

# Our Virtual Reality: Facing the Constitutional Dimensions of Virtual Family Court

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LYNDA B. MUNRO\* & NICOLE M. RIEL\*\*

## Introduction

Fear and danger, not words we want associated with our judicial processes, are two words punctuating recent articles detailing the unintended consequences and attendant uncertainty accompanying virtual court.<sup>1</sup> The *New York Times*, the *Wall Street Journal*, the *Washington Post*, and countless other newspapers have consistently reported on the ongoing difficulty of virtual court proceedings both in this country and abroad in the time of the COVID-19 pandemic.<sup>2</sup> The Brennan Center for Justice has

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\* Judge Lynda B. Munro served as a Connecticut Superior Court judge for 20 years before retiring from the bench in 2014. She is a member of the Connecticut law firm Pullman & Comley, LLC, where she works within the firm's Alternative Dispute Resolution and Family Law practices.

\*\* Nicole M. Riel is an associate in Pullman & Comley's Family Law practice. The authors would like to thank Pullman & Comley's 2020 Summer Associate Duncan Grimm for his contribution to the research and writing of this Article.

1. Kevin Penton, *Shift to Virtual Eviction Hearings Stirs Due Process Fears*, LAW360 (July 12, 2020, 8:02 PM), <https://www.law360.com/articles/1290933/shift-to-virtual- eviction- hearings- stir- due- process- fears>; Jessica Klein, *Virtual Parental Visitation Could Have Unintended Consequences for Abuse Survivors*, ATLANTIC (June 23, 2020), <https://www.theatlantic.com/family/archive/2020/06/dangers-virtual-visitation-abuse-victims/613243/>.

2. Alan Feuer et al., *N.Y.'s Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html> (explaining how the pandemic has strained the New York court system, as evidenced by the increase in backlog of criminal cases, and discussing some challenges posed by virtual proceedings); Raphael Minder, *Spain's Courts, Already Strained, Face Crisis as Lockdown Lifts*, N.Y. TIMES (May 25, 2020), <https://www.nytimes.com/2020/05/25/world/europe/spain-courts-coronavirus.html> (detailing how Spain's courts have struggled with technology, communication, and bureaucratic confusion amid the pandemic); Paul Sullivan, *The Pandemic*

cautioned that courts must not jeopardize justice in their effort to protect public health.<sup>3</sup> Nearly every jurisdiction has taken steps to encourage or require judges to hold at least some of their proceedings by telephone or video conference.<sup>4</sup> While courts, including those within our state of Connecticut, are beginning to reopen,<sup>5</sup> courts and court observers are assessing the havoc wrought by the pandemic, a chaos made all the more acute by decades of chronic underfunding felt nationwide.<sup>6</sup>

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*Has Slowed the Divorce Process. Here's What to Expect*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/05/08/your-money/divorce-coronavirus-courts.html> (interviewing lawyers and judges about the impacts of the pandemic on family court in Connecticut and elsewhere, and highlighting the drawbacks of a virtual proceeding); Jacey Fortin, *When Court Moves Online, Do Dress Codes Still Matter?*, N.Y. TIMES (Apr. 15, 2020), <https://www.nytimes.com/2020/04/15/us/coronavirus-lawyers-court-telecommute-dress-code.html> (exploring the lack of uniform etiquette in virtual meetings, and how one judge responded); Adam Liptak, *The Supreme Court Will Hear Arguments by Phone. The Public Can Listen in.*, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/us/politics/supreme-court-phone-arguments-virus.html> (detailing the U.S. Supreme Court's "major break with tradition" in hearing arguments for the first time over the phone); Alan Feuer et al., *Coughing Lawyers. Uneasy Jurors. Can Courts Work Under Coronavirus?*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/nyregion/coronavirus-new-york-courts.html> (listing some of the extraordinary impacts of COVID-19 on all types of courts, highlighting the tension between pursuing cases and public health); Laura Kusisto, *Coronavirus Forces Courts to Experiment*, WALL ST. J., (Mar. 28, 2020, 5:30 AM), <https://www.wsj.com/articles/coronavirus-forces-courts-to-experiment-11585387800> (discussing the "glitches" experienced by attorneys and judges as they attempt to conduct court business by teleconference and video); Keith L. Alexander, *D.C. Superior Court Increases Capacity for Virtual Hearings Amid Pandemic*, WASH. POST (May 18, 2020, 8:16 AM), [https://www.washingtonpost.com/local/public-safety/dc-superior-court-increases-capacity-for-virtual-hearings-amid-pandemic/2020/05/18/5ffb6440-983a-11ea-ac72-3841fcc9b35f\\_story.html](https://www.washingtonpost.com/local/public-safety/dc-superior-court-increases-capacity-for-virtual-hearings-amid-pandemic/2020/05/18/5ffb6440-983a-11ea-ac72-3841fcc9b35f_story.html) (discussing the courts' technological advancements allowing them to conduct additional virtual proceedings); Ann E. Marimow & Justin Jouvenal, *Courts Dramatically Rethink the Jury Trial in the Era of the Coronavirus*, WASH. POST (July 31, 2020, 8:54 AM), [https://www.washingtonpost.com/local/legal-issues/jury-trials-coronavirus/2020/07/31/8c1fd784-c604-11ea-8ffe-372be8d82298\\_story.html](https://www.washingtonpost.com/local/legal-issues/jury-trials-coronavirus/2020/07/31/8c1fd784-c604-11ea-8ffe-372be8d82298_story.html) (addressing the difficulties of keeping cases moving during the pandemic, including the move to virtual technology).

3. Douglas Keith & Alicia Bannon, *Promise and Peril as Courts Go Virtual Amid Covid-19*, BRENNAN CTR. FOR JUST. (May 29, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/promise-and-peril-courts-go-virtual-amid-covid-19>.

4. *Id.*

5. See Edmund H. Mahony, *Connecticut's Court System Is Struggling to Recover from Devastating Coronavirus Shutdown*, HARTFORD COURANT (June 30, 2020), <https://www.courant.com/coronavirus/hc-news-coronavirus-connecticut-courts-20200626-20200630-dn5hvpmsqzeaffxhbnevmezehem-story.html> (exploring how Connecticut courts first struggled and then later coped with the new normal of virtual court proceedings).

6. The National Center for State Courts reported that, based on a 2017–2018 survey of the Conference of State Court Administrators, "some state court systems (26.5%) are in better financial shape than a year ago and others (20.6%) are in worse financial shape. Sixty percent of the state courts are in better shape than nine years ago." *Budget Resource Center*, NAT'L CTR. FOR STATE CTS. (NCSC), <https://www.ncsc.org/information-and-resources/resource-centers/resource-centers-items/budget-resource-center> (last visited Dec. 2, 2020; on file with author).

In family court, while technology has advantages, the realities of virtual hearings raise serious privacy, due process, and credibility concerns. The family bar can and should critically engage and address these concerns by paying special attention to how they impact their clients' rights and safety. In so doing, we would do well to remember Justice Thurgood Marshall's response to another crisis: "Precisely because the need for action . . . is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure."<sup>7</sup> Today, the pandemic has exacerbated the traditional challenges inherent to the family court setting, and we must ensure our solutions not only meet the challenges we face, but do so in a way that protects the most vulnerable in our society.

Using Connecticut as a case study, our family court continues to evolve with our urgent times. Since April 2020, individuals who would have been required prior to the pandemic to physically step foot within a courthouse have been able to apply for temporary restraining orders via email or by fax.<sup>8</sup> Since May 2020, individuals have been able to remotely request the final judgment in their divorce or legal separation case without a court appearance; before the pandemic, in the normal course absent exceptional circumstances, parties were required to appear in court before a judge to have their judgment of dissolution entered.<sup>9</sup> In late June, we began

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State court underfunding has been a national issue for a number of years. *See id.* ("We have a tragedy taking place in our courts," attorney and NCSC Board member Ted Olson told an audience May 1, 2012, at the Newseum in Washington, D.C., referring to severe budget cuts to state courts."); NCSC & JUSTICE AT STAKE, *FUNDING JUSTICE: STRATEGIES AND MESSAGES FOR RESTORING COURT FUNDING* (2012), <https://www.americanbar.org/content/dam/aba/administrative/tips/Court%20Funding/Funding%20Justice.pdf> ("Nearly every court in the United States has been shaken by the Great Recession, as economic contraction has devastated state budgets, forced the slashing of thousands of jobs, and closed courthouse doors. . . . [A]cross the country, the judiciary's treasured constitutional role has not spared it from the budget axe. Access to justice is in peril."); Robert J. Derocher, *Justice at Stake? Bars Battle State Budget Cuts*, 28 *BAR LEADER*, A.B.A., No.1, Sept.–Oct. 2003, [https://www.americanbar.org/groups/bar\\_services/publications/bar\\_leader/2003\\_04/2801/budgetcuts/](https://www.americanbar.org/groups/bar_services/publications/bar_leader/2003_04/2801/budgetcuts/) (stating that "virtually every state judicial and legal program has been touched by funding shortfalls").

7. *Skinner v. Railway Labor Excs.' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

8. *CONN. JUD. BRANCH, FILING YOUR APPLICATION FOR A TEMPORARY RESTRAINING ORDER OR CIVIL PROTECTION ORDER BY EMAIL OR FAX* (2020), [https://jud.ct.gov/HomePDFs/TRO\\_Instructions.pdf](https://jud.ct.gov/HomePDFs/TRO_Instructions.pdf).

9. *How to Request the Entry of Judgment by Agreement, or the Approval of Any Final Agreement, in a Divorce, Legal Separation or Custody/Visitation Action Without a Court Hearing*, STATE OF CONN. JUD. BRANCH, <https://jud.ct.gov/family/FArequest.htm> (last visited Sept. 14, 2020).

remote hearings in family matters by videoconference using Microsoft Teams, and our judges are conducting pretrial and status conferences remotely.<sup>10</sup> Amid these adaptations, the Connecticut Judicial Branch has acknowledged concerns in a guide released in July: *Connecticut Guide to Remote Hearings: For Attorneys and Self-Represented Parties*.<sup>11</sup> Section headings range from the prosaic—“Joining the *Microsoft Teams* Meeting”; “Technical Difficulties and Other Challenges”—to the prescient—“Virtual Courtroom Etiquette and Protocol”; “Communication with Clients and/or Co-Counsel”; “Recording the Hearing”; and so on.<sup>12</sup> This latter category suggests our colleagues are conscious of the serious risks posed to the integrity of the proceedings if the lawyers, judges, or witnesses start taking shortcuts around established protocol. Indeed, the guide warns: “[p]articipants must appreciate the distinction between appropriate adversarial behavior involving substantive issues, and inappropriate adversarial behavior regarding procedure that interferes with the court’s ability to decide cases on their merits. Counsel should remain mindful that they are still subject to the Rules of Professional Conduct, regardless of whether they are in a physical or virtual courtroom.”<sup>13</sup>

But why does this matter? It matters because in each virtual setting, no matter the proceeding, the privacy of the parties, the effectiveness of factfinders, and the strength of the process are at risk when we forget that our living room, our kitchen, or our child’s bedroom is, but for a brief moment, a place where rights are decided.

There certainly are proven benefits to virtual proceedings. It is, however, only when we guard against behavior that threatens our clients’ privacy, ensure the court’s ability to make credibility determinations, and protect due process of law that the benefits of virtual proceedings outweigh their potential for harm. Accordingly, this Article poses the various challenges that face virtual proceedings but encourages careful technological progress and advancement, as long as we safeguard against the inherent pitfalls that accompany the virtual courtroom. Within Part I of this Article, we discuss the tension between the push for open courts and the necessity of privacy; within Part II, we consider the move to the virtual courtroom’s impact on the factfinder’s ability to evaluate demeanor and credibility;

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10. CONN. JUD. BRANCH, THE JUDICIAL BRANCH IS EXPANDING ITS REMOTE CAPABILITIES (last updated July 28, 2020), <https://jud.ct.gov/HomePDFs/RemoteCapabilities720.pdf>.

11. CONN. JUD. BRANCH, CONNECTICUT GUIDE TO REMOTE HEARINGS (Nov. 13, 2020), <https://jud.ct.gov/HomePDFs/ConnecticutGuideRemoteHearings.pdf>.

12. *Id.* at 1–2.

13. *Id.* at 19.

within Part III, we explore the implications of virtual court proceedings on access to justice; within Part IV, we survey the implementation of virtual proceedings throughout the country; and within Part V, we conclude with our final impressions and how we believe virtual proceedings will become a part of family law practice moving forward.

## I. The Balance of Open Courts and Functional Privacy

Public access to the courts is important for transparency and the protection of our rights.<sup>14</sup> In many states, public access is also a constitutional mandate; 27 states have constitutional provisions that include language that “courts ‘shall be open’ or that justice ‘shall be administered openly.’”<sup>15</sup> There also is, however, an expectation of privacy that accompanies the public courtroom. The balancing of these two competing interests must be maintained as we transition from the physical courtroom to the virtual one.

We may not consider the courtroom to be a very private place. After all, we are all certainly used to the bustling, crowded courthouse hallways and to presenting legal argument and testimony in a crowded courtroom. And yet, there is a sort of functional privacy to the public courtroom. People do not generally go out of their way to attend court proceedings unless they have a compelling reason to do so. If there are others around, they may not be listening closely to your client’s case. When family court occurs physically in person, absent special circumstances (for example, some interstate custody or child support proceedings),<sup>16</sup> there is no accessibility for those not physically present, and generally there is no visual recording

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14. See Jamiles Lartey, *The Judge Will See You on Zoom, but the Public Is Mostly Left Out*, MARSHALL PROJECT (Apr. 13, 2020), <https://www.themarshallproject.org/2020/04/13/the-judge-will-see-you-on-zoom-but-the-public-is-mostly-left-out> (“Monitoring court hearings has become difficult, in some cases even impossible, for dozens of court watch programs scattered throughout cities and towns in the country. . . . [T]heir access has been slowed or halted as virtually every system in the country suspended or reduced public court and moved online during the pandemic.”). We note, however, that family court proceedings are not open to the public in every state. See e.g., W. VA. R. FAM. CT. 6 (b) (“Family court proceedings are not open to the public.”).

15. *Open Courts: Injury and Remedy*, NAT’L CTR. FOR STATE CTS. (June 17, 2020), <https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing-pg/open-courts-injury-and-remedy>.

16. See UNIF. CHILD CUSTODY JURISDICTION & ENF’T ACT § 111(b) (UNIF. L. COMM’N 1997) (“A court of this State may permit an individual residing in another State to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that State.”); UNIF. INTERSTATE FAM. SUPPORT ACT § 316(f) (UNIF. L. COMM’N 2008) (“In a proceeding under this act, a tribunal of this state shall permit a party or witness residing outside this state to be deposed or to testify under penalty of perjury by telephone, audiovisual means, or other electronic means at a designated tribunal or other location.”).

of the proceedings. The audio recording that may exist is not generally available in the public domain. The idea of a virtual hearing may seem appealingly more private to stressed and self-conscious clients. After all, in the comfort of their own home, office, or other place of their choosing, they do not have to deal with the anxiety inherent in the courthouse atmosphere. There are, however, significant privacy risks that exist without the protections offered in neutral, impersonal courtrooms.

What does public access look like for the virtual proceeding? Various states are live-streaming their virtual proceedings in response to court closures caused by the pandemic, some on their judicial website<sup>17</sup> and others via YouTube.<sup>18</sup> Notably, states without accommodations for public access during this new COVID-19 virtual hearing era are being faced with petitions and cries for openness.<sup>19</sup> Even where virtual court proceedings are available to viewers over the internet, there are important practical considerations to ensure *meaningful* access to open virtual courts. Does this mean that the public has access to listings of virtual hearing times, complete with case names and presiding judges? Should courts broadcast virtual hearings live, or make recordings available? Must we adjust how

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17. See, e.g., *Virtual Courtroom*, N.J. CTS., <https://njcourts.gov/public/vc/index.html> (allowing individuals to check each county for its live proceedings).

18. See, e.g., *Livestream Courts*, WIS. CT. SYS., <https://www.wicourts.gov/courts/livestream.htm> (Wisconsin's virtual court platform directory, where one can locate a virtual courtroom by county and branch, which is linked to the corresponding YouTube page); MICOCURT VIRTUAL COURTROOM DIRECTORY, <https://micourt.courts.michigan.gov/virtualcourtroomdirectory/> (Michigan's virtual court platform directory, where one can locate a virtual courtroom by county or by judge, which is linked to the corresponding YouTube page).

19. See, e.g., Jamie Satterfield, *Petition Asks Tennessee Supreme Court to Ensure Public Access to Hearings Across State*, KNOXVILLE NEWS SENTINEL (June 3, 2020, 9:02 AM), <https://www.knoxnews.com/story/news/crime/2020/06/02/petition-public-access-tennessee-court-hearings/3122849001/> (“The Tennessee Coalition for Open Government and 55 other media, legal and community groups are asking the state’s highest court to fling open courtroom doors—virtual and real—slammed shut to the public by judges across the state amid the COVID-19 pandemic.”); Letter from David Snyder, First Amend. Coal., Re: Public Access to Court Proceedings and Records Amid COVID-19 Crisis (Mar. 25, 2020), <https://firstamendmentcoalition.org/wp-content/uploads/2020/03/Letter-on-Court-Access-March-25-2020-3.pdf> (“As the California judiciary takes steps to protect public health amid the COVID-19 pandemic, we write today to urge the courts to ensure the press and public continue to have access to public proceedings and records.”); Nick Ochsner, *Mecklenburg Co. Courts Improving Virtual Court Access After Public Shut Out of Hearing*, WBTW (May 14, 2020, 10:20 PM), <https://www.wbtv.com/2020/05/14/mecklenburg-co-courts-improving-virtual-court-access-after-public-shut-out-hearing/> (“The Mecklenburg County courts took steps to increase public access to virtual court hearings Thursday, after questions from WBTW.”).

the public may gain access to court documents so that access to court records is also virtual and accessible online?<sup>20</sup>

While there may be no easy answers to these questions, how we answer them may have dire consequences for litigants. With more people than ever before at home, and with the convenience of online access and anonymity, it is easier for neighbors, coworkers, bosses, and even tech-savvy children to access virtual proceedings than it would be for them to attend proceedings in court. Given the state of the technology, it is unclear how easily or quickly specific observers may be identified. The possibility that children could see, either now or in the future, the details of their parents' divorce play out should be especially concerning to those in our profession and area of practice.

An additional privacy concern comes with the very nature of the technology itself.<sup>21</sup> The judge has inherent control in the courthouse and within her own courtroom, where she may be able to see everyone within the room and also may have a marshal or court officer present to maintain order. In contrast, virtual court hearings lack the assurances of the same kind of security. Many states have strictly prohibited participants from recording virtual proceedings, the same as if they were in a physical courtroom.<sup>22</sup> However, in practice this rule may be very difficult to enforce.

There is special concern for safety in domestic violence cases as well. Technology like Microsoft Teams, Zoom, and WebEx may allow children and domestic violence victims to feel more secure calling in from the comfort of their homes, not having to face adverse parties in

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20. See Laura W. Morgan, *Preserving Practical Obscurity in Divorce Records in the Age of E-Filing and Online Access*, 31 J. AM. ACAD. MATRIM. L. 405 (2019) (discussing the threat to “practical obscurity” in a divorce context in the age of online access); Arminda Bradford Bepko, *Public Availability or Practical Obscurity: The Debate over Public Access to Court Records on the Internet*, 49 N.Y.L. SCH. L. REV. 967 (2004–05) (discussing the history of access to court proceedings and records, and the constitutional and common law presumption in favor of public access).

21. At the beginning of July 2020, the American Bar Association published an article on various considerations to keep in mind as court made the move to virtual. Cathy Krebs, *Privacy and Confidentiality Tips for Virtual Hearings*, AM. BAR ASS'N (July 1, 2020), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/privacy-and-confidentiality-tips-for-virtual-hearings/> (“With more juvenile courts around the country convening virtually in response to COVID-19, court personnel and lawyers have a steep learning curve on how to ensure due process and navigate the many logistical issues involved in remote court hearings. Addressing privacy is one of the many new challenges they face, and while the platform used for remote court may vary by jurisdiction, there are some general steps that can be taken to address this issue.”).

22. See, e.g., CONNECTICUT GUIDE TO REMOTE HEARINGS, *supra* note 11, at 20.

person.<sup>23</sup> However, participating in such proceedings remotely may also prove dangerous without the courthouse’s security measures. A physical courtroom is a space where victims should know they will be safe, but, when dialing in from home, victims may unintentionally reveal their locations to abusers.<sup>24</sup> Additionally, there are unique concerns as to the influence of off-camera individuals on such victims. While off-screen coaching will always be a concern when virtual proceedings are conducted, the notion that a victim’s abuser could be influencing, coaching, coercing, or threatening them off-screen is especially troubling and must be guarded against.

Moving protective order applications online may actually prove to limit a victim’s access to the courts.<sup>25</sup> If one’s internet use is monitored by an abuser, it may be difficult to access these critical forms.<sup>26</sup> Moreover, in light of the fact that many public services and spaces have been closed to the public—like community centers, libraries, and even courthouses—victims may have very limited access to the court’s protections.<sup>27</sup>

Regarding matters of parenting and child custody, jurisdictions have adopted different approaches to ensure noncustodial parents are still able to see their children despite quarantine.<sup>28</sup> An emergency order in Bucks County, Pennsylvania, provided that parents would be permitted nonphysical, “daily contact” with their children during times when they were not able to see their children in person because of a COVID-19 infection or symptoms, while Ross County, in Ohio, ordered that separated parents should communicate daily about their children’s well-being.<sup>29</sup>

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23. Allie Reed & Madison Alder, *Virtual Hearings Put Children, Abuse Victims at Ease in Court*, BLOOMBERG L. (July 23, 2020), <https://news.bloomberglaw.com/us-law-week/virtual-hearings-put-children-abuse-victims-at-ease-in-court>.

24. *See id.*; *see also* Jessica Klein, *Virtual Parental Visitation Could Have Unintended Consequences for Abuse Survivors*, ATLANTIC (June 23, 2020), <https://www.theatlantic.com/family/archive/2020/06/dangers-virtual-visitation-abuse-victims/613243/>.

25. *See* Cheryl Thomas, *Domestic Violence and Court Services During COVID-19*, JURIST (Apr. 25, 2020, 1:12 AM), <https://www.jurist.org/commentary/2020/04/cheryl-thomas-covid19-domestic-violence/>.

26. *Id.*

27. *Id.*

28. *See* Klein, *supra* note 24; *see also* Deborah Copaken, *How Are Parents Supposed to Deal with Joint Custody Right Now?*, ATLANTIC (Apr. 8, 2020), <https://www.theatlantic.com/family/archive/2020/04/navigating-joint-custody-under-coronavirus-quarantine/609676/> (drawing a stark contrast between the rules of the pandemic requiring everyone to stay socially isolated in a single household and the rules of joint custody, which require the opposite).

29. *See* Klein, *supra* note 24; *In re* Operation of Family Division During Judicial Emergency, 43 MM 2020, Emergency Order No. 2020-11 ¶ 3(c) (Pa. Ct. Common Pleas Bucks Cnty. Apr. 8, 2020), <https://www.bucksbar.org/wp-content/uploads/2020/04/Emergency-Order-11.pdf> (“Any party whose physical custodial rights are presumptively suspended shall instead have the right to

These “contacts,” like virtual proceedings, leave parents and domestic violence victims without any of the safeguards of the courts, or public or supervised visitation spaces. In New York, when a mother learned that her son’s court-mandated visitations with her abusive ex-husband would be virtual, she prepared by hanging bedsheets over windows, fearing any view outside would betray her address.<sup>30</sup> Her son enjoyed aiming the camera out windows, and because she as the custodial parent was forbidden from being in the room during her ex-husband’s virtual visit, she was not able to redirect her son’s behavior.<sup>31</sup>

As with anything else, the push to open virtual proceedings for public consumption must be met with means to protect those who attend such proceedings, including judges. Just as the divorcing couple may face scrutiny from anonymous onlookers, judges too face another platform for disgruntled litigants or members of the public angry with the court system. Experience tells us that risks are heightened for family court and family division judges, where tensions and the stakes are especially high and personal. While the judge’s privacy may not be affected in the same way as the litigants’, exposing our judges to the public at large via the boundless internet may create a Pandora’s box that we are not ready to open, submitting our judges to scrutiny and public censure like they have never seen before.<sup>32</sup>

The courthouse and the courtroom itself are imposing and solemn places. And they should be. When we—attorneys, litigants, and the public at large—walk up those courthouse steps or stand before the judge on her bench, we are reminded by the structural cues around us as to the gravity

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have daily contact with the subject child or children involved through any electronic means they have available, including telephone, skype, facetime or other such means. The electronic contact shall be liberally allowed in such a way to maximize the contact with the child or children without unnecessarily interfering with the lives of the custodial party. Such electronic contact shall be private and without interference of the custodial party.); *In re Parenting Time During COVID-19 Public Health Crisis*, Journal Entry (Ohio Ct. Common Pleas Ross Cnty. Mar. 23, 2020), <http://www.rosscountyccommonpleas.org/docs/COVID%2019%20PARENTING%20TIME.pdf> (“The parties should also communicate about the location, health, and welfare of the children daily and should discuss travel plans and arrangements as required by their parenting plans or custody orders.”).

30. Klein, *supra* note 24.

31. *Id.*

32. Scholars have recognized a relationship between the anonymity of the internet and an increase in aggression. See Adam G. Zimmerman, *Online Aggression: The Influences of Anonymity and Social Modeling*, UNF GRADUATE THESES & DISSERTATIONS 19, 22 (2012), <https://digitalcommons.unf.edu/etd/403>; see also Todd Leopold, *Anonymous Anger Rampant on Internet*, CNN (Nov. 3, 2008), <https://www.cnn.com/2008/TECH/11/03/angry.internet/index.html>.

and importance of the judicial process. The very idea that courtroom proceedings should be live-streamed from YouTube should feel inherently uncomfortable to those within our profession. Should proceedings be conducted in secret, beyond the public's reach? Absolutely not. We must fear virtual courtroom proceedings transforming the significance of the institution into something trivial and flippant.

## II. Evaluation of Demeanor and Credibility

One of the roles of a judge or a neutral arbiter is, of course, to find facts. This means that she must weigh the credibility of the witnesses. Judges hopefully are trained and rely on their experience in picking up on both the verbal and nonverbal cues of everyone in the courtroom—from the testimony and body language of the witness on the witness stand, to the demeanor of the litigant beside his or her counsel, to the attorneys themselves.

Naturally, there is the fear that the realities of our present technology, coupled with the glitches that often accompany it, mean that it may be more difficult for a factfinder to do her job. Will the factfinder be able to ascertain the witness's demeanor as if he or she were sitting nearby within the confines of a courtroom? Will the factfinder physically be able to perceive the witness's body language within the confines of a screen? If an individual does not have access to appropriate technology, will it interfere with the factfinder discharging this function? These limits on access to technology will disproportionately affect the most vulnerable and marginalized groups in society. While our first instinct is to immediately think that an on-screen appearance will minimize the judge's ability to really *see* hearing participants, our own experience tells us that, in many ways, this is not the case.

When a witness—or, more broadly, a hearing participant—appears remotely, as one article pithily puts it,

it is critical to bear in mind that . . . the arbitrator is still watching the witness testify. The witness's face is still in front of us. We can see expressions change, eyes dart, heads turn to the side to search for signals from counsel or a co-party, or heads bend down to search a document for an answer. We can see initial reactions to questions, reluctance to respond, indirection, indecision, circularity, obfuscation—as well as forthright, straight-on answering (which,

we've learned, sometimes can pose the greatest threat to making accurate findings).<sup>33</sup>

If anything, the ability of the factfinder to see these subtle truth-telling (or not-so truth-telling) cues may be amplified by his or her ability to switch from gallery view to speaker view to focus on the person giving testimony.

Of course, the ability of the judge to perceive these cues virtually depends on factors outside of the control she normally would have within the courtroom. There are issues of sound, lighting, and camera placement, to name but a few. Additionally, while a litigant's attire and state of grooming may have always factored into a judge's unconscious bias and credibility determinations, now, judges will be confronted with perceiving the state of someone's home in a way that could spark a new and unprecedented unconscious bias.<sup>34</sup> Moreover, the judge's window into the litigant's home may provide her with additional cues, such as pictures of children—or less endearing subjects. Dangerously, that window can then be contrived to tell the kind of story that the litigant wants portrayed.

The inclusion of third-party witnesses in virtual proceedings raises additional questions and concerns. Their environments, like those of the parties themselves, also are outside of the court's oversight and control. Their involvement creates practical questions as well. For instance, to where does one subpoena a third-party witness for a virtual proceeding? What if the third party lacks (or pretends to lack) the necessary technology to participate in the proceeding?

While virtual proceedings provide their own challenges to a judge's ability to make credibility determinations and judge demeanor, if the alternative is conducting in-person hearings with everyone wearing masks within the courtroom, the choice may be obvious. In-person proceedings with mask-wearing litigants create their own challenges. A judge may be able to pick up on cues associated with body language but would be unable to see facial expressions that are obscured by the mask. Accordingly, the virtual courtroom may allow for better judicial determinations when the alternative is in-person proceedings where masks must be worn.

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33. Wayne Brazil, *Credibility Concerns About Virtual Arbitration Are Unfounded*, LAW 360 (May 26, 2020, 5:23 PM), <https://www.law360.com/articles/1274230>. The article considers the particular importance of credibility determinations and queries: “[H]ow many cases actually turn on credibility?” *Id.* We posit, however, that the importance of credibility determinations cannot be underestimated in the context of family cases where every issue at its core comes down to people.

34. Reed & Alder, *supra* note 23.

Significant to the integrity of the proceedings is the concern that litigants will be coached off-screen as they appear virtually. While the judge has control over her courtroom and can survey people's interactions, her ability to do so through the computer screen is vastly limited. Additionally, there is only so much that can be done to monitor the possibility of coaching as the proceeding progresses. Litigants can be asked to move their screens around to show that no one else is in the room with them as a proceeding begins, but what then will prevent a devious litigant from having someone join them further into the proceeding? Besides additional individuals being present during the proceeding, there also is the possibility that litigants may improperly use electronic means to communicate with others—maybe even their attorney—during the proceeding. Moreover, careful witnesses may inappropriately rely on notes or other papers as they testify without the judge or opposing counsel noticing.

The ultimate question is how appearing remotely will affect the outcome of the proceeding, if at all. Unfortunately, there is no way to have a controlled experiment to determine the outcome in a reliable study.

Where children are concerned, research shows that they may do best to avoid the courtroom. A 1993 UCLA study tested children's memories and found they made more mistakes when questioned in a courtroom setting than those children who were questioned in a familiar classroom setting.<sup>35</sup> However, in a 1998 study that compared the effects of video versus in-person child witness testimony, mock jurors found witnesses testifying remotely to be less credible than live witnesses, even though their testimony was more accurate.<sup>36</sup> While the use of video in that study apparently did not impact the verdicts, another study of child witness testimony did find a difference in mock juror verdicts based on whether the testimony was by video or in person.<sup>37</sup> That, of course, leaves the unanswered question as to whether using video instead of in-person testimony could, in fact, impact outcomes in actual cases.

In the criminal context, Australian scholars conducted a study that simulated a criminal trial, with mock jurors "randomly assigned to different configurations," including different contexts for in-person and video

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35. *Id.*; see Karen J. Saywitz & Rebecca Nathanson, *Children's Testimony and Their Perceptions of Stress in and out of the Courtroom*, 17 CHILD ABUSE & NEGLECT 613 (Sept.–Oct. 1993).

36. Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 LAW & POL'Y 211, 221 (2006).

37. *Id.* at 221–22.

testimony.<sup>38</sup> Ultimately, the study found that the defendants appearing via video were not more likely to be found guilty.<sup>39</sup> Additional research, however, alludes to environmental issues: “In criminal matters, defendants who appear remotely from police custody or jail are more likely to have a higher bail set, plead guilty and receive longer sentences than those who appear in person.”<sup>40</sup> Along these lines, when Cook County, Illinois, which includes Chicago, started holding bail hearings for certain offenses by video, a study found that on average judges set bail significantly higher than when the hearings were in person.<sup>41</sup> In yet another study, the Administrative Conference of the United States reviewed the use of video hearings by the Board of Veterans’ Appeals and other federal agencies.<sup>42</sup> It was found that “the difference in grants [of Veterans’ appeals] between video hearings and in-person hearings has been within one percent.”<sup>43</sup>

Virtual hearings are commonplace for immigration proceedings, where they were a fixture prior to the COVID-19 pandemic. Before the pandemic, of 57,182 final immigration court hearings held from October through December 2019, one out of every six was held by video.<sup>44</sup> A study found that the rate at which asylum was granted roughly doubled when the hearing was held in person rather than over videoconference.<sup>45</sup> One

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38. Meredith Rossner & David Tait, *Courts Are Moving to Video During Coronavirus, but Research Shows It’s Hard to Get a Fair Trial Remotely*, THE CONVERSATION (Apr. 7, 2020, 9:28 PM), <https://theconversation.com/courts-are-moving-to-video-during-coronavirus-but-research-shows-its-hard-to-get-a-fair-trial-remotely-134386>. The different configurations included “a defendant sitting in the dock in the courtroom, a defendant sitting beside their lawyer in the courtroom, a defendant appearing remotely on their own (as they would in most standard remote hearings), or a defendant appearing with their lawyer in a video hearing, with the prosecutor also appearing on video.” *Id.*

39. *Id.*

40. *Id.*

41. Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 891–98 (2010).

42. FUNMI E. OLORUNNIPA, ADMIN. CONF. OF THE U.S., AGENCY USE OF VIDEO HEARINGS: BEST PRACTICES AND POSSIBILITIES FOR EXPANSION 16–25 (May 10, 2011), <https://www.acus.gov/sites/default/files/documents/Revised-Final-Draft-Report-on-Agency-Use-of-Video-Hearings-5-10-11.pdf>.

43. *Id.* at 23.

44. *Use of Video in Place of In-Person Immigration Court Hearings*, TRAC IMMIGRATION, <https://trac.syr.edu/immigration/reports/593/> (last visited Jan. 5, 2021). This number was only a small percentage of the total number of hearings held in the first quarter of the 2020 fiscal year; 566,537 hearings were scheduled but were continued, and data show that of those that were continued, “only one out of every twenty-five (4%) were held by video.” *Id.*

45. Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 271 (2007).

article attributes the following “outcome paradox” to virtually conducted immigration cases:

[D]etained televideo litigants were more likely than detained in-person litigants to be deported, but judges did not deny respondents’ claims in televideo cases at higher rates. Instead, these inferior results were associated with the fact that detained litigants assigned to televideo courtrooms exhibited depressed engagement with the adversarial process—they were less likely to retain counsel, apply to remain lawfully in the United States, or seek an immigration benefit known as voluntary departure.<sup>46</sup>

The bottom line is, lawyers, judges, and litigants now more than ever must be conscious of not just what they argue, adjudge, or testify to, but how they do so. One Florida judge issued a rare letter when he felt lawyers were failing to dress appropriately for court. Confronted with lawyers still in bed or not fully dressed, he wrote: “[P]lease, if you don’t mind, let’s treat court hearings as court hearings, whether Zooming or not.”<sup>47</sup> Commenting on the letter, Douglas Keith, counsel at the Brennan Center for Justice, explained why this mattered: “‘What this letter puts out in the open is something that all courts should be aware of, which is that parties are going to be judged based on their appearance,’” and “not only on their clothes, but also on their surroundings or the quality of their internet connections.”<sup>48</sup> The letter also serves as a reminder that we must ensure the solemnity of the judicial process, no matter what form it takes. Without the dignity of the proceedings, we risk losing public buy-in to the process.

While the concept of factfinders making credibility determinations in a virtual context may not be new, the widespread use of virtual hearings in light of the pandemic is making the implications more widely known, and the effects, if any, will be felt more broadly. As such, in addition to doing what we can to minimize the possible negative consequences of virtual proceedings on our clients’ testimony and presentation, we should take this opportunity to better understand the impact of virtual proceedings, especially in the context of family court where there is much at stake and where in-person proceedings have been the norm.

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46. Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 N.W. U. L. REV. 933 (2015).

47. Fortin, *supra* note 2.

48. *Id.*

### III. Access to Justice

A 2020 national National Center for State Courts (NCSC) poll found that 70% of respondents expressed confidence in state courts, consistent with previous studies, and 64% “indicated that if they had business with the courts and could do so online they would be likely to do so,” an increase from 43% in 2014.<sup>49</sup> These numbers have startling implications for our field, which has been long overdue in adapting to technology. In our race to catch up, however, we must not compromise our ability to provide access to justice. Accordingly, we suggest that there is a difference in analyzing the benefits of virtual hearings versus in-person hearings if one is not supplanting the other, as compared to the benefits of virtual hearings if in-person proceedings are, for whatever reason, not an option. That is to say, there unquestionably are benefits to conducting proceedings virtually, even when appearing in person remains a safe option. Perhaps most significantly, virtual proceedings offer the convenience of accessing the court without having to get there physically. They also take the cost and time expense of travel and much of the wait time in court out of the equation, allowing individuals to take less time off from work, and allowing caregivers to take less time away from their loved ones. One author argues that the benefits of virtual hearings for self-represented litigants may outweigh the negatives.<sup>50</sup>

There also are aspects of in-person appearances that we believe cannot be replicated virtually. These include the judge’s ability to perceive all aspects of physical demeanor when surveying the courtroom and the attorneys’ ability to really *present* their case without the constraints of the four screen corners.

In its “Statement Regarding Safe Courts and Access to Justice During COVID-19,” the National Council of Juvenile and Family Court Judges encouraged all court systems to adopt various guidelines, including encouraging video and telephonic hearings “whenever possible in the

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49. NCSC *National Poll Gives Insight into the Public’s Perception and Interaction with Courts in a (Post?) Pandemic World*, NAT’L CTR. FOR STATE CTS. (NCSC) (June 29, 2020), <https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing-pg/ncsc-national-poll-gives-insight-in-the-publics-perception-and-interaction-with-courts-in-a-post-pandemic-world>.

50. Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J.L. & PUB. POL’Y 331, 333 (2016) (arguing “that technology can do much more to alleviate the challenges associated with pro se litigation . . . [including] improv[ing] the ability of self-represented litigants (SRLs) to effectively participate in proceedings, as well as the ability of courts to administer them fairly and efficiently”).

interest of justice. . . .”<sup>51</sup> Such a simple statement includes the implication that virtual hearings are preferable to no hearings, but virtual hearings should be utilized with caution such that their use remains consistent with the interests of justice.

Undoubtedly, without care, individual rights will be jeopardized by our strides for technological utilization, especially when appearing in person within the confines of the courthouse no longer imposes safety concerns. It is important to consider litigants’ access to justice in the context of whether their virtual access is their only access. Regardless of the type of proceeding, many individuals in the first instance may be unable to access a virtual courtroom entirely, lacking the basic, necessary infrastructure such as high-speed internet.<sup>52</sup> “The Brookings Institution used available data from the U.S. Census Bureau’s American Community Survey to find that in 2018, nearly 14 million households in urban and suburban areas and 4.5 million households in rural areas did not have an in-home or wireless broadband subscription.”<sup>53</sup> As far back as 2017, a Department of Justice report on immigration courts found “[f]aulty [video and teleconferencing] equipment, especially issues associated with poor video and sound quality, can disrupt cases to the point that due process issues may arise.”<sup>54</sup>

Appearing virtually may impact a participant’s perception and understanding of the proceedings. For example, “[s]ome defendants have reported feeling disorientated, not being able to hear or understand the proceedings and lacking confidence in the fairness of the hearing.”<sup>55</sup> This sense of disassociation may be especially true if the litigant and his or her attorney appear virtually from separate locations. In these situations, attorney and client are no longer a whisper away, and clients may not understand or have the foresight to ask for an opportunity to convene with counsel if they wish to do so. Clients with a language barrier also will no longer be steps away from their interpreters, further creating a dissociative environment for certain virtual hearing participants.

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51. Romana A. Gonzalez, *Statement Regarding Sage Courts and Access to Justice During COVID-19*, NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES (May 13, 2020), <https://www.ncjfcj.org/news/statement-regarding-safe-courts-and-access-to-justice-during-covid-19/>.

52. Keith & Bannon, *supra* note 3.

53. Kevin Penton, *Shift to Virtual Eviction Hearings Stirs Due Process Fears*, LAW 360 (July 12, 2020, 8:02 PM), <https://www.law360.com/articles/1290933/shift-to-virtual-eviction-hearings-stirs-due-process-fears>. Further, “[f]or adults who live in households with an annual income of less than \$30,000, 29% don’t own smartphones, 44% do not have broadband at home and 46% don’t own a computer, according to a 2019 survey by the Pew Research Center.” *Id.*

54. Keith & Bannon, *supra* note 3.

55. Rossner & Tait, *supra* note 38.

A corollary concern to the sense of disassociation is the resulting loss of personal engagement by litigants. Specifically, an abiding concern is that virtual court may transform participants into mere spectators, as they are physically removed from the proceedings, and less likely to participate and interact as they would have had they appeared in person. Aesthetically, there is something impersonal, even dehumanizing, to the virtual proceeding as compared to the physical presence before a judge.<sup>56</sup> We cannot help but fear that participants may watch the screen, disinterested, as if they were watching a courtroom drama on television. Perhaps worse yet, participants may give remote proceedings their casual attention as they go about their day attending to other tasks, even as their case is proceeding before a judge. Anecdotal reports of litigants working on another screen, cooking a meal, and surfing the internet are pervasive.

This concern is tempered by the optimism that widespread use of technology may make participants more likely to engage because technology, unlike the court system, is something that large swaths of the population may have experience with and know well. Without the physical and temporal barriers imposed by in-person court proceedings, coupled with the unknown and possibly intimidating nature of the courtroom, some litigants may be more comfortable and more engaged in the court process should their case proceed remotely.

In the end, we go back to the National Council of Juvenile and Family Court Judges' measured statement that virtual hearings should be conducted when they are in the interest of justice. That sentiment, however, becomes murky when we consider the barriers to justice we have discussed in this Article. The answer to the question of when a virtual hearing is in our client's interest, and thus in the interest of justice, comes down to the specific circumstances of the case, including the client him- or herself.

#### **IV. Implementation of Virtual Hearings Throughout the Country**

In response to the COVID-19 pandemic, every state, the District of Columbia, the U.S. Virgin Islands, Puerto Rico, and Guam issued some

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56. Recognizing that “not all of what we [judges] do readily lends itself to remote appearances,” Associate Judge Sanjay Tailor of the Circuit Court of Cook County, Chicago, Chancery Division, has explained, “[t]he human element in a settlement conference, which is so often critical to its success, is best conveyed and perceived in person. Advances continue to be made in the quest for a virtual trial, but, legal issues aside, there is still no satisfying substitute for an in-person trial.” Sanjay Tailor, *Impact of the Pandemic: A Judge's View*, 34 CBA REC., no. 3, May/June 2020, at 23.

form of jurisdiction-wide ordered delays or restrictions on court access.<sup>57</sup>

57. See *COVID-19 Updates*, ALA. ADMIN. OFF. OF CTS., <https://www.alacourt.gov/COVID19.aspx> (last visited Jan. 6, 2021) (Alabama); *COVID-19 Response*, ALASKA CT. SYS., <https://courts.alaska.gov/covid19/> (last visited Jan. 6, 2021) (Alaska); *COVID-19 Information and Updates*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/covid19/> (last visited Jan. 6, 2021) (Arizona); *Arkansas Supreme Court Statement on Novel Coronavirus Outbreak and the Courts*, ARK. JUD., <https://www.arcourts.gov/arkansas-supreme-court-statement-novel-coronavirus-outbreak-and-courts> (last visited Jan. 6, 2021) (Arkansas); *Coronavirus Updates*, CAL. CTS. NEWSROOM, JUD. BRANCH OF CAL., <https://newsroom.courts.ca.gov/covid-19-news-center> (last visited Jan. 6, 2021) (California); *COVID-19 Important Announcements*, COLO. JUD. BRANCH, <https://www.courts.state.co.us/announcements/COVID-19.cfm> (last visited Jan. 6, 2021) (Colorado); *COVID-19 Information from the Connecticut Judicial Branch*, STATE OF CONN. JUD. BRANCH, <https://jud.ct.gov/COVID19.htm> (last visited Jan. 6, 2021) (Connecticut); *The Delaware Judiciary Response to Coronavirus Disease (COVID-19)*, DEL. CTS., <https://courts.delaware.gov/aoc/covid-19> (last visited Jan. 6, 2021) (Delaware); *COVID-19 Information and Updates*, FLA. CTS., <https://www.flcourts.org/Resources-Services/Emergency-Preparedness/COVID-19-Information-and-Updates> (last visited Jan. 6, 2021) (Florida); *Court Information Regarding the Coronavirus*, SUP. CT. OF GA., [https://www.gasupreme.us/court-information/court\\_corona\\_info/](https://www.gasupreme.us/court-information/court_corona_info/) (last visited Jan. 6, 2021) (Georgia); *COVID-19 Information*, HAW. STATE JUD., <https://www.courts.state.hi.us/covid-19-information-page> (last visited Jan. 6, 2021) (Hawaii); *State Judicial Emergency Orders*, STATE OF IDAHO JUD. BRANCH SUP. CT., <https://isc.idaho.gov/Emergency%20Orders> (last visited Jan. 6, 2021) (Idaho); *COVID-19 Information and Updates*, ILL. CTS., <http://www.illinoiscourts.gov/Administrative/covid-19.asp> (last visited Jan. 6, 2021) (Illinois); *COVID-19 Responses and Resources*, COURTS.IN.GOV, <https://www.in.gov/judiciary/5575.htm> (last visited Jan. 6, 2021) (Indiana); *COVID-19 Information and Updates*, IOWA JUD. BRANCH, <https://www.iowacourts.gov/iowa-courts/covid-19-information-and-updates/> (last visited Jan. 6, 2021) (Iowa); *Kansas Courts Response to Coronavirus (COVID-19)*, KAN. JUD. BRANCH, [https://www.kscourts.org/About-the-Courts/Court-Administration/OJA/Kansas-Courts-Response-to-Coronavirus-\(COVID-19\)](https://www.kscourts.org/About-the-Courts/Court-Administration/OJA/Kansas-Courts-Response-to-Coronavirus-(COVID-19)) (last visited Jan. 6, 2021) (Kansas); *COVID-19 and the Courts*, KY. CT. OF JUST., <https://kycourts.gov/COVID-19/Pages/default.aspx> (last visited Jan. 6, 2021) (Kentucky); *Coronavirus (COVID-19) Information and Resources*, LA. SUP. CT., <https://www.lasc.org/COVID19/> (last visited Jan. 6, 2021) (Louisiana); *Coronavirus 2019 (COVID-19 Information)*, STATE OF ME. JUD. BRANCH, <https://www.courts.maine.gov/covid19/index.html> (last visited Jan. 6, 2021) (Maine); *Maryland Judiciary Coronavirus (COVID-19) Updates*, MD. CTS., <https://www.courts.state.md.us/coronavirusupdate> (last visited Jan. 6, 2021) (Maryland); *Court System Response to COVID-19*, MASS.GOV, <https://www.mass.gov/resource/court-system-response-to-covid-19> (last visited Jan. 6, 2021) (Massachusetts); *COVID-19 News and Resources*, MICH. CTS., <https://courts.michigan.gov/News-Events/Pages/COVID-19.aspx> (last visited Jan. 6, 2021) (Michigan); *COVID-19 Information*, MINN. JUD. BRANCH, <https://www.mncourts.gov/Emergency.aspx> (last visited Jan. 6, 2021) (Minnesota); *Latest News*, STATE OF MISS. JUD., <https://courts.ms.gov/> (last visited Jan. 6, 2021) (Mississippi); *Missouri Judiciary Responses to Coronavirus (COVID-19)*, MO. COURTS JUD. BRANCH OF GOV'T, <https://www.courts.mo.gov/pandemic/> (last visited Jan. 6, 2021) (Missouri); *Local Rules on Coronavirus for District Court*, MONT. JUD. BRANCH, <https://courts.mt.gov/> (last visited Jan. 6, 2021) (Montana); *COVID-19 & the Nebraska Judicial Branch*, STATE OF NEB. JUD. BRANCH, <https://supremecourt.nebraska.gov/administration/nebraska-judicial-branch-emergency-status-information> (last visited Jan. 6, 2021) (Nebraska); *COVID-19: Information and Resources*, STATE BAR OF NEV., <https://www.nvbar.org/covid-19-update/> (last visited Jan. 6, 2021) (Nevada); *Important Information About the Judicial Branch Response to COVID-19*, N.H. JUD. BRANCH, <https://www.courts.state.nh.us/aoc/corona-covid-19.html> (last visited Jan. 6, 2021) (New Hampshire); *COVID-19 Home*, N.J. CTS., <https://njcourts.gov/>

The NCSC website page dedicated to the coronavirus public health emergency lists the five “most common efforts state courts are taking to combat the coronavirus” as “restricting or ending jury trials; restricting entrance into courthouses; encouraging or requiring teleconferences and videoconferences in lieu of hearings; generally suspending in-person

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public/covid19\_one-stop.html (last visited Jan. 6, 2021) (New Jersey); *New Mexico Courts—Coronavirus (COVID-19) Information*, N.M. CTS.: THE JUD. BRANCH OF N.M., <https://www.nmcourts.gov/covid-19.aspx> (last visited Jan. 6, 2021) (New Mexico); *Coronavirus and the New York State Courts*, N.Y. STATE UNIFIED CT. SYS., <http://www.nycourts.gov/index.shtml> (last visited Jan. 6, 2021) (New York); *COVID-19 (Coronavirus) Updates*, N.C. JUD. BRANCH, <https://www.nccourts.gov/covid-19> (last visited Jan. 6, 2021) (North Carolina); *Emergency Order and Pandemic Response*, STATE OF N.D. CTS., <https://www.ndcourts.gov/emergency-order-and-pandemic-response> (last visited Jan. 6, 2021) (North Dakota); *Coronavirus Resources*, SUP. CT. OF OHIO & OHIO JUD. SYS., <http://www.supremecourt.ohio.gov/coronavirus/default.aspx> (last visited Jan. 6, 2021) (Ohio); *COVID-19 Notices*, OKLA. STATE CTS. NETWORK, <https://www.oscn.net/news/2003171536/covid19-notices> (last visited Jan. 6, 2021) (Oklahoma); *Responses to Coronavirus (COVID-19)*, OR. STATE CTS., <https://www.courts.oregon.gov/courts/Pages/coronavirus.aspx> (last visited Jan. 6, 2021) (Oregon); *UJS Coronavirus Information*, UNIFIED JUD. SYS. OF PA., <http://www.pacourts.us/ujs-coronavirus-information> (last visited Jan. 6, 2021) (Pennsylvania); *Coronavirus (COVID-19)*, R.I. JUD. BRANCH, <https://www.courts.ri.gov/Courts/SupremeCourt/Pages/COVID-19.aspx> (last visited Jan. 6, 2021) (Rhode Island); *Court Information*, S.C. JUD. BRANCH, <https://www.sccourts.org/coronavirus/covid-19/> (last visited Jan. 6, 2021) (South Carolina); *Covid-19 Response*, S.D. UNIFIED JUD. SYS., <https://ujs.sd.gov/uploads/news/COVID19UJSProcedures.pdf> (last visited Jan. 6, 2021) (South Dakota); *Coronavirus & Court Leadership*, TENN. STATE CTS., <https://www.tncourts.gov/Coronavirus> (last visited Jan. 6, 2021) (Tennessee); *Court Coronavirus Information*, TEX. JUD. BRANCH, <https://www.txcourts.gov/court-coronavirus-information/> (last visited Jan. 6, 2021) (Texas); *Utah State Courts Alerts and Information*, UTAH CTS., <https://www.utcourts.gov/alerts/> (last visited Jan. 6, 2021) (Utah); *COVID-19 and Court Operations*, VT. JUD., <https://www.vermontjudiciary.org/news/information-regarding-coronavirus-disease-2019-covid-19-and-court-operations> (last visited Jan. 6, 2021) (Vermont); *COVID-19 Appellate and Local Court Information*, VA.’S JUD. SYS., [http://courts.state.va.us/news/items/covid\\_19.pdf](http://courts.state.va.us/news/items/covid_19.pdf) (last visited Jan. 6, 2021) (Virginia); *COVID-19 Response*, WASH. CTS., <http://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.COVID19> (last visited Jan. 6, 2021) (Washington); *Coronavirus Disease 2019 (COVID-19)*, W. VA. JUD., <http://www.courtsww.gov/covid19/COVID19.html> (last visited Jan. 6, 2021) (West Virginia); *COVID-19 Orders & Information*, WIS. CT. SYS., <https://www.wicourts.gov/covid19.htm> (last visited Jan. 6, 2021) (Wisconsin); *Coronavirus COVID-19 Court Operations Updates*, WYO. JUDICIAL BRANCH, <https://www.courts.state.wy.us/coronavirus-covid-19-updates/> (last visited Jan. 6, 2021) (Wyoming); *DC Courts’ Coronavirus Advisories*, D.C. CTS., <https://www.dccourts.gov/coronavirus> (last visited Jan. 6, 2021) (District of Columbia); *COVID-19 Information & Updates*, JUD. BRANCH OF U.S. V.I., [https://www.vicourts.org/c\\_o\\_v\\_i\\_d\\_19\\_pandemic](https://www.vicourts.org/c_o_v_i_d_19_pandemic) (last visited Jan. 6, 2021) (U.S. Virgin Islands); *Plan De Emergencia COVID-19*, LA RAMA JUD. DE P.R., <http://www.ramajudicial.pr/Plan-emergencia-COVID-19.htm> (last visited Jan. 6, 2021) (Puerto Rico); *COVID-19 Response: Supreme Court Administrative Orders, Updates and Other Information*, WELCOME TO JUD. OF GUAM, [http://www.guamsupremecourt.com/General-Information/2020-03-ADVISORY-ON-COVID-19\(1\).pdf](http://www.guamsupremecourt.com/General-Information/2020-03-ADVISORY-ON-COVID-19(1).pdf) (last visited Jan. 6, 2021) (Guam).

proceedings; and granting expansions for court deadlines, including deadlines to pay fees/fines.”<sup>58</sup>

As stated by Texas Chief Justice Nathan Hecht, chair of the NCSC Board of Directors: “Since the onset of the pandemic, courts throughout the country have determined to stay open to deliver justice without faltering, no matter the adjustments and sacrifices demanded, but also to protect staff ... and the public from the risks of disease. We are learning new technology and practices together.”<sup>59</sup> Although every state court system has responded to the pandemic in some fashion, their new policies vary widely.<sup>60</sup>

Variations in the rules in different states have allowed some states to implement virtual proceedings with ease compared to other states where amendments had to be made to established procedure.<sup>61</sup> In Texas, for example, virtual hearings were quickly implemented: “As of March 30, 2020, Texas judges held about 1,800 virtual hearings, with more than 12,500 participants. One judge reported handling 51 cases in one hearing, said Texas State Court Administrator David Slayton.”<sup>62</sup> Moreover, in Michigan, between April 1 and mid-May 2020, the state courts “conducted

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58. *Coronavirus and the Courts*, NAT’L CTR. FOR STATE CTS. (NCSC), <https://www.ncsc.org/newsroom/public-health-emergency> (last visited Jan. 7, 2021).

59. *Id.*

60. In the majority of states, in-person proceedings were suspended pursuant to statewide orders versus being suspended on the local level. NAT’L CTR. FOR STATE CTS., *CORONAVIRUS & THE COURTS* (updated June 18, 2020), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0019/40384/Coronavirus-and-the-Courts-State-Profiles-6-18-2020.pdf](https://www.ncsc.org/_data/assets/pdf_file/0019/40384/Coronavirus-and-the-Courts-State-Profiles-6-18-2020.pdf). The state of California is but one state where many in-person court proceedings were suspended on the local level, consistent with how California’s court operations are structured. *See Judicial Branch Actions Responding to COVID-19*, LEGIS. ANALYST’S OFF. (May 6, 2020), <https://lao.ca.gov/Publications/Report/4227>. In response to the pandemic, California’s governor issued an executive order on March 27, 2020, suspending any state law that restricted the ability of the state’s Judicial Council or chief justice to “authorize, issue, or amend emergency orders or emergency Rules of Court . . . .” *Id.* The chief justice utilized this authority and issued various emergency orders including one specifying that Local Rules of Court adopted by trial courts in response to the pandemic would become effective immediately. *Id.* The 58 California trial courts, one in each county, have in turn implemented their own orders such that court operations vary from county to county. *See Cheryl Miller, How COVID-19 Is Impacting California Courts: Roundup of Services*, LAW.COM (Sept. 11, 2020), <https://www.law.com/therecorder/2020/07/13/how-covid-19-is-impacting-california-courts-roundup-of-services/>.

61. *See Joseph Raczynski, The Current Status of the Virtual Courts*, THOMSON REUTERS (July 22, 2020), <https://www.legalexecutiveinstitute.com/virtual-courts/> (comparing the ease of moving to virtual proceedings in Texas versus the restrictive rules for criminal cases in Maryland).

62. *State Court Judges Embrace Virtual Hearings as Part of the “New Normal,”* NCSC (Apr. 1, 2020), <https://www.ncsc.org/newsroom/public-health-emergency/newsletters/videoconferencing>.

more than 100,000 hours of hearings remotely. . . .<sup>63</sup> In Maryland, on the other hand, the state's procedural rules had to be amended to authorize circuit and district courts to conduct remote electronic proceedings and to grant authority to presiding judges of the district court to permit remote electronic participation in a judicial proceeding.<sup>64</sup>

As of April 10, 2020, NCSC reported that 34 states, the District of Columbia, and Puerto Rico were either mandating or urging their courts to conduct virtual hearings.<sup>65</sup> As of the writing of this Article, that number has grown in that virtual hearings were mandated or urged via statewide order in 38 states plus the District of Columbia and Puerto Rico.<sup>66</sup>

Additionally, states have gone beyond virtually conducting simple hearings to conducting actual jury trials via virtual platforms. In May 2020, jury selection was held via Zoom in Collin County District Court in Texas for a one-day, summary jury trial, which would deliver a nonbinding verdict.<sup>67</sup> In August 2020, Florida held what is believed to be the first fully remote jury trial with a legally binding verdict.<sup>68</sup>

In the myriad courthouses that remain open, various safety measures have been implemented for the safety of their patrons. According to the NCSC, as of the writing of this Article, 27 states across the country require masks to be worn for individuals to enter courthouses.<sup>69</sup> Additionally, the NCSC reports that 12 states require, provide, or suggest the use of gloves by court personnel or visitors while at court;<sup>70</sup> seven states provide courthouse visitors and staff with hand sanitizer;<sup>71</sup> and courts in 12 states

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63. Angie Jackson, *Here's How to Watch Michigan Court Hearings Online During Coronavirus Shutdown*, DETROIT FREE PRESS (May 18, 2020, 10:48 AM), <https://www.freep.com/story/news/local/michigan/2020/05/18/how-watch-michigan-court-hearings-online-covid-19-shutdown/5212027002/>.

64. MD. RULE CIV. P. 2-802, 2-803, 3-513.1 (effective July 1, 2020).

65. *State Courts Getting Creative During the Coronavirus Pandemic*, NCSC (Apr. 10, 2020), <https://www.ncsc.org/newsroom/public-health-emergency/newsletters/courts-get-creative>.

66. *Coronavirus and the Courts, Virtual Hearings*, NCSC, <https://www.ncsc.org/newsroom/public-health-emergency> (last visited Jan. 7, 2021).

67. Nate Raymond, *Texas Tries a Pandemic First: A Jury Trial by Zoom*, REUTERS (May 18, 2020, 7:19 AM), <https://www.reuters.com/article/us-health-coronavirus-courts-texas/texas-tries-a-pandemic-first-a-jury-trial-by-zoom-idUSKBN22U1FE>.

68. Aila Slisco, *America's First Jury Trial via Zoom Begins, Complete with Virtual Jurors*, NEWSWEEK (Aug. 10, 2020, 10:20 PM), <https://www.newsweek.com/americas-first-jury-trial-via-zoom-begins-complete-virtual-jurors-1524154#:~:text=The%20first%20Dever%20U.S.%20jury,to%20The%20Florida%20Times%20Union>.

69. *Coronavirus and the Courts, Statewide Court Entrance Requirements*, NCSC, <https://www.ncsc.org/newsroom/public-health-emergency> (last visited Jan. 7, 2021).

70. *Id.*

71. *Id.*

may take the temperatures of courthouse employees or visitors.<sup>72</sup> One poll found that “[a]bout two-thirds of respondents said they think courts should require people to wear masks in courthouses, and at least 70 percent said they would be more comfortable in a courthouse if courts enforced social distancing, checked temperatures at the door, required court employees and visitors to wear masks and tested for Covid-19. . . .”<sup>73</sup> Even when there are safety measures implemented to protect those stepping within courthouse doors, however, as with anywhere in our tumultuous world, ensuring that people follow those procedures is another matter.<sup>74</sup>

## V. Conclusion

Remote technology has been a vital tool for courts in the midst of a public health crisis. This use of remote technology—and its possible expansion—also raises critical questions about how litigants’ rights and their access to justice may be impacted, either positively or negatively, and what courts and other stakeholders can do to mitigate any harms. After the challenges the judiciaries across this country have faced in light of this pandemic to meet the needs of the public virtually in one way or another, there is no doubt that these technological advancements will stay with us in some way as we figure out life after COVID-19.

A national poll conducted for the NCSC indicates the public is more comfortable with the idea of appearing in courtrooms remotely than they were six years ago.<sup>75</sup> The poll found that two out of three people are amenable to attending remote proceedings, where previously that fraction was two out of five.<sup>76</sup> When asked whether they would be more comfortable serving on juries in person or remotely, “44% said remotely, 32% expressed no preference, and 23% said in person.”<sup>77</sup> Notably, the NCSC recognized that the poll exhibits a disturbing trend in that women were the most reluctant virtual jurors, specifically young Black and

72. *Id.*

73. *National Poll: Public Warming to Idea of Remote Court Appearances*, NCSC (June 24, 2020), <https://www.ncsc.org/newsroom/at-the-center/2020/national-poll-public-warming-to-idea-of-remote-court-appearances> [hereinafter *NCSC Poll*].

74. Maura Doyle, *Inside California Courts, Lawyers Fume That Mask Wearing Is Mixed During Pandemic*, L.A. TIMES (July 11, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-07-11/courts-masks-coronavirus-public-defenders>.

75. *NCSC Poll*, *supra* note 73; *see also supra* note 49 and accompanying text.

76. *NCSC Poll*, *supra* note 73. “[T]he poll, called State of the State Courts in a (Post) Pandemic World, largely focuse[d] on the public’s feelings about serving on juries and being in courthouses.” *Id.*

77. *Id.*

Hispanic women and older white women.<sup>78</sup> The most enthusiastic potential virtual jurors were “younger white males, especially blue-collar workers who identify as politically conservative.”<sup>79</sup> While the poll results may also be indicative of the public’s displeasure at the idea of being required to congregate in courthouses during the pandemic, they may be an indication that virtual court proceedings are likely to stay in one way or another.<sup>80</sup>

As practitioners, we are confident we can and should move forward with virtual proceedings because we are much more than judges, lawyers, clerks, and court staff on the family bar. We are counselors. We are comforters. When necessary, we are fighters to make sure we protect the lives of others. While we go home weighed down only by our memories of the day, others must go forward with the consequences, good or bad. We owe it to those we serve to not just do the work but to be actively working towards the best process for the most people.

Despite the concerns discussed in this Article, technology in some ways makes our deliberately arcane world more open and more friendly to others who are less accustomed to it. Although individuals who bring their matters before family court are (hopefully) just passing through, their comfort level with telling their stories is of paramount importance to the factfinders. Recognizing these competing concerns of efficiency, fairness, and basic decency, where do we go from here? Perhaps we are in need of uniformity in how we move courts to virtual platforms across the country.

In the end, the most we can say is that the best way forward is, not surprisingly, a careful balance. But this balancing act will require everyone practicing our craft—judges, clerks, court reporters, marshals and, yes, lawyers—to take a willing and active role in maintaining it. Ours is an adversarial system, but for that system to work, adversaries need to meet on equal footing, where the courtroom—physical or virtual—is no barrier to fair and equal participation. If we move together by integrating the lessons of this pandemic into our next normal, we as the family bench and bar must ensure those values remain protected.

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78. *Id.*

79. *Id.*

80. *Cf.* Allie Reed & Madison Alder, *Zoom Courts Will Stick Around as Virus Forces Seismic Change*, BLOOMBERG L. (July 30, 2020), <https://news.bloomberglaw.com/us-law-week/zoom-courts-will-stick-around-as-virus-forces-seismic-change>.