be excluded from the residence and that petitioner be granted a two-year order of protection.

#### Granted

<u>C.C. v. A.R.,</u> 2020 N.Y. Misc. LEXIS 6769; 2020 NY Slip Op 20245 (Supreme Court, Kings Co., September 30, 2020) (Sunshine, J.)

The court held that Judiciary Law Section 2-b(3) permits a court to order a trial or hearing to proceed virtually even where one of the remedies sought against the husband was civil and criminal contempt.

#### Granted

A.S. v. N.S., 68 Misc. 3d 767 (Supreme Ct. NY Co., July 1, 2020) (Dawson, J.)

The custody hearing was to proceed virtually because objections did not set forth a prejudicial basis to further delay the hearing, given the unpredictable nature of COVID-19, where compelling in-person attendance, in a courtroom, could subject vulnerable individuals to an increased risk of harm. Virtual technology would remove that risk.

#### Granted

Wyona Apts. LLC v. Ramirez, 70 Misc. 3d 591, 2020 N.Y. Misc. LEXIS 9295, 2020 WL6879003 (Civil Ct., Kings Co., November 22, 2020) (Wang, J.)

After the stay on residential eviction matters was lifted by Administrative Order 160A/20 on August 13, 2020, the court ordered the nonpayment of rent proceeding commenced in 2017 to proceed by virtual trial. The court reasoned that:

"if listening to an interpreter simultaneously translate is infeasible, both parties may consent to have the interpreter translate through a phone directly" to the tenant. 70 Misc. 3d at 596.

Bonilla v. State of NY, Misc. 3d, 2021 NY Slip Op 21013 (Court of Claims January 22, 2021) (Weinstein, J.)

Virtual trial on liability for alleged wrongful conviction was ordered over defendant's objection. The court had the authority to order a resistant party to appear for a trial to be conducted remotely and was unwilling to delay the trial indefinitely.

#### Denied

Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 2020 NY Slip Op 34293(U) (Supreme Ct., NY Co., December 24, 2020) (Sherwood, J.)

Motion to stay trial granted until it could be safely held in person or virtually because of the complexity of the matter, the number of firms, lawyers, staff and expert witnesses who would need to travel to New York City and comply with quarantine requirements. Discrete groups, including several attorneys and staff in the high risk category and many family members of trial participants, would be working together in the same space for long periods each day over the course of the trial, making it difficult to form a "closed loop" during trial preparation and trial to prevent the spread of COVID-19.

#### II. Pre-COVID-19

D. Child's Testimony in Sex-Crime Case

A. People v Cintron, 75 N.Y. 2d 249 (Ct. of Appeals of New York January 11, 1990) (Hancock, J.)

The court reasoned that N.Y Crim. Proc. Law § 65 which authorizes a trial court, under specified circumstances, in certain sex crime cases, to permit a child witness to testify over live two-way closed-circuit television in defendant's absence, does not necessarily violate the defendant's constitutional right of confrontation, where it is likely that the child witness, as a result of "extraordinary circumstances," would suffer severe mental or emotional harm if required to testify in person. However, the court held that the prosecutor failed to establish by clear and convincing evidence the required threshold determination of vulnerability in permitting the child witness to testify from a testimonial room over live, two-way, closed-circuit television.

#### B. Complainant's Testimony from California Granted

People v. Wrotten, 14 N.Y. 3d 33 (Ct. of Appeals December 15, 2009) (Ciparick, J.)

Eighty-five year old complainant who was unavailable because traveling from California to New York would endanger his health was permitted to testify at defendant's trial from a courtroom in California via a real-time two-way video.

C. Defendant's Testimony from Argentina Granted

<u>American Bank Note Corp. v. Daniele</u>, 81 A.D. 3d 500, 916 N.Y.S. 2d 112, (1st Dept., February 15, 2011)

The court reasoned it was proper to allow defendants to testify by means of a live video conference link from Argentina via video conferencing. Defendant's appearance via video conference was voluntary and plaintiffs fully participated in that hearing. Defendant had not made travel arrangements to come to the United States and there was also a question of whether he could

lawfully leave Argentina because of charges plaintiffs filed against him in that country. Thus, coming to New York to testify was not feasible as a practical matter and would have resulted in hardship.

#### D. Expert Witness's Testimony Denied

Matter of State of New York v. Robert F., 25 N.Y.3d 448, 34 N.E.3d 829 (Ct. of Appeals March 23, 2015) (Pigott, J.)

Permitting expert witness to deliver testimony via video conference over objection without requiring a proper showing of exceptional circumstances was error. Video conference is an exceptional procedure to be used only in exceptional circumstances. Here, petitioner merely indicated that the expert could not appear in court on short notice, and was somehow limited by her employment.

Witness's Testimony Denied

People v. DePalo, 60 Misc. 3d 267 (Supreme Ct. NY Co., April 11, 2018) (Merchan, J.)

The court denied defendant's request for a witness to testify via live video because the adult witness living in the United Kingdom was unwilling to disrupt his current job or expose himself to media attention by coming to New York to testify. The court reasoned this was not the type of exceptional circumstance for which live, two-way video testimony would be authorized.

#### E. Claimant's Testimony from Prison Permitted

<u>Jackson v. State of NY</u>, 165 A.D. 3d 1527 (3d Dept., October 25, 2018)

Claimant, a prison inmate, was not deprived of his right to a public trial due to his participation in the trial via video conference from prison. The manner of claimant's appearance did not, in any way, alter the facts that the trial was conducted in a Court of Claims courtroom and open to the public as required.

### OUTLINE OF VIRTUAL BENCH TRIAL: PROTOCOLS AND PROCEDURES (B. 1-34)

at 3

 Applies throughout NYS: "each Court should adapt the foregoing to their specific needs, requirements and concerns"

#### at 4

#### Virtual Bench Trial Decorum

- All participants are to have proper attire and there should be no consumption of food or drink or smoking during the proceedings
- Virtual backgrounds should be prohibited
- Physically raise hand or use the "raise hand" function
- At any time during proceeding, Counsel may request that the Virtual Bench trial be paused to allow Counsel to consult with client
- · Court may permit the use of Breakout Room feature

#### at 5

#### Safeguarding the Virtual Bench Trial

Exchange cell phone numbers and/or email addresses

#### Maintaining Public Access

- Remote access to the Virtual Bench Trial may be provided from courthouse location.
- To the extent possible, live-streams and Microsoft Teams link should include a notice/banner prohibiting recordings of the proceeding

#### **Pre-Trial Considerations**

at 6

- A Courtroom Clerk must be present
- Attorneys and litigants should stipulate in writing to the Virtual Bench Trial and to waive a jury trial
- Judiciary Law 2-b(3) gives Court inherent power and broad discretion "to carry into effect the powers & jurisdiction possessed by it."

Virtual Pre-Trial Conference to be held at least 7-10 days before trial

- Exhibits: at least 48 hours before Pre-Trial Conference
  - Stipulate into evidence and redact as necessary
  - Electronically submit
  - Court can rule on objections to contested exhibits
- Witnesses: at least 48 hours before Pre-Trial Conference
  - Electronically submit witness list and objections

at 7

at 8

Motions in Limine to be submitted at least 7-10 days before trial

#### **Opening Statements**

 Before the Opening Statement, Counsel should make a good faith effort to agree upon demonstratives to be used and Court will allow "share screen" function to be used

#### at 8 Exhibits

- Must be "Bates-Stamped" if more than 1 page. With Court's approval, other pagination methods may be used
- Plaintiff to use numbers
- Defendant to use letters
- physical object should be submitted 15 days before the Virtual Pre-Trial Conference
- Counsel can make an appointment with the Court to view and photograph physical exhibits
- Electronically submit a list of agreed upon physical exhibits and objections 48 hours before the Pre-Trial Conference
- Court Reporter will mark exhibits into evidence
- If an exhibit is altered during trial, it should be saved and exchanged electronically

#### at 9 Witness Testimony

- witnesses names, email addresses and back-up telephone numbers must be submitted at Pre-Trial Conference
- language interpreter must be requested at the Pre-Trial Conference
- all witnesses must give testimony with both audio and video
- recordings are strictly prohibited
- written or oral communications between witness or party and Counsel for the witness during testimony are prohibited
- Counsel must insure that a remote witness is not being coached, assisted or signaled in any way
- not permitted to read or refer to anything other than what counsel provides during testimony
- no information shall be available out of the sight of the Court
- no other computer monitor, screening, t.v. or cell
- room to be displayed to the Court prior to the testimony and periodically thereafter
- no other person in the room
- no testimony from a cell phone, without Court's permission

at 10

at 11 If a participant is in the same location, Counsel shall have a separate camera available for each individual so that the Court can see Counsel and all participants at all times simultaneously.

#### Sidebar Conferences

 may use the Breakout Room feature or a cell phone conference call

#### **Closing Arguments**

 agree upon demonstratives prior to the Pre-Trial or Pre-Summation Conference

#### at 12 Record on Appeal

 only the official transcript or FTR recording device where appropriate and Exhibits marked into evidence

#### at 12 Virtual Criminal Bench Trial Considerations

- may only proceed with the consent of the Defendant and Defendant's counsel (recommended by in-person appearance)
- Court must explain on the record that Defendant is waiving Jury Trial and defendant must execute a written waiver of Jury Trial
- Everyone must state on the record that they are waiving In-Person Trial
- at 13 In-Person Pre-Trial Conference is recommended
  - During the Pre-Trial Conference, it is recommended that:
    - all documentary evidence be pre-marked and inspected
    - physical evidence and chain of custody issues be determined if possible
    - if Defendant's identification is an issue and Defendant is wearing a face covering, arrangements may be made in advance to have the Defendant lower his/her face covering during the identification process
    - provisions should be established for Defense Counsel and the Defendant to privately confer and communicate at all times by: Breakout Room, cell phone, audio, text or with headphones

#### Attached Exhibits

- at 16-28 A. Proposed Stipulation and Order for Virtual Bench Trial Protocols and Procedures
- at 30 B. Sample Witness Inquiry
- at 32 C. Waiver of In-Person Bench Trial
- at 33, 34 Sample Waiver Inquiry and Consent to a Virtual Bench Trial

# THE DOS AND DON'TS OF VIRTUAL TRIALS BY: HON. NANCY QUINN KOBA, JSC AND HON. CHERYL A. JOSEPH, AJSC

#### I. TECHNOLOGY

#### A. DO

- when the virtual appearance is scheduled, contact your client to verify they have access to the necessary technology, and if they do not, contact the Court to make arrangements for access before the scheduled trial date
- provide contact information for your clients and witnesses, such as cell phone numbers and/or e-mail addresses before the virtual trial commences so the individual can be contacted if they become disconnected
- test your equipment using the Microsoft TEAMS platform before the trial commences and confirm your client has done the same
- attend the trial from quiet and appropriate locations without background distractions
- connect to the Microsoft TEAMS platform using a secure, password protected Internet connection
- inform your clients they must display their actual backgrounds during the trial
- ensure there is not another computer, monitor, screen, TV screen, cellphone, or other electronic device in the same room where your witness is testifying
- mute your microphone when you are not speaking,
- immediately notify the court if it appears a participant has been dropped from the trial.

#### B. DO NOT

- use a public Wi-Fi connection
- record the trial
- use virtual backgrounds
- allow a non-participant or third party to gain unapproved entry to the trial
- share the same computer screen with another participant

#### II. DECORUM

#### A. DO

#### Generally:

- remember a virtual trial is a formal court proceeding
- always maintain a respectful demeanor
- wear proper attire
- arrange for any pets to be in a separate room during the trial
- arrange for childcare while attending the trial so children do not inadvertently hear the testimony

#### Counsel:

- make all objections audibly
- raise your hands and/or use the "raise hand" function in Microsoft TEAMS
- contact the court in advance to request their procedure/rules for the submission of exhibits
- contact your adversary to agree on which exhibits you can stipulate to in advance
- ensure all exhibits are properly marked and uploaded to the Court
- practice displaying the exhibits on the Microsoft TEAMS platform so you can smoothly display them while the witness is testifying

#### B. DO NOT

#### Generally:

- consume food or drink or smoke during the trial
- be off screen or turn off the computer camera without the express prior permission of the Court
- speak when someone else is speaking or speak over one another or the court
- attend the trial from a noisy or informal location, i.e. your bedroom, while driving, etc.
- answer your cell phone and engage in a conversation during the trial

#### Counsel:

- engage in colloquies with other Counsel during the trial
- communicate, either in writing or orally, via electronic means or otherwise with a witness or party during the trial

#### Witnesses/Parties:

- read or refer to an exhibit, image, document, or other writing of any kind during their trial testimony other than exhibits, images, documents, or other writings provided to them by counsel during their direct or cross examinations
- allow another person to be present, either physically or electronically, in the same room with them or so near them as to be seen or heard by the witness
- testify from a cell phone unless specially authorized by the Court in advance

# **EXHIBIT** A

### Hon. Cheryl A. Joseph



Supreme Court, Suffolk County

# **Judicial Offices**

Acting Supreme Court Justice, Supreme Court, Suffolk County, 2016 to Present

Acting Supreme Court Justice, Family Court, Suffolk County, Designated by Hon. A. Gail Prudenti, 2015 to Present

Judge, New York State Court of Claims, Appointed by Governor Andrew M. Cuomo, 2015 to 2022

## Other Professional Experience

Suffolk County Family Court, Support Magistrate, 2008 to 2015

Touro Law Center, Adjunct Professor, 2009 to Present

Family Court of the City of New York, Bronx County, Support Magistrate, 2006 to 2008

Family Court of the City of New York, Queens County, Supervising Court Attorney, 2004 to 2006

Family Court of the State of New York, Queens County, Court Attorney, 2003 to 2004

The Center for Court Innovation, Domestic Violence Court Coordinator, 2002 to 2003

Children's Law Center, Law Guardian, 2001 to 2002

The Children's Law Center, Law Guardian, 2001 to 2002

Judge Hatchett, Columbia Tri-Star Television, Legal Research, 2001 to 2001

New York County, Assistant District Attorney, 1996 to 2001

#### Admission to the Bar

NYS, Appellate Division, Second Department, 1998

#### Education

J.D., New York University School of Law

B.A. (Magna Cum Laude & Phi Beta Kappa), New York University

# Hon. Nancy Quinn Koba



Supreme Court, Westchester County

#### **Judicial Offices**

Justice, Supreme Court, Westchester County, Elected, 2020 to 2034

Town Justice, Town Court, Ossining, Appointed October 2009, Elected, 2010 to 2019

### Other Professional Experience

Wood Smith Henning & Berman, LLP, Partner, 2014 to 2019

Wilson Elser Moskowitz Edelman & Dicker, Partner, 2005 to 2014

Gallina & Connolly, Trial Counsel, 1990 to 2005

MacCartney, MacCartney, Kerrigan & MacCartney, Associate, 1987 to 1990

Rothschild Esposito Himmelfarb Sher & Pearl, Associate, 1986 to 1987

Westchester Legal Services, Staff Attorney, 1985 to 1986

#### Admission to the Bar

NYS, Appellate Division, Second Department, 1986

Second Circuit Court of Appeals, 2018

United States District Court, Western District of New York, 2016

United States District Court, Northern District of New York, 2014

United States District Court, Southern and Eastern District of New York, 1987

Connecticut, 1985

#### Education

J.D., Pace University School of Law, cum laude, 1985

B.A., Manhattanville College, cum laude, 1982

#### **Professional & Civic Activities**

Member, Comprehensive Plan Advisory Committee, Town of Ossining, 2001 to Present

Co-President & Vice President, Ossining PTA Council, 2001 to 2004

Member, Full Day Kindergarten Committee, OUFSD, 1998 to 1999

Trustee, Board of Trustees, Village of Irvington, 1990 to 1992

#### Hon. Doris M. Gonzalez



Supreme Court, Bronx County, Civil Term

#### **Judicial Offices**

Administrative Judge, Supreme Court, Bronx County, Appointed by Chief Administrative Judge Lawrence K. Marks, 2019 to Present

Justice, Supreme Court, Bronx County, Elected, 2017 to 2031

Acting Justice, Supreme Court, Bronx County, Appointed by Chief Administrative Judge Ann Pfau, 2010 to 2018

Judge, Civil Court of the City of New York, Bronx County, Elected, 2007 to 2017

## Other Professional Experience

NYS Unified Court System, Principal Law Clerk, 2005 to 2007

Hayes and Mensching Esqs.; Kings County, 2000 to 2004

Velella, Vellella, Basso & Calandra Esqs.; Bronx County, 1999 to 2000

Smith, Mazure, Director, et. al.; New York County, 1998 to 1999

Sheft, Golub and Kamlet Esgs.; New York County;, 1997 to 1998

Hayes and Ryan Esqs.,; New York County;, 1990 to 1997

#### Admission to the Bar

NYS, Appellate Division, Second Department, 1989

United States District Court, Southern District of New York, 1989

United States District Court, Eastern District of New York, 1997

#### Education

JD, CUNY Law School at Queens College

# Hon. Richard A. Dollinger



Monroe County Supreme Court

# **Judicial Offices**

Judge, Court of Claims, Appointed by Governor David Paterson, 2009 to 2015

Acting Justice, Supreme Court, Seventh Judicial District, 2009 to Present

## **Other Professional Experience**

New York State Senate, Senator, 1993 to 2002

Monroe County Legislator

**Brighton Town Justice** 

Barrett, Greisberger, Dollinger & Fletcher, Litigator

Underberg & Kessler, Litigator

#### Admission to the Bar

NYS, Appellate Division, Fourth Department, 1981

#### **Education**

J.D., Albany Law Schoool

St. Michael's College at the University of Toronto

# Hon. Ellen Spodek



Supreme Court, Kings County

# **Judicial Offices**

Justice, Supreme Court, Kings County, Elected, 2009 to 2022

Supervising Judge, Civil Court of the City of New York, Kings County, Appointed by Chief Administrative Judge Ann Pfau, 2007 to 2009

Judge, Civil Court of the City of New York, Kings County, Elected, 2003 to 2008

# **Admission to the Bar**

NYS, Appellate Division, First Department

#### Education

JD, Fordham University School of Law, 1988



Cassandra Aimée Johnson is a Court Attorney Referee in the Queens County Supreme Court, Civil Term. In this role, she presides over foreclosure and matrimonial settlement conferences as well as foreclosure and commercial trials and hearings. As part of the statewide initiative to implement Presumptive Alternative Dispute Resolution, Ms. Johnson was selected to participate in basic and advanced mediation training programs and mediates civil and commercial matters. Ms. Johnson is a member of the Statewide Foreclosure Working Group, chaired by the Chief of Policy and Planning, where she reviews foreclosure inventory and issues, assesses emerging trends, shares case management strategies and helps develop pilot projects to increase access to justice, improve case processing, and establish best practice standards. In addition, she participates in a working group to create Do-It-Yourself step-by-step computer programs for self-represented litigants. Ms. Johnson has been a panelist at the Office of Policy and Planning's Statewide Foreclosure Continuing Legal Education programs.

While in the court system, Ms. Johnson has also served as principal law secretary to Justices of the Queens Supreme Court and senior court attorney in the Law Department. She was a contributing writer and editor of the chapter entitled "Commercial Leasing," which was published in the fourth edition of West's New York Practice Series, Commercial Litigation in New York State Courts. Prior to her service in the court system, Ms. Johnson worked as an attorney for the New York City Human Resources Administration, where she focused her practice on preventative law and civil litigation. She began her legal career in private practice as a litigation and real estate associate at the Law Offices of Andrée Sylvestre.

Ms. Johnson obtained her Juris Doctor from St. John's University School of Law. She is admitted to practice in New York and Connecticut, as well as the United States District Court for the Eastern and Southern Districts of New York. Ms. Johnson is a board member of the Queens County Women's Bar Association, Corresponding Secretary of the Macon B. Allen Black Bar Association, First Vice-President of the Law Secretaries Association to the Justices of the Supreme and Surrogates' Courts, and co-chairs the Women's Bar Association of the State of New York's Collaborative Law Committee.



KATHLEEN DONELLI is a partner in the law firm of Goldschmidt & Genovese, LLP in White Plains, N.Y. and concentrates her practice in matrimonial and collaborative law. Ms. Donelli is an adjunct professor at Elisabeth Haub School of Law at Pace University ("Pace Law School") teaching Matrimonial Practice and Collaborative Law and is the Vice Chair of its Board of Visitors. Ms. Donelli is a member of the Matrimonial Practice Advisory and Rules Committee and the recipient of the N.Y.S. Bar Association Ruth Schapiro Award for promoting women in the legal profession. Ms. Donelli worked with the Hon. Sondra Miller to draft and promote the "No Fault" divorce bill which was enacted into law in October, 2010. Ms. Donelli is a former President of the Westchester Women's Bar Association ("WWBA") (2003-2005), the White Plains Bar Association (1998-2000) and member of the Grievance Committee for the Ninth Judicial District. In 2010, Ms. Donelli received the "Leading Matrimonial Attorney" Above the Bar Award. She is a graduate of Pace Law School ('85, *cum laude*) where she was the Articles Editor of the Pace Law School Law Review. In 2005, Ms. Donelli received the Alumni Leadership Award from Pace University School of Law. She is listed as a Super Lawyer in Thomas Reuter's annual list of top family law attorneys in the N.Y. Metro area.

Ms. Donelli won a landmark Court of Appeals custody decision, *Tropea*, 87 N.Y.2d 727 (1996), which established the rule in New York for custodial parents who seek to relocate. Ms. Donelli's additional reported cases in the area of matrimonial law include: *Seruya v. Seruya*, 107 A.D.3d 972 (2d Dep't 2013); *Amari v. Molloy*, 293 A.D.2d 431 (2d Dep't 2002); *Amari v. Molloy*, 180 Misc. 2d 664 (Kings Co. 1999); *Amari v. Molloy*, 8/8/00 NYLJ, page 23, col. 5 and *Frayne v. Frayne*, 234 A.D.2d 545 (2d Dep't 1996). In the area of commercial litigation, Ms. Donelli's reported cases include: Jaffer v. Miles, 134 A.D.2d 572 (2d Dep't, 1987); 1185 *Avenue of the Americas Associates v. The Resolution Trust Corp.*, 22 F.3d 494 (2d Cir. 1994); *Route 22 Associates v. Cipes*, 204 A.D.2d 705 (2d Dep't, 1994).

# **EXHIBIT B**

LAWRENCE K. MARKS

JOHN W. MCCONNELL, ESO. EXECUTIVE DIRECTOR

NANCY J. BARRY, ESQ.

#### MEMORANDUM

April 5, 2021

TO:

Hon. George Silver Hon. Vito C. Caruso

FROM:

Nancy Barry NB

RE:

Virtual Evidence Courtrooms in Matrimonial Cases

As you may recall, over the past few months a pilot program for submission of virtual evidence before and during virtual trials has been used in selected matrimonial cases in New York, Kings, Westchester, and Ontario counties. This program was designed by our NYSCEF team at the Division of Technology, in close coordination with the Hon. Jeffrey Sunshine, Statewide Coordinating Judge for Matrimonial Cases, and Jeff Carucci, Statewide Coordinator for Electronic Filing.

I am pleased to report that, effective today, the pilot program is being expanded to include all contested matrimonial matters filed through NYSCEF throughout the State. Moreover, the program now includes a Virtual Evidence Courtroom (VEC) module, by which documents can be submitted to the court and parties for trial use through a NYSCEF-based system in both fully remote and hybrid trial settings. Instructions on this new system, including a video recording for court users, can be found at the NYSCEF website at www.nycourts.gov/efile. Although currently a case must be filed through NYSCEF to use this platform, we anticipate that it will be more broadly available in the future for matters that are not electronically filed.

Please distribute this memorandum further as you deem appropriate. Questions on this subject can be directed to Justice Sunshine (jsunshin@nycourts.gov). Questions regarding the NYSCEF-based aspects of the program can be directed to NYSCEF@nycourts.gov. As always, thank you for your kind assistance.

c: Hon. Lawrence K. Marks Hon. Edwina G. Mendelson Hon. Jeffrey S. Sunshine

County Clerks

Scott Murphy

Linda Dunlap-Miller

Michelle Smith

Jeffrey Carucci

Susan Kaufman

<sup>&</sup>lt;sup>1</sup> The instructions may be accessed by selecting the "Virtual Evidence Courtroom" link located under the Help menu at the top right side of the home page.

# EXHIBIT C



# Virtual Bench Trial Protocols and Procedures

Hon. Norman St. George, J.S.C. District Administrative Judge 10<sup>th</sup> 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. Nonspeaking participants should always activate the mute microphone function.

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

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

# Safeguarding the Virtual Bench Trial

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

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

# Maintaining Public Access

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

# **Pre-Trial Considerations**

Since Virtual Bench Trials will be conducted using the Microsoft Teams platform, Judges presiding over Virtual Bench Trials must be familiar with the Microsoft Teams platform and should ensure that their staff and Courtroom Clerks are familiar with the platform. A Courtroom Clerk must be present during all stages of the Virtual Bench Trial with audio and video connections in working order.

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

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

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

# Virtual Pre-Trial Conference

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

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

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

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

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

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

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

# **Opening Statements**

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

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

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

#### **Exhibits**

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

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

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

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

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

### Witness Testimony

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

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

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

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

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

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

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

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

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

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

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

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

### Sidebar Conferences

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

# **Closing Arguments**

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

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

# Record on Appeal

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

# Virtual Criminal Bench Trial Considerations

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

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

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

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

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

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

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

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

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

## Summary

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

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

# EXHIBIT A

COUNTY OFCOUNTY OF	
	Index No.
Plaintiff(s)/Petitioner(s),	PROPOSED STIPULATION AND ORDER FOR VIRTUAL BENCH TRIAL PROTOCOLS AND PROCEDURES
V.	TROTOCOLS AND TROCEDURES
Defendant(s)/Respondent(s).	

#### 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 Courtapproved 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.

[STIPULA]	TED BY AND THROUGH COUNSEL OF RECORD]
DATED:	
	Attorneys for Plaintiff(s)/Petitioner(s)
DATED:	
	Attorneys for Defendant(s)/Respondents(s
[PURSUAN	NT 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

#### $\underline{SAMPLE\ DEFENDANT\ WAIVER\ OF\ IN-PERSON\ BENCH\ TRIAL\ FORM}$

COURT OF THE STATE OF NEW YOR COUNTY OF	
THE PEOPLE OF THE STATE OF NEW YORK,	-x Waiver of In-Person Bench Trial
	Docket No. CR-
-against-	
Defendan	
I, the defendant in this case, having been changed the crime(s) of:	-
as specified in the above-numbered Docket No., as right to be tried by way of an In-Person Bench Trial and consent wirtual electronic manner.	ial, hereby, in open court, waive
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.

# **EXHIBIT D**

#### 1 WBASNY

#### **COLLABORATIVE LAW COMMITTEE**

Virtual trials: From Judges Perspectives

April 28, 2021

Evaluating Demeanor/Credibility

Via Zoom

Hon. Richard A. Dollinger

New York Court of Claims

Acting Supreme Court Justice

7<sup>th</sup> Judicial District

#### 2 THE CURRENT PARADIGM - IN-COURT TRIALS

- Evidentiary hearings and trials are live events, conducted in dedicated spaces to which
  members of the public and the press generally have access, at which litigants appear at the
  same time and participate; evidence, especially testimony, is presented; and decisions are
  publicly and formally pronounced.
- Participants can observe one other as they variously testify, argue, watch, and listen.
- The liveness, momentousness, and visibility of hearings and trials are all components of the familiar metaphors of the courtroom as stage and the trial as theater, which remind us that an audience--in the courtroom gallery or watching at home--is always at least notionally part of the performance as well.

## FACTORS TO CONSIDER IN REMOTE/VIDEO FAMILY LAW MATTERS

- 1. Importance of Demeanor Evidence
- 2. Credibility Assessments in Contested Cases
- 3. Is remote testimony inherently less reliable?
- 4. Impact on the Litigant who is "not live"
- 5. Public Confidence in the Remote Hearing via Video
- 6. Confidence in the Courts does it extend to family matters?
- 7. Judicial Steps to Minimize any Impact

#### **4** □ Demeanor Evidence – The "key" to a trial?

- The centrality of demeanor evidence in the U.S. system is the product of a number of sources: textual guarantees like the Sixth Amendment's Confrontation Clause and the Federal Rules of Civil Procedure, the common-law tradition of an open courtroom and its attendant rituals, the folk-knowledge belief that demeanor is a reliable indicator of credibility, and faith in the "elusive" power of "sense impressions."
- A similar spectrum of text-based rules, norms and rituals, beliefs about human behavior, and
  mysticism underlies much of courtroom practice. Courtrooms, in the words of the late legal
  and literary scholar Robert Ferguson, aim to create "an aura," a mystique of authenticity and
  legitimacy."
- When proceedings are forced onto Zoom, Webex, or other virtual platforms, much if not all of

#### **DEMEANOR IN FAMILY LAW – DECISIVE?**

- This preference for in-court proceedings has been intimately tied to a belief that personal observation is essential to the ability to evaluate demeanor, and to a belief in the importance of demeanor in the assessment of credibility and character.
- Demeanor evidence "relies heavily on the interpretation of facial expression and body language." This evidence is especially probative in family law cases, where there are direct conflicts in testimony.
- Access to witnesses' demeanor is viewed as an aspect of fairness to the parents and as a sign
  of respect for their dignity: a parent deserves to be able to hear, see, and cross-examine the
  other parent and related witnesses. It is also an article of faith that access to demeanor helps
  decision-makers assess witnesses' credibility and thus advances the core value of accurate
  judgment, especially in family cases where the only witnesses may be the litigants.

### 6 The Prevailing Consensus – MASKS AND DEMEANOR

- As one defense attorney grappling with the use of surgical masks in the courtroom recently stated:
- "[I]f witnesses or jurors are allowed to wear masks, it could obscure key nonverbal cues during testimony and jury selection. 'We need to be able to see someone's face in order to judge their credibility' . . . . "

#### 7 Demeanor = Credibility?

- The issue of discerning truth, the overwhelming weight of social science research debunks the common-sense belief that demeanor is a reliable cue to credibility. In general, people, including judges, are much less accurate than they think they are when they seek to use witnesses' demeanor to differentiate truthful from untruthful testimony.
- But the larger problem is that although most jurists and scholars focus on "truthfulness" or "credibility" as if they are freestanding, measurable traits, the use of demeanor evidence in practice is much broader.

#### 8 **DEMEANOR = BELIEVEABILITY?**

- What is believable depends as well as on the assumptions and biases of the fact-finder who is
  evaluating the witness--whether a story seems believable will depend on whether it resonates
  with the fact-finder's experience of the world. This factor may be especially accurate in family
  law cases if the testimony comports with the fact-finder's life experience.
- The Judge's Rape Victims Study -- Calhoun et al., Victim Emotional Response: Effects on Social Reaction to Victims of Rape, 20 BRIT. J. SOC. PSYCHOL. 17 (1981) (more emotional rape victim deemed more credible); Winkel & Koppelaar, Rape Victims' Style of Self-Presentation and Secondary Victimization by the Environment: An Experiment, 6 J. INTERPERS. VIOLENCE 29 (1991)

#### 9 **DEMEANOR = INTENTION?**

- Even though there is no evidence that remorse can be accurately assessed via facial expressions, jurors tend to believe they are well equipped to make just such an evaluation in a matter of life or death.
- Nor are judges and the media exempt from these beliefs.
- Indeed, studies show that judges and other fact-finders employ cues to complex states like

remorse in an inconsistent or even contradictory manner, so that one judge may rely on a given behavior as indicative of remorse while another believes the same behavior indicates lack of remorse.

#### 10 Remote Testimony – Does it Change?

- Witnesses in proceedings on Zoom are also likely to testify differently than they would in physical courtrooms for half a dozen other reasons, none of which bode well for judges' and jurors' construals of their demeanor. How is a judge to know?
- Impact on "The Up Close and Personal" camera?
- One judge reported after conducting a summary jury trial in a civil matter, the attorneys conducting voir dire were surprised that the online view provided even more information about juror demeanor that they would have had in court. "Online . . . 'you see the whole face, eyebrow twitches, and panel members are way more relaxed' sitting at home, instead of in a courtroom."

#### 11 REMOTE WITNESSES AND THE TRIER OF FACT

- The increased cognitive demands of participating in an extended Zoom proceeding and possibly the lesser drama in a videoconferenced as opposed to a physically co-present trial may reduce judges' ability to pay attention to whatever they take to be demeanor evidence.
- The trier of facts ability to concentrate on a given witness or party may be further impaired by the simultaneous appearance on the interface of other participants (including themselves), offering a constant source of distraction, in an array that may shift, sometimes without notice, as persons are dropped or added.
- This increased mental effort that judges must allocate to what they are doing in the virtual courtroom may itself bias their impressions of witnesses' and parties' demeanors steps to avoid?

### 12 SUBLIMINAL/UNCONSCIOUS IMPACTS OF REMOTE WITNESSES – THE WWE EFFECT

- Crucially, judges may be unaware of how these features of the videoconferencing medium are influencing their evaluations and decisions. Instead, they will intuitively think that they are perceiving others' facial expressions, tones of voice, and postures "as they really are." This is naïve realism.
- Judges may discount or ignore the extent to which the demeanors that witnesses and parties are displaying are due to the situation in which those witnesses and parties find themselves-not just in court but in court on Zoom, talking to their computer screens and aware of other participants only as multiple head-and-upper-torso images in the interface.

#### 13 CAN JUDGES RELY ON DEMEANOR EVIENCE?

- If our legal culture continues to privilege physical courtrooms for the demeanor evidence they afford, and views virtual courts with suspicion until they can yield equivalent displays, it ought to be on a firmer basis than a mystical faith in the "elusive and incommunicable imponderable" nature of demeanor evidence.
- As mentioned above, the overwhelming weight of social science research debunks the common-sense belief that demeanor is a reliable cue to credibility.

#### 14 TIME TO REVIEW ALL DEMEANOR EVIDENCE?

• There is much to be learned about how virtual proceedings affect the presentation and

interpretation of demeanor evidence. Perhaps more to the point, there is still a vast amount to be learned about the presentation and interpretation of demeanor evidence in traditional courtrooms.

• For a central, largely unquestioned tenet of the common-law system, and one that exercises enormous influence over decisions about property, liberty, and even life, demeanor evidence has been resting on its laurels for far too long.

## 15 REMOTE HEARINGS – IMAPCT ON THE LITIGANT

- Tiana Clark, a woman who recently got divorced on Zoom, wrote that what should have been a momentous experience seemed not fully real:
- My virtual divorce felt dreamlike -- weeks later, I sometimes wonder whether it really happened. So much of dreaming feels like you're trying to grab the hem of something that dissipates right in front of you. Videoconferencing has the same effect, inducing an exhausting sense of placelessness. . . . [Despite the procedure's legal efficacy], I still felt like I missed something.
- Tiana Clark, The Surreal Anticlimax of Getting Divorced over Videoconference, WASH. POST (June 23, 2020), https://www.washingtonpost.com/outlook/2020/06/23/surreal-anticlimax-getting-divorced-over-videoconference/.

#### 16 UNCERTAINTY OVER THE IMPACT?

- The current pandemic squarely presents the question whether physical proximity in a public courtroom is a necessary condition for a family member or child who wishes to make their presence felt and communicate their stress, disappointment or pain.
- Virtual proceedings can disinhibit as well as inhibit emotional expression. Though the lack of immediacy might feel less immersive to the unwilling participant, it might also feel less coercive.
- We simply don't know enough yet about how the move to virtual platforms may affect the sorts of strong emotions that family members or children often express during family disputes or what decision-makers and others feel when hearing them.

#### 17 PUBLIC CONFIDENCE IN VIDEO

- As one New Zealand judge has written: "One must express some concern that if the court
  process is not seen as relevant to modern technologies and modern means of communication,
  where then will lie the respect for the Rule of Law?"
- This judge also posited of "digital natives" (persons born after about 1985) in particular: "Their attitude towards the symbolism of the court is that the court is a place where the requirement to be physically present at a certain place for the disposal of court business may be seen as laughable, particularly when there are other systems that are available."
- Courts and Covid 19: Delivering the Rule of Law in a Time of Crisis, THE IT COUNTRY JUSTICE (Mar. 26, 2020) https://theitcountreyjustice.wordpress.com/2020/03/26/courts-and-covid-19-delivering-the-rule-of-law-in-a-time-of-crisis/.

18

FEDERAL - AND STATE -- COURTS ARE JUMPING IN -

WITH BOTH FEET

## 19 Xcoal Energy & Res. v. Bluestone Energy Sales Corp., 2020 U.S. Dist. LEXIS 1497 (D. Del. 2020)

- While Defendants continue to raise vague and conclusory assertions that due process rights require the trial to be held in person, they cite no authority for their position, and as Plaintiff correctly observes courts are regularly determining that, in light of the ongoing pandemic, taking testimony remotely is sometimes the best available (and adequate) option. See Fed. R. Civ. P. 43(a) ("At trial, the witnesses' testimony must be taken in open court, . . . . [However, for] good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.");
- The Court believes (and is every day observing) that able counsel can effectively examine
  witnesses without being in the same room, providing the Court the evidence it needs to make
  necessary factual findings, including credibility assessments.

#### "Sensitive proceedings" – Same for Family Courts?

The Court predicts that because this case does involve "sensitive" and "intimate" topics, all parties—plaintiff, defendants and jurors alike—will be more comfortable, forthcoming and candid outside a massive, sterile, imposing federal courtroom. Indeed, judges who have conducted remote criminal proceedings note that allocution is typically more productive, informative and helpful because the very nature of Zoom technology is more intimate (their words, not mine) than a typical courtroom experience. In short, the sensitive subject matter of this litigation does not make it unsuitable for remote trial proceedings.

Xcoal Energy et al v. Bluestone Energy Sales, supra

## 21 Ritz Enters. v. V., 2020 Fla. Cir. LEXIS 845 (Fla. Cir Ct. 2020)

- DOES VIDEO GIVE THE COURT A BETTER VIEW OF A WITNESS?
- The Court has now conducted many hours of hearings using Zoom and has found that the credibility of witnesses can be evaluated using video. In fact, because the witnesses are facing the camera the Court can see their reactions up close and from straight on as opposed to the typical side view from the witness stand which pre-COVID and now with social distancing has been and will be from much further away.

#### 22 Bonilla v State of New York 2021 N.Y. Misc. LEXIS 329 (Ct. Cl. 2021)

- Under <u>Judicial Law § 2-b(3)</u>, "[a] court of record has power to devise and make new process
  and forms of proceedings, necessary to carry into effect the powers and jurisdiction
  possessed by it." Long before anyone had heard the words "COVID-19" or "social distancing,"
  trial courts used this authority to conduct proceedings by remote means, and appellate courts
  consistently upheld that authority.
- The pandemic has presented courts with a Hobson's Choice between exposing the public and bar to a deadly and highly contagious disease through conducting in-person trials on the one hand, and greatly delaying access to the courts on the other. Virtual proceedings have presented a way out of this dilemma, allowing the legal process to move forward without endangering the health of the participants.

#### 23 **Bonilla v State of New York**

• All courts confronted with the question during the past year have found it both permissible and advisable to compel a party to participate in virtual proceedings (see C.C., supra [contempt hearing]; Wyona Apartments LLC, supra [landlord-tenant trial]; Ciccone v One W. 64th St., Inc., 69 Misc. 3d 585, 132 N.Y.S.3d 261, 2020 WL 6325719 [Sup Ct, NY Cty 2020] [evidentiary hearing]; A.S. v N.S., 68 Misc 3d 767, 128 N.Y.S.3d 435 [Sup Ct, NY Cty 2020] [custody trial]; see also Rodriguez v Montefiore Med. Ctr., 2020 N.Y. Misc. LEXIS 10798, 2020 WL 7689633 [Sup Ct, Bx Cty Dec 23, 2020] [citing numerous cases directing that depositions be conducted virtually during pandemic]; 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 the preference) of conducting matters via video"]). As the Court put it in Wynona Apartments LLC, supra: "There can be little dispute that the state of the current COVID-19 pandemic sweeping the nation justifies conducting the instant trial by virtual means" (2020 NY Slip Op 20309, at \*4).

#### 24 Bonilla v State of New York

• Improvements in video technology now facilitate transmission of virtual images that are clear and closeup, and allow for sufficient consideration of a witness's demeanor . . . while "[c]ertain features of testimony useful to evaluating credibility and persuasiveness . . . can be lost with video technology, and the ability to observe demeanor, central to the fact-finding process, may be lessened", advances in video technology "permit[] the jury [or, in a bench trial, 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"])

# **EXHIBIT E**



Report of the Trials Subgroup on Improving and Streamlining the Presentation of Evidence, Commission to Reimagine the Future of New York's Courts

#### **EXECUTIVE SUMMARY**

As with many other government services, the COVID-19 pandemic has presented unprecedented challenges to the New York state court system. Among those challenges has been ongoing efforts to restart court proceedings effectively and safely. New York's courts have been meeting those challenges with innovation, including through the use of virtual and remote court proceedings.

Drawing on experiences of courts and practitioners across the country, this report seeks to identify key factors and considerations for courts and practitioners to ensure that remote and virtual evidentiary proceedings are conducted safely, effectively, and fairly, as well as considerations for in-person evidentiary proceedings while the COVID-19 Pandemic persists. Recognizing the diverse nature of New York's unified court system and the varying demands and resources available, these factors are not intended to be exhaustive or prescriptive. Instead they are meant to provide a roadmap for courts and practitioners in New York to develop effective procedures for their caseloads.

This report consists of four primary sections: (I) Applicable Authority for Holding Virtual/Remote Evidentiary Hearings; (II) Considerations for Remote/Virtual Evidentiary Proceedings," (III) "Considerations for In-Person Evidentiary Proceedings in Light of COVID-19," and (IV) "Special Considerations for "Hybrid" Proceedings (with Both In-Person and Remote Participants)."

#### Members of the Commission

Henry M. Greenberg (Chair) Hon. Rolando T. Acosta Hon. Ariel E. Belen Mark A. Berman T. Andrew Brown Hon. Michael V. Coccoma Hon. Anthony Cannataro Mylan L. Denerstein Hon. Craig J. Doran Richard A. Edlin Hon. Michael J. Garcia Robert J. Giuffra, Jr. Dennis E. Glazer Alecia Walters-Hinds Hon. Timothy C. Idoni Seymour James Brad S. Karp Roger Juan Maldonado Mary McQueen Hon. Edwina G. Mendelson Laurette D. Mulry Jack Newton Sharon M. Porcellio Paul C. Saunders Arthur J. Semetis Paul Shechtman Michael A. Simons Hon. Madeline Singas Hon. Leslie E. Stein Edward A. Steinberg Ari Ezra Waldman

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#### I. Applicable Authority for Holding Virtual/Remote Evidentiary Hearings

This section provides an overview of current legal authority to conduct a virtual/remote evidentiary hearing in New York state courts. The overview of legal authority set out below in also relevant for in-person and "hybrid" proceedings.

Courts and judges should keep apprised of the fast developing law in this area. The below list constitutes an overview of the some of the law governing courts' ability to conduct virtual/remote evidentiary hearings.

#### General powers of the courts to hold remote hearings:

- The Judiciary Law authorizes courts in New York, at their discretion, "to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it." N.Y. Judiciary Law § 2-b (3) (McKinney).
- The Guide to New York Evidence notes that "[i]n the exercise of the court's responsibility to supervise and oversee the conduct of a hearing or trial, the mode and order of presenting evidence and examining witnesses is committed to the sound discretion of the court." Guide to New York Evidence § 1.07(1).
- In the context of the ongoing COVID-19 pandemic, New York courts have recognized that remote hearings are "safe ... feasible, fair, and preferable to further postponing trial." See Ciccone v. One W. 64th St., Inc., 2020 WL 5362065, at \*4 (N.Y. Sup. Ct. Sept. 4, 2020) (ordering remote hearing in civil matter over objections from one party), citing A.S. v. N.S., 68 Misc. 3d 767 (N.Y. Sup. Ct. 2020); Bonilla v. State, 2021 WL 318406, at \*2 (N.Y. Ct. Cl. Jan. 22, 2021) (collecting cases, and observing that "[g]iven the authority the Court to adopt remote procedures under section 2-b, and the extraordinary equities weighing in favor of the use of such procedures to address our current predicament, all courts confronted with the question during the past year have found it both permissible and advisable to compel a party to participate in virtual proceedings.").
- Courts are currently considering whether, and to what extent, party consent is required for specific types of remote or hybrid proceedings. At least one New York court has overruled a party's objections to virtual proceedings, holding "there is no judicial prohibition on this Court continuing the ongoing evidentiary hearing on the issues presented, including criminal contempt, by virtual means." C.C. v. A.R., 2020 WL 5824118 (N.Y. Sup. Ct. Sept. 30, 2020). The Court went on to note that "[t]here is no doubt that all of our lives have been impacted by the events around us" but that "there are viable alternatives," namely proceeding trial virtually, which "provides additional safeguards to all involved." Id.

## Statutory limitations in criminal matters and recent Executive Orders modifying those provisions:

- CPL 182.20 permits remote appearances by criminal defendants upon the defendant's consent, "except an appearance at a hearing or trial," in courts of 27 enumerated counties, as long as doing so will not "impair the legal rights of the defendant." § 182.30 places limitations on what may occur at a remote hearing, prohibiting defendants from appearing electronically, for example, to plead guilty to or be sentenced upon conviction of a felony.
- > On March 12, 2020, Governor Cuomo signed Executive Order 202.1, which broadened the scope of CPL 182.20 to all counties in New York State, among its other emergency provisions.
- On May 7, 2020, Governor Cuomo signed Executive Order 202.28, which, among other provisions, (i) suspended the limitations of CPL 182.30 to authorize remote appearances for the kinds of proceedings that are typically not permitted, and (ii) authorized remote appearance for any party or witness at CPL 180.60 preliminary hearings.
- On May 8, 2020, the Chief Clerk for the City of New York published a procedural directive for scheduling and conducting virtual preliminary hearings in the City of New York.<sup>2</sup>
- On July 6, 2020, Governor Cuomo signed Executive Order 202.48, which (among other provisions) authorized remote appearances by criminal defendants at grand jury proceedings "to waive immunity and testify in his or her own behalf, provided the defendant elects to do so." Executive Order 202.67, signed by Governor Cuomo on October 4, 2020, extended the Orders affecting §§ 182.20 and 182.30 for an additional 30 days, through November 3, 2020.
- Effective July 17, 2020, CPL 180.65 codifies as law the provision of Executive Order 202.28 that authorizes remote appearances at preliminary hearings on felony complaints. The newly-adopted §180.65 provides that "[d]uring the COVID-19 state disaster emergency," parties and witnesses may make electronic appearances at preliminary hearings, whenever the court finds that "a personal appearance by such party or witness would be an unreasonable hardship to such person or witness or create an unreasonable health risk to the public, court staff or anyone else involved in the proceeding."
- CPL 180.65 and these Executive Orders are limited to the COVID-19 emergency, and both the CPL and case law strictly curtail the ability of remote hearings or testimony in criminal matters in the ordinary course, save for the limited proceedings generally permitted in 27 of New York's counties by CPL 182.20.
- In the context of grand jury proceedings, proposed legislative amendments to Section 190.30(8)(a) of the criminal procedure law would add a new subdivision 4-a permitting

a witness located out of state or more than fifty miles from the grand jury proceeding, the person may provide live testimony by closed circuit video or videoconferencing in the same manner as if the witness had testified in person.

#### Remote testimony in criminal matters:

- In People v. Wrotten, 14 N.Y.3d 33 (2009), the Court of Appeals discussed the propriety of two-way video testimony, and concluded that remote testimony is permitted as "an exceptional procedure to be used only in exceptional circumstances.":
  - "Live two-way video may preserve the essential safeguards of testimonial reliability, and so satisfy the Confrontation Clause's primary concern with 'ensur[ing] the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Id. at 39.
  - Video testimony procedures must ensure that "all of the other elements of the confrontation right' [are] preserved, including testimony under oath, the opportunity for contemporaneous cross-examination, and the opportunity for the judge, jury, and defendant to view the witness's demeanor as he or she testifies." *Id.* at 39.
  - "Live televised testimony is certainly not the equivalent of in-person testimony, and the decision to excuse a witness's presence in the courtroom should be weighed carefully. Televised testimony requires a case-specific finding of necessity; it is an exceptional procedure to be used only in exceptional circumstances." *Id.* at 40.<sup>3</sup>

#### Remote Proceedings in Civil Matters:

- As of October 22, 2020, the Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Commercial Division Advisory Council ("CDAC"), to create a new Commercial Division rule (22 NYCRR § 202.70(g)) permitting virtual evidentiary hearings and non-jury trials, at the discretion of the judges and upon consent of the parties. This proposed rule would be a permanent rule change, and not limited to the duration of the COVID-19 pandemic. According to the CDAC, "[b]ased on the advances in technology and positive experiences of courts throughout New York State, this country and many parts of the world, the next logical step is virtual evidentiary hearings and non-jury trials, on consent. The text of the proposed rule provides:
  - If the requirements of paragraph (3) are met, the court may, with the consent of the parties, conduct an evidentiary hearing or a non-jury trial utilizing video technology.

- If the requirements of paragraph (3) are met, the court may, with the consent of the parties, permit a witness or party to participate in an evidentiary hearing or a non-jury trial utilizing video technology.
- The video technology used must enable:
  - (i) a party and the party's counsel to communicate confidentially;
  - (ii) documents, photos and other things that are delivered to the court to be delivered to the remote participants;
  - (iii) interpretation for a person of limited English proficiency;
  - (iv) a verbatim record of the trial; and
  - (v) public access to remote proceedings.

#### II. Considerations for Remote/Virtual Evidentiary Proceedings

Remote evidentiary hearings—like all remote court proceedings—present the judicial system with a host of novel challenges. The recommended checklist of considerations that follows aims to provide a roadmap for courts and practitioners to ensure that remote evidentiary hearings are conducted effectively, drawing from "best practices" from courts and practitioners across the United States. These factors are not meant to be an exhaustive or prescriptive list, as considerations may vary depending on the nature and scope of individual proceedings.

#### **Internet Connectivity & Audio-Visual Testing:**

- ✓ Ensure that solutions are in place to avoid internet connectivity and bandwidth issues, including by providing judges and staff with access with devices that can use mobile data, where necessary.<sup>7</sup>
- ✓ Ensure that judges are not using personal devices to conduct court proceedings.<sup>8</sup>
- Encourage test-runs of participants' audio-visual capabilities with court staff in advance of hearing.

#### **Platform for Remote Proceedings**

#### **Videoconferencing Software:**

- Work to ensure provision of judicial education on technology where necessary. 10
- Ensure technology platform being used (e.g., Microsoft Teams) is reasonably available to litigants and witnesses who need to appear and can facilitate presentation of documentary evidence (e.g., minimum bandwidth requirements, free access to particular software).
- Ensure that technological support is available to assist litigants with technological issues as necessary. 12
- ✓ Create easy-to-follow reference guides for how to install and use Microsoft Teams (including encouraging participants to mute themselves when not speaking during the hearing), and what to expect in a virtual hearing. <sup>13</sup>
- ✓ Consider using closed-caption features or live transcription to assist those with hearing impairments and those with English comprehension limitations.<sup>14</sup>

#### **Evidence Repository:**

✓ Ensure effective storage for electronic evidence (e.g., either through e-filing system, email, separate database). 15

- ✓ Create protocols to ensure that the integrity of electronic documents is maintained and that documents are not inadvertently or improperly altered (e.g., encouraging documents to be submitted in a "locked" or "flattened" PDF/A format). <sup>16</sup>
- ✓ Discourage the practice of holding mobile devices to the computer camera to share electronic evidence. If the native format of such evidence is unavailable, then printouts, or screenshots should be used.<sup>17</sup>
- Determine where the official court record will be stored, and provide clear guidance on how the file can be appropriately accessed by interested parties in a remote environment. This includes controlling access to the file (e.g. using electronic audit logging when files are accessed and by whom). 18
- If needed, develop policies for the safe transfer of physical evidence where the physical evidence must, by law, be surrendered to the court, and policies for the safe access to this evidence, where necessary.<sup>19</sup>
- ✓ Discourage the transmission of evidence by facsimile.<sup>20</sup>
- Provide training on presentation of audio and visual evidence, and encourage participants to do a test run with the court staff in advance of the hearing.<sup>21</sup>

#### **Procedures for Hearings**

Access to Proceedings. Consider measures that need to be put into place with respect to:

- Providing access to the public to view proceedings where appropriate, and controlling access for participants (via password or private link) to exclude members of the public where necessary. Courts should also communicate rules for viewers/participants recording virtual proceedings.
- ✓ Ensuring a physical space for the use by litigants or witnesses to use during a hearing in the event that they do not have access to a private, quiet space.<sup>25</sup>
- ✓ Protecting non-public or confidential information during virtual proceedings. 26

#### **Special considerations for the litigants:**

- Ensure that parties can confer privately with counsel during remote proceedings (e.g., either through videoconferencing "break- out" room or permitting separate communication via text messaging between attorney and client).<sup>27</sup>
- ✓ Consider whether, based on the type of matter, consent of the parties is required or advisable to hold a remote hearing.<sup>28</sup>

#### **Special Considerations for Witness Examinations:**

- ✓ Establish protocols for testifying witnesses before, during, and after their testimony (e.g., sequestration, decorum) and provide counsel and witnesses with instructions in advance.<sup>29</sup>
- ✓ Ensure that testimony is free from influence, coaching, or coercion (e.g., requiring witnesses to confirm no one else is with them off camera).<sup>30</sup>
- Establish protocols for conducting direct and cross- examinations, including urging lawyers to speak slowly and instructing witnesses to pause before answering questions to allow for objections and/or using electronic form of objection (e.g., hand raising function).<sup>31</sup>
- ✓ Consider written direct examinations, where appropriate.<sup>32</sup>
- ✓ Monitor, and consider use of, technology developments that would permit witnesses to be observed throughout the course of a hearing.<sup>33</sup>

**Conduct of the Hearing**. Consider, depending on the matter, whether protocols are needed and in place for the following:

- ✓ Holding a pre-hearing status conference before remote hearings for the purpose of addressing the protocol for, and specific concerns on particular matters.<sup>34</sup>
- ✓ Submitting and marking of documentary evidence electronically in advance and during the hearing (e.g., requiring all evidence be submitted in advance or shortly after hearing by email or filed where e-filing is available).<sup>35</sup>
- ✓ Allowing the parties and court to access electronically stored evidence prior to, during and after hearing.<sup>36</sup>
- ✓ Recording proceedings for the purpose of creating a reliable transcript (by live reporter or recording for post-hearing transcription).<sup>37</sup>
- ✓ Establish protocol to be followed where an interpreter is required, or translation is needed.<sup>38</sup>
- Commence each proceeding with a colloquy that includes: (i) an identification of all participants; (ii) instructions to lawyers and litigants to mute microphones when not speaking; (iii) an instruction for each speaker to identify themselves before speaking (including by displaying names on video screens); (iv) a reminder to all participants that courtroom rules apply (including that participants must speak one at a time); (v) an admonishment against unauthorized recording of the virtual proceeding; and (vi) general permission for a party or lawyer to call into a virtual proceeding if they certify that they are unable to communicate by video, or video becomes unavailable during the course of the proceedings.<sup>39</sup>
- ✓ Establishing protocols for resolving objections to admissibility (e.g., encouraging stipulations and considering objections during a pre-hearing conference). 40

#### **Special Considerations for Criminal Matters:**

- ✓ Create policies that ensure that the rights of criminal defendants are not compromised through the use of virtual proceedings (e.g., obtaining consent for modified procedures whenever necessary and ensuring that defense counsel and the defendant are able to privately confer at all times).⁴¹
- ✓ Implement policies to ensure compliance with CPL 180.65.<sup>42</sup>
- ✓ Monitor developments in case law.
- Ensure that criminal defendants and their counsel are able to submit and access evidence (both physical and electronic), with particular attention to in-custody defendants.<sup>43</sup>
- ✓ Ensure that policies are in place to maintain and permit the confidentiality of electronic evidence, where necessary.<sup>44</sup>
- ✓ Consider special issues arising from incarcerated defendants (e.g., access to counsel and ability to participate meaningfully in proceedings). <sup>45</sup>

## III. Special Considerations for In-Person Evidentiary Hearings in Light of COVID-19<sup>46</sup>

Where in-person evidentiary proceedings occur during the COVID-19 pandemic, courts must ensure that procedures are put in place to ensure the health and safety of all participants, and that these measures permit workable hearings. The checklist of considerations that follows aims to provide a roadmap to ensure that in-person evidentiary hearings are conducted effectively, drawing from "best practices" identified by courts and practitioners from across the United States. Courts should, however, consult appropriate state and local health officials on health and safety measures.

#### Consider Safety Recommendations and Background Rights of Parties to Hearing

- ✓ Stay up to date on state and local recommendations/guidelines on appropriate safety measures, and consider how those measures impact the court's current hearing procedures. 47
- ✓ Monitor developments in case law concerning COVID-19-related restrictions on court proceedings to ensure compliance with prevailing precedent, particularly in criminal cases. ⁴8
- ✓ Consider alternatives to masks for witnesses to allow trier of fact to fully assess credibility, where appropriate (e.g., transparent face shields and/or plexiglass barriers around witness stands).<sup>49</sup>
- ✓ Consider practical limitations on specific proceedings, including where identification of criminal defendants is contemplated, and implement procedures for witnesses to make appropriate identifications. 

  The specific proceedings including where identification of criminal defendants is contemplated, and implement procedures for witnesses to make appropriate identifications.

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- ✓ Consider, where identification may be an issue, stipulating as to an appropriate method in advance, or asking if the witness "sees" the perpetrator in the courtroom as a middle ground.<sup>51</sup>
- If masks are necessary, and a jury is the trier of fact, consider whether additional instructions are warranted to ensure jurors do not take into account the need for unique safety measures in determining credibility or other facts.<sup>52</sup>
- ✓ Ensure that witnesses and lawyers speak clearly and slowly when masked to ensure trier of fact and other participants can hear sufficiently well.<sup>53</sup>
- ✓ Consider accommodations to ensure access for participants with disabilities (e.g. masks for speakers may be problematic for those with hearing loss).<sup>54</sup>
- ✓ Consider for accommodations for interpreters, including American Sign Language, interpreters, where necessary, as special masks may be required. 55

#### **Maximizing Efficient Use of Courtroom Time**

- ✓ Require exhibit lists and exhibit marking in advance of any hearing, and deposition designations and objections thereto to be exchanged and addressed in advance (with good cause exception). 

  <sup>56</sup>
- ✓ Encourage stipulations on facts and evidentiary issues (e.g., foundation objections) to reduce the need for witnesses.<sup>57</sup>
- ✓ Consider written submissions or telephone/video conference to resolve as many evidentiary disputes as possible in advance of hearing.<sup>58</sup>
- ✓ Require the parties to disclose their witness lists to the Court as early as possible and adhere
  to an agreed schedule. Avoid delays in calling scheduled witness in order to minimize time
  in the courthouse and the possibility of contact with other witnesses.<sup>59</sup>
- ✓ Use evidence in electronic forms to the extent possible in order to reduce the use of hard copy documents and other physical evidence, and using technology to share and present documentary and demonstrative evidence.<sup>60</sup>
- Where paper exhibits are required, use multiple copies of exhibits so that one document is not passed around among numerous participants.<sup>61</sup>
- Establish procedures for live witnesses that accommodate the need for any social distancing or other protections while in courtroom (e.g., designate an area for each witness to wait before they testify, while ensuring effective sequestration where necessary; provide guidelines for appropriate PPE before and during testimony; designate areas for counsel and prohibits lawyers from approaching a witness).<sup>62</sup>

## IV. Special Considerations for "Hybrid" Proceedings (with both in-person and remote participants)

Proceedings that involve a mix of in-person and remote participants also present unique procedural and fairness issues for parties and the courts. The below checklist, drawing from the prior two sections, provides a roadmap to ensure that hybrid evidentiary hearings are conducted effectively, drawing from "best practices" identified by courts and practitioners across the United States. Courts should consider these factors together with the "Considerations for Remote/Virtual Evidentiary Proceedings" and "Considerations for In-Person Evidentiary Hearings in Light of COVID-19" above, where applicable. And courts should always consider the relevant authority for holding virtual or remote proceedings, as also noted above.

#### Physical Evidence

- ✓ Encourage stipulations as to authenticity. 63
- ✓ Consider continuing to rely, to the extent possible, on electronic evidence that preserve parity between in-person and remote participants.<sup>64</sup>
- ✓ Ensure that all participants have the similar access to any exhibits. If physical documents are being used, consider creating an electronic version that can be accessed remotely. 65

#### Witnesses

- ✓ Consider whether witnesses or parties appearing remotely must be on video or telephone. 66
- √ Where a jury is trier of fact, consider appropriate instructions to direct jurors that witnesses may be equally credible or not credible regardless of whether they are testifying remotely or in-person, and that credibility should not be assessed in relation to whether or not a participant or witness is testifying remotely or in person.
- ✓ Consider available technology to ensure that remote testifying or participating parties and witnesses are visible and/or audible in person, and in-person testifying parties and witnesses are visible and/or audible to remote participants.<sup>68</sup>

#### **ENDNOTES**

- See <a href="https://www.nycourts.gov/judges/evidence/1-GENERAL/1.07\_Court\_Control\_Over\_Presentation\_of\_Evidence\_npdf">https://www.nycourts.gov/judges/evidence/1-GENERAL/1.07\_Court\_Control\_Over\_Presentation\_of\_Evidence\_npdf</a>.
- See https://cdn.ymaws.com/www.nysda.org/resource/resmgr/covid-19\_pdfs/nyc\_courts\_virtual\_prelimina.pdf.
- Note that CPL § 65 provides a statutory basis for the use of video testimony in certain child sexual abuse cases where there is a finding by "clear and convincing evidence that it is likely, as a result of extraordinary circumstances, that such child witness will suffer severe mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television" and the "the use of such [television procedure] will help prevent, or diminish the likelihood or extent of, such harm." N.Y. Crim. Proc. Law § 65.10 (McKinney); People v. Cintron, 551 N.E.2d 561 (N.Y. 1990).
- Memo from Eileen D. Millett to All Interested Persons re: Request for Public Comment on a Proposed New Commercial Division Rule to Allow Virtual Evidentiary Hearings and Non-Jury Trials on Consent.
- 5 Id. at 4.
- 6 Id. at 5.
- <sup>7</sup> See, e.g., Remote Judging Survey: Experiences With Virtual Proceedings, Second Report February 2021, at 4, 6-7.
- See, e.g., Remote Judging Survey, First Report, at 6-8.
- <sup>9</sup> Remote Judging Survey: Experiences With Virtual Proceedings, Second Report February 2021, at 12.
- Remote Judging Survey: Experiences With Virtual Proceedings, Second Report February 2021, at 9.
- See, e.g., Michigan Trial Courts Virtual Courtroom Standards and Guidelines, at 7; Memo from Chief Justice Canady (Florida Supreme Court) to Chief Judges of the Circuit Courts, Trial Court Administrators re: Guidance and Best Practice Materials, "Management of Evidence in Remote Pretrial Hearings in Criminal Cases," at 2; American Bar Association: Tips for Remote Video Hearings and Trials: Technology, Witnesses, Evidence, and Etiquette, at 1-2.
- See, e.g., Connecticut Guide to Remote Hearings, Appendix A (example of public tech support guidance); The California Commission on Access to Justice: Remote Hearings and Access to Justice During COVID-19 and Beyond, at 14; Conducting Effective Remote Hearings in Child Welfare Cases, at 1.
- See, e.g. Memo from Edward Friedland to SDNY Bar re: Court Reporter Tele/Videoconferencing Best Practices, at 1; Connecticut Guide to Remote Hearings, (example of easy-to-follow guide to Microsoft Teams); Illinois Remote Hearing FAQs, (example of tips for attending court remotely).
- See, e.g., Remote Judging Survey: Experiences With Virtual Proceedings, Second Report February 2021, at 11.
- <sup>15</sup> See, e.g., JTC Quick Response Bulletin: Managing Evidence for Virtual Hearings, at 5.
- <sup>16</sup> See, e.g., JTC Quick Response Bulletin: Managing Evidence for Virtual Hearings, at 2-3.
- <sup>17</sup> See, e.g., Remote Judging Survey: Experiences With Virtual Proceedings, Second Report February 2021, at 19.
- See, e.g., The California Commission on Access to Justice: Remote Hearings and Access to Justice During COVID-19 and Beyond, at 8; JTC Quick Response Bulletin: Managing Evidence for Virtual Hearings, at 3, 5-6.
- See, e.g., JTC Quick Response Bulletin: Managing Evidence for Virtual Hearings, at 2; Michigan Trial Courts Virtual Courtroom Standards and Guidelines, at 7; Best Practices Tips: Conducting Court Proceedings during the Coronavirus Pandemic, at 2.
- <sup>20</sup> See, e.g., Remote Judging Survey: Experiences With Virtual Proceedings, Second Report February 2021, at 19.
- <sup>21</sup> See, e.g., Remote Judging Survey: Experiences With Virtual Proceedings, Second Report February 2021, at 20.
- See, e.g., Michigan Trial Courts Virtual Courtroom Standards and Guidelines, at 4; Memo from Chief Justice Canady (Florida Supreme Court) to Chief Judges of the Circuit Courts, Trial Court Administrators re: Guidance and Best

#### **ENDNOTES** (continued)

- Practice Materials, "Jury Management Considerations," at 4; National Center for State Courts: Checklist for Judges in Virtual Proceedings, at 2.
- See, e.g., The California Commission on Access to Justice: Remote Hearings and Access to Justice During COVID-19 and Beyond, at 15.
- See, e.g., National Center for State Courts: Checklist for Judges in Virtual Proceedings, at 2.
- See, e.g., JTC Quick Response Bulletin: Managing Evidence for Virtual Hearings, at 6; Conducting Effective Remote Hearings in Child Welfare Cases, at 4; Addressing the COVID-19 Public Health, Eviction and Economic Crisis in our Justice System (Memo in Support), The New York Legal Services Coalition, at 4.
- <sup>26</sup> See, e.g., JTC Quick Response Bulletin: Managing Evidence for Virtual Hearings, at 3-4.
- See, e.g., Michigan Trial Courts Virtual Courtroom Standards and Guidelines, at 4; Remote Judging Survey: Experiences With Virtual Proceedings, Second Report February 2021, at 10.
- <sup>28</sup> See, e.g., Remote Hearings and Access to Justice During COVID-19 and Beyond, at 17.
- See, e.g., Michigan Trial Courts Virtual Courtroom Standards and Guidelines, at 7-8; Florida Management of Evidence in Remote Hearings in Civil and Family Cases Best Practices, at 3-4.
- <sup>30</sup> See, e.g., Florida Domestic Proceedings Best Practices, at 4; Suggested Protocols for Fact Finding Hearings, at 3.
- See, e.g., American Bar Association: Tips for Remote Video Hearings and Trials: Technology, Witnesses, Evidence, and Etiquette, at 3-4.
- Rule 32-a of the Rules of the Commercial Division of the Supreme Court (permitting direct testimony by affidavit).
- <sup>33</sup> See, e.g., Remote Judging Survey: Experiences With Virtual Proceedings, Second Report February 2021, at 12.
- See, e.g., Florida Management of Evidence in Remote Hearings in Civil and Family Cases Best Practices, at 1; Memo from Chief Justice Canady (Florida Supreme Court) to Chief Judges of the Circuit Courts, Trial Court Administrators re: Guidance and Best Practice Materials, "Management of Evidence in Remote Pretrial Hearings in Criminal Cases," at 1.
- See, e.g., Michigan Trial Courts Virtual Courtroom Standards and Guidelines, at 7; Florida Domestic Proceedings Best Practices, at 3; Florida Management of Evidence in Remote Hearings in Civil and Family Cases Best Practices, at 1; Memo from Chief Justice Canady (Florida Supreme Court) to Chief Judges of the Circuit Courts, Trial Court Administrators re: Guidance and Best Practice Materials, "Management of Evidence in Remote Pretrial Hearings in Criminal Cases," at 2; The California Commission on Access to Justice: Remote Hearings and Access to Justice During COVID-19 and Beyond, at 16; Remote Judging Survey: Experiences With Virtual Proceedings, Second Report February 2021, at 19.
- See, e.g., Michigan Trial Courts Virtual Courtroom Standards and Guidelines, at 7. Arizona Jury Management Subgroup Best Practice Recommendations during the COVID-19 Public Health Emergency, at 21; The California Commission on Access to Justice: Remote Hearings and Access to Justice During COVID-19 and Beyond, at 6.
- See, e.g., Michigan Trial Courts Virtual Courtroom Standards and Guidelines, at 4-5; The California Commission on Access to Justice: Remote Hearings and Access to Justice During COVID-19 and Beyond, at 8; Email from Hon. Judge Craig Doran, re: Virtual Proceedings/Court Reporters, July 10, 2020; Remote Judging Survey: Experiences With Virtual Proceedings, Second Report February 2021, at 15-17.
- See, e.g., Remote Judging Survey: Experiences With Virtual Proceedings, Second Report February 2021, at 17-18; Initial Report on the Goals and Recommendations for New York State's Court System, at 16.
- <sup>39</sup> See, e.g., Email from Hon. Judge Craig Doran, re: Virtual Proceedings/Court Reporters, July 10, 2020; Remote Judging Survey: Experiences With Virtual Proceedings, Second Report February 2021, at 8, 11.
- See, e.g., Michigan Trial Courts Virtual Courtroom Standards and Guidelines, at 8; Western District of New York Plan for Jury Trials During the Phased Return to Onsite Operations, at 18; Report of the Jury Subgroup: Conducting Jury Trials and Convening Grand Juries during the Pandemic, at 11, 12; JTC Quick Response Bulletin: Managing Evidence for Virtual Hearings, at 2, 5-6; Best Practices Tips: Conducting Court Proceedings during the Coronavirus Pandemic, at 2, 3-4.

#### **ENDNOTES** (continued)

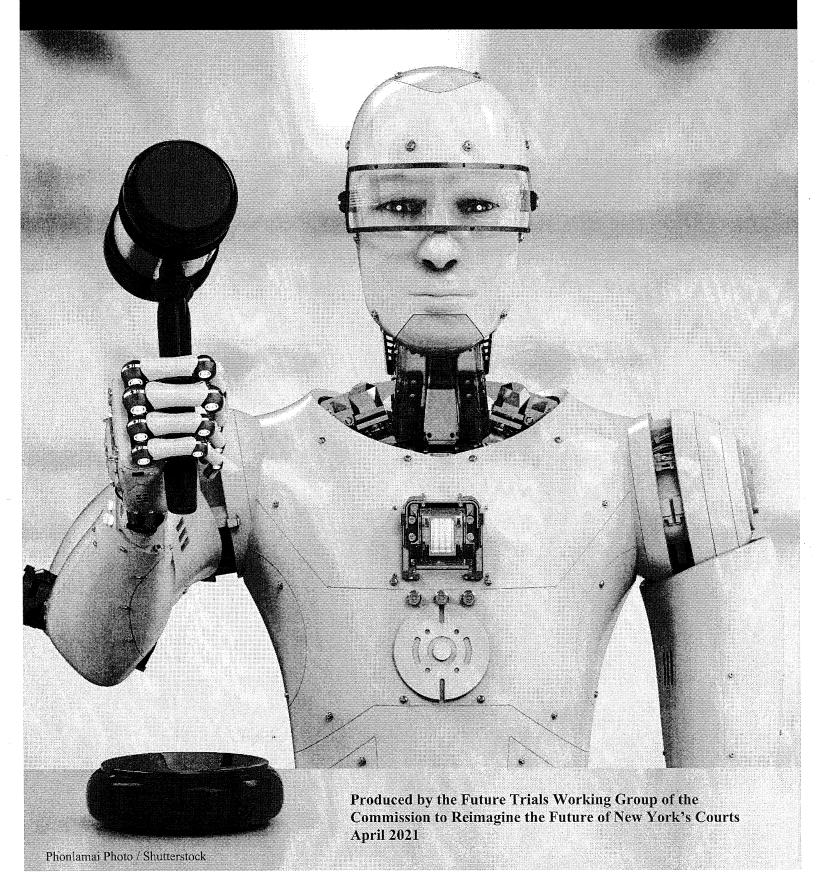
- See, e.g., Michigan Trial Courts Virtual Courtroom Standards and Guidelines, at 2; Safeguarding the Right to a Fair Trial During the Coronavirus Pandemic: Remote Criminal Justice Proceedings; Court Appearances in Criminal Proceedings Through Telepresence, (generally); Best Practices Tips: Conducting Court Proceedings during the Coronavirus Pandemic, at 3-4.
- 42 See I.B.5, supra.
- See, e.g., Safeguarding the Right to a Fair Trial During the Coronavirus Pandemic: Remote Criminal Justice Proceedings, at 6-7.
- See, e.g., Safeguarding the Right to a Fair Trial During the Coronavirus Pandemic: Remote Criminal Justice Proceedings, at 5.
- See, e.g., Michigan Trial Courts Virtual Courtroom Standards and Guidelines, at 4; Safeguarding the Right to a Fair Trial During the Coronavirus Pandemic: Remote Criminal Justice Proceedings, at 4-5.
- These materials overlap, to a large degree, with the Goals and Checklist for Restarting In-Person Jury Trials and Related Proceedings document previously published by this Commission.
- For a discussion of some potentially relevant safety measures, see, e.g., Arizona Jury Management Subgroup Best Practice Recommendations during the COVID-19 Public Health Emergency, at 10-12, 26; Western District of New York Plan for Jury Trials During the Phased Return to Onsite Operations, at 18; Report of the Jury Subgroup: Conducting Jury Trials and Convening Grand Juries during the Pandemic, at 5. Best Practices Tips: Conducting Court Proceedings during the Coronavirus Pandemic, at 4.
- 48 See, e.g., United States v. Crittenden, 2020 WL 4917733 (M.D. Ga. Aug. 21, 2020).
- See, e.g., Arizona Jury Management Subgroup Best Practice Recommendations during the COVID-19 Public Health Emergency, at 18-19; Western District of New York Plan for Jury Trials During the Phased Return to Onsite Operations, at 19.
- <sup>50</sup> See, e.g., Washington Association of Prosecuting Attorneys Memorandum, at 8-9.
- See, e.g., Washington Association of Prosecuting Attorneys Memorandum, at 10-11; Conducting Jury Trials and Convening Grand Juries during the Pandemic, at 14; Best Practices Tips: Conducting Court Proceedings during the Coronavirus Pandemic, at 4.
- See, e.g., Arizona Jury Management Subgroup Best Practice Recommendations during the COVID-19 Public Health Emergency, at 18; Conducting Jury Trials and Convening Grand Juries during the Pandemic, at 14; Safeguarding the Right to a Fair Trial During the Coronavirus Pandemic: Remote Criminal Justice Proceedings; Court Appearances in Criminal Proceedings Through Telepresence, at 5.
- 53 See, e.g., Western District of New York Plan for Jury Trials During the Phased Return to Onsite Operations, at 18.
- <sup>54</sup> See, e.g., Goals and Checklist for Restarting In-Person Jury Trials and Related Proceedings, at 5.
- See, e.g., Western District of New York Plan for Jury Trials During the Phased Return to Onsite Operations, at 19; Washington Association of Prosecuting Attorneys Memorandum, at 4-5.
- 56 See, e.g., Goals and Checklist for Restarting In-Person Jury Trials and Related Proceedings, at 8.
- <sup>57</sup> See, e.g., Goals and Checklist for Restarting In-Person Jury Trials and Related Proceedings, at 8.
- 58 See, e.g., Goals and Checklist for Restarting In-Person Jury Trials and Related Proceedings, at 8.
- 59 See, e.g., Goals and Checklist for Restarting In-Person Jury Trials and Related Proceedings, at 8.
- See, e.g., Federal Judges Reinventing the Jury Trial During Pandemic, at 2; Goals and Checklist for Restarting In-Person Jury Trials and Related Proceedings, at 8; Best Practices Tips: Conducting Court Proceedings during the Coronavirus Pandemic, at 4.
- See, e.g., Ohio Judicial Conference, Continuing Jury Operations, at 7; Goals and Checklist for Restarting In-Person Jury Trials and Related Proceedings, at 8.
- 62 See, e.g., Goals and Checklist for Restarting In-Person Jury Trials and Related Proceedings, at 8.

# **ENDNOTES** (continued)

- See, e.g., Michigan Trial Courts Virtual Courtroom Standards and Guidelines, at 8; Western District of New York Plan for Jury Trials During the Phased Return to Onsite Operations, at 18; Report of the Jury Subgroup: Conducting Jury Trials and Convening Grand Juries during the Pandemic, at 11, 12; JTC Quick Response Bulletin: Managing Evidence for Virtual Hearings, at 2, 5-6; Best Practices Tips: Conducting Court Proceedings during the Coronavirus Pandemic, at 2, 3-4.
- 64 See, e.g., JTC Quick Response Bulletin: Managing Evidence for Virtual Hearings, at 2.
- 65 See, e.g., JTC Quick Response Bulletin: Managing Evidence for Virtual Hearings, at 2.
- See, e.g., The California Commission on Access to Justice: Remote Hearings and Access to Justice During COVID-19 and Beyond, at 5; Conducting Effective Remote Hearings in Child Welfare Cases, at 3.
- See, e.g., Court Appearances in Criminal Proceedings Through Telepresence, at 5-6, 7-8; Court Operations During the COVID-19 Pandemic, at 753.
- 68 See, e.g., Remote Judging: The Impact of Video Links on the Image and the Role of the Judge, at 509, 511.

# **EXHIBIT F**

# Report and Recommendations of the Future Trials Working Group



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# **Executive Summary**

The Commission to Reimagine the Future of New York's Courts (the "Commission") was created on June 17, 2020, by Chief Judge Janet DiFiore. The Commission is charged with making recommendations to improve the delivery and quality of justice services, facilitate access to justice, and better equip the New York State Unified Court System ("UCS") to keep pace with society's rapidly evolving changes and challenges. The Commission is comprised of judges, lawyers, academics, and technology experts.<sup>1</sup>

This Report has been prepared by the Commission's Future Trials Working Group, one of six working groups or subsets of the Commission (the "Working Group").<sup>2</sup> The Working Group has been tasked with evaluating the ways in which evolving technologies and other developments may be applied to improve future trial practice in New York State, to identify any threats posed by such technologies, and to make recommendations as to how USC may best prepare for, benefit from, and handle issues posed by such technologies.

In imagining what a trial in New York State might look like ten or twenty years in the future, it is useful to consider how trial practice has evolved over the past two decades. While many familiar and well-tested aspects of trial practice (e.g., opening statements, cross-examination, voir dire in jury trials) largely have remained stable over this period, advances in technology have provided trial attorneys and courts with a plethora of new tools to craft ever-more forceful and sophisticated arguments and decisions.

In particular, the advent and proliferation of devices and technologies like laptops, smart phones, tablets, wireless technology, and Bluetooth have forever changed trial practice by enabling attorneys to communicate with a diverse range of support staff, colleagues and experts, and to access entire case files and case law databases, during trial. Realtime transcripts have enabled counsel to engage in more targeted and effective cross-examination and assisted judges in keeping track of evidentiary rulings by means of simple and fast word searches. Additional advances have allowed attorneys to display and annotate evidence for fact-finders with increasing clarity, and to visualize and synthesize data in powerful demonstrative presentations.

Most recently—in what fairly could be labelled one of the most significant changes to litigation practice in centuries—the COVID-19 pandemic has forced New York judges to migrate essentially their entire appearance calendars to remote conferencing platforms. Although this forced transition from physical to remote proceedings has not been without its issues, as recently as ten years ago, it may have been technologically impossible (notably, the Zoom platform only launched in 2013). The bar and public's widespread access to such technology has greatly advanced the administration of justice (and likely saved lives) by allowing New York courts to continue to supervise their dockets and adjudicate disputes safely during long months of shutdowns and other restrictions.

Although the speed and scale of changes over the past year is (hopefully) a historical anomaly, it would be naïve to expect that the next twenty years will not present their own extraordinary changes and challenges to trial practice. This Report aims to lay the groundwork for UCS to prepare New York's courts for such future developments.

Part I proposes a series of broad, general principles to guide UCS in its evaluation of emerging technologies with the potential to impact trial practice in New York State. Part II provides an overview of the areas of trial practice legal scholars and experts agree are the most likely to be transformed by advances in technology in the near future. Part III discusses trial by remote videoconference, including an overview of pre-pandemic case law concerning the constitutionality of remote testimony in civil and criminal trials, as well as discussion of the handful of remote jury trials which have been conducted over the past year. Part IV discusses the need for increased training for judges and court staff related to technological issues.

Consistent with its mandate from the Commission, the Working Group also has prepared recommendations and proposed next steps for UCS's consideration with respect to each topic discussed in this Report. Among other things, the Working Group recommends that UCS:

- Seek to partner with major internet service and/or other technology providers to supply all
  courtrooms in New York State with secure and reliable high-speed wireless internet;
- Develop uniform rules to clarify when, and in what matter, parties may supply their own portable courtroom technology for trial or other court proceedings;
- Commission an expert analysis of the cost, reliability, and security of services offered by private vendors for automated and/or remote transcription and translation services;
- Create a pilot program for the streaming of trial-level court proceedings;
- \* Establish a committee of judges and permanent law clerks to periodically review and summarize for other judges and staff the most recent precedent and developments in the handling of new forms of evidence and demonstrative presentations at trial, or partner with outside firms or organizations to provide periodic reports on those subjects;
- \* Commission an expert analysis of the ways in which currently available artificial intelligence technology may be applied to improve court efficiency;
- \* Implement the *Virtual Bench Trial Protocols and Procedures* manual of best practices for remote bench trials, and develop a similar manual for remote jury trials for experimentation and application on a voluntary basis;
- \* Create mandatory training programs for judges on new developments in technology and the legal issues presented by new forms of evidence.

Finally, the Working Group is cognizant that portions of this Report—particularly its overview of certain technologies of the future (holograms, virtual reality, robot judges!)—may strike some readers as fantastical, inaccessible, or even out of touch given the multiple serious and pressing challenges facing the court system at *this very moment*. None of the more long-term recommendations expressed herein will or should be implemented until UCS fully has addressed the current crisis. But if the present crisis demonstrates anything, it is that developing technologies can temper even once-in-a-century crises, if they adequately are understood and if court systems are prepared and otherwise equipped to take advantage of them and anticipate concerns. This Report aims humbly to begin that process.

# PART I: Guiding Principles for the Evaluation of Emerging Technologies

The Working Group respectfully proposes that the following principles guide UCS's evaluation of emerging technologies with the potential to impact future trial practice in New York State (as well as litigation in general).

These guiding principles are consistent with, and intentionally build upon, those identified in prior reports from our sister working groups within the Commission.<sup>3</sup>

# 1. Fairness/Equal Access to Justice

Emerging technologies should be employed by courts to promote fairness and to diminish inequalities in the justice system, never to accentuate them.

As the Commission has previously recognized, "[o]ne of the fundamental principles of the rule of law is access to justice, or the 'ability of individuals to seek and obtain a remedy through formal or informal institutions of justice for grievances." For the New York court system to remain a strong and trusted institution well into the future—and for parties of all backgrounds to continue to view it as an attractive forum to try cases—UCS must strive constantly to reaffirm such trust. This includes, at minimum, ensuring that all litigants are afforded an equal opportunity to be heard and to present their cases before informed and unbiased fact-finders for resolution.

The Working Group thus agrees with its sister groups that great care must be taken to ensure that any efforts by UCS to address emerging technologies account for the needs of *all* stakeholders, particularly those who have been historically underserved by the justice system.<sup>5</sup>

# 2. <u>Efficiency</u>

Emerging technologies should be employed by courts to reduce judicial backlogs and make all litigation more efficient.

As the old saying goes, "time is money." Not all litigants can afford to wait years for their disputes to be resolved, to take off work for drawn out in-person conferences, or to spend hours learning how to operate complex e-file systems. Increased efficiency in the litigation process promotes access to justice by limiting the sacrifices of time and money litigants must expend simply to reach the point at which their disputes can finally be resolved, by trial or otherwise. The public is also more likely to trust courts they perceive as adequately balancing fairness and efficiency.

In February 2016, Chief Judge DiFiore announced an "Excellence Initiative" focused on improving the courts' ability to ensure the just and timely resolution of all matters.<sup>6</sup> Although this initiative led to major improvements in its first few years,<sup>7</sup> the pandemic has given rise to challenging backlogs in certain courts, particularly in New York's high-volume courts, such as criminal and housing court.

The seriousness of this problem should not be understated. According to a recent New York Times report, there were only nine criminal trials in New York City between March and December 2020,

compared to over 800 such trials in 2019.<sup>8</sup> The Mayor's office has reported that more than 400 criminal defendants have been waiting in jail for over two years for their cases to be resolved.<sup>9</sup> Meanwhile, the backlog in New York City's housing courts reportedly numbers in the hundreds of thousands of cases.<sup>10</sup>

One foreseeable consequence of these increased backlogs will be a continuation of the trend of vanishing trials. To even make it to trial, parties in civil cases must first litigate through the pleading stage, an increasingly expansive discovery process (given the many and ever-increasing new forms of discoverable data), and summary judgment. In recent years, the vast majority of litigants who have made it to this last stage have chosen the predictability of settlement over the uncertainty and additional expense of trial. Indeed, the percentage of New York civil case dispositions culminating in jury verdicts in recent years appears to have hovered around 1%—and New York has generally had one of the *highest* such rates of all states.<sup>11</sup>

Current and future technological developments will likely create opportunities to make litigation—including trials—more efficient. If improperly implemented, however, technological innovations only will add to the complexity and expense of the litigation process. Trials that rely heavily on equipment like monitors or projectors, or internet or Bluetooth connectivity, can be delayed if and when those technologies malfunction, or if litigants and court staff are not properly trained to operate them. Incorporation of new forms of evidence and new methods of delivering testimony may lead to drawn out disputes over due process and other constitutional issues, greatly adding to the expense of legal proceedings.

Thus, in developing policies and other responses to emerging technologies and other future developments impacting trial practice, UCS should aim to promote efficiency. USC also should ensure that extensive data is being collected and periodically reviewed for the purpose of assessing the success or failure of any efforts to reduce judicial backlog.

# 3. Reliability of New Technologies

Emerging technologies should be employed by courts only after careful evaluation by experts of their reliability and suitability for their intended purpose.

Any attempt to address or incorporate new technologies impacting future trial practice must also include a careful assessment of the reliability of such technologies for their intended purpose. Unreliable physical equipment and networks can derail proceedings and undermine trust in the court system. Remote conferencing platforms must not only be reliable, but also permit secure, private conferencing where necessary and appropriate (e.g., for private communications between clients and counsel or counsel and the court, sensitive *voir dire* issues, and jury deliberations).

New methods of proof will also need to be assessed for reliability. As an illustrative example, some commentators have predicted that future trials will increasingly feature the use of technology to detect deception and assist the fact-finder in making credibility determinations. Such technology may include "the use of stylometric techniques (the examination of measurable features of style, such as word forms, word lengths, etc.) to identify deceptive statements, an infrared camera to record eye movement and pupil dilation, a high-definition video camera to capture body language and fidgeting, a microphone to collect data concerning changes in vocal

pitch, a weight-sensing platform to measure various body shifts, and even a 3-D camera to track movements of the person's entire body."<sup>12</sup>

Another technology that has been discussed as a useful tool for deception detection is functional magnetic resonance imaging ("fMRI"), which "'measures small and variable changes in the ratio of oxygenated to deoxygenated blood in the brain when a particular task is performed or stimulus presented."<sup>13</sup> It has been suggested that fMRI effectively can be used to measure whether someone is lying:

[Using fMRI,] a person can be shown pictures or asked questions while electrodes are attached to their head to measure reactions. By looking at which areas of the brain 'light up' due to a higher presence of oxygenated blood, scientists may hypothesize whether the subject was previously familiar with a certain picture or words and whether or not the subject is lying when they make certain statements.<sup>14</sup>

Until the science on these technologies is settled, courts should be reluctant to admit such evidence at trial, much less permit such tools to be used *during* testimony (as has ambitiously been suggested by some authorities). Notably, the accuracy of the polygraph—a well-known and in some ways similar detection-deception device—remains controversial a full century after its invention, and the results of polygraph tests are frequently precluded at trial.<sup>15</sup> Courts should also be conscious of the unfortunate misuse of novel "scientific" testimony and theories over the past few decades, particularly in criminal proceedings, which have led in some cases to wrongful convictions.

Accounting for reliability will require UCS and judges to closely monitor emerging technologies and to partner with technological and other experts to understand and assess the processes by which such technologies work before they are put in practice in New York courtrooms. The Working Group has crafted this Report and its recommendations with reliability considerations in mind.

#### 4. Ease of Use

Emerging technologies should be employed by courts only if they are sufficiently easy for the bar and general public to understand and apply in the course of litigation.

In addition to being reliable, new technologies also must be sufficiently understandable and usable by lay persons to meaningfully increase access to justice and court efficiency. In this regard, it is important to recognize that no matter how pervasive new technologies become among consumers, there always will be people and demographic groups who will have unequal access to or familiarity with such technologies.

Inequalities in access to and familiarity with technology are a particular concern in the present environment. As discussed at length in this Report, courts are placing heavy reliance on remote conferencing technology to continue to supervise and adjudicate cases during the COVID-19 pandemic. Although not ideal, the temporary substitution of remote appearances for in-person conferences has been possible because large percentages of the bar and public have access to the devices and platforms necessary to use such technology.

Yet, significant gaps in accessibility remain. As noted in the report recently published by the Commission's Online Courts Working Group:

According to a recent survey by the National Center for State Courts, 85% of potential jurors report having some form of internet service at home, with 79% saying they have high-speed broadband service. However, 2% say they have no internet service at all. There are also significant differences in access to the internet across ages. Only 70% of those over age 65 have internet access in their home, and only 64% have broadband.

The pandemic has also increased many people's comfort with video conferencing services, but, here too, there are large demographic gaps. According to the survey, 70% of respondents said they have used services such as Zoom, WebEx, Skype, or Google Hangouts at least once during the pandemic, and 52% reported using such services regularly during this period. However, regular usage rates were much lower for men over age 50 (38%), non-college educated men (31%), and seniors (30%). <sup>16</sup>

As might be expected, some of the largest gaps are between lower- and high-income households. According to 2019 data from Pew Research, rough 29% of adults with household incomes below \$30,000 a year do not own a smartphone, and more than four-in-ten do not have home broadband services (44%) or a traditional computer (46%). In comparison, these technologies are "nearly ubiquitous" among adults in households earning \$100,000 or more per year.<sup>17</sup>

Similar inequalities will exist with respect to every emerging technology. Any efforts by UCS to incorporate and/or respond to such technologies must account for these inequalities of access and familiarity and ensure that all technology employed by the court system is easy for the vast majority of the bar and public to use.

#### 5. Financial Cost

Emerging technology should be employed by courts only to the extent the cost of such technology is merited by its benefits in enhancing access to justice, efficiency, and/or other public interests.

The Working Group recognizes that New York courts' efforts to incorporate and respond to emerging technologies—particularly physical equipment and systems—are likely to be expensive. The benefits such technologies theoretically may provide in the form of enhanced access to justice and increased court efficiency thus must be balanced against the financial cost of implementing such technologies.

Since at least the 2008-09 recession, New York's judicial system has operated under significant fiscal constraints. These constraints have limited UCS's ability to renovate courtrooms, increase judicial and administrative staff, and take other substantial measures to prepare New York's courts for the future.

The pandemic has only exacerbated these issues. Budget shortfalls caused by the pandemic and an expected decline in tax revenues have forced New York's Governor and UCS to contemplate a \$300 million cut to the judicial system's funding. Absent significant help from the federal government, the non-profit or private sectors, and/or a quick financial recovery, it is likely that these fiscal issues will continue to burden UCS's ability to take full advantage of current and future technological developments. Creativity and private-sector partnerships will likely be required to help fill some of these gaps.

# PART II: Aspects of Trial Practice Likely to be Impacted by Evolving Technology

In preparing this Report, the Working Group conducted an in-depth review and analysis of legal scholarship to assess the ways in which experts and leaders in the industry are predicting that technology (extant and emerging) will change trial practice in the near future. The sections below proceed topically, summarizing the Working Group's findings and recommendations based on its research and discussions with stakeholders.

# 1. Courthouse and Courtroom Technology

Until relatively recently, parties had to rely primarily on their own or their counsel's oral advocacy skills to tie together trial evidence into a compelling and persuasive narrative for the fact-finder. Modern technological advancements have given rise to new tools and expanded methods for storytelling and persuasion, which are increasingly being deployed at trial. It can be expected, for example, that counsel will continue to place increasing emphasis on the visual display of evidence and argument at trial in the form of timelines, calendars, maps, charts, diagrams, and animations. The presentation of evidence visually during trial has been shown to increase expediency, decrease trial costs, and improve jury retention.<sup>19</sup>

Utilization of such displays, however, requires physical courtroom technology. In particular, the below-mentioned technologies have been described as both "basic" and essential to any modern court, whether as built-in features or those that can be easily transported between courtrooms or imported by litigants for use during trial and other proceedings:

- Multiple video display monitors, such that each trial participant, including the judge, jury, witnesses, and counsel, may look toward the monitor that provides the best personal viewing perspective.
- Monitors and/or tablet-type devices with annotation and saving capabilities for use by counsel and witnesses, so that exhibits and other documents and presentations can be marked-up and saved for inclusion in the court record.
- \* A computer program and integrated controller to control the source of images and sound to the courtroom's video and audio systems, which must be capable of limiting the specific monitors on which certain images are displayed (so that, for example, a witness can authenticate an exhibit and it can be viewed by the court before it is shown to jurors).
- \* An "evidence camera" with zoom and other pertinent controls, so that visuals of hard-copy exhibits can be broadcast live on the courtroom's monitors.
- \* High-speed broadband (and ideally wireless installation) to connect the above devices and enable counsel to connect with remote support staff and access case files, the docket, and legal databases during trial.

- \* The ability to connect laptops and tablets to the courtroom's audio and video display systems through hardwiring in convenient locations (e.g., on both counsels' tables, the speaker's lectern, and the judge's bench), with input adaptors for common types of devices.
- Courtroom printing and electronic storage of exhibits, with a laptop or kiosk for the jury's use.
- Capability for remote witness testimony and videoconferencing.
- Judicial clerks or other support staff adequately trained to operate and/or assist with the above-described devices and systems.<sup>20</sup>

The biggest question with respect to courtroom technology, with which court systems must grapple, is not whether it is actually of assistance to litigants and fact-finders (it unquestionably is), rather, it is a question of practicality and expense: to what extent should court systems undertake the significant expense and burden of acquiring and installing such technology—such that it is available for use by all litigants—as opposed to simply permitting litigants with the interest and financial wherewithal to supply and install their own preferred equipment in particular cases?

It has been suggested that "the installation of new technology into courtrooms serves to equalize what would otherwise be a 'digital divide' if the parties provided their own systems." Yet, few court systems to date appear to have invested the funds necessary to permanently outfit their courtrooms with the above-mentioned technologies on any wide-scale basis.

In federal court, the Administrative Office of the United States Courts has consistently aimed to update its courtroom infrastructure to reflect the latest technological developments.<sup>22</sup> A number of state courts also have created so-called "technology-enhanced" courtrooms, albeit often in limited number/scale.<sup>23</sup> New York historically has been a pioneer in this space. The Courtroom 2000 project, initiated in December 1997, resulted in the creation of several technology-enhanced courtrooms in New York Supreme Court. These courtrooms' features include realtime court reporting and streaming, wireless internet access, remote streaming of witness testimony, videoconferencing capability, advanced 17-inch LCD monitors and a 40-inch plasma monitor for the public, an interactive "whiteboard" for the presentation of drawings or writings, a touch screen monitor in the witness box for the annotation of evidence, personal computer docking stations at various locations throughout the courtroom, and a customized integrated electronic podium allowing for control over various other equipment.<sup>24</sup> Similar technology-enhanced courtrooms, known as Integrated Courtroom Technology ("ICT") parts, opened in Westchester County in 2016 and 2017 to hear family court and commercial cases.<sup>25</sup>

That said, the vast majority of New York courtrooms today offer few such features. Built-in display monitors are rare (and to the extent they exist, likely outdated), and internet access in many courtrooms either is nonexistent or unreliable. Likely not coincidentally, most pre-pandemic trials were conducted in much the same fashion as trials have for decades, through the presentation of oral argument and witness testimony and the physical exchange of exhibits between counsel, witnesses, and the fact-finder.

As noted, the primary holdback to the greater incorporation of technology into courtrooms has not been lack of interest or concern over such technologies' usefulness, but cost. Outfitting every courtroom in New York state with even just the basic technologies discussed at the outset of this section would undoubtedly be a monumental financial and logistical undertaking. The age of many court buildings across the state also raises special installation problems and costs, insofar as many New York court buildings are old and may prove difficult to rewire or set up for wireless internet. As previously discussed, New York courts have operated under fiscal constraints more or less since the 2008-09 financial recession, and a \$300 million cut to the court system's budget may be looming. There also are questions as to whether large investments into particular types of courtroom technology (e.g., monitors, hard-wiring, etc.) are prudent, given the speed at which new technologies and consoles are being developed, rendering even recent innovations and models quickly obsolete.

Unable to purchase and install advanced courtroom technologies themselves, many New York judges have permitted parties and their counsel to supply and install their own technology for trial. However, there is no uniform UCS policy concerning litigants' ability to bring in and set up such portable technology. Members of this Working Group themselves have had difficulty coordinating with court staff to arrange for such equipment to be brought into the courthouse and courtroom for installation, or to answer questions about compatibility and other issues.

# Recommendations and Next Steps:

Seek Partnerships with Private Vendors/Internet Service Providers: The most important step UCS can take to expand technological options in courtrooms and prepare for future trial practice is to supply all courtrooms with secure and reliable high-speed wireless internet. To accomplish this objective notwithstanding current fiscal restraints, the Working Group recommends that UCS seek to partner with major internet service and/or other technology providers with an interest in community building in New York State and a commitment to access to justice.

The unfortunate fact is that meaningful advancements in courtroom technology over the next few years will not be possible without encouraging private vendors and suppliers to donate equipment and expertise. The Working Group is cognizant that a partnership between UCS and one or more private, for-profit technology providers may give rise to a concern among some members of the public that such entities will receive special treatment if they become parties to litigation in New York. However, it is the Working Group's belief that transparency and careful separation between judicial staff and the administrators involved in such partnerships can alleviate much of that concern. The negotiation and issuance of any vendor contracts should be handled statewide, by UCS.

Develop Uniform Rules for the Provision of Portable Courtroom Technology: Once the pandemic has abated and the occupancy and social distancing restrictions that have prevented most in-person trials are lifted, UCS should consider developing a policy or set of rules to clarify when, and in what manner, parties may supply their own portable courtroom technology for trial or other court proceedings. Such policy/rules should be developed in consultation with judges, court staff (including IT and security personnel), technology experts, attorneys, and vendors. The rules should aim to ensure that any technology brought into New York courtrooms (a) is secure and

reliable, (b) does not unduly disrupt other court proceedings, and (c) will not give any party an unfair advantage as a result of its greater financial resources or technological expertise.

Study Cost-Effective Ways to Make Courtrooms More Adaptable to External Technology: In addition to developing the partnerships and policies discussed above, UCS should seek the opinions of technological experts on additional, cost-effective ways to make New York courtrooms more adaptable to varying technologies supplied by litigants.

<u>Create Training Programs for Court Staff</u>: To the extent any renovations or updates are made to courtroom technology, or policies are enacted with respect thereto, UCS will need to create training programs for court staff so that they fully are apprised and knowledgeable of applicable rules, and can assist litigants with existing and future courtroom technology.

The Working Group will confer with its sister working groups, such as the Technology and Structural Innovations working groups, to determine whether additional, specific recommendations can be made on the subject of courtroom and courthouse technology and trial practice.

# 2. Remote and/or Automated Transcription and Translation Services

The way in which arguments, testimony, and rulings are transcribed and/or translated for trial participants and the court record is evolving.

# A. Realtime In-Person Transcription

Most court reporting services already offer realtime transcription for trials and other proceedings. To create a realtime transcript, a highly-trained reporter types stenography shorthand or other input corresponding to live testimony or argument into a computer as it happens. That input is then processed by computer algorithms to create a near-instantaneous, readable and searchable record of the ongoing testimony or argument. In some trials, an additional professional is employed to proofread or "scope" the feed as it is being produced, giving the resulting live transcript an even greater degree of readability. Realtime transcription has been successfully employed in countless New York trials, particularly in the Supreme Court's Commercial Division.

#### B. Fully Automated Transcription

As with numerous services across many industries, the most foreseeable endgame in the evolution of trial transcription likely is full automation. Technology in fact already exists that is capable of converting the spoken word into written text, near-instantaneously and without any human assistance. Indeed, many consumers already experience and benefit from such technology in their daily lives—some phones, for example, are capable of automatically transcribing voicemails so that they can be read, rather than listened to.<sup>27</sup>

For the moment, at least, such technologies remain insufficiently reliable for use at trial, at least without significant, contemporaneous human proof-reading and/or audio recording for backup. The arcane and unusual jargon attorneys often employ at trial, and the tendency of trial participants to talk over each other, will present significant obstacles to the use of such technology on a fully or even predominantly automated basis for the foreseeable future. In addition, automated

transcription programs appear to have greater difficulty transcribing testimony from speakers with accents, which means that automated transcription—at least at its current stage—could threaten access to justice if widely employed.<sup>28</sup>

#### C. Remote Transcription Services

While automated transcription technology continues to develop, courts can be expected to rely increasingly on remote transcription services. Experience during the pandemic has shown that remote transcription is feasible—albeit highly dependent on the quality of litigants' internet and connection devices and the privacy and quiet of the environments from which they connect. As with other applications of remote conferencing technology, remote transcription has the potential to make court proceedings more efficient by enabling reporters to transcribe proceedings from their offices or homes, rather than having to cart cumbersome machines from courtroom to courtroom.

#### D. Remote Translation Services

Remote conferencing technology also gives courts new options to provide translation services to litigants and others for whom English is not a first or primary language. As UCS has recognized, New York is a diverse community of 62 counties with unique linguistic challenges.<sup>29</sup> While parties with the financial wherewithal to do so likely will always want to carefully select and vet their own translators, the court system is both morally and constitutionally required to provide translation services to litigants where necessary to ensure their voices are heard. Indeed, New York courts already provide free translation services to court users in both criminal and civil matters with limited English proficiency, regardless of their level of ability to communicate in the spoken English language and regardless of their role in the litigation process (*e.g.*, whether they are defendants, parties, witnesses, victims, or those who utilize non-courtroom services provided by the court).<sup>30</sup> Automated translation can enhance access to justice to marginalized communities by expanding the number, quality, and expertise of available translators.<sup>31</sup>

# Recommendations and Next Steps:

Study Outside Vendor Offerings for Automated/Remote Transcription and Translation: The Working Group recommends that UCS commission an expert analysis of the services offered by private vendors for automated and/or remote transcription and translation services, with the goal of assessing their cost, reliability, and security.

<u>Create Pilot Programs</u>: After the above study has been conducted and examined, UCS should consider establishing a pilot program or programs to test such technologies on a voluntary basis in appropriate courts, or by means of mock trials.

# 3. Streaming of Trial (and Other Trial-Level) Proceedings

Streaming is the delivery of media content such as video over the internet in realtime. New York's appellate courts offer live online streaming of most proceedings before them.<sup>32</sup> In contrast, the online streaming of trials and trial-level court proceedings in New York and elsewhere has

historically been rare. To observe such proceedings, members of the press and general public generally have had to travel to court and attend in person.

The COVID-19 pandemic has shuttered courtrooms across the country and, with them, ordinary forms of public access to trial-level court proceedings. This is a problem of constitutional magnitude—the Sixth Amendment guarantees the right to a "public trial" in criminal cases, and the First Amendment requires public access in most civil cases.

In an effort to satisfy these legal obligations in the current environment, a number of courts across the country have begun to stream trial-level court proceedings. For example, the court administration in Texas has encouraged judges to create YouTube channels for the purpose of streaming proceedings and collected them in an online directory.<sup>33</sup> The Working Group anticipates that the availability of such streaming will continue to expand even after physical courtrooms reopen.

Online streaming of trial-level court proceedings does raise a number of important potential issues. While the recording of such broadcasts can be prohibited by rule or statute and otherwise discouraged (e.g., by adding watermarks to stream feeds), there is no certain way to guarantee that observers are not able to record proceedings.<sup>34</sup> Clips of such recordings—stripped of context or even misleadingly edited—might then go "viral" in high-profile cases, potentially undermining the administration of justice.

Moreover, it is doubtful that the benefit to the public of streaming will outweigh the interests of litigants in every case. Trials and evidentiary hearings will generally be more important to the public than scheduling and discovery conferences. Meanwhile, privacy may be required in certain types of disputes, such as domestic violence and child protection cases, or cases involving trade secret or commercially sensitive issues. The task of balancing these various interests will fall upon judges, who will require both the discretion and technical capability to decide on a case-by-case basis—and even in the midst of ongoing proceedings—what should and should not be streamed. If such a system is put in place, there will likely also need to be an emergency procedure to challenge judicial determinations to stream proceedings, to protect against abuses of discretion.

# Recommendations and Next Steps:

<u>Creation of a Pandemic Pilot Program for Trial-Level Streaming</u>: The Working Group recommends that UCS establish a pilot program for the streaming of trial-level court proceedings during the pandemic, using Texas's online streaming platform as a model. UCS should consider and identify, in consultation with judges, the types of proceedings that may be particularly well-or ill-suited for online streaming, but as an initial matter, Commercial Division cases and criminal proceedings (given Sixth Amendment requirements) should be prioritized for the program.

Should UCS decide to establish such a pilot program, this Working Group will work with UCS to develop standards for judges in exercising their discretion to order online streaming in particular cases.

# 4. New Forms of Evidence and Admissibility Disputes

In recent years, courts in New York and across the country have begun to grapple with admissibility issues posed by an ever-expanding array of new forms of evidence created by emerging technologies. Since the scope of discovery under New York law is broad, and the pace at which new technologies are coming to market is unlikely to slow anytime soon, trial judges need to be competent to address novel forms of evidence and evidentiary disputes.

The following types of evidence have been cited by legal commentators as likely to be increasingly featured in evidentiary presentations in the future:

- \* Geolocational data, *i.e.*, information that can be used to identify the physical location of an electronic device (and therefore potentially its holder) at a particular time. Such data is increasingly available from cellphones, tablets, cameras, wearable computer devices (*e.g.*, Apple Watch, and perhaps next-generation eyewear or headsets along the lines of Google Glass), and vehicle GPS and other location systems.<sup>36</sup>
- Video recordings and photographic evidence from any number of existing and future sources and devices, including cellphone cameras, commercial and home surveillance cameras, vehicle cameras, drones, and existing and forthcoming wearable recording devices, such as those worn by police officers to document arrests or by physicians when performing medical procedures.<sup>37</sup>
- \* Facial recognition evidence, which will be used to identify or verify the identity of individuals whose images have been captured on video or by photograph.<sup>38</sup>
- Social media evidence, which can be used to demonstrate a person's location, appearance, or even mood at a particular time.<sup>39</sup>
- Neuroimaging evidence, which among other things can be used to argue that a criminal defendant lacked the cognitive capability to form the requisite *mens rea*, or suffered from an affliction that might mitigate culpability, or to prove pain, posttraumatic stress disorder, recidivism, or lack of credibility.<sup>40</sup>
- Genetics evidence, which might be used in personal injury and toxic tort cases to disprove causation.<sup>41</sup>
- \* "Internet of things" evidence, *i.e.*, data from chips placed into ordinary devices to connect them to the internet and allow them to interact with other devices, including machines and systems responsible for "smart" homes such as home security systems, home speakers, garage doors, heating and air-conditioning systems, refrigerators, ovens, ranges, washers and dryers, televisions and other home entertainment, lighting, outlets, and switches. All of these devices can act as sensors and collect and store data which may be important to a party in a legal dispute. 42

As an increasing variety of technological data is collected and exchanged in discovery, courts should expect that motions *in limine* and other evidentiary disputes will become increasingly technical, complex, and common. Longstanding evidentiary rules, such as hearsay rules, the best

evidence rule, and rules governing authentication, may need to be amended as concepts of "original" documents, "speakers" (e.g., for purposes of the "present sense impression" exception to the hearsay rule), and authorship become more complicated.<sup>43</sup> Requests for metadata or blockchain data (used to determine who made edits to documents, and when) will likely become routine.<sup>44</sup> Sanctions, spoliation, and/or preclusion motions for failure to preserve or produce various digital forms of data may also increase in frequency.

Finally, courts may increasingly be asked to resolve claims that documents have been manipulated or fabricated. "Deep fakes"—meaning media that has been technologically manipulated to make it appear that someone is saying or doing something that they did not—are increasingly a subject of discussion in the media and may soon appear with increasing frequency in courtrooms. This concern has been heightened by recent revelations and reports that even metadata and blockchain data—information which until recently was considered unalterable—may in fact be editable like other forms of data. Undges need to be prepared to address these and other highly technical evidentiary disputes competently and efficiently.

# **Recommendations and Next Steps:**

Establish a Committee/Partnerships to Engage in Ongoing Study of Legal Developments: The Working Group recommends that UCS establish a committee of judges and permanent law clerks within the New York court system, whose task will be to periodically review and summarize for other judges and staff the most recent precedent and developments in the handling of new forms of evidence at trial. Alternatively, UCS should consider partnering with law firms and/or bar organizations or non-profit institutions to provide periodic training on these subjects.

#### 5. Demonstrative Evidence

In addition to new forms of technological recordings and data being proffered as evidence at trial, technology will also be used to create increasingly sophisticated and vivid demonstrative aids and displays to streamline and visualize important information for the jury. The following are only a few examples of the types of demonstratives likely to become much more commonplace in trials of the future.

#### A. 3D Printing and Scanning

3D printing is a quickly advancing technology and manufacturing process in which a three-dimensional object is constructed by depositing materials (e.g., metals, composites, and even living cells) layer by layer under computer control in accordance with a 3D model.

Although 3D printing appears to have been discussed within the legal community primarily with respect to the new types of legal claims it will generate (e.g., patent infringement suits arising from the printing of drugs and other patented products), attorneys also are likely to use 3D printers to create visual and physical aids for trial. For example, 3D printing can be used to provide fact-finders with a model of a murder weapon or another important object in a case.<sup>47</sup> Judges will need to assess and ensure that particular 3D-printed models sufficiently are reliable and accurate to be shown to jurors, to avoid prejudice to the opposing party.

Relatedly, 3D laser scanners also have been developed and employed by police departments to scan crime scenes. These devices have been said to allow law enforcement to "retain nearly every detail of a crime scene, permanently." The State's use of such technologies will no doubt give rise to new evidentiary and constitutional challenges as criminal defendants attempt to investigate and question the process by which such evidence was generated.

#### B. Holographic Evidence and Virtual Reality

If the 3D printing of objects gains acceptance, the next step may be virtual reproductions of entire rooms, locations, or sequences of events. For example, attorneys may attempt to introduce holographic representations of objects, people, or places of interest as demonstrative exhibits at trial.

Virtual reality evidence has also been the subject of significant academic discussion. Immersive virtual environments ("IVEs") already are proliferating in industries from video gaming to job training; accordingly, many commentators predict that lawyers will soon seek to employ such technology in the courtroom.<sup>49</sup> As one commentator has put it, "both VR [virtual reality] and AR [augmented reality] will become part of the litigation process. The only question is when." VR technologies have in fact already been used in courts in China, and courtroom applications are currently in development by a number of U.S. companies.<sup>51</sup>

The idea of virtual reality demonstrative presentations is not completely new. Indeed, IVE technology successfully was showcased in a mock trial conducted in 2002 by National Center for State Courts as part of its "Courtroom 21 Project." The case—a mock manslaughter trial—centered around the allegation that a stent manufactured by the defendant had caused a man's death. In arguing that the surgeon was responsible for implanting the stent in the wrong location, and therefore responsible for the patient's death, the defense presented testimony from a nurse wearing a virtual reality headset and specialized goggles. "With a three-dimensional view of the operating room, the nurse described the surgery and the stent's placement.... The jurors observed the virtual reenactment on laptops and were able to decide for themselves, given what appeared on their screens, what the nurse observed, ultimately ruling in favor of the defendants." In the future, jurors themselves may be asked to wear virtual reality headsets to experience disputed events firsthand.

The use of IVEs as demonstratives at trial is likely to lead to numerous evidentiary and constitutional challenges. Among other things, courts will need to develop standards for determining whether an IVE presentation accurately represents the facts of a given case. The potential prejudice from unrepresentative IVE is considered greater than that posed by computer animations and other visual aids already commonly proffered at trial. As explained by one source:

Computer animations have proven to be a useful tool of persuasion in the courtroom because people have a natural tendency to accept what they see as true. Further, jurors are significantly more likely to remember information presented visually rather than orally. IVE re-creations also harness this persuasive visual power, but go an additional step further by engaging all of a juror's senses and completely immersing the juror in an alternate environment. This complete immersion, or sense of presence, allows jurors to directly *experience* a party's version of the

events, rather than merely seeing it on a two-dimensional display. Since direct experience is shown to be more persuasive than mediated experience—such as observing a two-dimensional computer animation—IVEs are significantly more likely to persuade jurors that the events actually occurred as depicted, or rather, as they experienced them in the IVE.

While the sense of presence and direct experience felt in an IVE makes the technology extremely persuasive, these characteristics also greatly increase the risk of unfair prejudice to the non-introducing party. First, jurors completely immersed within an IVE will be less aware of contradictory real-world facts and will be more reluctant to critically question the facts and assumptions presented in the IVE. Second, there is a high probability that jurors will commit inferential error by giving too much weight to the vivid evidence, finding it more probative than it actually is.<sup>53</sup>

This potential for unfair prejudice may be alleviated where both sides are able to present IVE evidence of similar quality, but in many cases one party's resources will exceed those of his or her opponent. And in criminal trials, the prosecution's use of IVE almost certainly implicates a defendant's right of cross-examination, and could influence his or her decision whether to testify at trial.<sup>54</sup>

Another concern with respect to IVEs is that they cause some people to experience dizziness and motion sickness. Others may find the technology traumatic—particularly in cases where the VR consists of the re-enactment of an accident or violent crime. Were such persons to be excluded from juries in cases in which such IVE presentations are anticipated, it could implicate those persons' rights to participate. <sup>55</sup> Courts will have to weigh and consider these and many other issues in deciding whether to permit such evidence at trial.

# Recommendations and Next Steps

Establish a Committee/Partnerships to Engage in Ongoing Study of Legal Developments: Consistent with its recommendation in Part II-4 of this Report, the Working Group recommends that UCS establish a committee of judges and permanent law clerks within the New York court system, whose task will be to periodically review and summarize for other judges and staff the most recent precedent and developments in the handling of new forms of demonstrative aids at trial. Alternatively, UCS might partner with law firms and/or bar associations or non-profit institutions to provide periodic training on these subjects.

<u>Create Pilot Programs</u>: Once the COVID-19 pandemic has receded and court operations have returned to normal, UCS should consider partnering with law firms or bar groups to organize mock trials or pilot programs to test such technologies.

# 6. Artificial Intelligence-Assisted Decision-Making

Thanks to science fiction entertainment like *Terminator* and *2001: A Space Odyssey*, when people think of artificial intelligence ("AI"), many imagine sentient robots or supercomputers with the capacity and intent to destroy the human race. In reality, discrete applications of AI are already

impacting our everyday lives by "completing our words as we type them, providing driving directions when we ask, vacuuming our floors, and recommending what we should buy or bingewatch next." 56

There is no uniformly accepted definition of "AI," but the term generally refers to the ability of computers "to mimic the capabilities of the human mind—learning from examples and experience, recognizing objects, understanding and responding to language, making decisions, solving problems—and combining these and other capabilities to perform functions a human might perform, such as greeting a hotel guest or driving a car." Computers perform these tasks through a combination of data collection and complex algorithms which process, analyze, and draw conclusions from that data.

Over the next two decades, it can be expected that AI will be employed to perform increasingly complex tasks across many industries—potentially even including some tasks presently performed by law clerks and judges. Among the most foreseeable future applications in the judicial context include the use of AI to (a) create fully-automated realtime transcripts of trial argument and testimony; (b) draft routine court documents (e.g., compliance conference orders); (c) help identify and narrow the authorities a judge must review to decide a particular issue; and (d) ensure that the result reached by the judge or fact-finder is consistent with the results of similar cases.<sup>58</sup>

Such applications have the capacity to dramatically reduce litigation costs, improve judicial efficiency, and ensure consistency between cases and litigants. Accordingly, once such technologies are determined to have reached a stage of sufficient reliability, they should be welcomed into court practice

A more difficult question is whether governments and court systems should support the development of AI technology which can be used to actually *decide* disputes with little or no human involvement.

Theoretically, at least, AI programs might be developed capable of collecting all of the various undisputed facts of a case, comparing them to those of millions of other cases stored in vast electronic databases, and generating a binding decision consistent with prior precedent. Indeed, there already are reports of judges in other countries using AI to assist with decision-making. In Argentina, for example, a software program called Prometea has been used to draft opinions in public housing and taxi license disputes, overseen by a (human) judge. More radically, certain "routine and small cases" in China have reportedly been decided by "an artificially intelligent female judge, with a body, facial expressions, voice, and actions all modeled off a living, breathing human (one of the court's actual female judges, to be exact)." When U.S. Supreme Court Chief Justice John Roberts was asked whether he could foresee a day when smart machines, driven by AI, would assist with courtroom fact-finding or judicial decision-making, he replied "[i]t's a day that's here..."

From an efficiency standpoint, the benefits of "robot" judges are self-evident.<sup>61</sup> However, courts must exercise extreme caution when considering the implementation of technology that diminishes the human aspects of the adjudication process. Public faith in the judicial system is founded on the belief that when litigants come to court, they will be adjudged by human beings capable of understanding and empathy and able not only to process raw data but also to assess character and

credibility. Relying on impersonal and mysterious algorithms and external data to decide dispute poses a significant threat to the trust that currently exists between the public and the courts, and would also raise serious constitutional concerns.

On the other hand, there is little apparent harm in courts making AI decision-making technologies available to litigants to inform their litigation strategy. A program like the one described above could be offered to parties as a mediation tool, for example. Instead of generating a decision, the program might instead produce an analysis of the litigant's likelihood of success at trial, and/or a recommended amount for settlement. Awareness of what an AI program believes is the most statistically likely endgame of a particular case could certainly influence many parties' decisions and trial strategy, while leaving undisturbed the rights of all litigants to a trial by a human judge or jury of their peers.

In addition, none of the above cautionary discussion should discourage UCS from exploring more clerical applications of AI both in court administration and by judges and litigants. AI has potential labor savings for filing and scheduling efficiency, as well as public communication and transparency benefits.

# Recommendations and Next Steps:

Study Ways in Which AI Technology Can Currently be Applied to Improve Court Practice: The Working Group recommends that UCS commission an expert analysis of the ways in which currently available AI technology might be applied to improve court efficiency and enhance access to justice.

# PART III: Trials by Remote Videoconferencing Technology Constitutional Issues and Lessons from the Pandemic

While many scholars and stakeholders have for years anticipated that courts—like essentially all industries—would eventually begin to make greater use of remote conferencing technology in their daily practice, the use of such technology was generally expected to develop in stages. First, courts would experiment with remote status conferences and oral arguments on motions (which generally do not require the examination of witnesses or documentary evidence). If the inevitable kinks in the procedures for presenting testimony and documentary evidence remotely could be worked out, eventually courts might permit evidentiary hearings—and perhaps even some very straightforward trials—to be conducted remotely. 62

The pandemic has forced many courts across the country to skip over most of these interim steps and transition directly to fully remote proceedings, including remote bench and possibly even jury trials. As discussed further below, this transition presents both serious risks to the administration of justice and tremendous learning opportunities for future remote practice.

# 1. Overview of Challenges Presented by Remote Trials

The various opportunities and challenges presented by the use of remote conferencing technology by courts have already been discussed at length in the *Initial Report on the Goals and Recommendations for New York State's Online Court System*, published on November 9, 2020, by the Commission's Online Courts Working Group.<sup>63</sup> This Working Group fully agrees with the findings and recommendations set forth in that report.

As the Online Courts group has explained, the opportunities presented by judicial use of remote conferencing technology include enhanced access to the courts by those who lack the flexibility in their work or caregiving arrangements to easily secure time to travel, or who live far from their nearest courthouse. The challenges include access to justice problems created by significant variations in the abilities of different people and groups to access and use the technology required for virtual hearings, as well as privacy and security concerns and the expense associated with the investments in technology, training, staffing, and public outreach necessary for effective and equitable expansion of remote proceedings.

All of these observations are equally true in the specific context of remote trials. However, the use of remote videoconferencing as a means to conduct trials—particularly *jury* trials, and even more particularly *criminal* jury trials—raises a number of unique and very serious practical, moral, social, and constitutional issues which merit special attention by judges and UCS.

#### Such concerns include:

- Serious access to justice and constitutional issues created by the public's unequal access to the computer devices, internet connections, and private spaces necessary to participate in jury trials, if widely conducted remotely.
- The increased potential for prejudicial disruptions to trial proceedings caused by technical malfunctions (e.g., muting/static problems and internet connectivity issues causing time

lags, screen freezes, or jurors accidentally being booted from remote conferencing platforms).

- \* The diminished ability of counsel to observe contemporaneously the full body language and reactions of each prospective juror during *voir dire*.
- \* The diminished ability of courts to provide confidential and secure break-out rooms for prospective jurors to discuss sensitive issues during *voir dire*.
- \* The diminished ability of counsel to observe contemporaneously the full body language and reactions of each juror to argument and evidence during trial, which can influence counsel's trial strategy and effectiveness.
- \* The diminished ability of courts and counsel to appropriately supervise jurors during trial to ensure they are present, paying attention, and/or not conducting outside research.
- The diminished ability of courts to seclude jurors from outside distractions while evidence is being presented, in the way jurors can be shielded from such distraction in a physical courthouse.
- Practical difficulties in the presentation and examination of documentary evidence remotely.
- \* Potential infringement of the right to cross-examination and the Sixth Amendment rights of criminal defendants to be present and to confront accusers (see Part III-2, infra).
- Diminished opportunities for "bonding" and other "human connection" between jurors, jurors and counsel, and jurors and the court.
- \* Privacy issues during jury deliberations (e.g., the risk that a family member might wander into the virtual deliberation room while jurors are discussing the case).<sup>64</sup>

Even more limited applications of remote conferencing technology can pose significant issues, particularly in the criminal context. For example, during the pandemic, UCS created and tested a virtual arraignment process using videoconferencing technology. At the beginning of this year, Governor Cuomo announced that he intends to propose legislation that would permit virtual arraignments statewide and further intends to work with UCS to permanently establish virtual arraignment protocols, with the goal ultimately to "eliminate obsolete ... in-person arraignments." In contrast, the Chief Defendants Association of New York ("CDANY") has expressed concern that virtual arraignments (i) deprive the accused of effective assistance of counsel, (ii) impede judges' ability to gauge a defendant's mental status and understanding of legal proceedings, and (iii) exacerbate the divide between wealthy and poor defendants. CDANY notes that a "televised arraignment protocol" was implemented in Cook County, Illinois in 1999, which was correlated with a 51% increase in bail amounts and ultimately was determined to be unconstitutional. The Working Group shares many of these concerns.

On the other hand, there are some likely categories of proceedings and testimony for which remote conferencing is appropriate, at least in some circumstances. Certain types of witnesses, for example, ordinarily may not need to testify in person, at least in civil cases (e.g., witnesses responsible for authenticating documents or explaining how evidence was collected). The choice for courts is not simply between all in-person and all-remote trials and other proceedings—numerous hybrid options are available and deserve consideration.

Determining the extent to which these and other issues can be resolved, creating best practices to handle and avoid problems, and potentially proposing new legislation to allow for remote conferencing even after the pandemic, will take significant time and require constant reevaluation and careful scrutiny as New York and other courts experiment with remote trials and other proceedings over the coming months.

# 2. Remote Jury Trials in Practice during the Pandemic

Even as the U.S. marks one year from its first statewide stay-at-home order due to COVID-19, there have been only scattered reports of courts experimenting with remote jury trials. Although discernment of national trends is difficult—given that most court systems' policies and procedures are in flux as they struggle to adapt to changing circumstances on the ground<sup>68</sup>—most courts appear to have either fully suspended jury trials, or are focusing on restarting in-person trials with appropriate capacity limits, social distancing, and other health and safety precautions.

That said, remote jury trials have been conducted in at least three states to date. The experiences of courts, litigants, and jurors in these groundbreaking trials are worthy of examination as UCS considers both the next steps in New York's efforts to reduce trial backlog caused by the pandemic and ways to prepare its courts for a brighter post-pandemic future.

#### A. Texas

In May 2020, a court in Collin County, Texas conducted a one-day, nonbinding, virtual jury trial in "a mundane civil case involving an insurance firm and a McKinney IT business." The trial was conducted by means of a "summary jury proceeding"—a statutorily authorized procedure in Texas which allows real litigants to test arguments in front of real jurors before a case is tried to a binding verdict. The trial, which was conducted by two judges, appears to be the first example anywhere in the U.S. of a case in which real jurors "were selected, heard evidence, deliberated and delivered a verdict all through a video call."

Based on reporting at the time of the trial, the overall experience appears to have been positive. There were some reported glitches, however, such as jurors forgetting to take themselves off mute and not responding when called upon. One juror reportedly "spent the first few minutes of the trial switching digital backgrounds from an underwater scene to a peaceful harbor before settling on a beige conference room...."

Another juror failed to return to the videoconference following a break, requiring the judge to shout through the virtual connection for attention: "[i]f you can hear us, please return to your chair, we're ready to get started."

Nonetheless, jurors reported that they were satisfied with the process, describing it as efficient, and affirming that they were able to easily view the parties' documentary evidence.

#### B. Florida

In June 2020, five trial-circuit courts across the State of Florida, covering the cities of Jacksonville, Daytona Beach, Orlando, Miami-Dade, and Fort Myers, were chosen to test the feasibility of remote trials and other proceedings during the pandemic.

In August 2020, Florida's first virtual, binding civil jury trial was held in a Duval County court. The case, *Cayla Griffin v. Albanese Enterprises, Inc. D/B/A Paradise*, involved a Jacksonville woman who was struck and injured by two nightclub bouncers. Commencement of the trial was preceded by substantial forethought and planning, reportedly including the following:

- \* Mock trials were conducted.
- A virtual courtroom background was designed to "len[d] dignity to the proceedings."
- A screen saver with a countdown clock was created to keep jurors engaged during recesses and sidebars.
- \* PowerPoint presentations were generated to familiarize jurors with Zoom.
- An electronic questionnaire was created to streamline the jury selection process and make voir dire more efficient.
- \* Existing programs were repurposed to give jurors the ability to examine documents placed into evidence and communicate with the court.
- Court IT workers were trained to serve as "remote bailiffs."
- \* A magistrate was appointed to help the presiding judge observe jurors.
- Court View Network was chosen to stream most of the proceedings so that they would be available for public view.

According to one source, describing the juror selection process, prospective jurors mostly were attentive throughout the proceeding. When one admitted to working on a school project during questioning, the issue was quickly and smoothly addressed.<sup>73</sup>

A second virtual jury trial, *K.B. Mathis P.A. v. Agatha Argyros*, was held in late September 2020 in a fee dispute between an attorney and his former client. Jury summonses were issued with a letter from the judge explaining the court's remote jury pilot program and instructing jurors to log in to the clerk's website and answer qualification questions. Notably, the response rate of jurors to these remote summonses was *higher* than the equivalent rate for in-person jury summonses prior to the pandemic.<sup>74</sup>

Following these two trials, Judge Bruce Anderson of the Fourth Judicial Circuit—in which both were held—issued a report to the Florida Supreme Court.<sup>75</sup> The report's conclusion is that fully virtual jury trials are too resource-intensive to be scalable for wholesale implementation across Florida, and therefore cannot serve as a practical solution for that state's approximately 990,000

case backlog. However, Judge Anderson opined that "when balancing the benefits of the remote process with the logistical impediments of scalability, ... a *hybrid jury trial process* is a realistic and feasible option for conducting civil jury trials if the restrictions of the pandemic persist." As proposed, such a hybrid process would consist "of a remote jury selection and an in-person jury trial."<sup>76</sup>

Meanwhile, the Eleventh Judicial Circuit of Florida issued a separate report following a pilot virtual jury selection proceeding in a case in Miami (the trial of which was held in-person). The report's conclusion is that the Zoom jury selection process "[s]urprisingly" did not have "nearly as many challenges as envisioned." Of the 39 jurors who responded to a survey distributed by the court following the proceeding, only five indicated that they experienced any technical issues during their jury service (a particularly notable statistic, given that 13 jurors reportedly had never used the Zoom platform before). Notably, the report found a "strong correlation" between these technical issues and the jurors' use of smartphones rather than computers to participate.<sup>77</sup>

While Florida's pilot program thus appears to have been a success from the perspective of jurors, its courts reportedly have had difficulty finding litigants willing to participate. As of October 2020, Florida was not considering making participation in its virtual jury trial pilot program mandatory. The hesitation among litigants likely is attributable to the special concerns posed by remote jury trials. Notably, anonymous surveys conducted earlier in 2020 suggested that most Florida Bar members favored conducting "at least some proceedings" remotely on a permanent basis moving forward. The have appears to have been a success from the perspective of jurors, its courts reportedly have had difficulty finding litigants willing to participate. As of October 2020, Florida was not considering making participation in its virtual jury trial pilot program mandatory. The hesitation among litigants likely is attributable to the special concerns posed by remote jury trials. Notably, anonymous surveys conducted earlier in 2020 suggested that most Florida Bar members favored conducting "at least some proceedings" remotely on a permanent basis moving forward.

In the fall of 2020, Florida established a COVID-19 Pandemic Recovery Task Force, which is planning a "major survey" to determine the most appropriate legal proceedings to continue conducting remotely during the pandemic.<sup>80</sup>

#### C. California

California has held at least two remote binding jury trials in asbestos cases. In both cases, defense counsel objected to and appealed challenges to the remote proceedings.

In Honeywell International, Inc. v. Superior Court for the County of Alameda, the trial court required the parties to participate in a virtual trial. The defendant, Honeywell, filed an emergency appeal, noting that no other court in California had at that time yet attempted an entirely remote trial, much less a lengthy, expert-intensive, and scientifically complex asbestos trial.<sup>81</sup> Additional concerns noted in its appellate papers were:

- \* The trial judge purportedly had expressed the view that jurors could participate on smartphones rather than computers and thus would not require internet connections.
- \* The judge purportedly had declined to excuse a juror who said "[m]y Chromebook frequently overheats using Zoom, & my apartment is not conducive to a focused environment."
- Lither "[t]he jurors or the witnesses or the counsel or the court could have technical problems," creating a risk that not all jurors would hear all evidence at the same time; that

some jurors might hear evidence twice in slightly different versions; or that entire testimony might be lost.

- The judge would not be able to seclude jurors from countless possible distractions (e.g., "the crying baby, the barking dog, the front door deliveries, the pinging text messages").
- Jurors might take screenshots of proceedings that would "skew the totality of the juror's recollection later, during deliberations."
- \* The judge purportedly might be so "consumed" by the responsibility to oversee the technological aspects of the trial that he would be unable to "attend also to the conduct of the people and the substance of the evidence that is introduced."
- Remote voir dire would not permit counsel to observe "subtle cues of demeanor" necessary to assess potential concealed biases. 82

The California appellate court denied Honeywell's petition without prejudice, reasoning in a brief decision that "[a]lthough petitioner raises serious concerns, at this point they are speculative rather than concrete."83

Subsequently, during the trial proceedings, Honeywell filed a "notice of irregularities" identifying a number of more concrete problems, including "problems with the Livestream audio feed and jurors walking around, lying on a bed or working on other devices during trial." Ultimately, however, these objections were mooted when the jury returned a defense verdict after deliberating remotely for about two days.<sup>84</sup>

California's second virtual jury trial, in the Almeda County case *Wilgenbusch v. American Biltrite*, likewise involved challenges to the remote proceedings. In July 2020, one of the defendants moved for a mistrial. According to the movant, "for at least half an hour" during *voir dire*, "the attorneys were put on mute by the moderator and were unable to unmute themselves to object. Thus, [defendant's] objections were neither noted on the record, nor ruled upon, thereby irrevocably tainting the fairness of the jury selection process." The defendant further argued that the Court "was unable to fulfill its role of controlling the proceedings before it, including juror conduct," noting that "during portions of *voir dire*, [one juror] was laying in what appeared to be a bed, curled up, and possibly asleep.... [Another] was working out on an elliptical machine.... Yet another juror ... had a child that was in and out of the room, and the juror appeared to leave the room at times with the child.... Furthermore, multiple jurors appeared to be using computers while having the Zoom meeting playing on another device." \*\*86\*\*

The motion for a mistrial was denied, and the claims against the moving defendant were ultimately settled. Subsequently, however, a different defendant in the same case brought two further motions for mistrial, including one focused on a purported "serious, prejudicial incident" in which the plaintiff chatted about his "virtual background" feature on Zoom with two jurors while counsel and the judge were in a breakout room. These later motions were also denied, and the jury ultimately awarded a \$2.5 million verdict in favor of the plaintiff.<sup>87</sup>

# 3. Precedent Addressing Constitutional Issues Posed by Remote <u>Trials/Testimony</u>

Whether remote jury trials like those discussed above will be deemed to satisfy constitutional requirements in contested cases is an open question. Due to the virtually unprecedented nature of such trials prior to the pandemic, there is very little precedent addressing constitutional challenges to such proceedings.<sup>88</sup> The sections below provide a brief overview of the primary issues and legal standards that have been applied to remote trial testimony pre-pandemic.

#### A. Civil Cases—Due Process Issues

In federal civil cases, Rule 43 of the Federal Rules of Civil Procedure explicitly authorizes the presentation of contemporaneous, remote video testimony at trial "[f]or good cause in compelling circumstances and with appropriate safeguards."

The issue occasionally has arisen, however, whether a party has a due process right to be physically present in court while a case is tried. In *Thornton v. Snyder*, for example, the Seventh Circuit held that a court did not violate a prisoner's due process rights by limiting his participation in the trial of his civil rights claim to appearance by remote videoconferencing technology. But the court also noted that the civil rather than criminal nature of the proceeding was "important," and expressly acknowledged that remote conferencing technology has "shortcomings" that may give rise to constitutional violations in certain circumstances. As explained by the court:

Virtual reality is rarely a substitute for actual presence and even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it.... Video conferencing is not the same as actual presence, and it is to be expected that the ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video conferencing. This may be particularly detrimental where it is a party to the case who is participating by video conferencing, since personal impression may be a crucial factor in persuasion.<sup>89</sup>

In *Rusu v. INS*, the Fourth Circuit similarly held that the hearing of an asylum petition by videoconference did not deprive an asylum-seeker of due process, despite its acknowledgment that such technology can create problems in proceedings where credibility is central to the resolution of the claim. Although there had been "several instances" during Rusu's hearing in which he had experienced difficulty communicating with and/or seeing other hearing participants, the court determined that Rusu nonetheless had been provided a full and fair opportunity to present his asylum claim, noting that "throughout the hearing, the IJ made a sincere effort to understand his testimony, and she provided him with numerous opportunities to elaborate and clarify it." 90

And in *United States v. Baker*, the Fourth Circuit rejected a claim that a civil commitment hearing conducted over videoconference violated due process. The court noted that the use of such technology in civil commitment proceedings "does not preclude the respondent from confronting and conducting relevant cross-examination of the witnesses" and "allows for the respondent's 'presence,' at least in some sense, at the commitment hearing." The court further suggested that videoconferencing is acceptable for civil commitment proceedings because "the district judge's

impression of the respondent is not generally the factor upon which a commitment decision turns," but rather, "the judge is more likely to be swayed by documentary and testimonial evidence of the respondent's mental competency." <sup>91</sup>

The decisions in this realm appear to be highly context- and fact-specific. Given the novelty of and variety of things that can go wrong during remote bench and jury trials, it is difficult at this time to enumerate or predict the circumstances or issues which might rise to the level of due process violations during fully remote civil trials.

#### B. Criminal Cases—Sixth Amendment Issues

In criminal cases, the Confrontation Clause of the Sixth Amendment mandates that "the accused shall enjoy the right ... to be confronted with the witness against him." The New York Constitution affords criminal defendants a similar right.<sup>92</sup>

In recognition of these restraints, the New York Criminal Procedure Law only permits "electronic appearances" in limited circumstances. Under CPL 182.20(1), for example, courts may conduct electronic appearances "except an appearance at a hearing or trial" in certain counties, "provided that the chief administrator of the courts has authorized the use of electronic appearance and the defendant, after consultation with counsel, consents on the record." CPLR 182.30 further limits the availability of such appearances by providing that an electronically appearing defendant may not, among other things, plead guilty to a felony or be committed to the department of mental hygiene. Meanwhile, CPL 660.20 limits the circumstances in which witnesses may be permitted to testify remotely in a criminal trial—generally speaking, the witness must not be amenable or responsive to legal process or available as a witness at the time when the witness's testimony will be sought, either because the witness is about to leave the state and not return for a substantial period of time, or is physically ill or incapacitated.

In Maryland v. Craig, the U.S. Supreme Court explained that "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." The clause is "generally satisfied" when the defense is given a full and fair opportunity to probe and expose testimonial infirmities (e.g., forgetfulness, confusion, or evasion) through cross-examination, "thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." <sup>94</sup>

Federal courts in criminal cases have recognized that "[t]he optimal way of conducting a trial is for the witness to appear in person in court to face the defendant, and to be subject to cross-examination in their presence...." However, "American criminal procedure ... is pragmatic." "Although face-to-face confrontation forms the core of the values furthered by the Confrontation Clause," the Supreme Court has "nevertheless recognized that it is not the *sine qua non* of the confrontation right," and has "never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant." Rather, Sixth Amendment precedents "establish that the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial ... a preference that must occasionally give way to considerations of public policy."

Thus, in *Craig*, the Supreme Court held that one-way closed-circuit video transmission of a child's testimony did not violate the Sixth Amendment where such transmission was necessary to further the important public policy purpose of protecting the child from the trauma of having to testify in the physical presence of the defendant, and where the reliability of the child's testimony was assured by the facts that she (a) testified under oath, (b) was subject to full cross-examination, and (c) was able to be observed by the judge, jury, and defendant as she testified.<sup>99</sup>

Although *Craig* involved one-way, closed-circuit video transmission rather than the type of multi-way interactions possible through modern remote videoconferencing technology, it has been treated by the vast majority of courts as establishing a standard for the latter types of remote testimony as well. Moreover, despite some of the permissive-sounding language quoted above, courts have defined the public policies that justify the admission of remote witness testimony under *Craig* very narrowly. In addition to child-witness cases, courts have permitted the use of remote videoconferencing technology in criminal trials "when the witness is essential to the case and the witness is located in another country outside the subpoena authority of the State," in which case "the State's interest in a just and expeditious resolution of the prosecution trumps face-to-face confrontation."

More relevantly for present purposes, courts also have permitted the use of videoconferencing technology when a witness is too ill to travel, on the theory that "[t]he State has a legitimate interest in protecting the witness from physical danger and suffering." The New York Court of Appeals has followed this trend. The current threat of infection and serious illness as a result of the COVID-19 pandemic should witnesses be forced to travel and attend in-person trial proceedings arguably presents an equivalent circumstance and may presently permit the use of remote videoconference technology consistent with the Sixth Amendment. 103

In contrast, the State's mere need for videoconference testimony to prove or "efficiently present its case" is not an interest that outweighs an accused's right to confront his/her accuser face-to-face. Convenience, cost savings, and a witness's general unwillingness to travel similarly are insufficient reasons to permit such videoconference testimony. These precedents will pose a substantial legal obstacle to any attempts by courts to utilize remote videoconferencing technology to reduce criminal trial backlogs after the public health crisis has abated.

The courts' hesitance to authorize remote videoconferencing during criminal trials stems from the majority view that such conferencing is not an adequate substitute for face-to-face cross-examination. In *United States v. Bordeaux*, for example, the Eighth Circuit held that a district court had violated the defendant's Sixth Amendment rights by allowing a child witness to testify via two-way closed-circuit television without a finding that the child's fear was the "dominant" reason she could not testify in open court. In so holding, the court rejected the government's assertion that "confrontation" through such virtual means was constitutionally equivalent to face-to-face confrontation:

The virtual "confrontations" offered by closed-circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect. The Constitution favors face-to-face confrontations to reduce the likelihood that a witness will lie.... [A] defendant watching a witness through a monitor will not have the same truth-inducing effect as an unmediated gaze across the

courtroom.... [T]he touchstone for deciding whether a "confrontation" satisfies the Constitution is whether it is likely to lead a witness to tell the truth to the same degree that a face-to-face confrontation does, and in this respect two-way systems ... both fall short.... [There are] intangible but crucial differences between a face-to-face confrontation and a "confrontation" that is electronically created by cameras, cables, and monitors. <sup>105</sup>

The minority view, represented primarily by the Second Circuit, is more open-minded with respect to the potential for remote videoconferencing technology to satisfy the Sixth Amendment. In *United States v. Gigante*, for example, the Second Circuit adopted the more lenient standard provided by Rule 15 of the Federal Rules of Criminal Procedure for the admission of testimony via two-way remote videoconferencing, on the theory that such technology "preserve[s] the face-to-face confrontation" required by the Sixth Amendment. Indeed, the court noted that contemporaneous remote video testimony provides "greater protection" for an accused's confrontation rights than Rule 15, under which the "bare transcript" of a witness's deposition testimony can be admitted at trial, precluding "any visual assessment of his demeanor" by the jury. Under the Rule 15 standard adopted in *Gigante*, testimony via two-way remote videoconferencing is permissible "[u]pon a finding of exceptional circumstances" and when it "furthers the interests of justice"—a showing considered less burdensome than required by *Craig*. 106

However, in 2002, the U.S. Supreme Court rejected a proposed amendment to Rule 26 of the Federal Rules of Criminal Procedure that would have permitted unavailable witnesses to testify via two-way videoconference. In a concurrence accompanying the court's order, the late Justice Scalia wrote that the proposed rule was "of dubious validity" under the Sixth Amendment, reasoning:

As we made clear in *Craig*, a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.<sup>107</sup>

How these issues will play out in the wake of the pandemic remains to be seen.<sup>108</sup> At minimum, courts should take care to ensure that their trial records adequately preserve details about how the remote conferencing technology functioned and any problems encountered, for review on appeal. As helpfully recently instructed by the Washington Supreme Court:

[W]e encourage the trial court or the State, with the court's concurrence, to verify on the record the structure and the mechanics of the video conference presentation. Such details should include the number and location of the video screens in the courtroom, the technology present at the location of the witness, the dimensions of the respective screens, and what sections of the witness's body that the jury can see on the screen. The record should confirm that the jury and the defendant see the witness and the witness's body language, and that they hear the witness. The record should also verify that the witness sees the jury and the defendant. Finally, at the conclusion of the testimony, the trial court or the State should substantiate that no

errors in the transmission occurred. We do not hold, however, that any of these suggestions must necessarily be followed to fulfill the strictures of the confrontation clause. 109

## Recommendations and Next Steps:

Implement Best Practices With Respect to Remote Bench Trials: On February 11, 2021, the Hon. Norman St. George, in collaboration with other judges throughout the state, issued on behalf of UCS *Virtual Bench Trial Protocols and Procedures*, a manual of best practices for remote bench trials for use by New York judges statewide. UCS should act as expeditiously as possible to publicize and familiarize judges and the public with these best practices, so that courts and litigants have a common baseline understanding of the issues that may arise in remote bench trials and how they can best be dealt with or avoided.

Develop Best Practices for Remote Jury Trials: This Working Group recommends that UCS consider creating a manual of best practices for remote jury trials, for experimentation and application on a voluntary basis in the event that current vaccination efforts do not permit in-person jury trials to recommence over the next few months. The Working Group will consult with UCS on the creation of any such manual. As part of this task, the Working Group will continue to monitor and evaluate the efforts of other court systems across the country to conduct remote jury trials during the pandemic.

# **PART IV: Training and Ethics**

In light of the coming advancements and issues discussed above, ethics experts "have predicted for some time that we w[ill] soon reach the point where failure to properly address technology and to employ available technology will constitute an ethical breach by an attorney." As clients themselves gain familiarity and comfortability with the use of technology, they "will come to expect their attorneys to use it in interacting with them and in interacting with other attorneys, as well as with the judge and jury in a trial." <sup>112</sup>

While the burden to adapt to advancements in technology may fall heaviest on counsel, judges also will need to stay abreast of technological developments in order to fulfill their duties and maintain public trust. As one commentator has noted:

[C]ourts do not have the luxury that the other branches of government usually have of postponing decisions when issues relating to new technologies appear on their docket. Courts are already being, and will even more in the near future be, called upon to adjudicate complex and unprecedented issues raised by emerging technologies. So like it or not, judges will have to get used to being on the front line of new technologies, and to have a basic understanding of both the technical and legal dimensions of these technologies. <sup>113</sup>

The Working Group thus agrees that "just as lawyers are now required to demonstrate a minimum level of technological competency by the ABA (and most state bar associations) in its Model Rules of Professional Responsibility, so too judges will need to have a basic level of scientific and technical knowledge and understanding to perform their jobs competently in the new era of emerging technologies." <sup>114</sup>

## Recommendations and Next Steps:

<u>Create Mandatory Training Programs for Judges Regarding Technological Issues</u>: Part 17 of the Rules of the Chief Judge state that UCS "shall provide training and education for its judges and justices," including "annual seminars, special seminars for new judges, and such other courses, classes and presentations as the Chief Administrator of the Courts deems appropriate." Judges and justices are required to attend at least twenty-four hours of such training every two calendar years, which may include (with the approval of the Chief Administrator) courses provided outside UCS.

UCS should consider establishing a mandatory requirement that at least two hours of the above-described training requirements for judges and justices consist of training on new developments in technology and the legal issues presented by new forms of evidence, to ensure they have a baseline understanding of how such technologies work. Such training could be provided by the Judicial Institute, the organization which already provides statewide education and training for judges and justices of UCS. Alternatively, UCS could partner with law firms and local bar organizations to develop such training programs for judges on both basic and emerging technologies.

# **Summary of Recommendations and Next Steps**

The recommendations and proposed next steps discussed in the preceding Parts of this Report are collected below for ease of reference.

#### **Courthouse and Courtroom Technology (Part II-1):**

<u>Seek Partnerships with Private Vendors/Internet Service Providers</u>: The Working Group recommends that UCS seek to partner with major internet service and/or other technology providers with an interest in community building in New York State and a commitment to access to justice to supply all courtrooms in New York state with secure and reliable high-speed wireless internet.

Develop Uniform Rules for the Provision of Portable Courtroom Technology: Once the pandemic has abated and the occupancy and social distancing restrictions that have prevented most in-person trials are lifted, UCS should consider developing a policy or set of rules to clarify when, and in what manner, parties may supply their own portable courtroom technology for trial or other court proceedings. Such policy/rules should be developed in consultation with judges, court staff (including IT and security personnel), technology experts, attorneys, and vendors. The rules should aim to ensure that any technology brought into New York courtrooms (a) is secure and reliable, (b) does not unduly disrupt other court proceedings, and (c) will not give any party an unfair advantage as a result of its greater financial resources or technological expertise.

Study Cost-Effective Ways to Make Courtrooms More Adaptable to External Technology: In addition to developing the partnerships and policies discussed above, UCS should seek the opinions of technological experts on additional, cost-effective ways to make New York courtrooms more adaptable to varying technologies supplied by litigants.

<u>Create Training Programs for Court Staff</u>: To the extent any renovations or updates are made to courtroom technology, or policies are enacted with respect thereto, UCS will need to create training programs for court staff so that they fully are apprised and knowledgeable of applicable rules, and can assist litigants with existing and future courtroom technology.

#### Remote and/or Automated Transcription and Translation Services (Part II-2)

Study Outside Vendor Offerings for Automated/Remote Transcription and Translation: The Working Group recommends that UCS commission an expert analysis of the services offered by private vendors for automated and/or remote transcription and translation services, with the goal of assessing their cost, reliability, and security.

<u>Create Pilot Programs</u>: After the above study has been conducted and examined, UCS should consider establishing a pilot program or programs to test such technologies on a voluntary basis in appropriate courts, or by means of mock trials.

## Streaming of Trial (and Other Trial-Level) Proceedings (Part II-3)

<u>Creation of a Pandemic Pilot Program for Trial-Level Streaming</u>: The Working Group recommends that UCS establish a pilot program for the streaming of trial-level court proceedings during the pandemic, using Texas's online streaming platform (described above) as a model. UCS should consider and identify, in consultation with judges, the types of proceedings that may be particularly well- or ill-suited for online streaming, but as an initial matter, Commercial Division cases and criminal proceedings (given Sixth Amendment requirements) should be prioritized for the program.

#### **New Forms of Evidence and Admissibility Disputes (Part II-4)**

Establish a Committee/Partnerships to Engage in Ongoing Study of Legal Developments: The Working Group recommends that UCS establish a committee of judges and permanent law clerks within the New York court system, whose task will be to periodically review and summarize for other judges and staff the most recent precedent and developments in the handling of new forms of evidence at trial. Alternatively, UCS should consider partnering with law firms and/or bar organizations or non-profit institutions to provide periodic training on these subjects.

## **Demonstrative Evidence (Part II-5)**

Establish a Committee/Partnerships to Engage in Ongoing Study of Legal Developments: Consistent with its recommendation in Part II-4 of this Report, the Working Group recommends that UCS establish a committee of judges and permanent law clerks within the New York court system, whose task will be to periodically review and summarize for other judges and staff the most recent precedent and developments in the handling of new forms of demonstrative aids at trial. Alternatively, UCS might partner with law firms and/or bar associations or non-profit institutions to provide periodic training on these subjects.

<u>Create Pilot Programs</u>: Once the COVID-19 pandemic has receded and court operations have returned to normal, UCS should consider partnering with law firms or bar groups to organize mock trials or pilot programs to test such technologies.

#### Artificial Intelligence-Assisted Decision-Making (Part II-6)

Study Ways in Which AI Technology Can Currently be Applied to Improve Court Practice: The Working Group recommends that UCS commission an expert analysis of the ways in which currently available AI technology might be applied to improve court efficiency and enhance access to justice.

#### Trials by Remote Videoconferencing Technology (Part III)

Implement Best Practices With Respect to Remote Bench Trials: The Working Group recommends that UCS act as expeditiously as possible to publicize and familiarize judges with the newly-issued *Virtual Bench Trial Protocols and Procedures*, so that courts and litigants have a common baseline understanding of the issues that may arise in remote bench trials and how they can best be dealt with or avoided.

<u>Develop Best Practices for Remote Jury Trials</u>: This Working Group recommends that UCS consider creating a manual of best practices for remote jury trials, for experimentation and application on a voluntary basis in the event that current vaccination efforts do not permit in-person jury trials to recommence over the next few months.

## Training and Ethics (Part IV)

Create Mandatory Training Programs for Judges Regarding Technological Issues: UCS should consider establishing a mandatory requirement that at least two of the twenty-four hours of training New York judges and justices must undergo pursuant to Part 17 of the Rules of the Chief Judge consist of training on new developments in technology and the legal issues presented by new forms of evidence, to ensure that the judiciary has a baseline understanding of how such technologies work. Such training could be provided by the Judicial Institute, the organization which already provides statewide education and training for judges and justices of UCS. Alternatively, UCS could partner with law firms and local bar organizations to develop such training programs for judges on both basic and emerging technologies.

# **Future Trials Working Group Membership**

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Hon. Michael Coccoma, former Deputy Chief Administrative Judge for Courts Outside New York City

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<sup>&</sup>lt;sup>1</sup> The Commission is chaired by former New York State Bar Association President, Hank Greenberg. Press Release, Chief Judge DiFiore Names Commission to Develop Comprehensive Vision for the Court System of the Future (June 17, 2020), http://www.nycourts.gov/LegacyPDFS/press/PDFs/PR20\_28.pdf.

<sup>&</sup>lt;sup>2</sup> The Future Trials Working Group is chaired by Richard A. Edlin, Vice Chair of Greenberg Traurig, LLP. The Working Group also wishes to express its great appreciation to Jennifer A. Surprenant and Keith Hammeran of Greenberg Traurig, LLP, for their work and support in furtherance of this Report.

<sup>&</sup>lt;sup>3</sup> See Online Courts Working Group, Initial Report on the Goals and Recommendations for New York State's Online Court System (Nov. 9, 2020) ("Online Courts Report"); Technology Working Group, Remote Judging Survey: Access and Use of Technology (Jan. 2021); Structural Innovations Working Group, The Expansion of Electronic Filing (Jan. 2021); Appellate Practice Working Group, Initial Report of the Working Group on Appellate Practice (Dec. 2020); Regulatory Innovation Working Group, Report and Recommendations of the Working Group on Regulatory Innovation (Dec. 2020); see also Goals and Checklist for Restarting In-Person Grand Juries, Jury Trials and Related Proceedings (July 2020).

<sup>&</sup>lt;sup>4</sup> See Online Courts Report, supra n.3, at 4 n.4 (quoting Leonard Wills, Access to Justice: Mitigating the Justice Gap, AMERICAN BAR ASSOCIATION (Dec. 3, 2017), <a href="https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2017/access-to-justice-mitigating-justice-gap/">https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2017/access-to-justice-mitigating-justice-gap/</a>).

<sup>&</sup>lt;sup>5</sup> See, e.g., id. at 4.

<sup>&</sup>lt;sup>6</sup> See The State of Our Judiciary 2017, Excellence Initiative: Year One, UCS (Feb. 2017), http://ww2.nycourts.gov/sites/default/files/document/files/2018-11/SOJ-2017.pdf.

<sup>&</sup>lt;sup>7</sup> Dan M. Clark, NY Sees Progress on Court Backlog as 'Excellence Initiative' Enters Fourth Year, LAW.COM (Mar. 11, 2019 at 5:30 PM), <a href="https://www.law.com/newyorklawjournal/2019/03/11/ny-sees-progress-on-court-backlog-as-excellence-initiative-enters-fourth-year/">https://www.law.com/newyorklawjournal/2019/03/11/ny-sees-progress-on-court-backlog-as-excellence-initiative-enters-fourth-year/</a>.

<sup>&</sup>lt;sup>8</sup> Nicole Hong et al., 9 Trials in 9 Months: Virus Wreaks Havoc on New York's Courts, N.Y. TIMES, Section A, pg. 1 (Dec. 2, 2020), https://www.nytimes.com/2020/12/02/nyregion/courts-covid.html.

<sup>&</sup>lt;sup>9</sup> *Id*.

<sup>&</sup>lt;sup>10</sup> Online Courts Report, supra n.3, at 5.

<sup>11</sup> See, e.g., Jeffrey Q. Smith et al., Going, Going, But Not Quite Gone, JUDICATURE, Vol. 101, No. 4 at 32-34 (Winter 2017), <a href="https://www.phillipsnizer.com/siteFiles/24092/Article-Judicature-GoingGoingGone-JQSmith-Winter2017.pdf">https://www.phillipsnizer.com/siteFiles/24092/Article-Judicature-GoingGoingGone-JQSmith-Winter2017.pdf</a>; New York State Unified Court System, 2019 Annual Report, <a href="https://www.nycourts.gov/legacypdfs/19">https://www.nycourts.gov/legacypdfs/19</a> UCS-Annual Report.pdf</a>; Benjamin Weiser, <a href="https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html">https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html</a>; <a href="https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays">https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays</a>. COURT STATISTICS PROJECT, <a href="https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays">https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays</a>.

<sup>&</sup>lt;sup>12</sup> See Hon. Herbert B. Dixon, Jr., et al., Technology, the Courts, and Nostradamus: Predictions for the Future, 25 Experience 8, 13 (2015) ("Nostradamus").

<sup>&</sup>lt;sup>13</sup> Jean R. Sternlight, *Justice in a Brave New World*, 52 CONN. L. REV. 213, 233 (Apr. 2020), https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2331&context=facpub.

<sup>&</sup>lt;sup>14</sup> *Id*.

<sup>&</sup>lt;sup>15</sup> Some authorities have argued that fMRI, at least, will be more reliable than polygraph evidence because "brain waves and cerebral blood flow are arguably less subject to control than blood pressure and heart rate." *Id.* at 233.

- <sup>18</sup> Emily Lever, NY Judges, Court Staff Say Budget Cuts Will Hurt Access, LAW360 (Nov. 12, 2020 at 5:11 PM EST), https://www.law360.com/articles/1328185/ny-judges-court-staff-say-budget-cuts-will-hurt-access.
- <sup>19</sup> Jessica Moyeda, *Courtroom Technology*, CORNELL LAW SCHOOL GRADUATE PAPERS, Paper 30, at 1-3 (2014), http://scholarship.law.cornell.edu/lps papers/30.
- <sup>20</sup> See, e.g., Hon. Herbert B. Dixon, Jr., The Basics of a Technology-Enhanced Courtroom, 56 JUDGES J. 36 (2017), <a href="https://www.americanbar.org/groups/judicial/publications/judges\_journal/2017/fall/basics-technologyenhanced-courtroom/">https://www.americanbar.org/groups/judicial/publications/judges\_journal/2017/fall/basics-technologyenhanced-courtroom/</a>; Hon. Herbert B. Dixon, Jr., The Evolution of a High-Technology Courtroom, FUTURE TRENDS IN STATE COURTS (2011), <a href="https://ncsc.contentdm.oclc.org/digital/collection/tech/id/769/">https://ncsc.contentdm.oclc.org/digital/collection/tech/id/769/</a>; Fredric I. Lederer, <a href="https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1319">https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1319</a></a> &context=popular\_media; Michael E. Heintz, <a href="https://www.repository.law.indiana.edu/fclj/vol54/iss3/8">https://www.repository.law.indiana.edu/fclj/vol54/iss3/8</a>.
- <sup>21</sup> Fedric I. Lederer, *Courtroom Technology: A Status Report*, ELECTRONIC JUDICIAL RESOURCE MANAGEMENT 179, 180 (Kamlesh N. Agarwala & Marli D. Tiwari eds., 2005).
- <sup>22</sup> Moyeda, *supra* n.19, at 1 (citing Judicial Conference of the United States, Admin. Office for U.S. Courts, *Long Range Plan for Information Technology in the Federal Judiciary* (2013)).
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- <sup>24</sup> Courtroom 2000, NYCOURTS, <a href="http://ww2.nycourts.gov/courts/1jd/supctmanh/courtroom\_2000.shtml">http://ww2.nycourts.gov/courts/1jd/supctmanh/courtroom\_2000.shtml</a>; Courtroom 2000 Trial Showcases Technology, TRIAL TOOLS (July 1998), <a href="https://nys-fjc.ca2.uscourts.gov/programs/10-23-19%20-%20Courtroom%202000%20-%20Article.pdf">https://nys-fjc.ca2.uscourts.gov/programs/10-23-19%20-%20Courtroom%202000%20-%20Article.pdf</a>.
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- <sup>26</sup> What is Realtime?, NCRA, <a href="https://www.ncra.org/home/professionals\_resources/professional-advantage">https://www.ncra.org/home/professionals\_resources/professional-advantage</a> /Captioning/realtime.
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- <sup>29</sup> Language Access and Court Interpreters, NYCOURTS, <a href="http://www2.nycourts.gov/COURTINTERPRETER">http://www2.nycourts.gov/COURTINTERPRETER</a>/index.shtml.

<sup>&</sup>lt;sup>16</sup> Online Courts Report, *supra* n.3, at 4 n.7 (quoting GBAO to National Center for State Courts, *Jury Trials in a (Post) Pandemic World – National Survey Analysis* (June 22, 2020), <a href="https://www.ncsc.org/">https://www.ncsc.org/</a> data/assets/pdf\_file/0006/41001/NCSC-Juries-Post-Pandemic-World-Survey-Analysis.pdf).

<sup>&</sup>lt;sup>17</sup> Monica Anderson *et al.*, *Digital Divide Persists Even as Lower-Income Americans Make Gains in Tech Adoption*, PEW RESEARCH (May 7, 2019), <a href="https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/">https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/</a>.

<sup>31</sup> See Lederer, supra n.20, 53 JUDGES J. at 7.

- <sup>32</sup> See Court of Appeals, <a href="https://www.nycourts.gov/ctappS/live.html">https://www.nycourts.gov/ctappS/live.html</a>; Appellate Division, First Department, <a href="http://www.courts.state.ny.us/courts/ad1/">http://www.courts.state.ny.us/courts/ad1/</a>; Appellate Division, Second Department, <a href="http://wowza.nycourts.gov/ad2/dd2.php">http://wowza.nycourts.gov/ad2/dd2.php</a>; Appellate Division, Fourth Department, <a href="http://www.courts.gov/go/live/">https://www.courts.gov/go/live/</a>. Papellate Division, Fourth Department, <a href="https://www.courts.gov/go/live/">https://www.courts.gov/go/live/</a>.
- Mia Armstrong, Justice, Livestreamed, SLATE (Aug. 14, 2020 at 12:09 PM), <a href="https://slate.com/technology/2020/08/zoom-courts-livestream-youtube.html">https://slate.com/technology/2020/08/zoom-courts-livestream-youtube.html</a>; Texas Court Live Streams, TXCOURTS, <a href="https://streams.txcourts.gov/">https://streams.txcourts.gov/</a>; see also Trial Court Remote Video Hearings, INDIANA COURTS, <a href="https://public.courts.in.gov/INCS#/">https://public.courts.in.gov/INCS#/</a>; Ohio Virtual Courtroom Directory, SUPREME COURT OF OHIO, <a href="https://supremecourtofohio.gov/virtualcourtstreamingdirectory/#/streams.">https://supremecourtofohio.gov/virtualcourtstreamingdirectory/#/streams.</a>
- <sup>34</sup> Armstrong, *supra* n.33.
- <sup>35</sup> But see id. (quoting a Texas Judge as opining that sensitive cases are those which most need public oversight: "I hear child protection cases where kids are removed from their parents by the government. We want those online most of all.... We want the public watching what judges are doing in situations where we're tearing kids away from families.").
- <sup>36</sup> Gary E. Marchant, *Emerging Technologies and the Courts*, 55 COURT REVIEW 146, 148-49 (2019); *Nostradamus, supra* n.12, 25 EXPERIENCE at 12.
- <sup>37</sup> Marchant, *supra* n.36, at 147; Kristin Bergman, *Cyborgs in the Courtroom: the Use of Google Glass Recordings in Litigation*, 20 RICH. J.L. & TECH. 1 (2014), <a href="https://jolt.richmond.edu/2014/06/23/cyborgs-in-the-courtroom-the-use-of-google-glass-recordings-in-litigation/">https://jolt.richmond.edu/2014/06/23/cyborgs-in-the-courtroom-the-use-of-google-glass-recordings-in-litigation/</a>.
- 38 Marchant, supra n.36, at 147.
- <sup>39</sup> *Id*.
- <sup>40</sup> *Id.* at 148.
- <sup>41</sup> *Id*.
- <sup>42</sup> *Id*.
- <sup>43</sup> See, e.g., Bergman, supra n.37, 20 RICH. J.L. & TECH. at 21; Jeffrey Bellin, Facebook, Twitter, and the Uncertain Future of Present Sense Impressions, 160 U. PA. L. REV. 331 (Jan. 2012) (discussing application of "present sense impression" hearsay exception to Facebook posts and Twitter tweets), <a href="https://scholarship.law.wm.edu/facpubs/1249/">https://scholarship.law.wm.edu/facpubs/1249/</a>; see also Lederer, supra n.20, 53 JUDGES J. at 8-9.
- <sup>44</sup> See Marchant, supra n.36, 55 COURT REVIEW at 150 (noting that blockchain is becoming an issue due to hearsay issues and the "quasi-anonymity of the owners of the encrypted data and assets"); J. Collin Spring, Comment, The Blockchain Paradox: Almost Always Reliable, Almost Never Admissible, 72 SMU L. REV. 925 (Fall 2019).
- <sup>45</sup> See, e.g., Marchant, supra n.36, at 150-51; When Seeing is No Longer Believing: Inside the Pentagon's Race Against Deepfake Videos, CNN, <a href="https://www.cnn.com/interactive/2019/01/business/pentagons-race-against-deepfakes/">https://www.cnn.com/interactive/2019/01/business/pentagons-race-against-deepfakes/</a>; James Vincent, I Learned to Make a Lip-Syncing Deepfake in Just a Few Hours (and You Can, Too), The Verge (Sept. 9, 2020), <a href="https://www.theverge.com/21428653/lip-sync-ai-deepfake-wav2lip-code-how-to">https://www.theverge.com/21428653/lip-sync-ai-deepfake-wav2lip-code-how-to</a>.
- <sup>46</sup> William Joel, *How to Hide Faces and Scrub Metadata When You Photograph a Protest*, THE VERGE (June 5, 2020 at 5:15 PM EDT), <a href="https://www.theverge.com/21281897/how-to-hide-faces-scrub-metadata-photograph-video-protest">https://www.theverge.com/21281897/how-to-hide-faces-scrub-metadata-photograph-video-protest</a>; William Worrall, *How to Remove Personal Information From an Image's Metadata*, HACKED (June 22, 2020), <a href="https://hacked.com/how-to-remove-personal-information-from-an-image-metadata/">https://hacked.com/how-to-remove-personal-information-from-an-image-metadata/</a>; Jeff John Roberts, *Why*

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- <sup>48</sup> See Bridget O'Neal, Today's 3D Virtual Reality Scanners by FARO Can Be Used to Understand and Make or Break a Courtroom Case, 3DPRINT.COM (Jan. 15, 2016), https://3dprint.com/115609/faro-virtual-reality-scanners/.
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- <sup>50</sup> Arash Homampour, VR in the Courtroom, LEGALTECHNEWS, at L11 (Feb. 2018).
- <sup>51</sup> See Marchant, supra n.36, 55 COURT REVIEW at 151.
- <sup>52</sup> See Young, supra n.49, 93 TEX. L. REV. at 259-60.
- <sup>53</sup> Id. at 261-62 (citations omitted, emphasis in original).
- 54 Id. at 271-73; see also Khirin Bunker, From Presentation to Presence: Immersive Virtual Environments and Unfair Prejudice in the Courtroom, 92 S. CAL. L. REV. 411 (2019), <a href="https://southerncalifornialawreview.com/2019/01/02/from-presentation-to-presence-immersive-virtual-environments-and-unfair-prejudice-in-the-courtroom-note-by-khirin-bunker/">https://southerncalifornialawreview.com/2019/01/02/from-presentation-to-presence-immersive-virtual-environments-and-unfair-prejudice-in-the-courtroom-note-by-khirin-bunker/</a>; Ron Vaughn, Is Virtual Reality the Future of Courtroom?, THE OKLA. BAR J., TECHNOLOGY (May 2019), <a href="https://www.okbar.org/barjournal/may2019/obj9005vaughn/#:~:text=%E2%80%9CVirtual%20reality%20can%20do%20more,in%20the%20opposing%20team's%20arguments">https://www.okbar.org/barjournal/may2019/obj9005vaughn/#:~:text=%E2%80%9CVirtual%20reality%20can%20do%20more,in%20the%20opposing%20team's%20arguments</a>; The Next Frontier for Virtual Reality: Courtrooms, BLOOMBERG LAW (Nov. 18, 2017 7:39PM), <a href="https://news.bloomberglaw.com/business-and-practice/the-next-frontier-for-virtual-reality-courtrooms/">https://news.bloomberglaw.com/business-and-practice/the-next-frontier-for-virtual-reality-courtrooms/</a>.
- <sup>55</sup> See Marchant, supra n.36, 55 COURT REVIEW at 151.
- <sup>56</sup> Artificial Intelligence (AI), IBM, https://www.ibm.com/cloud/learn/what-is-artificial-intelligence.
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- <sup>58</sup> See Ray Worthy Campbell, Artificial Intelligence in the Courtroom: The Delivery of Justice in the Age of Machine Learning, 18 COLO. TECH. L.J. 323 (2020), <a href="https://ctlj.colorado.edu/wp-content/uploads/2020/08/2-Campbell\_06.25.20.pdf">https://ctlj.colorado.edu/wp-content/uploads/2020/08/2-Campbell\_06.25.20.pdf</a>.
- <sup>59</sup> Marchant, *supra* n.36, 55 COURT REVIEW at 152.
- <sup>60</sup> *Id*.
- <sup>61</sup> See Eugene Volokh, Chief Justice Robots, 68 DUKE L.J. 1135, 1142-50 (March 2019), <a href="https://dlj.law.duke">https://dlj.law.duke</a>.edu/article/chief-justice-robots-volokh-vol68-iss6/.
- <sup>62</sup> See Nostradamus, supra n.12, 25 EXPERIENCE at 10.
- 63 Online Courts Report, supra n.3, http://www.nycourts.gov/whatsnew/pdf/OCWG-Report.pdf.
- <sup>64</sup> See Quentin Brogdon, Mandatory Online Jury Trials: An Idea Whose Time Has Not Come, TEXAS LAWYER (Aug. 30, 2020), <a href="https://www.law.com/texaslawyer/2020/08/30/mandatory-online-jury-trials-an-idea-whose-time-has-not-come/">https://www.law.com/texaslawyer/2020/08/30/mandatory-online-jury-trials-an-idea-whose-time-has-not-come/</a>; Nostradamus, supra n.12, 25 EXPERIENCE at 10-11.

<sup>&</sup>lt;sup>47</sup> See Marchant, supra n.36, 55 COURT REVIEW at 149-50.

- <sup>68</sup> A number of organizations are attempting to keep track of each state's evolving policies with respect to virtual and in-person trials, but it is frequently unclear how recently or comprehensively such databases are being updated. See, e.g., How Every State's Legal System is Responding to COVID-19, NOLO, <a href="https://www.nolo.com/legal-encyclopedia/how-every-states-legal-system-is-responding-to-covid-19.html">https://www.nolo.com/legal-encyclopedia/how-every-states-legal-system-is-responding-to-covid-19.html</a> (last updated Feb. 5, 2021); Court Operations During COVID-19: 50-State Resources, JUSTIA, <a href="https://www.justia.com/covid-19/50-state-covid-19-resources/court-operations-during-covid-19-50-state-resources/">https://www.justia.com/covid-19/50-state-covid-19-state-resources/</a>; Courts' Responses to the Covid-19 Crisis, THE BRENNAN CENTER, <a href="https://www.brennancenter.org/our-work/research-reports/courts-responses-covid-19-crisis">https://www.brennancenter.org/our-work/research-reports/courts-responses-covid-19-crisis</a> (last updated Sept. 10, 2020).
- <sup>69</sup> Charles Scudder, *In a test case, Collin County Jury Renders Verdict on Zoom for the First Time; Too Risky for a Full Trial?*, THE DALLAS MORNING NEWS (May 22, 2020), <a href="https://www.dallasnews.com/news/courts/2020/05/22/in-a-test-case-collin-county-jury-meets-on-zoom-for-the-first-time-but-some-lawyers-say-its-too-risky-for-real-trial/">https://www.dallasnews.com/news/courts/2020/05/22/in-a-test-case-collin-county-jury-meets-on-zoom-for-the-first-time-but-some-lawyers-say-its-too-risky-for-real-trial/</a>.

<sup>70</sup> *Id*.

<sup>71</sup> *Id*.

<sup>72</sup> *Id*.

<sup>73</sup> Jim Ash, *Report Finds a 'Hybrid' Approach to Jury Trials 'Is a Realistic and Feasible Option*, THE FLORIDA BAR (Oct. 30, 2020), <a href="https://www.floridabar.org/the-florida-bar-news/report-finds-a-hybrid-approach-jury-trials-is-a-realistic-and-feasible-option/">https://www.floridabar.org/the-florida-bar-news/report-finds-a-hybrid-approach-jury-trials-is-a-realistic-and-feasible-option/</a>.

<sup>74</sup> *Id*.

<sup>75</sup> See Remote Civil Jury Trial Pilot Project Fourth Judicial Circuit, A Report to Chief Justice Charles T. Canady Florida Supreme Court (Oct. 2, 2020), <a href="https://www.jud4.org/Top-Navigation/Court-Administration/Fourth-Judicial-Circuit-Remote-Civil-Jury-Trial">https://www.jud4.org/Top-Navigation/Court-Administration/Fourth-Judicial-Circuit-Remote-Civil-Jury-Trial</a>

- <sup>77</sup> See Eleventh Judicial Circuit of Florida, Miami, Remote Civil Jury Trial Pilot Program Report, at 18-19, <a href="https://www.jud11.flcourts.org/coronavirus/ArtMID/2392/ArticleID/3522/Final-Report-on-the-Eleventh-Circuit-Remote-Civil-Jury-Trial-Pilot-Now-Available">https://www.jud11.flcourts.org/coronavirus/ArtMID/2392/ArticleID/3522/Final-Report-on-the-Eleventh-Circuit-Remote-Civil-Jury-Trial-Pilot-Now-Available</a>.
- <sup>78</sup> Jim Ash, *Remote Hearings for Civil Cases May Be The Norm Going Forward*, THE FLORIDA BAR (Oct. 21, 2020), <a href="https://www.floridabar.org/the-florida-bar-news/remote-hearings-for-civil-cases-may-be-the-norm-going-forward/">https://www.floridabar.org/the-florida-bar-news/remote-hearings-for-civil-cases-may-be-the-norm-going-forward/</a>
- <sup>79</sup> Jim Ash, *COVID-19 Pandemic Recovery Task Force Studies Remote Proceedings*, THE FLORIDA BAR (Nov. 19, 2020), <a href="https://www.floridabar.org/the-florida-bar-news/covid-19-pandemic-recovery-task-force-studies-remote-proceedings/">https://www.floridabar.org/the-florida-bar-news/covid-19-pandemic-recovery-task-force-studies-remote-proceedings/</a>.

<sup>80</sup> *Id*.

<sup>81</sup> See Petition for Writ of Mandate, *Honeywell Intl. Inc. v. Super. Court for the Cnty. of Alameda*, at 10-12 (July 13, 2020), <a href="https://s3.amazonaws.com/jnswire/jns-media/76/fe/11450238/honeywellpetition.pdf">https://s3.amazonaws.com/jnswire/jns-media/76/fe/11450238/honeywellpetition.pdf</a>.

<sup>&</sup>lt;sup>65</sup> Andrew M. Cuomo, *State of the State* (2021), <a href="https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/SOTS2021Book Final.pdf">https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/SOTS2021Book Final.pdf</a>.

<sup>&</sup>lt;sup>66</sup> *Id*.

<sup>&</sup>lt;sup>67</sup> Chief Defendants Association of New York, Memorandum in Opposition to Permanent Virtual Arraignments.

<sup>&</sup>lt;sup>76</sup> *Id.* at xviii.

<sup>82</sup> See id. at 16-17, 22-29, 39-40.

- <sup>83</sup> See Juliette Fairley, Appellate Court Denies Honeywell's Appeal to Stay Asbestos Trial by Zoom: Opening Arguments Monday, SOUTHERN CALIFORNIA RECORD (July 27, 2020), <a href="https://socalrecord.com/stories/543842157-appellate-court-denies-honeywell-s-appeal-to-stay-asbestos-trial-by-zoom-opening-arguments-monday">https://socalrecord.com/stories/543842157-appellate-court-denies-honeywell-s-appeal-to-stay-asbestos-trial-by-zoom-opening-arguments-monday</a>.
- <sup>84</sup> Amanda Bronstad, First Virtual Asbestos Trial Ends in Defense Verdict, LAW.COM (Sept. 3, 2020), https://www.law.com/therecorder/2020/09/03/first-virtual-asbestos-trial-ends-in-defense-verdict/.
- 85 Motion for Mistrial, *Wilgenbusch v. American Biltrite*, at 1, <a href="https://images.law.com/contrib/content/uploads/documents/292/70974/Asbestos-trial-folo-up-mtn-for-mistrial.pdf">https://images.law.com/contrib/content/uploads/documents/292/70974/Asbestos-trial-folo-up-mtn-for-mistrial.pdf</a>.
- <sup>86</sup> *Id.* at 3-4.
- <sup>87</sup> Amanda Bronstad, *Jury in Second Virtual Asbestos Trial Awards \$2.5 Million*, LAW.COM (Sept. 28, 2020), <a href="https://www.law.com/therecorder/2020/09/28/jury-in-second-virtual-asbestos-trial-awards-2-5m/">https://www.law.com/therecorder/2020/09/28/jury-in-second-virtual-asbestos-trial-awards-2-5m/</a>; Daniel Siegal, <a href="https://www.law360.com/articles/1302843/calif-jurors-zoom-chat-not-grounds-for-mistrial-judge-says">https://www.law360.com/articles/1302843/calif-jurors-zoom-chat-not-grounds-for-mistrial-judge-says</a>.
- <sup>88</sup> See Meredith Dearborn, Civil Jury Trials in a Pandemic, THOMSON REUTERS PRACTICAL LAW (Dec. 2020/Jan. 2021), <a href="https://www.paulweiss.com/media/3980655/lit\_dec20jan21\_spotlighton.pdf">https://www.paulweiss.com/media/3980655/lit\_dec20jan21\_spotlighton.pdf</a>.
- 89 Thornton v. Snyder, 428 F.3d 690, 697 (7th Cir. 2005) (internal quotation marks, ellipses, and citations omitted).
- <sup>90</sup> Rusu v. INS, 296 F.3d 316, 322-24 (4th Cir. 2002).
- 91 United States v. Baker, 45 F.3d 837, 843-45 (4th Cir. 1995).
- <sup>92</sup> N.Y. CONST. Art. I, § 6.
- 93 Maryland v. Craig, 497 U.S. 836, 845 (1990).
- <sup>94</sup> Delaware v. Fensterer, 474 U.S. 15, 22 (1985) (per curiam).
- 95 United States v. Beaman, 322 F. Supp. 2d 1033, 1034 (D.N.D. 2004)
- 96 United States. v. Gigante, 971 F. Supp. 755, 756-57 (E.D.N.Y. 1997), aff'd 166 F.3d 75 (2d Cir. 1999).
- <sup>97</sup> Craig, 497 U.S. at 847 (internal citations and quotations omitted, emphasis in original).
- <sup>98</sup> *Id.* at 849 (internal citations and quotations omitted, emphasis in original)
- 99 Id. at 857.
- 100 State v. Sweidan, 461 P.3d 378, 387 (Wash. 2020).
- <sup>101</sup> *Id*.
- <sup>102</sup> See generally People v. Wrotten, 14 N.Y.3d 33 (2009).
- <sup>103</sup> See United States v. Trimarco, No. 17-CR-583, 2020 U.S. Dist. LEXIS 159180, at \*18-19 (E.D.N.Y. Sep. 1, 2020).
- <sup>104</sup> Sweidan, 461 P.3d at 387-88; see also United States v. Yates, 438 F.3d 1307 (11th Cir. 2006).
- <sup>105</sup> United States v. Bordeaux, 400 F.3d 548, 554-55 (8th Cir. 2005).