BOARD OF JUDICIAL POLICY AND ADMINISTRATION

TEAMS Meeting
December 13, 2021
9:00 A.M. – NOON

MINUTES

BJPA Members: Chief Justice Kate Fox (Chair), Justice Lynne Boomgaarden, Justice Kari Gray, Judge Catherine Wilking, Judge Catherine Rogers, Judge Thomas Rumpke, Judge Wes Roberts, Judge Wendy Bartlett, Judge Matt Castano

Others Present: Judge Rick Lavery, Judge Brian Christensen, Elisa Butler

Agenda Items:	**Description:**
Roll Call Elisa Butler	All members were present.
Introduction Chief Justice Fox	Chief Justice Fox opened the meeting and indicated that the newsletter provided to was intended to update Board members on the work of Court Administration without taking up time during the meetings. If any member requests further discussion on a newsletter topic, it will be placed on the agenda. Chief Justice Fox explained that the new process is fluid, and adjustments can be made moving forward if necessary.
Future of BJPA Chief Justice Fox	Chief Justice Fox opened the discussion surrounding the potential need to redesign the Wyoming Judiciary. She indicated that the job of "Judge" is becoming less attractive and more difficult, leading to fewer judicial candidates. The question for the BJPA is whether the Board is ready to take a hard look at how the Judiciary works, and whether the Judicial Branch as a whole has the energy to take on a project of this magnitude. The Board members all agreed the project is worthwhile and necessary. The Board discussed issues affecting the Judiciary and different approaches to addressing those issues. The BJPA members agreed that the BJPA is not the appropriate body to take on the work required. Chief Justice Fox indicated that Judge John Perry (retired) expressed interest in helping with the project. The Board members agreed that a task force with Judge Perry leading was a good approach. The BJPA also discussed the possibility of enlisting a facilitator to assist with the discussion and keeping the task force on track. The Board members directed staff to reach out to the National Center for State Courts to assist with the project. Chief Justice Fox moved to create a task force that would report back to the BJPA; each conference would select two to three delegates to serve on the task force by the end of January; Chief Justice Fox will reach out to Judge Perry to determine his level of participation; staff will reach out to the National Center for State Courts to determine if there is a facilitator available to assist; and the task force will meet as soon as possible, and report back to the BJPA at the March meeting. Justice

	Boomgaarden seconded the motion. All voted in favor with none voting against. The motion passed.
COVID Operations Chief Justice Fox	The BJPA considered the future of court operations in light of the COVID-19 pandemic. The Board members discussed the fact that COVID does not seem to be going away, and the discussion may need to be directed toward maintaining court operations with the presence of COVID, not looking forward to a post-COVID world. The BJPA considered whether the topic should be made part of the broader discussion of redesigning of the Judiciary, or whether it should be made a discrete topic. The Board members determined that there were changes that should be discussed more immediately, and there may be long-term changes that could be addressed by the task force. The Board determined that the Permanent Rules Advisory Committees should examine each of their rules to determine if changes need to be made to accommodate the process of the Judiciary in light of the continuing COVID pandemic. The task force can consider the long-term changes that may need to be addressed.
Court Interpreter Policy Elisa Butler	Elisa Butler provided some history and background on the court interpreter program and walked through the changes in the Court Interpreter Policy. Judge Roberts suggested that a separate policy be developed to address individuals with hearing and speech impairments who need assistance to participate in court proceedings. The BJPA discussed the need for Judges to have the discretion to appoint interpreters in any case where they believe it is warranted. The Board determined that the indigency requirement should be removed from the Policy. The Board members discussed additional minor changes that will be implemented in the final version of the Policy. Judge Roberts moved to adopt the revised Court Interpreter Policy, as modified. Judge Rogers seconded the motion. All voted in favor with none voting against. The motion passed.
Permanent Rules Advisory Committee – Civil Rules Division Elisa Butler	Three changes have been proposed by the Civil Rules Division of the Permanent Rules Advisory Committee. - Rule 3 amendment to limit the time within which to file a complaint when the savings statute is in play. - Rule 16 amendment requires the courts to explore the possibility of removing the case to chancery court in a pretrial conference with the parties. - Rule 40.1 amendment is intended to address a concern raised by the WTLA to ensure that litigants have the opportunity to peremptorily disqualify a judge after there has been a reassignment. Judge Roberts moved to recommend adoption of the amendments to the Wyoming Supreme Court. Judge Castano seconded the motion. All voted in favor with none voting against. The motion passed.
Adjournment	Judge Rumpke moved to adjourn. Judge Castano seconded the motion. All voted in favor with none voting against. The motion passed and the meeting was adjourned at 10:36 a.m.

In response to BJPA requests, standard administration reports will be made via newsletter and made in person at the BJPA meeting only upon request.

BJPA action items are designated in green text.

Appendix 1: Topics BJPA Future
Appendix 2: NY – Report and Recommendations of the Future Trials Working Group
Appendix 3: NY – Presentation of Evidence
Appendix 4: MN – Other Side Workgroup Report to Judicial Council
Appendix 5: PEW – How courts embraced technology, met the pandemic challenge, and revolutionized their operations
Appendix 6: Clean Proposed Court Interpreter Policy
Appendix 7: Redline Proposed Court Interpreter Policy
Appendix 8: WRCP 3 Proposal
Appendix 9: WRCP 16 Proposal
Appendix 10: WRCP 40.1 Proposal

Appendix 1

BJPA Proposal for discussion
Chief Justice Fox, Judge Lavery, Judge Christensen
Dec. 13, 2021

I. How do you make the judge job better?

The unrelenting grind of judicial work, increase in uncivil practice, increase in pro se litigants, and shortage of resources, is making it more and more difficult for judges across Wyoming to continue to produce sound and timely resolution of the citizen's disputes. And it is making the job less attractive to the top-notch and experienced lawyers that historically apply to the bench. We need to change that, for the good of the judges, of the judicial system, and of the people of Wyoming.

Toward that end, the BJPA should examine:

A. Adequate resources
B. Caseload
C. Work type
D. Pay
E. Staff pay
F. Shorter work weeks
G. Increasing the role of magistrates and commissioners
H. Specialized courts (i.e family)
I. Courthouse security/safety of judges & staff
J. External relations – Bar, legislature, public
K. Internal relations – branch or conference retreats
L. Judicial independence
M. Self-represented litigants
N. Search warrants
O. Mental health treatment
P. Staff management/ administrative burdens
Q. Identifying and obtaining necessary data

II. What is the best mechanism for this project?

Although the BJPA should be the ultimate decision-maker, we probably need a subcommittee/taskforce/working group that can meet more frequently, do research, and report back. How should that look?

Possible participants, in addition to judges:

Clerks of court

DFS

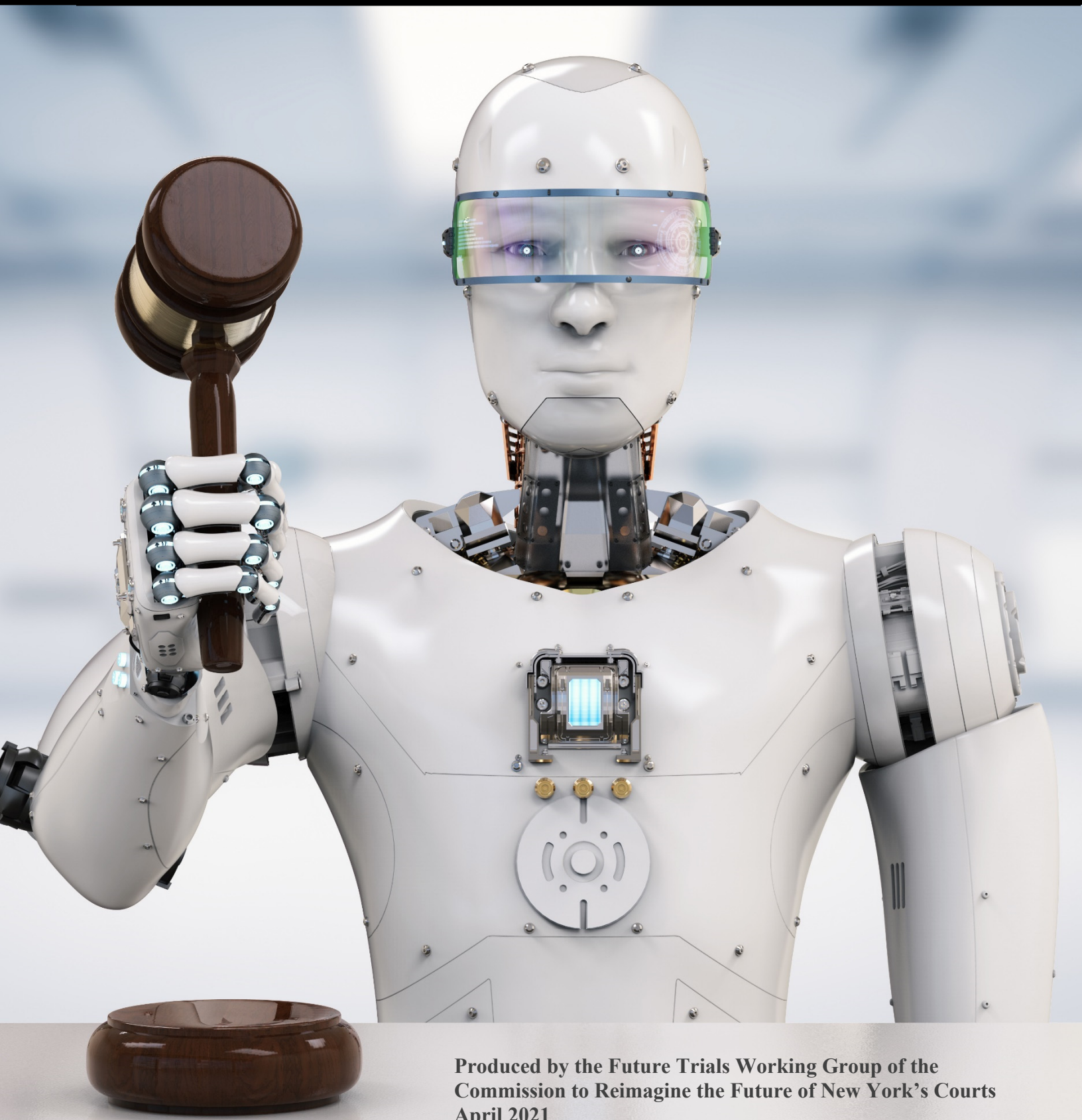
Corrections

Legislators

Lawyers

Appendix 2

Report and Recommendations of the Future Trials Working Group



Produced by the Future Trials Working Group of the Commission to Reimagine the Future of New York's Courts
April 2021

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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.[1]

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").[2] 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.[3]

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.'"[4] 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.[5]

2. Efficiency

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.[6] Although this initiative led to major improvements in its first few years,[7] 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.[8] 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.[9] Meanwhile, the backlog in New York City's housing courts reportedly numbers in the hundreds of thousands of cases.[10]

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.[11]

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."[12]

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.'"[13] 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.[14]

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.[15] 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%).[16]

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.[17]

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.[18] 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.[19]

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.[20]

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."[21] 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.[22] A number of state courts also have created so-called "technology-enhanced" courtrooms, albeit often in limited number/scale.[23] 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.[24] 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.[25]

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.

Create Training Programs for Court Staff: 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.[26] 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.[27]

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.[28]

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.[29] 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).[30] Automated translation can enhance access to justice to marginalized communities by expanding the number, quality, and expertise of available translators.[31]

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.

Create Pilot Programs: 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.[32] 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.[33] 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.[34] 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,[35] 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:

Creation of a Pandemic Pilot Program for Trial-Level Streaming: 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.[36]

- 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.[37]

- 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.[38]

- Social media evidence, which can be used to demonstrate a person's location, appearance, or even mood at a particular time.[39]

- 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.[40]

- Genetics evidence, which might be used in personal injury and toxic tort cases to disprove causation.[41]

- "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.[43] Requests for metadata or blockchain data (used to determine who made edits to documents, and when) will likely become routine.[44] 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.[45] 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.[46] Judges 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.[47] 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."[48] 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.[49] 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."[50] 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.[51]

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."[52] 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.[53]

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.[54]

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.[55] 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.

Create Pilot Programs: 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 binge-watch 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."[57] 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.[58]

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).'"[59] 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…."[60]

From an efficiency standpoint, the benefits of "robot" judges are self-evident.[61] 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.[63] 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).[64]

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.[65] 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."[66] 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.[67] 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[68]—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."[69] 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."[70]

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…."[71] 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."[72] 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.[73]

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.[74]

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.[75] 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."[76]

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.[77]

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.[78] 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.[79]

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.[80]

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.[81] 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."

- Either "[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.[84]

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."[85] 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.[87]

3. Precedent Addressing Constitutional Issues Posed by Remote Trials/Testimony

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.[88] 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.[89]

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."[91]

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.[92]

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."[93] 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."[94]

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…."[95] However, "American criminal procedure … is pragmatic."[96] "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."[97] 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."[98]

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.[99]

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."[100]

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."[101] The New York Court of Appeals has followed this trend.[102] 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.[104] 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.[105]

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.[107]

How these issues will play out in the wake of the pandemic remains to be seen.[108] 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.[110] 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."[111] 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."[112]

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.[113]

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."[114]

Recommendations and Next Steps:

Create Mandatory Training Programs for Judges Regarding Technological Issues: 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."[115] 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.[116] 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):

Seek Partnerships with Private Vendors/Internet Service Providers: 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.

Create Training Programs for Court Staff: 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.

Create Pilot Programs: 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)

Creation of a Pandemic Pilot Program for Trial-Level Streaming: 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.

Create Pilot Programs: 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.

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.

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.

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[1] 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.

[2] 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.

[3] *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).

[4] *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), https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2017/access-to-justice-mitigating-justice-gap/).

[5] *See, e.g.*, *id.* at 4.

[6] *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.

[7] Dan M. Clark, *NY Sees Progress on Court Backlog as 'Excellence Initiative' Enters Fourth Year*, LAW.COM (Mar. 11, 2019 at 5:30 PM), https://www.law.com/newyorklawjournal/2019/03/11/ny-sees-progress-on-court-backlog-as-excellence-initiative-enters-fourth-year/.

[8] 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.

[9] *Id.*

[10] Online Courts Report, *supra* n.3, at 5.

[11] *See, e.g.*, Jeffrey Q. Smith *et al.*, *Going, Going, But Not Quite Gone*, JUDICATURE, Vol. 101, No. 4 at 32-34 (Winter 2017), https://www.phillipsnizer.com/siteFiles/24092/Article-Judicature-GoingGoingGone-JQSmith-Winter2017.pdf; New York State Unified Court System, 2019 Annual Report, https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf; Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES, Section A, pg. 1 (Aug. 8, 2016), https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html; *Interactive Caseload Data Displays*, COURT STATISTICS PROJECT, http://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays.

[12] *See* Hon. Herbert B. Dixon, Jr., *et al.*, *Technology, the Courts, and Nostradamus: Predictions for the Future*, 25 EXPERIENCE 8, 13 (2015) ("*Nostradamus*").

[13] 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.

[14] *Id.*

[15] 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.

[16] 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), https://www.ncsc.org/__data/assets/pdf_file/0006/41001/NCSC-Juries-Post-Pandemic-World-Survey-Analysis.pdf).

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

[18] 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.

[19] Jessica Moyeda, *Courtroom Technology*, CORNELL LAW SCHOOL GRADUATE PAPERS, Paper 30, at 1-3 (2014), http://scholarship.law.cornell.edu/lps_papers/30.

[20] *See, e.g.*, Hon. Herbert B. Dixon, Jr., *The Basics of a Technology-Enhanced Courtroom*, 56 JUDGES J. 36 (2017), https://www.americanbar.org/groups/judicial/publications/judges_journal/2017/fall/basics-technologyenhanced-courtroom/; Hon. Herbert B. Dixon, Jr., *The Evolution of a High-Technology Courtroom*, FUTURE TRENDS IN STATE COURTS (2011), https://ncsc.contentdm.oclc.org/digital/collection/tech/id/769/; Fredric I. Lederer, *Judging in the Age of Technology*, 53 JUDGES J. 6, 7-8 (2014), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1319&context=popular_media; Michael E. Heintz, *The Digital Divide and Courtroom Technology: Can David Keep Up With Goliath?*, 54 FED. COMMC'NS L.J. 567, 570 (2002), https://www.repository.law.indiana.edu/fclj/vol54/iss3/8.

[21] Fedric I. Lederer, *Courtroom Technology: A Status Report*, ELECTRONIC JUDICIAL RESOURCE MANAGEMENT 179, 180 (Kamlesh N. Agarwala & Marli D. Tiwari eds., 2005).

[22] 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)).

[23] *See, e.g.*, The Judicial Branch of Arizona, Maricopa County, *E-Courtrooms*, https://superiorcourt.maricopa.gov/e-courtrooms/.

[24] *Courtroom 2000*, NYCOURTS, http://ww2.nycourts.gov/courts/1jd/supctmanh/courtroom_2000.shtml; *Courtroom 2000 Trial Showcases Technology*, TRIAL TOOLS (July 1998), https://nys-fjc.ca2.uscourts.gov/programs/10-23-19%20-%20Courtroom%202000%20-%20Article.pdf.

[25] Press Release, *High-Tech Courtroom Opens in Westchester County Supreme Court*, UCS (Dec. 13, 2017), http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/PR17_19.pdf.

[26] *What is Realtime?*, NCRA, https://www.ncra.org/home/professionals_resources/professional-advantage/Captioning/realtime.

[27] *See, e.g.*, Marissa Perino, *How to Use Voicemail Transcription on Your iPhone, So You Can Read Your Voicemail Instead of Listening to Them*, BUSINESS INSIDER (Jan. 14, 2020), https://www.businessinsider.com/how-to-turn-on-voicemail-transcription-on-iphone.

[28] *See* Joseph Darius Jaafari, *In Court, Where Are Siri and Alexa?*, THE MARSHALL PROJECT (Feb. 14, 2019), https://www.themarshallproject.org/2019/02/14/in-court-where-are-siri-and-alexa; Roxanne Khamsi, *Say What? A Non-Scientific Comparison of Automated Transcription Services*, THE OPEN NOTEBOOK (Dec. 17, 2019), https://www.theopennotebook.com/2019/12/17/say-what-a-non-scientific-comparison-of-automated-transcription-services/.

[29] *Language Access and Court Interpreters*, NYCOURTS, http://ww2.nycourts.gov/COURTINTERPRETER/index.shtml.

[30] *Id.*

[31] *See* Lederer, *supra* n.20, 53 JUDGES J. at 7.

[32] *See* Court of Appeals, https://www.nycourts.gov/ctappS/live.html; Appellate Division, First Department, http://www.courts.state.ny.us/courts/ad1/; Appellate Division, Second Department, http://wowza.nycourts.gov/ad2/ad2.php; Appellate Division, Third Department, http://wowza.nycourts.gov/ad3/ad3.php; Appellate Division, Fourth Department, https://ad4.nycourts.gov/go/live/.

[33] Mia Armstrong, *Justice, Livestreamed*, SLATE (Aug. 14, 2020 at 12:09 PM), https://slate.com/technology/2020/08/zoom-courts-livestream-youtube.html; *Texas Court Live Streams*, TXCOURTS, http://streams.txcourts.gov/; *see also Trial Court Remote Video Hearings*, INDIANA COURTS, https://public.courts.in.gov/INCS#/; *Ohio Virtual Courtroom Directory*, SUPREME COURT OF OHIO, http://supremecourtofohio.gov/virtualcourtstreamingdirectory/#/streams.

[34] Armstrong, *supra* n.33.

[35] *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.").

[36] Gary E. Marchant, *Emerging Technologies and the Courts*, 55 COURT REVIEW 146, 148-49 (2019); *Nostradamus*, *supra* n.12, 25 EXPERIENCE at 12.

[37] 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), https://jolt.richmond.edu/2014/06/23/cyborgs-in-the-courtroom-the-use-of-google-glass-recordings-in-litigation/.

[38] Marchant, *supra* n.36, at 147.

[39] *Id.*

[40] *Id.* at 148.

[41] *Id.*

[42] *Id.*

[43] *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), https://scholarship.law.wm.edu/facpubs/1249/; *see also* Lederer, *supra* n.20, 53 JUDGES J. at 8-9.

[44] *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).

[45] *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, https://www.cnn.com/interactive/2019/01/business/pentagons-race-against-deepfakes/; James Vincent, *I Learned to Make a Lip-Syncing Deepfake in Just a Few Hours (and You Can, Too)*, THE VERGE (Sept. 9, 2020), https://www.theverge.com/21428653/lip-sync-ai-deepfake-wav2lip-code-how-to.

[46] William Joel, *How to Hide Faces and Scrub Metadata When You Photograph a Protest*, THE VERGE (June 5, 2020 at 5:15 PM EDT), https://www.theverge.com/21281897/how-to-hide-faces-scrub-metadata-photograph-video-protest; William Worrall, *How to Remove Personal Information From an Image's Metadata*, HACKED (June 22, 2020), https://hacked.com/how-to-remove-personal-information-from-an-image-metadata/; Jeff John Roberts, *Why*

Accenture's Plan to 'Edit' the Blockchain Is a Big Deal, FORTUNE (Sept. 20, 2016 at 2:04 PM EDT), https://fortune.com/2016/09/20/accenture-blockchain/https://fortune.com/2016/09/20/accenture-blockchain/.

[47] *See* Marchant, *supra* n.36, 55 COURT REVIEW at 149-50.

[48] *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/.

[49] *See, e.g.*, Caitlin O. Young, *Employing Virtual Reality Technology at Trial: New Issues Posed by Rapid Technological Advances and Their Effects on Jurors' Search for the Truth*, 93 TEX. L. REV. 257, 257 (2014).

[50] Arash Homampour, *VR in the Courtroom*, LEGALTECHNEWS, at L11 (Feb. 2018).

[51] *See* Marchant, *supra* n.36, 55 COURT REVIEW at 151.

[52] *See* Young, *supra* n.49, 93 TEX. L. REV. at 259-60.

[53] *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), https://southerncalifornialawreview.com/2019/01/02/from-presentation-to-presence-immersive-virtual-environments-and-unfair-prejudice-in-the-courtroom-note-by-khirin-bunker/; Ron Vaughn, *Is Virtual Reality the Future of Courtroom?*, THE OKLA. BAR J., TECHNOLOGY (May 2019), https://www.okbar.org/barjournal/may2019/obj9005vaughn/#:~:text=%E2%80%9CVirtual%20reality%20can%20do%20more,in%20the%20opposing%20team's%20arguments; *The Next Frontier for Virtual Reality: Courtrooms*, BLOOMBERG LAW (Nov. 18, 2017 7:39PM), https://news.bloomberglaw.com/business-and-practice/the-next-frontier-for-virtual-reality-courtrooms/.

[55] *See* Marchant, *supra* n.36, 55 COURT REVIEW at 151.

[56] *Artificial Intelligence (AI)*, IBM, https://www.ibm.com/cloud/learn/what-is-artificial-intelligence.

[57] *Id.*; Darrell M. West, *What is Artificial Intelligence?*, BROOKINGS (Oct. 4, 2018), https://www.brookings.edu/research/what-is-artificial-intelligence/.

[58] *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), https://ctlj.colorado.edu/wp-content/uploads/2020/08/2-Campbell_06.25.20.pdf.

[59] Marchant, *supra* n.36, 55 COURT REVIEW at 152.

[60] *Id.*

[61] *See* Eugene Volokh, *Chief Justice Robots*, 68 DUKE L.J. 1135, 1142-50 (March 2019), https://dlj.law.duke.edu/article/chief-justice-robots-volokh-vol68-iss6/.

[62] *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.

[64] *See* Quentin Brogdon, *Mandatory Online Jury Trials: An Idea Whose Time Has Not Come*, TEXAS LAWYER (Aug. 30, 2020), https://www.law.com/texaslawyer/2020/08/30/mandatory-online-jury-trials-an-idea-whose-time-has-not-come/; *Nostradamus*, *supra* n.12, 25 EXPERIENCE at 10-11.

[65] Andrew M. Cuomo, *State of the State* (2021), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/SOTS2021Book_Final.pdf.

[66] *Id.*

[67] Chief Defendants Association of New York, *Memorandum in Opposition to Permanent Virtual Arraignments*.

[68] 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, https://www.nolo.com/legal-encyclopedia/how-every-states-legal-system-is-responding-to-covid-19.html (last updated Feb. 5, 2021); *Court Operations During COVID-19: 50-State Resources*, JUSTIA, https://www.justia.com/covid-19/50-state-covid-19-resources/court-operations-during-covid-19-50-state-resources/; *Courts' Responses to the Covid-19 Crisis*, THE BRENNAN CENTER, https://www.brennancenter.org/our-work/research-reports/courts-responses-covid-19-crisis (last updated Sept. 10, 2020).

[69] 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), 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/.

[70] *Id.*

[71] *Id.*

[72] *Id.*

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

[74] *Id.*

[75] *See* Remote Civil Jury Trial Pilot Project Fourth Judicial Circuit, *A Report to Chief Justice Charles T. Canady Florida Supreme Court* (Oct. 2, 2020), https://www.jud4.org/Top-Navigation/Court-Administration/Fourth-Judicial-Circuit-Remote-Civil-Jury-Trial

[76] *Id.* at xviii.

[77] *See* Eleventh Judicial Circuit of Florida, Miami, *Remote Civil Jury Trial Pilot Program Report*, at 18-19, https://www.jud11.flcourts.org/coronavirus/ArtMID/2392/ArticleID/3522/Final-Report-on-the-Eleventh-Circuit-Remote-Civil-Jury-Trial-Pilot-Now-Available.

[78] Jim Ash, *Remote Hearings for Civil Cases May Be The Norm Going Forward*, THE FLORIDA BAR (Oct. 21, 2020), https://www.floridabar.org/the-florida-bar-news/remote-hearings-for-civil-cases-may-be-the-norm-going-forward/

[79] Jim Ash, *COVID-19 Pandemic Recovery Task Force Studies Remote Proceedings*, THE FLORIDA BAR (Nov. 19, 2020), https://www.floridabar.org/the-florida-bar-news/covid-19-pandemic-recovery-task-force-studies-remote-proceedings/.

[80] *Id.*

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

[82] *See id.* at 16-17, 22-29, 39-40.

[83] *See* Juliette Fairley, *Appellate Court Denies Honeywell's Appeal to Stay Asbestos Trial by Zoom: Opening Arguments Monday*, SOUTHERN CALIFORNIA RECORD (July 27, 2020), https://socalrecord.com/stories/543842157-appellate-court-denies-honeywell-s-appeal-to-stay-asbestos-trial-by-zoom-opening-arguments-monday.

[84] 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, https://images.law.com/contrib/content/uploads/documents/292/70974/Asbestos-trial-folo-up-mtn-for-mistrial.pdf.

[86] *Id.* at 3-4.

[87] Amanda Bronstad, *Jury in Second Virtual Asbestos Trial Awards $2.5 Million*, LAW.COM (Sept. 28, 2020), https://www.law.com/therecorder/2020/09/28/jury-in-second-virtual-asbestos-trial-awards-2-5m/; Daniel Siegal, *Calif. Jurors' Zoom Chat Not Grounds For Mistrial, Judge Says*, LAW360 (Aug. 19, 2020), https://www.law360.com/articles/1302843/calif-jurors-zoom-chat-not-grounds-for-mistrial-judge-says.

[88] *See* Meredith Dearborn, *Civil Jury Trials in a Pandemic*, THOMSON REUTERS PRACTICAL LAW (Dec. 2020/Jan. 2021), https://www.paulweiss.com/media/3980655/lit_dec20jan21_spotlighton.pdf.

[89] *Thornton v. Snyder*, 428 F.3d 690, 697 (7th Cir. 2005) (internal quotation marks, ellipses, and citations omitted).

[90] *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).

[92] N.Y. CONST. Art. I, § 6.

[93] *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

[94] *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).

[97] *Craig*, 497 U.S. at 847 (internal citations and quotations omitted, emphasis in original).

[98] *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).

[101] *Id.*

[102] *See generally People v. Wrotten*, 14 N.Y.3d 33 (2009).

[103] *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).

[104] *Sweidan*, 461 P.3d at 387-88; *see also United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).

[105] *United States v. Bordeaux*, 400 F.3d 548, 554-55 (8th Cir. 2005).

[106] *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999); *see also United States v. Trimarco*, No. 17-CR-583 (JMA), 2020 U.S. Dist. LEXIS 159180, at *18-19 (E.D.N.Y. Sep. 1, 2020); *United States v. Donziger*, No. 19-CR-561 (LAP), 2020 U.S. Dist. LEXIS 157797, at *4-5 (S.D.N.Y. Aug. 31, 2020).

[107] *Order of the Supreme Court*, 207 F.R.D. 89, 94 (2002).

[108] Notably, members of this Working Group have expressed concern that the availability of remote testimony will be expanded in the future beyond cases involving sensitive witnesses or subjects (*e.g.*, children or sexual offenses) and the other limited circumstances in which remote testimony has traditionally been permitted. Under this view, if a person is unavailable to give in-person testimony on a particular date, due to a temporary illness or absence from the jurisdiction, courts should grant adjournments rather than resort to remote testimony. These concerns will need to be balanced against the obvious efficiency and potential cost benefits of remote testimony. For more detailed discussion of New York authority for holding virtual/remote evidentiary hearings, in both criminal and civil cases, *see* Trials Subgroup on Improving and Streamlining the Presentation of Evidence, *Improving and Streamlining the Presentation of Evidence: Court Hearings* (March 2021).

[109] *Sweidan*, 461 P.3d at 390-91.

[110] Hon. Norman St. George, *Virtual Bench Trial Protocols and Procedures* (Feb. 11, 2021), http://www.nycourts.gov/whatsnew/pdf/VirtualBenchTrial-Protocols-2112021.pdf.

[111] *Nostradamus*, *supra* n.12, 25 EXPERIENCE at 11.

[112] *Id.*

[113] Marchant, *supra* n.36, 55 COURT REVIEW at 146.

[114] *Id.* at 153; *see also* John G. Browning, *Should Judges Have a Duty of Tech Competence?*, 10 ST. MARY'S J. LEGAL MAL. & ETHICS 176, 178 (2020) (noting that "[a] judge's role demands tech competence in a wide range of matters from overseeing technology used in courtroom presentations, ruling on discovery and evidentiary issues involving digital sources, to their ethical use of technology like social media"), https://commons.stmarytx.edu/lmej/vol10/iss2/1/.

[115] *Rules of the Chief Judge*, NYCOURTS, http://ww2.nycourts.gov/rules/chiefjudge/01.shtml.

[116] *The New York State Judicial Institute*, NYCOURTS, http://www.nycourts.gov/ip/judicialinstitute/index.shtml.

IMPROVING AND STREAMLINING THE PRESENTATION OF EVIDENCE: COURT HEARINGS

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

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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).[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.[2]

- 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.[3]

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.[4] This proposed rule would be a permanent rule change, and not limited to the duration of the COVID-19 pandemic.[5] 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."[6] 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.[7]
- ✓ Ensure that judges are not using personal devices to conduct court proceedings.[8]
- ✓ Encourage test-runs of participants' audio-visual capabilities with court staff in advance of hearing.[9]

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).[11]
- ✓ 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.[13]
- ✓ Consider using closed-caption features or live transcription to assist those with hearing impairments and those with English comprehension limitations.[14]

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).[16]

- ✓ 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 print-outs, or screenshots should be used.[17]

- ✓ 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.[19]

- ✓ Discourage the transmission of evidence by facsimile.[20]

- ✓ 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.[21]

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,[22] and controlling access for participants (via password or private link) to exclude members of the public where necessary.[23] Courts should also communicate rules for viewers/participants recording virtual proceedings.[24]

- ✓ 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.[25]

- ✓ 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).[27]

- ✓ Consider whether, based on the type of matter, consent of the parties is required or advisable to hold a remote hearing.[28]

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.[29]

- ✓ Ensure that testimony is free from influence, coaching, or coercion (*e.g.*, requiring witnesses to confirm no one else is with them off camera).[30]

- ✓ 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).[31]

- ✓ Consider written direct examinations, where appropriate.[32]

- ✓ Monitor, and consider use of, technology developments that would permit witnesses to be observed throughout the course of a hearing.[33]

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.[34]

- ✓ 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).[35]

- ✓ Allowing the parties and court to access electronically stored evidence prior to, during and after hearing.[36]

- ✓ Recording proceedings for the purpose of creating a reliable transcript (by live reporter or recording for post-hearing transcription).[37]

- ✓ Establish protocol to be followed where an interpreter is required, or translation is needed.[38]

- ✓ 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.[39]

- ✓ 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.[42]

- ✓ 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.[43]

- ✓ Ensure that policies are in place to maintain and permit the confidentiality of electronic evidence, where necessary.[44]

- ✓ Consider special issues arising from incarcerated defendants (*e.g.*, access to counsel and ability to participate meaningfully in proceedings).[45]

III. Special Considerations for In-Person Evidentiary Hearings in Light of COVID-19[46]

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).[49]
- ✓ Consider practical limitations on specific proceedings, including where identification of criminal defendants is contemplated, and implement procedures for witnesses to make appropriate identifications.[50]
- ✓ 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.[51]
- ✓ 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.[52]
- ✓ Ensure that witnesses and lawyers speak clearly and slowly when masked to ensure trier of fact and other participants can hear sufficiently well.[53]
- ✓ Consider accommodations to ensure access for participants with disabilities (e.g. masks for speakers may be problematic for those with hearing loss).[54]
- ✓ 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).[56]

- ✓ Encourage stipulations on facts and evidentiary issues (*e.g.*, foundation objections) to reduce the need for witnesses.[57]

- ✓ Consider written submissions or telephone/video conference to resolve as many evidentiary disputes as possible in advance of hearing.[58]

- ✓ 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.[59]

- ✓ 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.[60]

- ✓ Where paper exhibits are required, use multiple copies of exhibits so that one document is not passed around among numerous participants.[61]

- ✓ 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).[62]

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.[64]
- ✓ 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.[67]
- ✓ 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.[68]

ENDNOTES

[1] See https://www.nycourts.gov/judges/evidence/1-GENERAL/1.07_Court_Control_Over_Presentation_of_Evidence.pdf.

[2] *See* https://cdn.ymaws.com/www.nysda.org/resource/resmgr/covid-19_pdfs/nyc_courts_virtual_prelimina.pdf.

[3] 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).

[4] 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.

[7] *See, e.g.*, Remote Judging Survey: Experiences With Virtual Proceedings, Second Report – February 2021, at 4, 6-7.

[8] *See, e.g.*, Remote Judging Survey, First Report, at 6-8.

[9] Remote Judging Survey: Experiences With Virtual Proceedings, Second Report – February 2021, at 12.

[10] Remote Judging Survey: Experiences With Virtual Proceedings, Second Report – February 2021, at 9.

[11] *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.

[12] *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.

[13] *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).

[14] *See, e.g.*, Remote Judging Survey: Experiences With Virtual Proceedings, Second Report – February 2021, at 11.

[15] *See, e.g.*, JTC Quick Response Bulletin: Managing Evidence for Virtual Hearings, at 5.

[16] *See, e.g.*, JTC Quick Response Bulletin: Managing Evidence for Virtual Hearings, at 2-3.

[17] *See, e.g.*, Remote Judging Survey: Experiences With Virtual Proceedings, Second Report – February 2021, at 19.

[18] *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.

[19] *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.

[20] *See, e.g.*, Remote Judging Survey: Experiences With Virtual Proceedings, Second Report – February 2021, at 19.

[21] *See, e.g.*, Remote Judging Survey: Experiences With Virtual Proceedings, Second Report – February 2021, at 20.

[22] *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

Practice Materials, "Jury Management Considerations," at 4; National Center for State Courts: Checklist for Judges in Virtual Proceedings, at 2.

[23] *See, e.g.*, The California Commission on Access to Justice: Remote Hearings and Access to Justice During COVID-19 and Beyond, at 15.

[24] *See, e.g.*, National Center for State Courts: Checklist for Judges in Virtual Proceedings, at 2.

[25] *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.

[26] *See, e.g.*, JTC Quick Response Bulletin: Managing Evidence for Virtual Hearings, at 3-4.

[27] *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.

[28] *See, e.g.*, Remote Hearings and Access to Justice During COVID-19 and Beyond, at 17.

[29] *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.

[30] *See, e.g.*, Florida Domestic Proceedings Best Practices, at 4; Suggested Protocols for Fact Finding Hearings, at 3.

[31] *See, e.g.*, American Bar Association: Tips for Remote Video Hearings and Trials: Technology, Witnesses, Evidence, and Etiquette, at 3-4.

[32] Rule 32-a of the Rules of the Commercial Division of the Supreme Court (permitting direct testimony by affidavit).

[33] *See, e.g.*, Remote Judging Survey: Experiences With Virtual Proceedings, Second Report – February 2021, at 12.

[34] *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.

[35] *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.

[36] *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.

[37] *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.

[38] *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.

[39] *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.

[40] *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.

[41] *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*.

[43] *See, e.g.*, Safeguarding the Right to a Fair Trial During the Coronavirus Pandemic: Remote Criminal Justice Proceedings, at 6-7.

[44] *See, e.g.*, Safeguarding the Right to a Fair Trial During the Coronavirus Pandemic: Remote Criminal Justice Proceedings, at 5.

[45] *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.

[46] 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.

[47] For a discussion of some potentially relevant safety measures, s*ee, 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).

[49] *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.

[50] *See, e.g.*, Washington Association of Prosecuting Attorneys Memorandum, at 8-9.

[51] *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.

[52] *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.

[54] *See, e.g.*, Goals and Checklist for Restarting In-Person Jury Trials and Related Proceedings, at 5.

[55] *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.

[57] *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.

[60] *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.

[61] *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.

[63] *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.

[66] *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.

[67] *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.

OTHER SIDE WORKGROUP REPORT

Recommended Approach to Remote Hearings on the Other Side of the COVID-19 Pandemic

Minnesota Judicial Branch
July 2021 Report to Judicial Council

Table of Contents

Executive Summary

The Other Side Workgroup was appointed by Chief Justice Lorie S. Gildea in March 2020 to assist the Minnesota Judicial Council in leading the Judicial Branch's planning for district court case processing on the "other side" of the COVID-19 pandemic.

In developing its recommendations to Judicial Council on the approach to district court remote hearings post-pandemic, the Other Side Workgroup identified a vision for balancing the Branch's strategic goals of Access to Justice, Effective Administration of Justice, and Public Trust & Accountability:

Given the lessons learned during the pandemic – as informed by significant feedback from judicial officers, staff and court customers – the Minnesota Judicial Branch should utilize remote hearings in certain case types moving forward, where doing so promotes both access to justice and a quality court workplace.

The Other Side Workgroup makes the following recommendations to Judicial Council:

1. The Judicial Council should establish standards for how to approach district court remote hearings to promote consistent access to justice across Minnesota. These standards need to be tailored by case type and hearing type, and there should also be a process for case-by-case exceptions (which is already consistent where existing Court Rules allow for ITV or other types of remote hearings).

2. Judicial District Administrators, Court of Appeals Judicial Administrator, and SCAO Directors Group (JAD) should be consulted on challenges and opportunities as needed related to the implementation of these recommendations before Judicial Council makes a decision.

3. The Judicial Council should direct a comprehensive approach to address implementation issues, which may include assessing, changing or developing practices, protocols, or tools to support these recommendations. As part of this approach, the Judicial Council should request that the Supreme Court direct review of the Court Rules that may be in conflict or prohibit implementation of these recommendations. Judicial Council should also establish an evaluation plan that ties into the existing Performance Measures process in September 2022.

4. Due to significant benefits to public safety and effective administration of justice, in-custody defendants should be presumed to attend hearings remotely, but this should be determined locally in consultation with local jail administration, based on local conditions such as the availability of in-custody courtrooms.
    a. State Court Administration, in collaboration with district court administration, should work with the Department of Corrections to established protocols and best practices for scheduling hearings for individuals in prison to continue remote participation.

5. The Workgroup recommends a strong presumption that contested hearings (hearings where evidence is being presented or testimony is taken on issues in dispute) be held in-person. Case-by-case exceptions, under extenuating circumstances, should be allowed, with extenuating circumstances to be defined by Court Rules.

6. The Workgroup recommends a strong presumption that uncontested hearings (hearings where no evidence is presented or testimony taken on issues in dispute) be held remotely. Case-by-case exceptions, under extenuating circumstances, should be allowed, with extenuating circumstances to be defined by Court Rules.

7. More case and hearing specific recommendations can be found later in the report.

8. Major and Minor Criminal uncontested matters should be presumed to be held remotely. However, any judicial district/county interested in holding these hearings in-person can ask for an exception. Exception requests should include a district/county-wide plan for uncontested criminal matters to be held in-person, or both in-person and remotely. The districts/counties must collaborate with local criminal justice partners in the development of these plans and articulate how the plan supports the priority of reducing the pandemic-related Major Criminal case backlog within the FY22-23 biennium. Plans should be approved by the Judicial Council Executive Committee. A template could be provided by State Court Administration.

9. Treatment Courts should develop and document their plan for hearings to be held in-person, remotely, or hybrid, including whether these approaches change based on the participant's phase in treatment court. Judicial Council should refer the Treatment Court Hybrid Hearing Exception Process Guidelines for Chief Judges, to the Treatment Court Initiative Advisory Committee to further develop these Guidelines.

The framework for the vision and these recommendations derives from the Minnesota Judicial Branch strategic goals, and through the following values and learnings identified by the Other Side Workgroup throughout the pandemic.

ACCESS TO JUSTICE

- Court customers and stakeholders embraced the convenience and efficiency of remote hearings, resulting in higher court attendance in many case types.
- Significant feedback has been provided about the benefits of continuing remote hearings and how remote hearings have seen greater participation of those involved or impacted by court proceedings (e.g. family members of litigants, victims).
- These themes were repeated and consistent from the 2019 Access and Fairness Survey, the internal Pandemic Strategy Survey in summer 2020, attorney and litigant surveys in early 2021, and the 50 internal and external Listening Sessions completed in 2021.
- In some scenarios, remote hearings remove obstacles to participating in court hearings for parties and participants.

EFFECTIVE ADMINISTRATION OF JUSTICE

- Recommendations must be implemented in ways that promote effective administration of justice and a quality court workplace environment. Employees and judges have worked hard, demonstrated dedication to making justice accessible during the pandemic, and acted innovatively and adaptably throughout the pandemic to maintain an open door to justice in Minnesota. Employee Quality Court Workplace Survey results were the highest ever recorded since the survey was first conducted in 2008.
- Employees and judges have remained resilient throughout the pandemic. However, feedback throughout the pandemic - and especially through the Listening Sessions - reinforced that there has been significant personal and professional uncertainty and stress due to changing court practices. It is important to address the issues raised to implement these recommendations. The top issues are identified later in this report.
- Despite the feedback on the difficulty of these changes, employees and judges also reported internal benefits to remote hearings, such as improved judicial and employee coverage across multiple court locations when hearings are being held remotely as a result of not needing to travel.
- Because the focus of the FY22-23 biennium will be reducing the Major Criminal case backlog, it is imperative to provide flexibility for districts to schedule their cases in a way that balances consistency for court customers (statewide presumption of remote uncontested hearings) with the real need to have district discretion in how best to address the pandemic backlog efficiently and effectively.

PUBLIC TRUST & ACCOUNTABILITY

- To maintain public trust in the Branch, responding to feedback is one critical factor.
    - The Workgroup heard strong support across all stakeholder groups – and across all information collection methods - for continuing to conduct at least some portion of court hearings online even after the pandemic.
    - The Workgroup also heard strong support for maintaining in-person proceedings for contested matters and certain case types where the decorum and formality of the in-person court hearing process was essential to preserve the significance and seriousness of court proceedings and the Court itself.
- Accountability to the public also involves seeking to eliminate disparities in the system. This can be done through the use of consistent statewide standards that also provide exceptions for individual cases or court customers, creating a framework to do individual justice in individual cases.
    - The digital divide in access to technology for some court customers, similar to disparities in access to transportation for in-person proceedings, must be addressed to enable access to justice. Innovative ideas such as providing technology access in courthouses and the community is one effective way to address these disparities.

Other Side Workgroup Actions & Lessons Learned

This report provides a summary of the key actions recommended by the Other Side Workgroup during the COVID-19 pandemic. The report is divided into four phases of the pandemic. Each section below describes:

- The Other Side Workgroup's response or recommendations
- A summary of feedback gathering from stakeholders during the phase
- A summary of the case backlog and other data summarizing the phase
- Identification of strategies or tactical improvements made during this phase
- Conclusion of what the Other Side Workgroup learned in the phase

I. Initial COVID-19 Outbreak: Putting Strategies into Place (March – May 2020)

The Other Side Workgroup was appointed by Chief Justice Lorie Gildea in March 2020 to assist the Judicial Council in leading the Branch's planning for district court case processing on the "other side" of the COVID-19 pandemic. The Workgroup's charge was to recommend broad strategies to the Judicial Council and provide recommendations on statewide pandemic-related policies and procedures. The Workgroup was intended to be nimble and to think "big picture," promoting strategies and practices based on remote technology advancements, judicial officer specialization and collaboration across district lines, and new ways of completing court work to ensure continued access to justice and the reduction of case backlogs during the COVID-19 pandemic.

The Workgroup determined to work within the following assumptions:

- The recovery transition will be fluid, and the Judicial Branch will need flexibility to ramp work up and down
- Statewide solutions must be considered
- Local approaches/plans/support are needed to address local-specific issues
- The Judicial Branch must leverage the lessons learned during the pandemic
- Use of Chief Justice Orders may be necessary
- Outreach to justice partners will be necessary

The Workgroup identified short-term strategies for each line of business in district courts, which evolved throughout the pandemic. Statewide meetings were held with partners by each case type to discuss the strategies. These were approved by Judicial Council in April 2020 and included the following lines of business:

- Criminal

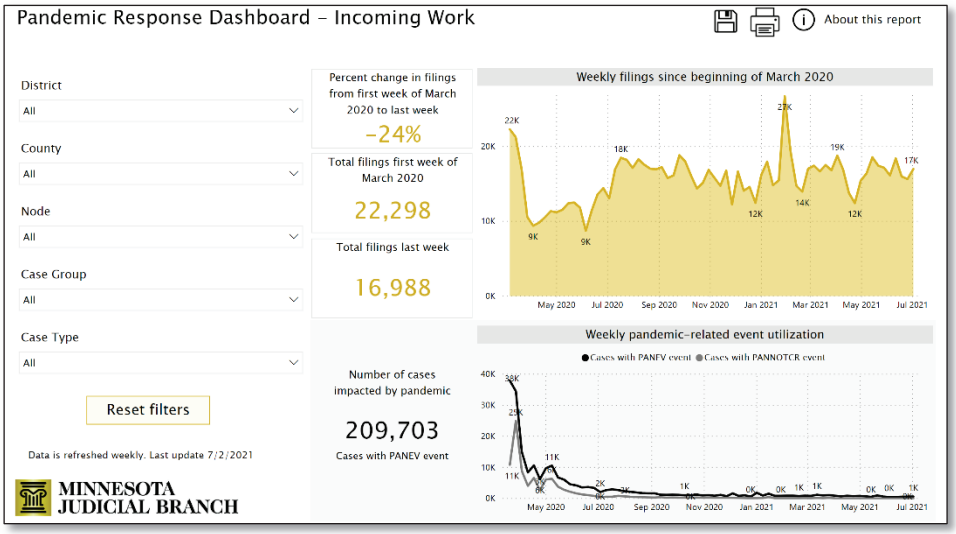
- Juvenile/CHIPS
- Civil/Family
- Probate/Mental Health

The Workgroup also identified some early challenges and opportunities to acknowledge and consider in making recommendations:

- Leveraging the increased use of technology during COVID-19 to make the Judicial Branch more effective in the future
- Implementing solutions with minimized fiscal tails
- Differences in resources or access to technology across the state
- Swift and nimble decision-making will enable quick transitions
- Opportunity for better outcomes through collaboration/feedback from partners, public, employees, and judges
- Learn what may be similar or different from the Great Recession (e.g. predict what filings may increase, decrease, etc.)

<u>Data, Backlog, and Customer Feedback</u>

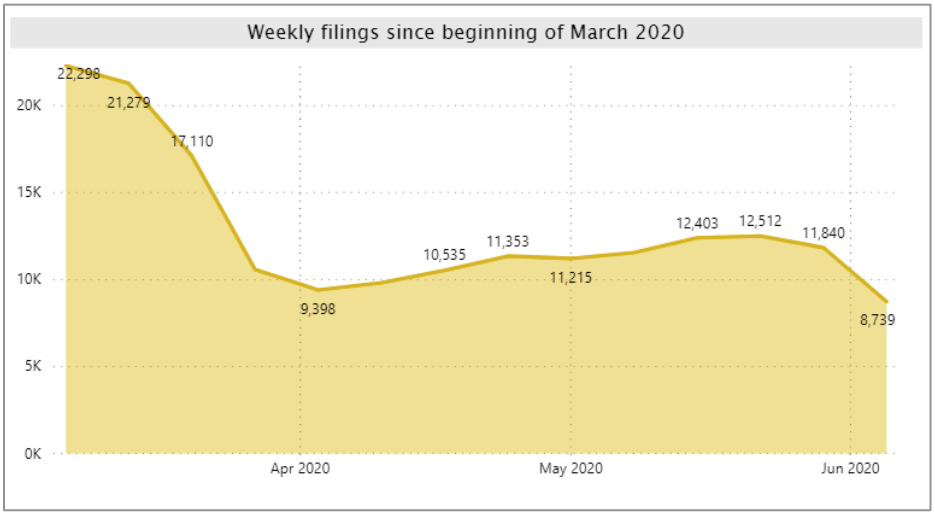
During the initial phase of the pandemic, efforts were taken to identify and report on key data metrics. Pandemic case events were established to create a record of which cases were impacted by case processing delays. By the end of May 2020, 150,000 cases had been delayed due to the pandemic.

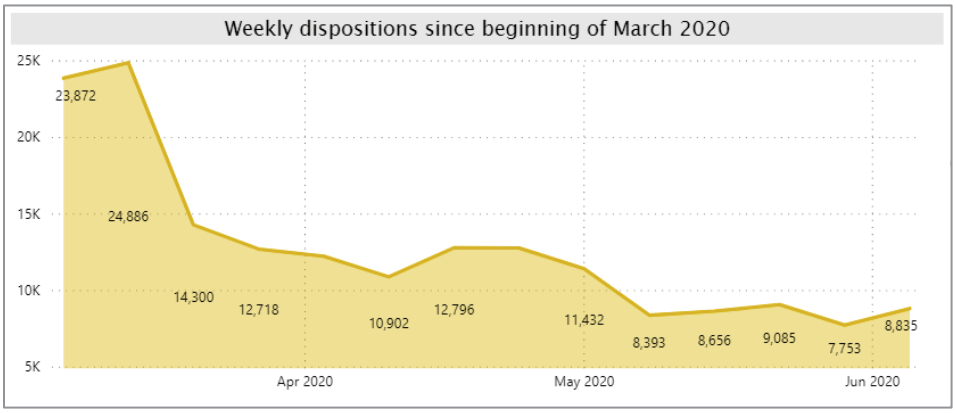


Two pandemic reporting services were developed to respond to court administration needs. First, pending caseload reports were launched in May 2020 in response to the unique data needs of court staff needing to reschedule complete calendars. Second, a Pandemic Response Dashboard was developed and launched in May 2020 to present timely and salient information to court administration and leadership.

Filing and disposition trends, hearings, and jury trial information were visualized on the dashboard. Key metrics on the dashboard showed:

- Weekly filings declined by 61% by the end of May 2020
- Weekly dispositions fell 63% by the end of May 2020





Lastly, Major Criminal clearance rates (dispositions divided by filings) were dramatically impacted during the first months of the pandemic. A clearance rates of 100% means a court is disposing of the same number of cases being filed in a given time period. In April 2020, the clearance rate sunk to 25% statewide and increased to only 48% in May 2020. As a result, an accumulation of pending cases began to form a backlog.

During this phase, the Branch focus was on rapid responses to core and critical functions. Leveraging business continuity plans was successful, and judicial officers and staff truly collaborated and came together to solve problems. Key actions and strategies included:

- Limited most in-person court activity
- Worked with Minnesota Department of Health (MDH)
- Developed new health and safety protocols
- Placed moratorium on most criminal and civil jury trials
- Began transition to remote hearings
- Transitioned judges and staff to remote work
- Conducted partner meetings by case type, led by the Chief Justice, in the areas of Criminal/Juvenile, Child Protection, Civil/ Family, Civil Legal Services, and Probate/Mental Health
- Launched communication processes such as Chief Justice weekly emails, Emergency page on mncourts.gov, and SharePoint sites for internal resources

Some lessons learned in this phase included (see more lessons learned in the Appendix):

- The Pandemic Response Team (PRT) was created and worked well during the pandemic to answer specific court administration process and practice questions, with input from all judicial districts and the State Court Administrator's Office (SCAO)
    - The PRT was formed to share feedback and information between district court administration and State Court Administration to quickly create and review processes and materials to help the state's district courts adapt to new business needs
- The formation of the PRT allowed the Other Side Workgroup to focus on bigger picture strategy.
- Use of Judicial Council and Executive Committee meetings helped make swift decisions on topics like the Chief Justice Orders
- The Other Side Workgroup meeting weekly enabled the Workgroup to make recommendations quickly, and to receive feedback and address questions being raised quickly as well
- Public Technology Rooms: Several courthouses in Minnesota created designated technology rooms to help people who lack access to technology to participate in their court proceeding
- Held justice partner phone calls to seek input and collaboration
- Promotion of paper based expungement process (expanded paper review) helped reduce demand for court hearings
- Learned that prompt action was needed to shift court operations. At times, statewide responses were not swift enough and local courts had to make decisions before statewide guidance was available
- Creative solutions were necessary to shift court proceedings to remote hearings

- Collaboration and partnership with justice partners were essential
- Partnership and direction from the MDH was very valuable, as was support and guidance from MJB Emergency Management personnel
- Continuing improvement to expand and develop remote hearing protocols and best practices was essential

II. Establishing Goals: Criminal Jury Trials & Criminal Clearance Rate Focus (June – October 2020)

The Workgroup's efforts during this phase focused on ramping up in-person operations to address the increasing backlog. The following actions were taken:

- Through review of pandemic backlog data, Major Criminal was identified as an area of focus
- Recommended Criminal Jury Trial Pilots, including evaluation plan
    - Reviewed results of six pilot counties held criminal jury trials and made recommendations to expand criminal jury trials, including an application process that was recommended to Judicial Council for Jury Plans
    - Expanded jury trials to Civil cases, through Chief Judge exception
- Directed, approved, conducted and analyzed the Pandemic Strategy Survey
- Proposed local follow-up meetings, including providing templates, with criminal justice coordinating committees or other justice system partners
- Directed JAD to develop a plan of best practices to utilize senior judges to promote efficiency and maximize their use to address the backlog
- Made larger recommendations to Judicial Council, including:
    - Strategies for contested payable cases
        - Encourage prosecutors to meet with defendants to discuss plea agreements/settlements
        - Use Senior Judges
    - Conduct Informal Probate appointments remotely
        - Encourage the use of remote technology (e.g., phone, Zoom)
        - Consider centralizing informal probate matters within the district
    - Share conciliation court resources
        - Regionalize or centralize existing per diem and volunteer referees for use within the district, regionally or statewide
    - Streamlining search warrants
        - Explore process improvement opportunities (e.g., district or multi-county work sharing, use senior judges during business hours)

        - Bring proposals to Chief Judges for implementation
    - Online dispute resolution (ODR)
        - Consider an ODR solution that includes prosecutors and hearing officers for payables
        - Support the Self-Represented Litigant program's pursuit of an ODR solution by referring topic to the FY22-23 Strategic Planning Committee
    - Centralize civil commitments
        - Work toward specialization by referring topic to the FY22-23 Strategic Planning Committee

During this phase, remote hearings and services were active. There was a focus on standardizing or normalizing practices, protocols, and tools that had supported successful outcomes. Other key actions and strategies included:

- Public counters opened in each county
- Strict safety protocols were put in place and communicated broadly, including face coverings made mandatory in all court facilities
- Criminal jury trials resumed in all 87 counties, through approved Jury Plans, consistent with the MJB Preparedness Plan
- Initiated effort to reduce the criminal backlog by 10% statewide by December 1, 2020
- Resumed late notices, penalties, and failure to appear notices for payable citations
- Remote hearing pilot conducted to provide external customer support for remote hearings by State Court Administration for four judicial districts
- Need for improving remote hearings was identified and new projects began to address these (e.g. eCheck-in, electronic Public Defender Eligibility application process, Zoom to MNCIS integration, etc.), and more remote hearing standards were established
- End of eviction moratorium planning began
- Began and continued work with Department of Corrections (DOC) to coordinate remote hearings within their facilities and with their staff support
- Expanded outreach and communication efforts with local agencies, community groups about process changes

<u>Data, Backlog, and Customer Feedback</u>

This second phase of the pandemic saw three major data and feedback initiatives.

First, six pilot counties held in-person jury trials with pandemic protocols. Extensive feedback was collected from judges, court staff, attorneys, and jurors to document the successes and challenges of jury trials in the pandemic. The pilots showed jury trials could successfully be completed with pandemic protocols. Specific findings showed:

Successes:

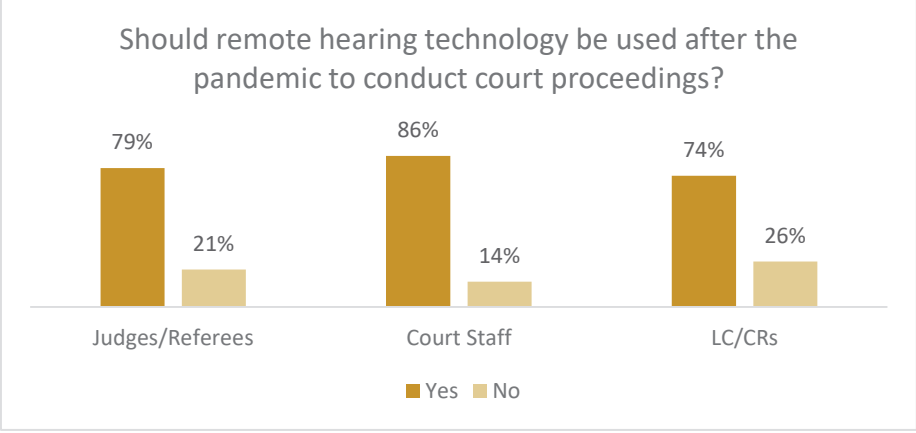
- Trials reached verdict.
- Jurors and attorneys felt safe.
- Jurors appeared at pre-COVID 19 rates.
- Social distancing, using physical cues, e.g. floor makings, was maintained.

Challenges:

- Public viewing issues (e.g. audio quality, single camera angle).
- Communication between defense attorneys and clients was an issue at times.
- Courtroom configurations (e.g. podium locations, attorney seating) were causing issues with sightlines.
- Trial process was much longer due to precautions and cleaning.

Second, the Other Side Workgroup directed an internal strategy survey from July 24 – August 12, 2020 to better understand what strategies were proving to be effective for processing cases during the pandemic. A total of 1,115 respondents completed the survey, including over 160 judges and referees. The survey found that:

- Plea-by-mail, paper submissions/reviews, and the Chief Justice's orders had been critical to guiding and prioritizing case-related work.
- Remote hearings were viewed as a successful strategy that improved access to justice and should be used as an ongoing method to conduct certain types of court proceedings
    - Respondents who participated in remote hearings felt that both justice partners (92%) and litigants (84%) were able to navigate and use the remote hearing technology.
    - Regarding access to justice for litigants, over half of survey respondents believed access to justice increased with remote hearings (55%). 18% of survey respondents believe that access to justice decreased with remote hearings.
    - 81% of survey respondents stated that remote hearing technology should be used post-pandemic.
    - Nearly 70% of judges believed



uncontested hearings in a remote environment were as effective as in-person hearings.

- Major Civil, Family, and Non-Mandatory case types were noted as most conducive to remote hearings.

During the 2020 summer months, the backlog of active pending cases continued to steadily increase. Nearly 3,000 Major Criminal cases were added to the pending backlog from June – September. An estimate of judicial hours needed to address the backlog showed Major Criminal cases represented nearly 66% of the accumulated work. As a result, the Other Side Workgroup recommended, and the Judicial Council approved, a clearance rate goal to address the rising Major Criminal caseloads. Districts were tasked with increasing the overall clearance rate since the start of the pandemic by ten percentage points by December 1st.

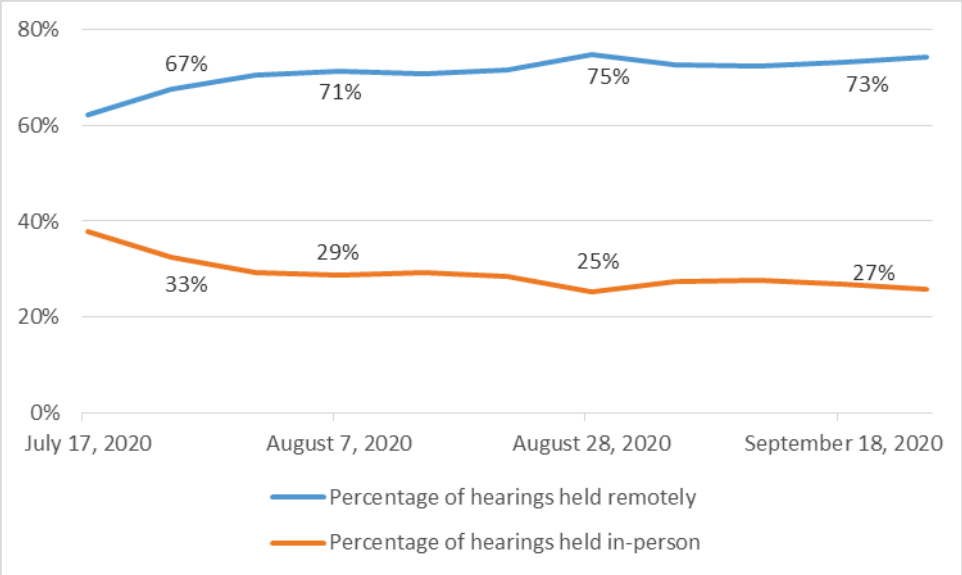
The table below includes the active backlog pending caseload as of each date in this phase. For example, as of August 14, 2020, there were 47,204 pandemic-related active pending Major Criminal cases.

Active Pending Caseload	Mar. 19	June 12	July 10	Aug. 14	Sept. 11
Felony	21,895	27,523	27,779	28,395	29,020
Gross Misdemeanor	13,787	17,677	18,204	18,809	19,163
Total	**35,682**	**45,200**	**45,983**	**47,204**	**48,183**

	August 31 Clearance Rate	December 1 Clearance Rate Goal
District 1	51%	61%
District 2	41%	51%
District 3	53%	63%
District 4	67%	77%
District 5	72%	82%
District 6	61%	71%
District 7	59%	69%
District 8	52%	62%
District 9	62%	72%
District 10	60%	70%

In addition to the major data efforts undertaken in this phase, another major milestone was reached. A collaborative effort to accurately track remote hearings culminated in the creation of the Hearing Held Using Remote Technology case event. Court Business Communication #494: New MNCIS Process to Capture When a Hearing is Held Using Remote Technology announced that the new case event would be used when a judicial officer, party, or participant uses a

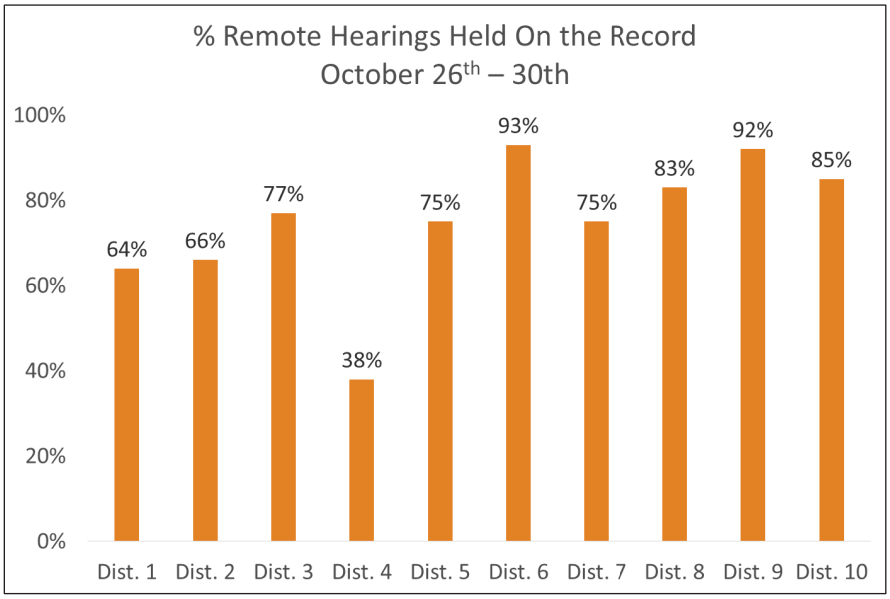
telephone, ITV, VMR, WebEx, Zoom or other method to attend a court hearing. Court staff across the state began entering this case event for specific hearings to track when parties appeared remotely. As a result, initial data showed the vast majority of hearings being held remotely each week.



Some additional lessons learned in this phase included (see more lessons learned in the Appendix):

- Judge specialization (e.g. calendaring, signing) was occurring and helping slow or address the backlog
- Strong communication and collaboration with justice partners happened
- Creative ideas to address barriers (e.g. Zoom Rooms, treatment court remote hearings) were emerging and being discussed and expanded
- The following challenges were identified during this phase:
    - Defendants in some locations were failing or refusing to appear for remote hearings
    - Some attorneys were resistant to participating in hearings remotely, and also for health and safety reasons were unwilling to participate in hearings in-person
    - Some attorneys refusing to be available for more hearing calendars than pre-pandemic scheduled hearing days
    - Trial date has traditionally been a milepost for completing plea agreements and without jury trials expanding significantly, less incentive to resolve cases
    - Concern about victims not receiving justice due to trial delays and witness unavailability

- There were opportunities identified as a result of the pandemic during this phase:
    - Judges were not traveling as much, freeing up more time for hearings, including less hearing-related travel in other counties and significantly less travel to meetings and conferences
    - Attorneys were also not traveling as much
    - Moving between remote hearings is quicker than between different courtrooms or counties
    - Hearings were more likely to be time certain (i.e. not mass calendars), resulting in more predictability for attorneys and judges
- Consistency gained through Chief Judge approval in processes such as the Civil Jury Trial exception
- There was confusion among judges and court administration around which hearings could/should be in-person or remote, and practices varied widely across the state



III. Ramping Down In-person Operations (November 2020 – January 2021)

The Workgroup's efforts during this phase shifted focus to doing remotely whatever could be done remotely as the pandemic situation worsened. This resulted in ramping down of in-person operations, but Major Criminal clearance rates continued to stay stable or increase. The following actions were taken:

- Heavy reliance on regular COVID-19 Situation Reviews from the MJB Emergency Management Planning Analyst as well as Pandemic Response Dashboard data provided by the Research & Evaluation Unit

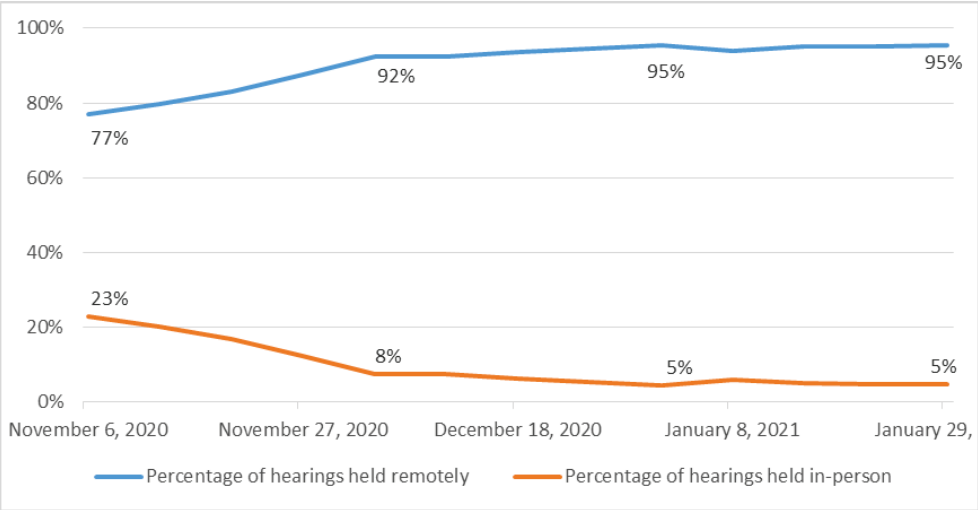
- Review and reporting on Major Criminal Clearance Rates and goal to increase clearance rates by 10% in each district
- Materials to centralize evictions work were distributed
- Monthly updates and recommendations provided to Judicial Council as situation evolved quickly and sometimes unexpectedly
- Directed, approved, conducted, and analyzed data from surveys of litigants and attorneys about remote hearing preferences from December 2020 – January 2021 (see more below)
- Continued to recommend if courts had the ability to conduct hearings remotely, they must continue to do so (absent exceptions)
- Transitioned Workgroup Chair from Judge Krista Martin to Judge Michelle Lawson

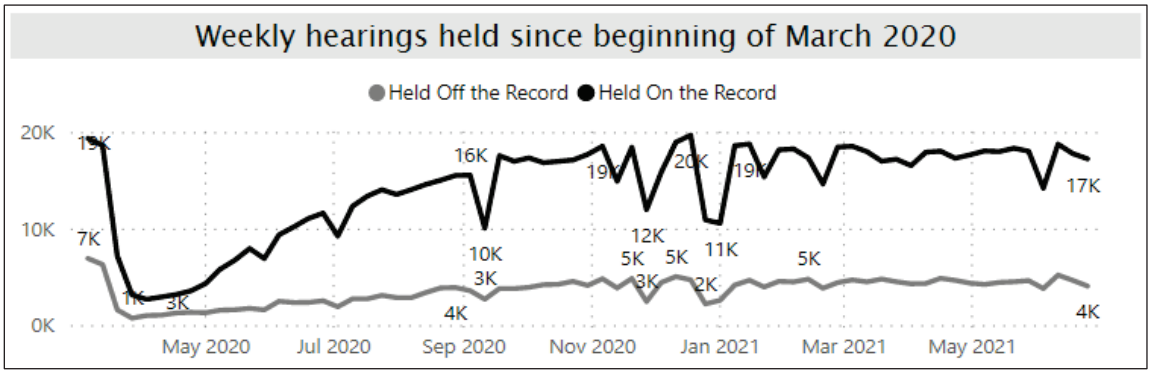
During this phase of the pandemic, significant concern about the pandemic caused the state, and the courts, to restrict in-person operations for public health and safety reasons. Judicial officers and staff were able to learn from the rapid transitions to remote work made at the beginning of the pandemic and improve on and normalize remote practices. Key actions and strategies included:

- Most in-person court proceedings and trials were suspended through January 31, with increase in remote hearings
- Created exception processes for in-person hearings
- Public service counters remained accessible, through remote, live and/or in-person appointments
- Continuation of projects and improvements identified in previous phases
- Equipment was purchased to support remote work and remote hearings through CARES Act funds procured by the Branch
- Additional judicial resources leveraged to address the case backlog (e.g. senior judges, temporary referees, remote hearing officers) through CARES Act funding through the end of calendar year 2020

Data, Backlog, and Customer Feedback

The ramping down of in-person operations saw an expected increase in remote hearings throughout the state, with the percentage of weekly hearings held remotely rising from 77% to 95% by mid-December. Yet despite the increased proportion of remote hearings, the total number of hearings held remained at or above the number of hearings held during previous months when in-person hearings were an option.



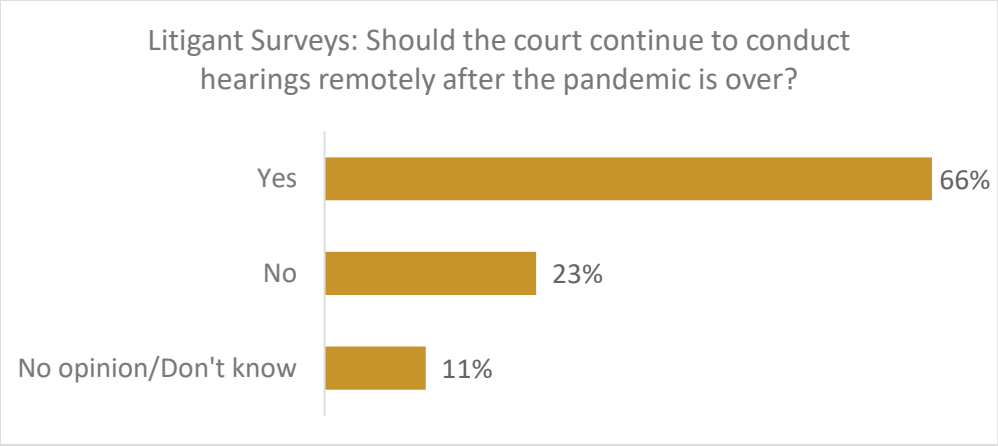


December also saw the conclusion of the 90-day period to meet the clearance rate goal. All districts made significant progress toward the goal, with seven out of ten districts achieving the ten percentage-point increase.

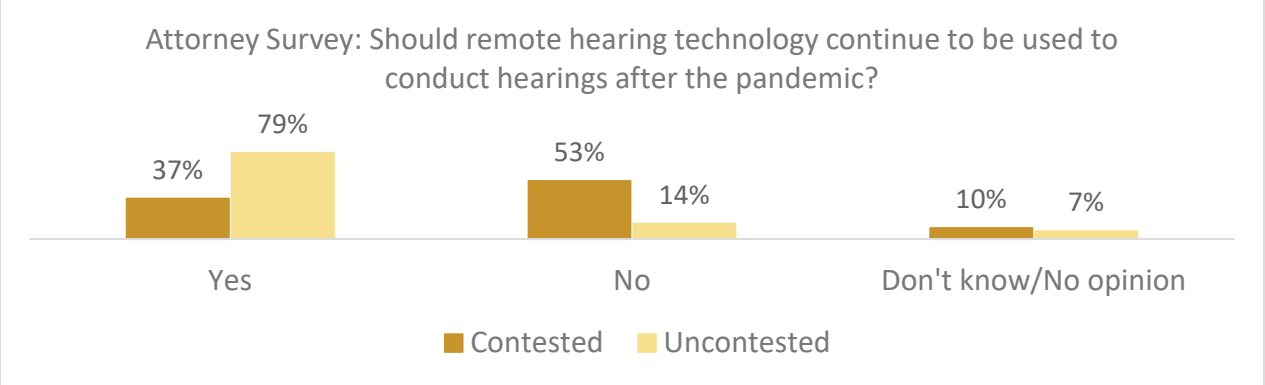
	Aug 31 Clearance Rate	Dec 1 Clearance Rate Goal	Oct 2 Clearance Rate	Nov 6 Clearance Rate	Dec 4 Clearance Rate
1	51%	61%	56%	**62%**	**64%**
2	41%	51%	42%	47%	**52%**
3	53%	63%	57%	62%	**65%**
4	67%	77%	72%	74%	75%
5	72%	82%	77%	81%	**83%**
6	61%	71%	64%	69%	**71%**
7	59%	69%	62%	65%	67%
8	52%	62%	56%	**63%**	**65%**
9	62%	72%	66%	71%	**74%**
10	60%	70%	63%	67%	69%
State	58%		62%	66%	**69%**

The Other Side Workgroup oversaw a major external feedback collection effort during this period to gather the customer's perspective about remote hearings. The survey was based on the judge and staff feedback from the internal strategy survey results. Surveys of litigants and attorneys were designed, launched, and analyzed over several months.

In December 2020 and January 2021, two separate efforts were made to survey litigants about their experiences and preferences related to remote hearings. In total, 98 individuals took these two surveys and most litigants reported that courts should continue hearings remotely after the pandemic. See further key lessons learned below.



In January 2021, a survey about remote hearings was distributed to attorneys. More than 600 attorneys completed the survey, and demonstrated support for uncontested hearings continuing to being held remotely. See further key lessons learned below.



Some lessons learned in this phase included:

- Clearance rates were able to be maintained or increased during primarily remote operations, including in Major Criminal

- Chief Judge approval processes were introduced and helped maintain consistency and created further clarity on what hearings would be remote or in-person and why
- Each attorney group prefers to attend contested hearings in person
- Remote hearings should continue to be used to conduct uncontested hearings in the future
    - Across the board, both private and public attorneys believe that remote hearings increase access to justice and that they prefer to attend uncontested hearings remotely - 56% believed access to justice for litigants was increased by remote hearings, while only 23% believed access to justice was decreased
    - 59% of litigants surveys prefer to attend hearings remotely
        - Reasons supporting the preference for remote hearings include no travel time or travel costs, easier with work schedule/less time off of work and the health safety with remote hearings.
    - 66% of litigants believe the court should continue to conduct hearings remotely after the pandemic is over

IV. Gradual In-person Expansion (February 2021 – current)

Due to the volatility of the pandemic, this phase included monthly recommendations from the Workgroup to Judicial Council. This phase began with continuation of remote hearings in all case types, but gradually carved out broader in-person exceptions, primarily focusing on Major Criminal hearings, which continued to contribute the largest portion of the backlog. The following actions were taken:

- Exceptions for in-person hearings and jury trials began for speedy trial demands for in-custody defendants, and for felony cases or non-felony person crime cases.
- Workgroup supported exploration of remote Civil Jury Trials. The 2nd and 4th districts conducted a mock remote civil jury trial to test the concept, with positive results. The first remote Civil Jury Trial was completed by Judge M. Jacqueline Regis in Hennepin County in spring 2021.
- Recommended aspirational performance measure goals focusing on the Major Criminal backlog (Judicial Council approved in June 2021)
- Recommended state criminal justice partners meetings to be held to discuss goal to address the Major Criminal backlog in the FY22-23 biennium
- Received and leveraged feedback received through SPPO Strategic Initiatives Roadshows with Court Administration leadership in the district courts (conducted October 2020 to January 2021)

During this phase of the pandemic, emphasis was placed on a cautious and gradual increase in operations as vaccines were made more broadly available and in-person operations were increased, especially in Major Criminal. Key actions and strategies included:

- Vaccine availability for all employees and judges
- Continual revision of the MJB Preparedness Plan as restrictions were lifted for in-person operations
- Feedback was gathered during 50 listening sessions (via Zoom) for court employees, judges, and court customers
- Implementation and analysis of short term and transitional strategies by case type.

Data, Backlog, and Customer Feedback

As the courts gradually began expanding in-person operations, the caseload trends continued to show Major Criminal and Mandatory Minor Criminal cases as the primary area of backlog. Most other case groups were below or near their pre-pandemic level as of 6/25/2021:

Case Type	Change in active pending caseload since March 2020	% change in active pending caseload since March 2020
Felony/GMD	+14,181	+40%
Mandatory Misd. (Court Required)	+15,075	+53%
Non-Mand Misd.	-46,939	-35%
Civil	+3,863	+15%
Delinquency	-1,311	-32%
Family	-1,017	-7%
Commitment	+47	+18%
Probate	+528	+19%
Total	**-15,573**	**-6%**

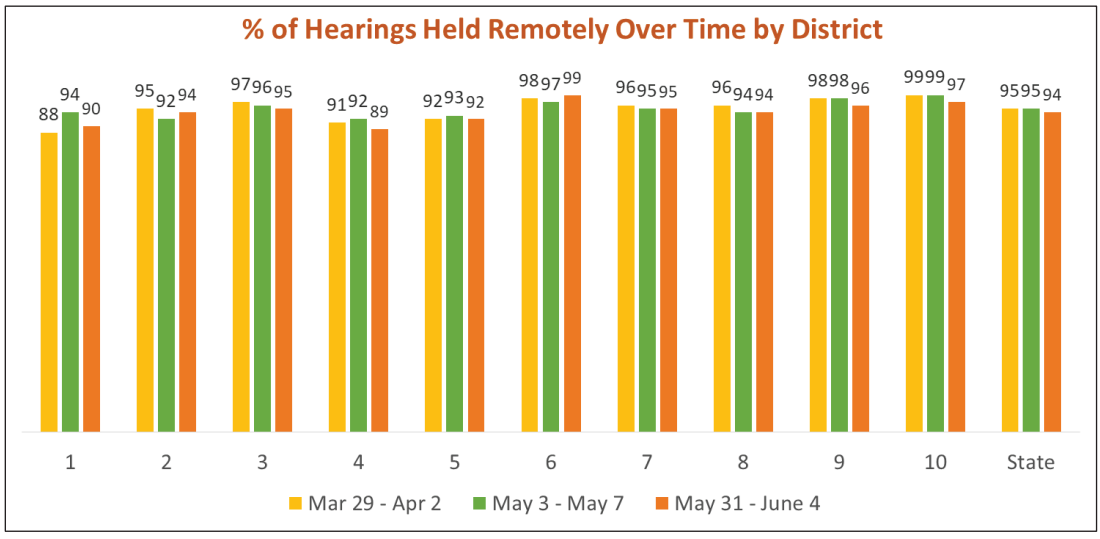
Given the complexity of Gross Misdemeanor and Felony cases, estimates of judicial workload to address the growing backlog were approximately 37,000 hours at the end of June 2021, which represents over 90% of the total estimated backlog effort of 41,000 hours.

Because of the challenges posed by the Criminal backlog, Judicial Council approved an aspirational goal of reducing the major criminal backlog by June 30, 2023. Districts were asked to focus especially on cases that have been pending over 12 months.

Age of Pending Cases: Major Criminal Cases Over the 99th Percentile		
District	End-of-Year 2020	End-of-June 2021
1	21%	27%
2	18%	31%
3	22%	26%
4	18%	25%
5	16%	16%
6	17%	19%
7	22%	23%
8	16%	17%
9	17%	17%
10	20%	23%
Statewide	19%	24%
Statewide 2019	8%	
*Goal for 99th percentile	12 months	

Some lessons learned in this phase included:

- At least 30-45 days were necessary for court administration employees to effectively implement changes expected with any new statewide order related to pandemic operations
- Identified the need for post-pandemic implementation to ensure resource, technology and business process needs are effectively addressed. A placeholder was included in the FY22 Operational Plan for this work (1A.3 Build a program to oversee re-engineering of court hearings in response to this time of disruption).
- There was clarity around which hearings could/should be in-person or remote, and practices gained significant consistency across the state over previous phases



- Widespread agreement from Court Administration leaders that the following were likely post-pandemic outcomes:
    - Remote hearings will continue (extent TBD)
    - Paper processes will continue (extent TBD)
    - Remote working for employees and judges will continue (details TBD)
    - Leadership will have new expectations for collaboration, communication, and rapid decision-making and change adoption
    - Permanent changes in methods and approaches to the public & customer service

Listening Sessions: Executive Summary

In spring 2021, the Workgroup identified a need to gather comprehensive feedback on the experiences of those participating in remote hearings during the pandemic. The Workgroup valued the input, survey results, and anecdotal feedback gathered throughout the pandemic. However, based on the significance of any post-pandemic changes to court operations, it was important to listen to the feedback of those – both internal and external to the Branch – who would be impacted by decisions on the approach to remote hearings on the other side of the pandemic. Additionally, the Workgroup found value in using a neutral third party to collect this feedback, supporting the nature of this effort as an information gathering forum.

This appendix contains the Executive Summary of the June 2021 Justice Connections, LLC report on the listening sessions they facilitated, titled "Use of Remote Hearings in the Minnesota Judicial Branch." The full report link can also be found in the Appendix.

The Other Side: Recommended Approach to Remote Hearings on the Other Side of the COVID-19 Pandemic

Taking together all of the Workgroup experiences, quantitative and qualitative information gathered, and lessons learned through the pandemic, the Workgroup developed the following vision and recommendations.

Overarching Vision and Principles for Recommendations

Given the lessons learned during the pandemic – as informed by significant feedback from judicial officers, staff and court customers – the Minnesota Judicial Branch should utilize remote hearings in certain case types moving forward, where doing so promotes both access to justice and a quality court workplace.

The following Minnesota Judicial Branch Strategic Goals formed principles for these recommendations:

ACCESS TO JUSTICE

- Court customers and stakeholders embraced the convenience and efficiency of remote hearings, resulting in higher court attendance in many case types.
- Significant feedback has been provided about the benefits of continuing remote hearings and how remote hearings have seen greater participation of those involved or impacted by court proceedings (e.g. family members of litigants, victims).
- These themes were repeated and consistent from the 2019 Access and Fairness Survey, the internal Pandemic Strategy Survey in summer 2020, attorney and litigant surveys in early 2021, and the 50 internal and external Listening Sessions completed in 2021.
- In some scenarios, remote hearings remove obstacles to participating in court hearings for parties and participants.

EFFECTIVE ADMINISTRATION OF JUSTICE

- Recommendations must be implemented in ways that promote effective administration of justice and a quality court workplace environment. Employees and judges have worked hard, demonstrated dedication to making justice accessible during the pandemic, and acted innovatively and adaptably throughout the pandemic to maintain an open door to justice in Minnesota. Employee Quality Court Workplace Survey results were the highest ever recorded since the survey was first conducted in 2008.

- Employees and judges have remained resilient throughout the pandemic. However, feedback throughout the pandemic - and especially through the Listening Sessions - reinforced that there has been significant personal and professional uncertainty and stress due to changing court practices. It is important to address the issues raised to implement these recommendations. The top issues are identified later in this report.
- Despite the feedback on the difficulty of these changes, employees and judges also reported internal benefits to remote hearings, such as improved judicial and employee coverage across multiple court locations when hearings are being held remotely as a result of not needing to travel.
- Because the focus of the FY22-23 biennium will be reducing the Major Criminal case backlog, it is imperative to provide flexibility for districts to schedule their cases in a way that balances consistency for court customers (statewide presumption of remote uncontested hearings) with the real need to have district discretion in how best to address the pandemic backlog efficiently and effectively.

PUBLIC TRUST & ACCOUNTABILITY

- To maintain public trust in the Branch, responding to feedback is one critical factor.
    - The Workgroup heard strong support across all stakeholder groups – and across all information collection methods - for continuing to conduct at least some portion of court hearings online even after the pandemic.
    - The Workgroup also heard strong support for maintaining in-person proceedings for contested matters and certain case types where the decorum and formality of the in-person court hearing process was essential to preserve the significance and seriousness of court proceedings and the Court itself.
- Accountability to the public also involves seeking to eliminate disparities in the system. This can be done through the use of consistent statewide standards that also provide exceptions for individual cases or court customers, creating a framework to do individual justice in individual cases.
    - The digital divide in access to technology for some court customers, similar to disparities in access to transportation for in-person proceedings, must be addressed to enable access to justice. Innovative ideas such as providing technology access in courthouses and the community is one effective way to address these disparities.

Recommendations

1. The Judicial Council should establish standards for how to approach district court remote hearings to promote consistent access to justice across Minnesota. These standards need to be tailored by case type and hearing type, and there should also be a process for case-by-case exceptions (which is already consistent where existing Court Rules allow for ITV or other types of remote hearings).

2. Judicial District Administrators, Court of Appeals Judicial Administrator, and SCAO Directors Group (JAD) should be consulted on challenges and opportunities as needed related to the implementation of these recommendations before Judicial Council makes a decision.

3. The Judicial Council should direct a comprehensive approach to address implementation issues, which may include assessing, changing or developing practices, protocols, or tools to support these recommendations. As part of this approach, the Judicial Council should request that the Supreme Court direct review of the Court Rules that may be in conflict or prohibit implementation of these recommendations. Judicial Council should also establish an evaluation plan that ties into the existing Performance Measures process in September 2022.

4. Due to significant benefits to public safety and effective administration of justice, in-custody defendants should be presumed to attend hearings remotely, but this should be determined locally in consultation with local jail administration, based on local conditions such as the availability of in-custody courtrooms.
    a. State Court Administration, in collaboration with district court administration, should work with the Department of Corrections to established protocols and best practices for scheduling hearings for individuals in prison to continue remote participation.

5. The Workgroup recommends a strong presumption that contested hearings (hearings where evidence is being presented or testimony is taken on issues in dispute) be held in-person. Case-by-case exceptions, under extenuating circumstances, should be allowed, with extenuating circumstances to be defined by Court Rules.
    a. The strong presumption is that absent extenuating circumstances, as determined by the presiding judge on a case by case basis, the hearing will be held in-person.
    b. Extenuating circumstances require more than the agreement of the parties, and demonstrate unique circumstances to this case and these parties.

6. The Workgroup recommends a strong presumption that uncontested hearings (hearings where no evidence is presented or testimony taken on issues in dispute) be held remotely. Case-by-case exceptions, under extenuating circumstances, should be allowed, with extenuating circumstances to be defined by Court Rules.
    a. The strong presumption is that absent extenuating circumstances, as determined by the presiding judge on a case by case basis, the hearing will be held remotely.
    b. Extenuating circumstances require more than the agreement of the parties, and demonstrate unique circumstances to this case and these parties.

7. More Specific Case Type Recommendations (full list of case types/hearings to be presumed remote/in-person can be found in the Appendix) beyond contested/uncontested recommendations:
    a. Minor Criminal cases:
        i. Electronic/paper-based plea petition processes should continue to be followed post-pandemic. If the matter is resolvable through a plea petition, this process should be maximized to reduce use of court hearing time on these matters
        ii. Contested matters such as Court and Jury Trials, Contested Omnibus/Evidentiary, Restitution presumed in-person
        iii. Sentencing and Probation Violation presumed in-person
        iv. All other uncontested matters presumed remote
        v. See Recommendation 8 below for recommendations specific to the FY22-23 biennium
    b. Major Criminal cases:
        i. Contested matters such as Court and Jury Trials, Contested Omnibus/Evidentiary, Restitution presumed in-person
        ii. Sentencing and Probation Violation presumed in-person
        iii. All other uncontested matters presumed remote
        iv. See Recommendation 8 below for recommendations specific to the FY22-23 biennium
    c. Family/Civil cases:
        i. Adoption cases presumed to be in-person, consistent with Listening Session feedback from judges and court administration
        ii. Domestic Abuse, Harassment cases presumed to be remote, consistent with feedback that victims have positive feedback on remote hearings and respondent service has not been identified as an insurmountable barrier

d. Juvenile Child Protection cases:
    i. Admit/Deny, Court Trial, EPC, Permanency Progress Review presumed in-person
    ii. IDH, Post-Permanency Review, and Pre-Trial presumed remote
e. Juvenile Delinquency cases:
    i. Disposition, Restitution, and Revocation presumed in-person
    ii. Arraignment, Detention, Motions, Pre-Trial, and Restitution presumed remote
f. Probate/Mental Health cases:
    i. Civil Commitment cases presumed remote, generally consistent with Listening Session feedback from judges, judicial staff, and court administration
    ii. All case types and hearings presumed remote, except Order to Show Cause hearings in Guardianship/Conservatorship and Probate cases presumed in-person

10. Major and Minor Criminal uncontested matters should be presumed to be held remotely. However, any judicial district/county interested in holding these hearings in-person can ask for an exception. Exception requests should include a district/county-wide plan for uncontested criminal matters to be held in-person, or both in-person and remotely. The districts/counties must collaborate with local criminal justice partners in the development of these plans and articulate how the plan supports the priority of reducing the pandemic-related Major Criminal case backlog within the FY22-23 biennium. Plans should be approved by the Judicial Council Executive Committee. A template could be provided by State Court Administration.

11. Treatment Courts should develop and document their plan for hearings to be held in-person, remotely, or hybrid, including whether these approaches change based on the participant's phase in treatment court. Judicial Council should refer the Treatment Court Hybrid Hearing Exception Process Guidelines for Chief Judges, to the Treatment Court Initiative Advisory Committee to further develop these Guidelines.

Anticipated Implementation Issues to Be Addressed

The following list contains issues raised in feedback through the pandemic, most notably in the recent Listening Sessions. Some of these issues may have already been addressed, but greater communication may be needed to share resolution on these issues. For others, strategies may be needed if the Workgroup recommendations are approved and implemented.

1. Need for local and statewide collaboration with justice partners
2. Supreme Court Rules may be in conflict with these recommendations. Chief Justice orders may be necessary in the interim before Court Rules are revised.
    a. Clarity on the processes for requesting/approving an exception for a hearing to be remote/in-person outside of the statewide approach for that case/hearing type
3. Statutes may be in conflict with these recommendations
4. Need for business process for service, fingerprinting/booking, and document signing for remote hearings
5. Implementation of the project for an exhibit management system
6. Broader communication on the training and resources available and development of additional training and resources, as necessary. Particular focus may be needed on simultaneous remote interpreting resources.
7. Changing from pre-pandemic in-person practices to a remote/in-person environment may require further data analysis and calendaring process review, including time needed to conduct and hold remote hearings, schedule calendars, allocate resources, etc.
8. Reports of "Zoom fatigue" and fewer breaks being taken during remote hearings
9. Further clarity and discussion on the expectations and/or standards around court decorum for in-person and/or remote hearings
10. Unintended administrative consequences outlined in the Listening Session report

Appendix

Case Types and Hearing Types Presumed Remote and In-person

This table includes case categories and major case types, where notable for the hearing types to be held remote or in-person. Not all case types are listed in this document. If they are not listed, presume the general case category recommendations for that case type (e.g. Family case category applies to "Family Other" MNCIS case type).

Case Category and Case Type	Hearing Type	Remote	In-Person
	Criminal:		
	Hearing Officer Appointments	X	
Petty Misdemeanors	Petty Arraignments	X	
	Petty Court Trials	X	
Minor Criminal[1]	Arraignment	X	
	Bail Hearing	X	
	Court Trial		X
	Jury Trial		X
	Motions		X
	Pre-Trials	X	
	Probation Violation		X
	Revocation		X
	Restitution		X
	Sentencing		X
	Settlement Conference		X
Major Criminal[2]	Bail Hearing	X	
	Court Trial		X
	Contested Omnibus/Evidentiary motions		X
	Omnibus (waiver)	X	
	First Appearance	X	
	Jury Trial		X
	Motions	X	
	Pre-Trials	X	
	Probation Violation		X
	Revocation		X
	Restitution		X
	Sentencing		X
	Settlement Conference		X
	Family:		
Dissolution, Custody, etc.	Court Trial		X
	Defaults	X	
	Evidentiary		X

[1] Minor criminal includes DWI, domestic assault, and mandatory court appearances. This also includes if the defendant has already schedule a hearing officer appointment and they wish to go to court.

[2] Major criminal cases includes all Gross Misdemeanor and felony level cases.

Case Category and Case Type	Hearing Type	Remote	In-Person
	ICMC	X	
	Motions	X	
	Pre-Trial Conference	X	
	Scheduling Conference	X	
Domestic Abuse	Evidentiary	X	
	Motions	X	
	Order for Protection-Initial appearance	X	
Expedited Process	Contempt	X	
	Hearing	X	
	Review	X	
Paternity	Hearing	X	
	Court Trial		X
	Evidentiary		X
Adoption	Adoption		X
Civil:			
Harassment	Evidentiary	X	
	Harassment	X	
	Motions	X	
Minor Civil[3]	Conciliation	X	
	Eviction (Unlawful Detainer)	X	
	Hearing	X	
	Implied Consent	X	
	Motions	X	
Major Civil[4]	Arbitration	X	
	Contempt		X
	Court Trial		X
	Default	X	
	Hearing	X	
	Jury Trial		X
	Motions	X	
	Scheduling Conference	X	
	Settlement Conference	X	
	Temporary	X	
Juvenile:			
Juvenile Protection	Admit/Deny		X
	Court Trial		X
	EPC		X
	IDH	X	
	Permanency Progress Review		X
	Post-Permanency Review	X	
	Pre-Trial	X	
Juvenile Delinquency[5]	Arraignment	X	
	Court Trial		X

[3] Minor civil case types include implied consent, unlawful detainer, conciliation cases, and minor civil judgments.
[4] Major civil case types includes all other case types that are not classified in minor civil types.
[5] Juvenile Delinquency includes all juvenile criminal case types such as petty offenses and traffic.

Case Category and Case Type	Hearing Type	Remote	In-Person
	Detention	X	
	Disposition		X
	EJJ		X
	Motions	X	
	Pre-Trial	X	
	Restitution		X
	Revocation		X
Probate/Mental Health:			
Guardianship/ Conservatorship	Account	X	
	Final Account	X	
	Hearing	X	
	Order to Show Cause		X
	Probate	X	
Civil Commitment	Commitment	X	
	Jarvis	X	
	Motions	X	
	Preliminary	X	
	Re-Commitment	X	
Informal Probate	Probate	X	
Formal Probate	Order to Show Cause		X
	Probate	X	

Executive Summary of Listening Session Report

SCOPE AND OBJECTIVE

The Other Side Workgroup (OSW) was appointed to assist with planning during the pandemic and in the transition to court operations on "the other side" by making recommendations to the Judicial Council regarding the use of remote hearings post-pandemic. The consulting services of Justice Connections, LLC was obtained to assist with the statewide collection of experiences associated with remote hearings. Project consultants facilitated listening sessions involving Judicial Branch stakeholder groups including judicial officers, court staff, attorneys, litigants, and justice system partners. Feedback collected was analyzed to derive themes, and information threads concerning the reported benefits and challenges associated with remote hearings.

FINDINGS: FEEDBACK THEMES

Feedback themes were identified for individual stakeholder group as well as across all stakeholder groups. Benefits and challenges, system enhancements and associated strategies and resource needsrelated to the use of remote hearings are detailed in the report. Litigant experience with remote hearings as collected from the impressions of legal services representatives and judicial officers participating in listening sessions are also incorporated.

Summary of Feedback Themes identified Across All Stakeholder Groups

Remote hearings have increased access to the court system for litigants, victims, witnesses, and family members.
Remote hearings appear to result in increased appearance rates, with fewer failures to appear noted and less warrants for non-appearances being issued.
Remote hearings have resulted in increased convenience for attorneys and litigants, reducing costs associated with traveling to the courthouse for an in-person hearing
Remote hearings can take up to twice as long to conduct than in-person hearings.
Conducting hearings remotely for incarcerated individuals has increased safety and reduced security concerns.
Coverage needs among judicial officers, judicial staff, court administration staff, attorneys and various justice partners is easier in a remote hearing environment.
Scheduling adjustments to better accommodate remote hearings, such as scheduling “time certain” hearings, have reduced delay, wait time and actual court appearance time for attorneys and litigants.
Dedicated IT resources to assist with remote hearing connectivity issues and technical troubleshooting is a critical resource need.
Remote hearings have significantly increased responsibilities for judicial officers, judicial staff, and court administration staff. This expansion of duties has led to increased workplace stress.
The assignment of specific roles, responsibilities, and business practices related to the managementof remote hearings is inconsistent across court locations, and in some cases among judges in the same court location.
A lack of court decorum in the remote hearing environment is a concern.
Continuous daily use of remote hearings results in “Zoom fatigue” and increased stress with fewer mental breaks for judicial officers and judicial branch personnel.
The process for submitting, managing, and storing electronic exhibits lacks clarity and causes additional work effort, confusion, and frustration for parties as well as judges and court staff.
Use of court forms requiring signatures is challenging in a remote hearing environment.
Remote hearings can be a progressive tool to use with case and hearing types that do not require considerable testimony, cross-examination, interpreters or exhibits.
Though Zoom use can foster a certain level of interaction and communication, it cannot replicate the development of professional relationships and interpersonal interaction/camaraderie in the same way as in-person interactions.
Capturing and preserving the official court record can be challenging in the remote hearing environment. Use of headsets and quality mics by all parties is one strategy to address this challenge.
Hybrid hearings require additional planning and resources to schedule and conduct.
Additional technical and administrative support is needed to assist with daily Zoom hosting, and ongoing operational system management and maintenance.
Additional training related to the efficient use of remote hearing tools, along with the need to explorer how the Zoom platform could be synchronized into the daily use of MNCIS is needed. More training and information regarding the use of the simultaneous interpreting feature is also needed.
Hybrid hearings are achievable but require additional planning, information, and resources to schedule and conduct.

SUMMARY OF CASE AND HEARING TYPE FEEDBACK THEMES

Experiences with specific case and hearing types in the remote hearing environment are represented in charts contained within the report. Some disparity exists among the major stakeholder groups as to their experiences with specific case and hearing types. Feedback themes agree regarding key attributes of case and hearing types most conducive to being addressed by remote and in-person hearings.

SUMMARY OF UNINTENDED ADMINISTRATIVE CONSEQUENCES

Key court operational efforts and initiatives unintentionally impacted by remote hearings as identified incourt administration listening sessions are outlined in the report. These include operational concerns carrying budgetary and resource impacts, potential gaps in data collection and statewide statistical information and concerns regarding an ability to maintain real-time case processing efficiency strategies.

NEXT STEPS

The OSW will use findings and information contained in this report to formulate recommendations to the Judicial Council regarding the ongoing use of remote hearings in the Minnesota Judicial Branch. State Court Administration may also utilize feedback relative to resource and support needs identifiedfor successful implementation of resulting Judicial Council determinations.

Links to Additional Reports and Information

1. Short term and Transitional Strategies by Case Group
2. Pandemic Response Dashboard
3. Other Side Workgroup Reports to Judicial Council (Judicial Council Agendas)
4. Pandemic Strategy Survey Results (Employees and Judges) & External Attorney and Litigant Survey Results (April 2021 Branching Out)
5. Future of Remote Hearings – Overview of Lessons Learned
6. Themes from 2020 Strategic Initiatives Roadshows
7. Full Report on Listening Sessions

Acknowledgements

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Judge Michelle Lawson, Chair (January 2021 – Current)
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Appendix 5

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

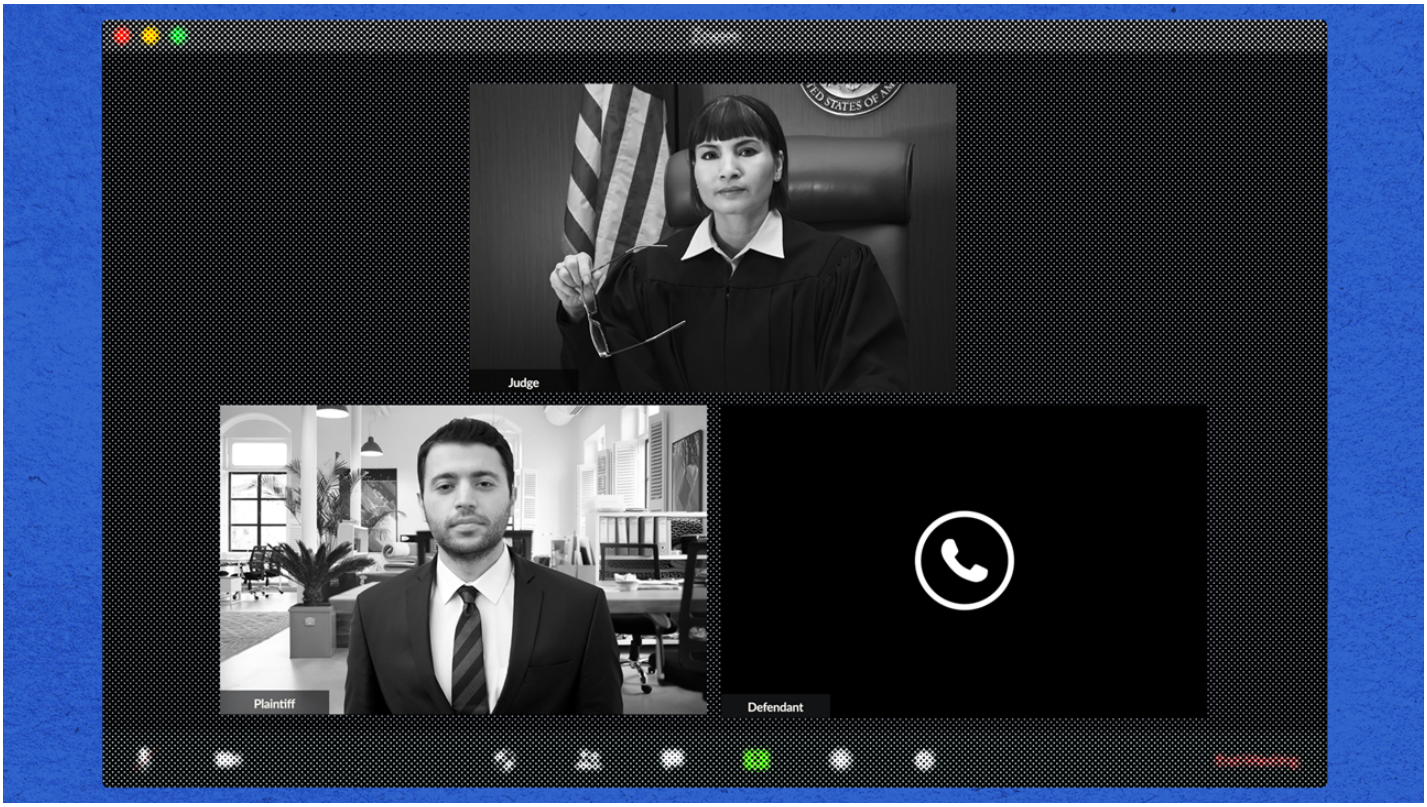
What the changes mean for the millions of people who interact with the civil legal system each year—and what remains to be done

REPORT

December 1, 2021

Read time: 33 min

Projects: Civil Legal System Modernization



Overview

The outbreak of COVID-19 in early 2020 forced public services to shift to online operations in a matter of weeks. For the nation's courts, that meant reimagining how to administer justice. Media coverage has focused mainly on the effects of the digital transformation in

criminal courts, but a rapid deployment of new technology also took place in the civil legal system.

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

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

To begin to assess whether, and to what extent, the rapid improvements in court technology undertaken in 2020 and 2021 made the civil legal system easier to navigate, The Pew Charitable Trusts examined pandemic-related emergency orders issued by the supreme courts of all 50 states and Washington, D.C. The researchers supplemented that review with an analysis of court approaches to virtual hearings, e-filing, and digital notarization, with a focus on how these tools affected litigants in three of the most common types of civil cases: debt claims, evictions, and child support. The key findings of this research are:

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

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

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

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

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

Court officials have made clear that improvements in technology must benefit all parties. CCJ and COSCA approved a resolution in July 2020 recommending that their members

"ensure principles of due process, procedural fairness, transparency, and equal access are satisfied when adopting new technologies."[6]

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

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

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

Methods

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

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

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

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

Courts adopted technology at unprecedented speed and scale

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

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

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

Figure 1

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

Steps of a civil case and the technologies that support them

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

Navigating Civil Courts Without an Attorney

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

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

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

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

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

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

And similar shifts took place across civil court dockets, as states quickly moved to use virtual meeting technology. For instance, neither Michigan nor Texas had conducted a single video

hearing for a civil court case before the pandemic, but between April 1 and June 1, 2020, they conducted more than 35,000 and 122,000 video hearings, respectively.[13]

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

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

Figure 2

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

Electronic filing adoption by number of states, 1996-2019

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

As a result of the pandemic, 10 states created new paths for people without lawyers to file papers electronically using dedicated software or other mechanisms, such as email, because either they previously had no e-filing system or their existing tools were accessible only by attorneys. And beginning in March 2020, seven states began allowing electronically

notarized documents for the first time.[14] (See Figure 3.) For instance, Alabama courts had long allowed electronic signatures but did not accept electronically, remote, or virtually notarized documents before April 2020; in New Jersey, a 2020 law allowed for temporary use of e-notarization.[15]

Figure 3

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

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

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

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

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

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

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

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

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

6. Take an open, data-driven, and transparent approach to implementing and maintaining court processes and supporting technologies.

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

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

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

Technology increased participation in civil courts

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

Case participation is typically measured in two ways: by the number of people filing or initiating lawsuits and by the count of defendants in cases filed against them. Data reviewed

by Pew researchers suggests that by the second metric, online proceedings may have driven an increase in participation.[26] In June 2020, for example, Arizona civil courts saw an 8% decline in the rate of default judgment resulting from litigants' failure to appear, compared with June 2019, indicating an increase in participation.[27] And the state found similar results at the local level. In Arizona's largest county, Maricopa, the failure-to-appear rate for eviction cases decreased from nearly 40% in 2019 to approximately 13% in February 2021.[28]

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

The boost in court appearances that followed the shift to virtual hearings is consistent with pre-pandemic assertions that reducing the day-to-day costs of coming to court—such as transportation, child care, lost wages, and travel time—would increase people's ability to meaningfully engage in court cases.[32] In addition, technology can be used to help people show up to court if tools are made available in multiple languages and are designed to serve people with a range of abilities. And although recent indications are promising, courts need more data to analyze and confirm the trend toward greater participation.

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

Further, examples from across the country indicate that technology, when implemented thoughtfully, can effectively help people navigate the civil court system, even when they are not represented by an attorney. For instance, Suffolk Law School in Massachusetts, in collaboration with courts in three states, developed Court Forms Online, a website that improves on typical e-filing tools by offering a more user-friendly interface that guides litigants through various court processes. The site walks users through the steps for

obtaining a domestic violence restraining order, applying for eviction protection under the Centers for Disease Control and Prevention (CDC) moratorium, and even handling certain appellate matters.[35] In one example, a woman was able to use forms provided through the website to electronically file a motion to the state's Appeals Court and obtain a stay of her improper eviction just as the constable was beginning to move her out of her home.[36]

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

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

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

This gap between the promise of technology to make courts more equitable for individuals without attorneys and the reality of its implementation is consistent with previous analyses of pioneering court systems that adopted new technologies around the turn of the century. In 2010, the NCSC examined seven states—Iowa, Michigan, Minnesota, New Hampshire, Oregon, Utah, and Vermont—at the forefront of court "re-engineering," a restructuring of services that included the expanded use of technology.[38] But most of the solutions that the center observed were either exclusively for lawyers—such as e-filing systems accessible only by attorneys—or required too much legal expertise to be helpful to people using the courts without professional assistance.

Court processes are not fully open, transparent

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

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

Equity gaps

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

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

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

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

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

Efficiency gaps

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

Figure 4

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

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

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

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

done, court officials have an opportunity to improve and enhance those systems to better serve all litigants.

Eviction Cases Proceeded During the Pandemic

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

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

Why did eviction cases proceed?

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

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

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

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

Courts' technology choices hindered participation for some people without lawyers

During the pandemic, courts—like schools, government agencies, and some businesses—discovered that shifting processes from in-person to online does not necessarily make them easier to navigate. For people without the tools needed to use court technology, such as high-speed internet and a sufficiently powerful computer, the move toward modernization

failed to improve their interactions with the civil legal system and may even have made them more difficult. And although technology can be used to make the courts more accessible to people with disabilities and limited English proficiency,[54] that promise remains largely unrealized. In practice, the new technologies often limited, rather than expanded, the ways in which these groups could interact with the civil system.

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

Internet and computer access and experience

Access to internet service is the baseline requirement for web-based court technologies. Yet, despite the steady growth of internet use over the past two decades, as of 2018, 42 million U.S. adults lacked reliable broadband connectivity, including disproportionately low rates of access for certain populations and locations.[55] For instance, U.S. Census Bureau research showed that 36.4% of Black households and 30.3% of Hispanic households had neither a computer nor broadband subscription, compared with 21.2% of White and 11.9% of Asian households.[56]

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

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

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

states, courts have permitted litigants for whom video technology is not an option to participate in hearings via telephone.

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

Access for users with disabilities and limited English proficiency

State courts, like other public institutions, have specific obligations under the Americans with Disabilities Act related to access for people with disabilities, and federal law also requires courts to provide language assistance for those with limited English proficiency.[62] But according to the National Center for Access to Justice's 2021 Justice Index, which scores states from 0 to 100 on their adoption of specific policies related to disability accessibility and language access, including court access for people without lawyers, 44 states scored below 50 for accessibility, and 31 scored below 50 for language access.[63]

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

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

Recommendations

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

1. Combine technological tools with process improvements.

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

One example of such an effort is that several states reviewed notarization policies, which in many instances led to the elimination of traditional verification requirements, such as in-person document review by a certified notary public. Another is how Hawaii leveraged its online dispute resolution (ODR) project to re-examine and revise its small claims process. ODR was originally developed as a dispute resolution mechanism in the e-commerce sector, and courts around the country began adopting it in 2014 to allow litigants to negotiate and resolve disputes among themselves outside of court business hours. Hawaii took the opportunity presented by the new system to add an early review step in which judges ensure that the collector-plaintiffs own the debts they are attempting to recoup before the case moves forward.[65] The state also developed and embedded in its ODR platform a user-friendly fee waiver application and review function so that litigants without lawyers must navigate only a single online platform.[66]

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

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

Court ODR pilot projects undertaken before the pandemic demonstrate that it is indeed possible to incorporate user feedback in the deployment of technology. For example, in 2019, the Utah courts engaged an external researcher to conduct a usability study of its ODR platform for small claims cases, which included testing by end users. The research

uncovered various issues with the platform's accessibility and functionality, and the court was able to make targeted improvements.[67]

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

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

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

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

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

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

- What data must be tracked to answer key questions?
- How can litigants, attorneys, court staff, and other stakeholders be engaged in the process of improving the court experience?

- What can the civil court system learn from the experiences of other courts that are implementing and testing similar changes?

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

Conclusion

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

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

Endnotes

1. E. Scigliano, "Zoom Court Is Changing How Justice Is Served," *The Atlantic*, April 13, 2021, https://www.theatlantic.com/magazine/archive/2021/05/can-justice-be-served-on-zoom/618392.
2. Conference of State Court Administrators, National Association for Court Management, and National Center for State Courts' Joint Technology Committee, "Judicial Perspectives on ODR and Other Virtual Court Processes" (2020), https://www.ncsc.org/__data/assets/pdf_file/0023/34871/2020-05-18-Judicial-Perspectives.pdf; National Center for State Courts, "Will Remote Hearings Improve Appearance Rates?" May 13, 2020, https://www.ncsc.org/newsroom/at-the-center/2020/may-13.
3. See, for example: G. Jurva, "The Impacts of the Pandemic on State & Local Courts Study 2021: Remote Hearings, Legal Technology, Case Backlogs, and Access to Justice" (Thomson Reuters 2021), https://legal.thomsonreuters.com/en/insights/reports/impacts-of-the-pandemic-on-

state-local-courts?form=thankyou&gatedContent=%252Fcontent%252Fewp-marketing-websites%252Flegal%252Fgl%252Fen%252Finsights%252Freports%252Fimpacts-of-the-pandemic-on-state-local-courts; Butler Snow, "Texas Appellate Law Podcast," podcast audio, July 15, 2021, https://www.butlersnow.com/2021/07/disruption-and-increasing-access-to-justice-chief-justice-bridget-mccormack/; National Center for State Courts, "Study of Virtual Child Welfare Hearings: Impressions from Judicial Interviews" (2021), https://www.ncsc.org/__data/assets/pdf_file/0018/65520/Study-of-Virtual-Child-Welfare-Hearings-Judicial-Interviews-Brief.pdf.

4. Connecticut did not have any Supreme Court pandemic emergency orders, but remote hearings did take place on a jurisdiction-by-jurisdiction basis, according to state contacts.

5. American Bar Association, "Report on the Future of Legal Services in the United States" (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf; E.C. Baig, "How a Wave of New Tech Products Are Making Life Easier for People With Disabilities," *USA Today*, Sept. 10, 2018, https://www.usatoday.com/story/tech/columnist/baig/2018/09/10/technology-improves-people-disabilities-firms-respond-moral-legal-demands/835232002/; D.S. Raja, "Bridging the Disability Divide Through Digital Technologies" (World Bank Group, 2016), http://pubdocs.worldbank.org/en/123481461249337484/WDR16-BP-Bridging-the-Disability-Divide-through-Digital-Technology-RAJA.pdf; J. Rubin-Wills, "Language Access Advocacy After Sandoval: A Case Study of Administrative Enforcement Outside the Shadow of Judicial Review," *N.Y.U. Review of Law & Social Change* 36, no. 3 (2012): 465-511, https://socialchangenyu.com/review/language-access-advocacy-after-sandoval-a-case-study-of-administrative-enforcement-outside-the-shadow-of-judicial-review/.

6. Conference of Chief Justices and Conference of State Court Administrators, "Resolution 2: In Support of the Guiding Principles for Post-Pandemic Court Technology" (2021), https://ccj.ncsc.org/__data/assets/pdf_file/0019/51193/Resolution-2-In-Support-of-the-Guiding-Principles-for-Post-Pandemic-Court-Technology-.pdf.

7. Conference of Chief Justices and Conference of State Court Administrators, "Resolution 13: The Emergence of E-Everything" (2006), https://ccj.ncsc.org/__data/assets/pdf_file/0011/23420/01182006-the-emergence-of-e-everything.pdf.

8. T.M. Clarke, "Reengineering: The Importance of Establishing Principles," in *Future Trends in State Courts* (2010): 31-32, https://cdm16501.contentdm.oclc.org/digital/collection/ctadmin/id/1627. In his 2019 State of the Judiciary address, then-Iowa Chief Justice Mark Cady highlighted the promise of a range of technological approaches, noting, "Our future can no longer be about taking small steps or standing still. We need to think big and take big steps. Every day we must seek to achieve what can be imagined." J.Q. Lynch, "Iowa Chief Justice Urges Lawmakers to 'Think Big,'" *Sioux City Journal*, Jan. 16, 2019, https://siouxcityjournal.com/news/state-and-regional/govt-and-politics/iowa-chief-justice-urges-lawmakers-to-think-big/article_da82d5c2-99e7-5258-a24c-dc54c944258c.html. See also, for example: M.E. Recktenwald, chief justice, "State of the Judiciary"(Honolulu, Jan. 24, 2019), https://www.courts.state.hi.us/wp-content/uploads/2019/01/State-of-the-Judiciary_FINAL_01-24-19.pdf; H.D. Melton, chief justice, "2020 State of the Judiciary Address"(Atlanta, Feb. 26, 2020), https://www.gasupreme.us/wp-content/uploads/2020/02/Judi20.pdf; J.D. Kemp, chief justice, "State of the Judiciary"(Little Rock, Arkansas, June 14, 2019), https://www.arcourts.gov/courts/supreme-court/state-judiciary; M.G. Heavican, chief justice, "State of the Judiciary" (Omaha, Nebraska, Jan. 17, 2019), https://supremecourt.nebraska.gov/sites/default/files/State-of-Judiciary-2019.pdf; M.E. Barbera, chief judge, Maryland Court of Appeals, "2019 State of the Judiciary Address to the General Assembly of Maryland"(Annapolis, Maryland, Feb. 6, 2019), https://mdcourts.gov/sites/default/files/import/coappeals/speeches/soj2019.pdf; J. Williams, trial court administrator, Massachusetts Trial Court, "2019 State of the Judiciary" (Boston, Oct. 30, 2019), https://www.mass.gov/service-details/2019-state-of-the-judiciary-addresses.

9. National Center for State Courts, "Landscape of Civil Litigation in State Courts" (2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf.

10. R. Zorza, "Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation," *Drake Law Review* 61 (2013): 845-81, http://www.zorza.net/Simple.pdf.

11. National Center for State Courts, "Justice for All State Planning Documents: Lessons From the Field" (2018), https://www.ncsc.org/__data/assets/pdf_file/0016/26305/jfa-lessons-learned-final-2018.pdf; National Center for State Courts, "Guiding Principles for Post-Pandemic Court Technology" (2020), https://www.ncsc.org/__data/assets/pdf_file/0014/42332/Guiding-Principles-for-Court-Technology.pdf.

12. This analysis is based on emergency orders from all 50 states and the District of Columbia. The list of websites used is available upon request. See also E. Benfer, R. Koehler, and A. Alexander, "COVID-19 Eviction Moratoria & Housing Policy: Federal, State, Commonwealth, and Territory," Boston University, COVID-19 U.S. State Policies Database, Aug. 23, 2021, https://statepolicies.com/policy-by-topic/economic-precarity/housing/.

13. Ibid.

14. DocVerify, "What States Allow Electronic Notary?" accessed Aug. 3, 2021, https://www.docverify.com/Products/E-Notaries/What-States-Allow-Electronic-Notary.

15. E. Rickard and Q. Naqui, "Response to Pandemic Pushes State Court Modernization Forward," The Pew Charitable Trusts, July 21, 2020, https://www.pewtrusts.org/en/research-and-analysis/articles/2020/07/21/response-to-pandemic-pushes-state-court-modernization-forward.

16. Pew analysis of state supreme court COVID-19 pandemic emergency orders issued from March 1 through Aug. 1, 2020. Three states— Missouri, New Hampshire, and South Carolina—adopted both e-notarization and alternatives to notarization.

17. Rickard and Naqui, "Response to Pandemic"; Supreme Court of Ohio, "Temporary Notarization Forms," accessed Sept. 20, 2021, https://www.supremecourt.ohio.gov/LegalResources/Rules/notarization/.

18. National Center for State Courts, "Guiding Principles for Post-Pandemic Court Technology."

19. Ibid.

20. Texas Judicial Council, "Civil Justice Committee Report and Recommendations" (2020), https://www.txcourts.gov/media/1449780/civil-justice-committee-2020_0923_final.pdf.

21. Michigan State Court Administrative Office, Michigan Trial Courts Virtual Courtroom Standards and Guidelines (2020), https://www.courts.michigan.gov/4a1e83/siteassets/court-administration/standardsguidelines/operations/vcr_stds.pdf.

22. J. DiFiore, chief judge of the Court of Appeals and chief judge of the State of New York, "The State of Our Judiciary 2021," March 2, 2021, https://www.nycourts.gov/whatsnew/pdf/21_SOJ-Speech.pdf; Commission to Reimagine the Future of New York's Courts, "Report and Recommendations of the

Future Trials Working Group" (2021), https://www.nycourts.gov/whatsnew/pdf/future-trials-working-grp-april2021.pdf.

23. Jurva, "The Impacts of the COVID-19 Pandemic on State & Local Courts."
24. The Pew Charitable Trusts, "How Debt Collectors Are Transforming the Business of State Courts" (2020), https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts.
25. Butler Snow,"Texas Appellate Law Podcast."
26. National Center for State Courts, "Will Remote Hearings Improve Appearance Rates?"; Scigliano, "Zoom Court."
27. Conference of State Court Administrators, National Association for Court Management, and National Center for State Courts' Joint Technology Committee, "Judicial Perspectives on ODR and Other Virtual Court Processes."
28. COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup, "Post-Pandemic Recommendations" (Arizona Supreme Court, 2021), https://www.americanbar.org/content/dam/aba/administrative/judicial/2021-az-post-pandemic-rec.pdf.
29. National Center for State Courts, "Will Remote Hearings Improve Appearance Rates?"
30. E.G. Thornburg, "Observing Online Courts: Lessons From the Pandemic," *Family Law Quarterly* 54, no. 3 (2021), https://www.americanbar.org/groups/family_law/publications/family-law-quarterly/volume-54/issue-3/observing-online-courts-lessons-the-pandemic/.
31. Jurva, "The Impacts of the COVID-19 Pandemic on State & Local Courts."
32. J. Greacen, "Remote Appearances of Parties, Attorneys and Witnesses: A Review of Current Court Rules and Practices" (Self-Represented Litigation Network, 2017), https://www.srln.org/node/1269/report-remote-appearances-parties-attorneys-and-witness-review-currentcourt-rules-practices.
33. J.I. Turner, "Remote Criminal Justice," *Texas Tech Law Review* 53 (2021): 197-271, https://papers.ssrn.com/a=3699045.
34. A.L. Bannon and D. Keith, "Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond," *Northwestern University Law Review* 115, no. 6 (2021): 1875-920, https://scholarlycommons.law.northwestern.edu/nulr/vol115/iss6/7.

35. Court Forms Online, "About Us: The Document Assembly Line Project," accessed Aug. 20, 2021, https://courtformsonline.org/about.

36. D. Colarusso, director, Suffolk Law School Legal Innovation and Technology Lab, email to The Pew Charitable Trusts, July 23, 2021.

37. Jurva, "The Impacts of the COVID-19 Pandemic on State & Local Courts." See also: A. Reed and M. Alder, "Zoom Courts Will Stick Around as Virus Forces Seismic Change," Bloomberg Law, July 30, 2020, https://news.bloomberglaw.com/us-law-week/zoom-courts-will-stick-around-as-virus-forces-seismic-change.

38. D.J. Hall, "Reengineering Lessons From the Field," *Future Trends in State Courts* (2010): 36-41, https://cdm16501.contentdm.oclc.org/digital/collection/ctadmin/id/1625.

39. See, for example: Z. Tillman, "Going to Court Without a Lawyer Was Always Hard. The Pandemic Has Made It Much Harder," Buzzfeed, May 15, 2020, https://www.buzzfeednews.com/article/zoetillman/coronavirus-courts-closed-civil-court-legal-help#news-content.

40. Commonwealth of Massachusetts, "Remote/Virtual Court Services," accessed Sept. 20, 2021, https://www.mass.gov/info-details/remotevirtual-court-services; E. Rickard and D. White, "Illinois, Michigan, and Ohio Residents Seek Legal Information Amid the COVID-19Pandemic," The Pew Charitable Trusts, May 19, 2020, https://www.pewtrusts.org/en/research-and-analysis/articles/2020/05/19/illinois-michigan-and-ohio-residents-seek-legal-information-amid-the-covid-19-pandemic.

41. The Pew Charitable Trusts, "How Debt Collectors Are Transforming the Business of State Courts."

42. bid.

43. P. Kiel and J. Ernsthausen, "Capital One and Other Debt Collectors Are Still Coming for Millions of Americans," ProPublica, June 8, 2020, https://www.propublica.org/article/capital-one-and-other-debt-collectors-are-still-coming-for-millions-of-americans.

44. State of Texas, Office of Court Administration, "Annual Statistical Report for the Texas Judiciary: Fiscal Year 2020" (2020), https://www.txcourts.gov/media/1451853/fy-20-annual-statistical-report_final_mar10_2021.pdf.

45. C.J. Raba, clinical instructor, University of California, Irvine (presentation, Paths to Justice, Sept. 14, 2021). See also A. DiPierro, "Debt Collection Lawsuits Compound COVID Woes for Some Bay Area Residents," Bay City News Foundation, Aug. 20, 2021,

https://localnewsmatters.org/2021/08/20/debt-collection-lawsuits-compound-covid-woes-for-some-bay-area-residents/.

46. See: A. Warren, S. McKernan, and B. Braga, "Before COVID-19, 68 Million U.S. Adults Had Debt in Collections. What Policies Could Help?" *Urban Wire* (blog), Urban Institute, April 17, 2020, https://www.urban.org/urban-wire/covid-19-68-million-us-adults-had-debtcollections-what-policies-could-help.

47. H. Schultheis and C. Rooney, "A Right to Counsel Is a Right to a Fighting Chance," Center for American Progress, Oct. 2, 2019, https://www.americanprogress.org/issues/poverty/reports/2019/10/02/475263/right-counsel-right-fighting-chance.

48. E. Rickard, "Many U.S. Families Faced Civil Legal Issues in 2018," The Pew Charitable Trusts, Nov. 19, 2019, https://www.pewtrusts.org/en/research-and-analysis/articles/2019/11/19/many-us-families-faced-civil-legal-issues-in-2018.

49. Alabama Association of Realtors v. Department of Health and Human Services et al., 21-5093, 594 (Supreme Court of the United States, Aug. 26, 2021). Congress extended the CDC-issued moratorium in December 2020, and the Biden administration further extended it in January, March, June, and August 2021. See: National Housing Law Project and National Low Income Housing Coalition, "Federal Moratorium on Evictions for Nonpayment of Rent" (2021), https://nlihc.org/sites/default/files/Overview-of-National-Eviction-Moratorium.pdf; L. Wamsley, "Here's What You Need to Know About the New Eviction Ban," National Public Radio, Aug. 6, 2021, https://www.npr.org/2021/08/06/1025212834/cdc-new-eviction-ban-moratorium-renters-landlords.

50. Pew analysis of state supreme court COVID-19 pandemic emergency orders issued from March 1 through Aug. 1, 2020.

51. E.A. Benfer et al., "State and Federal Eviction Moratoria and Rental Housing Stabilization Measures During the COVID-19 Pandemic" (forthcoming, 2021).

52. J. Reichman, "First Results of the CDC Eviction Moratorium in Houston," *January Advisors* (blog), Feb. 8, 2021, https://www.januaryadvisors.com/cdc-eviction-moratorium-houston/.

53. P. Hepburn et al., "U.S. Eviction Filing Patterns in 2020," *Socius* 7 (2021): 1-18, https://doi.org/10.1177/23780231211009983.

54. B.R. Hough, "Let's Not Make It Worse: Issues to Consider in Adopting New Technology," in "Using Technology to Enhance Access to Justice," *Harvard Journal of Law and*

Technology 26, no. 1 (2012): 262, https://jolt.law.harvard.edu/articles/pdf/v26/26HarvJLTech241.pdf. The American Bar Association issued standards on language access: Standard 4.3 and accompanying commentary highlight the changing nature of technology that could benefit litigants with limited English proficiency. See: American Bar Association, "Standards for Language Access in Courts" (2012), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf. Further, the National Center for State Courts documented some specific uses of technology for language access, including video remote interpreting and remote translation of written documents. See: National Center for State Courts, "Call to Action: Achieving Civil Justice for All" (2016), https://www.ncsc.org/__data/assets/pdf_file/0021/25581/ncsc-cji-report-web.pdf.

55. N. McCarthy, "Report: 42 Million Americans Do Not Have Access to Broadband," *Forbes*, Feb. 7, 2020, https://www.forbes.com/sites/niallmccarthy/2020/02/07/report-42-million-americans-do-not-have-access-to-broadband-infographic/?sh=751bda10b12a; the Pew Research Center, "Internet/Broadband Fact Sheet" (2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/.

56. U.S. Census Bureau, "The Digital Divide: Percentage of Households by Broadband Internet Subscription, Computer Type, Race and Hispanic Origin," Sept. 11, 2017, https://www.census.gov/library/visualizations/2017/comm/internet.html.

57. National Telecommunications and Information Administration, "NTIA Data Reveal Shifts in Technology Use, Persistent Digital Divide" (2020), https://www.ntia.doc.gov/blog/2020/ntia-data-reveal-shifts-technology-use-persistent-digital-divide#main-content.

58. Federal Communications Commission, "2020 Broadband Deployment Report" (2020), https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2020-broadband-deployment-report.

59. S. Atske and A. Perrin, "Home Broadband Adoption, Computer Ownership Vary by Race, Ethnicity in the U.S.," The Pew Research Center, July 16, 2021, https://www.pewresearch.org/fact-tank/2021/07/16/home-broadband-adoption-computer-ownership-vary-by-race-ethnicity-in-the-u-s.

60. This analysis is based on emergency orders from all 50 states and Washington, D.C. See the separate methodological appendix, available at

https://www.pewtrusts.org/-/media/assets/2021/11/clsm-court-tech-methodological-appendix.pdf.

61. E.A. Vogels and M. Anderson, "Americans and Digital Knowledge," the Pew Research Center, Oct. 9, 2019, https://www.pewresearch.org/internet/2019/10/09/americans-and-digital-knowledge.

62. T.E. Perez, assistant attorney general, Civil Rights Division, U.S. Department of Justice, letter to chief justice/state court administrator, Aug. 16, 2010, https://www.lep.gov/final_courts_ltr_081610.pdf.

63. National Center for Access to Justice, "About the Justice Index," accessed Aug. 20, 2021, https://ncaj.org/state-rankings/2020/disability-access/about-justice-index.

64. National Science Foundation, "Award Abstract # 2028981—Rapid: Procedural Changes in State Courts During COVID-19," accessed Aug. 20, 2021, https://www.nsf.gov/awardsearch/showAward?AWD_ID=2028981&HistoricalAwards=false.

65. Ibid.

66. M. Acosta and A. Min, "Tiny Chat 64: Hawaii ODR," National Center for State Courts, September 2021, https://www.ncsc.org/newsroom/public-health-emergency/tiny-chats.

67. D. Hirsch, principal court management consultant, National Center for State Courts, email to The Pew Charitable Trusts, Oct. 13, 2020. See also: National Center for State Courts, "Eight Lessons to Consider for ODR Implementation" (2020), https://www.ncsc.org/__data/assets/pdf_file/0020/58016/8-Lessons.pdf.

68. S. Butler et al., "The Utah Online Dispute Resolution Platform: A Usability Evaluation and Report" (working paper, University of Arizona, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696105.

69. M. Hagan, "Participatory Design for Innovation in Access to Justice," *Daedalus* 148, no. 1 (2019): 120-27, https://doi.org/10.1162/DAED_a_00544; National Center for State Courts, "Guiding Principles for Post-Pandemic Court Technology."

70. The Pew Charitable Trusts, "How Debt Collectors Are Transforming the Business of State Courts."

71. A.L. Miller, P. Hannaford-Agor, and K. Genthon, "An Evaluation and Performance Measurement Framework for Online Dispute Resolution: Assessing Improvements in Access to Justice" (National Center for State Courts, 2021),

https://www.ncsc.org/__data/assets/pdf_file/0022/65641/ODR-Evaluation-Performance-Measure-Framework.pdf.

72. National Center for State Courts, "Open Data Principles to Promote Court Technology Post-Pandemic: Key Data Elements to Collect and Report" (2020), https://www.ncsc.org/__data/assets/pdf_file/0028/59671/Open-Data-Principles-Corrected-2.pdf.

73. J. Karp, "Trial Alternatives Getting Fresh Look With COVID-19 Backlog," Law360, Feb. 4, 2021, https://www.law360.com/articles/1351450/trial-alternatives-getting-fresh-look-with-covid-19-backlog; R. Lewis, "Justice Delayed: Courts Overwhelmed by Pandemic Backlog," CalMatters, Jan. 19, 2021, https://calmatters.org/justice/2021/01/justice-courts-overwhelmed-pandemic.

REPORT

December 1, 2021

Projects: Civil Legal System Modernization

Topics: U.S. Policy & U.S. State Policy

Experts: Erika Rickard

Places: United States

RELATED EXPERTS

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SUPREME COURT OF WYOMING
Language Interpreter Policy

This policy governs language interpreters by the courts and offers guidelines for access to the courts by persons with Limited English Proficiency.

I. DEFINITIONS

A. **Court Proceeding** – Any hearing, trial, or other appearance before the circuit court, district court, chancery court, and the Wyoming Supreme Court in an action, appeal, or other proceeding conducted by a Judicial Officer.

B. **Indigent Party** – A party found by the court to be indigent pursuant to the fiscal standards established by the Wyoming Supreme Court, Rule 44(d) and (e) of the Wyoming Rules of Criminal Procedure, or other applicable statute.

C. **Judicial Officer** – A justice, judge, or magistrate authorized to preside over a Court Proceeding.

D. **Language Interpreter –** A language interpreter who is an independent contractor pursuant to contract or is an independent contractor as defined by IRS Revenue ruling 87-41. A language interpreter may be Professionally Certified, Registered, or Qualified as defined below. Judicial Branch employees are not considered Language Interpreters as defined by this Policy.

E. **Limited English Proficient ("LEP") Person** – An individual who does not speak English as their primary language and who has limited ability to speak or understand the English Language.

F. **Professionally Certified Interpreter** – A Language Interpreter who has achieved certification by a recognized interpreter certification program and who is on a roster of interpreters, if any, maintained by another jurisdiction. Professionally Certified Interpreters are listed on Wyoming's Interpreter Roster, maintained by the Wyoming Supreme Court and posted on the Wyoming Judicial Branch website. Professionally Certified Interpreters must attend Wyoming's interpreter orientation program.

G. **Qualified Interpreter** – A Language Interpreter who is not Professionally Certified or Registered, as defined above, but has been qualified by the local court. Qualified Interpreters are <u>not</u> listed on the Interpreter Roster maintained by the Wyoming Supreme Court.

H. **Registered Interpreter** – A Language Interpreter who has not achieved

certification but has met minimum professional competency standards, as outlined below. Registered Interpreters are listed on the Interpreter Roster maintained by the Wyoming Supreme Court and posted on the Wyoming Judicial Branch website.

To receive the designation of a Registered Interpreter in the State of Wyoming the interpreter shall:

1. Attend the Wyoming Interpreter two (2) day orientation, ethics, and skill building workshop;

2. Complete and return the Wyoming Interpreter Service Provider Interest Form;

3. Pass the Wyoming Interpreter written exam with a score of eighty percent (80%) or higher;

4. Pass Oral Proficiency Interview (OPI) with a score of Advanced- Mid or better; and

5. Take the Wyoming interpreter oath.

II. APPOINTMENT OF LANGUAGE INTERPRETERS

A. The court shall appoint and pay for language interpretation in Court Proceedings relating to the following case types, subject to Section II(C):

1. Felony and Misdemeanors

2. Forcible Entry or Detainer

3. Juvenile Delinquency and CHINS

4. Protection Orders involving domestic abuse

5. Abuse and Neglect

6. Paternity and Support when covered under Title IV-D of the Social Security Act

7. Relinquishment and Termination of Parental Rights

8. Mental Health- Title 25

9. For a deaf or mute individual pursuant to Wyo. Stat. Ann. § 5-1-109(c)

B. The court may appoint and pay for an interpreter for any LEP party to a Court Proceeding where the person's indigency has been determined.

C. For those cases listed in Sections II(A) and II(B), the court may pay for language interpretation services in the following circumstances:

1. During Court Proceedings when an individual related to a case, a victim, witness, parent, legal guardian, or minor charged as a juvenile is a LEP person, as determined by the court.

2. To facilitate communication outside of the Judicial Officer's presence to allow a Court Proceeding to continue as scheduled, including pretrial conferences between defendants and prosecuting attorneys to relay a plea offer immediately prior to a court appearance.

3. During contempt proceedings when loss of liberty is a possible consequence.

4. During mental health evaluations performed for the purpose of aiding the court in determining competency.

D. The court shall not arrange, provide, or pay for language interpretation to facilitate communication with attorneys, prosecutors, or other parties related to a case involving LEP individuals for the purpose of gathering background information, investigation, trial preparation, client representation, or any other purpose that falls outside of the immediate Court Proceedings, except as delineated in Section II(C). Prosecutors and attorneys are expected to provide and pay for language interpretation that they deem necessary for case preparation and general communication with parties outside of Court Proceedings.

E. For cases other than those listed in Sections II(A) through II(C) above, the parties may provide and arrange for their own interpretation services. Failure by the parties to provide and arrange for language interpretation services in these cases will not require a continuance of the case.

III. QUALIFICATIONS OF LANGUAGE INTERPRETERS

A. All Language Interpreters provided by the courts shall sign an oath to abide by the Code of Professional Responsibility for Interpreters.

B. To ensure that Court Proceedings are interpreted as accurately as possible, courts are strongly encouraged to appoint a Language Interpreter according to the following preference list: (1) Professionally Certified Interpreters; (2)

Registered Interpreters; and (3) Qualified Interpreters.

C. When an interpreter is not listed on the Interpreter Roster maintained by the Wyoming Supreme Court or not a Professionally Certified or Registered Interpreter on the roster of another jurisdiction, the court shall conduct a *voir dire* inquiry of the interpreter to determine the interpreter's credentials prior to initiating a Court Proceeding. The *voir dire* inquiry applies to family members and friends used as interpreters. The court shall make the following findings in open court on the record:

1. A summary of the unsuccessful efforts made to obtain a Professionally Certified or Registered Interpreter; and

2. That the proposed interpreter appears to have adequate language skills, knowledge of interpreting techniques, and familiarity with interpreting in a court setting; and

3. That the proposed interpreter has read, understands, and will abide by the Interpreter's Code of Ethics, attached as Appendix B to this Policy.

IV. ASSIGNMENT OF MORE THAN ONE LANGUAGE INTERPRETER

A. Absent exigent circumstances, the court should arrange, provide and pay for two (2) or more Language Interpreters during the following proceedings to prevent interpreter fatigue and the concomitant loss of accuracy in interpretation:

1. Court Proceedings scheduled to last three (3) hours or more; or

2. Court Proceedings in which multiple languages other than English are involved; or

3. Court Proceedings in which sign language interpreters are needed for an individual who is deaf, mute, or hearing impaired that are scheduled for more than one (1) hour.

B. When two (2) Language Interpreters are used, one will be the proceedings interpreter and the other a support interpreter. The proceedings interpreter provides language interpretation services for all LEP parties and witnesses, while the support interpreter is available to assist with research, vocabulary, equipment or other issues. The proceedings interpreter and the support interpreter shall alternate roles every thirty (30) minutes.

C. If two (2) Language Interpreters are not reasonably available as set forth in Section IV(A), the Language Interpreter should be given no less than a ten (10) minute break for every fifty (50) minutes of interpreting.

D. The following guidelines and limitations apply to the utilization of more than one interpreter:

1. Language Interpreters are bound by an oath of confidentiality and impartiality, and serve as officers of the court; therefore, the use of one Language Interpreter by more than one individual in a case is permitted.

2. The court is not obligated to appoint a different Language Interpreter when a Language Interpreter has previously provided interpreter services during a Court Proceeding for another individual in a case.

3. Any individual may provide and arrange for interpretation services to facilitate attorney-client communication if interpretation services exceeding those provided by the court are desired.

V. USE OF COURT PERSONNEL AS INTERPRETERS

A. A court employee may not interpret Court Proceedings except as follows:

1. Prior to using a court employee as an interpreter, the court shall make findings in open court on the record summarizing the unsuccessful efforts made to obtain a Language Interpreter who is not a court employee.

2. The court employee will not be paid wages or benefits in addition to the employee's regular compensation as a court employee. The court employee will not receive any interpreter service fees established in this Policy.

VI. INVESTIGATION OF COMPLAINTS AND IMPOSITION OF SANCTIONS

An interpreter should be one whose record of conduct justifies the trust of the courts, witnesses, jurors, attorneys, parties, and the public.

Language Interpreters are not entitled to interpret on behalf of the courts or in Court Proceedings. Instead, the provision of interpretation services by Language Interpreters rests within the discretion of each Judicial Officer.

Similarly, Professionally Certified and Registered Interpreters are not entitled to have their names included on the Interpreter Roster. The Interpreter Roster is maintained at the discretion of the Wyoming Supreme Court. The Wyoming Supreme Court authorizes the State Court Administrator to investigate complaints and impose sanctions against Language Interpreters to protect the integrity of Court Proceedings and the safety of the public.

A. Sanctions may be imposed when:

1. The Language Interpreter is unable to adequately interpret the Court Proceedings;

2. The Language Interpreter knowingly makes a false interpretation;

3. The Language Interpreter knowingly discloses confidential or privileged information obtained while serving as a Language Interpreter;

4. The Language Interpreter knowingly fails to disclose a conflict of interest;

5. The Language Interpreter fails to appear as scheduled without good cause; or

6. If a sanction is determined appropriate in the interest of justice.

B. A complaint against a Language Interpreter must be in writing, signed by the complainant, and delivered via mail or email to the Court Interpreter Program Manager at:

Wyoming Supreme Court
c/o Court Interpreter Program Manager
2301 Capitol Ave.
Cheyenne, WY 82002

interpreters@courts.state.wy.us

The complaint shall state the date, time, place, and nature of the alleged improper conduct. The complaint shall include the names, titles, and telephone numbers of possible witnesses. If the complainant is unable to communicate in written English, the complainant may submit the complaint in his/her primary language.

The Court Interpreter Program Manager may take immediate action, upon

receipt and review of the complaint, if deemed necessary to protect the integrity of the courts, including immediately suspending the Professionally Certified or Registered Interpreter from the Interpreter Roster for the pendency of the investigation and consideration of the complaint. In any case where the Court Interpreter Program Manager deems it necessary to suspend the Professionally Certified or Registered Interpreter from the Interpreter Roster, notice shall be sent by certified mail to the Language Interpreter.

C. Upon receipt by the Court Interpreter Program Manager of a written complaint against a Language Interpreter or to further the interest of justice, the Court Interpreter Program Manager shall conduct an investigation into the alleged improper conduct of the Language Interpreter. The Court Interpreter Program Manager shall seek and receive such information and documentation as is necessary for the investigation. The rules of evidence do not apply to this evaluation and consideration of complaint, and the Language Interpreter is not entitled to representation by counsel. The Court Interpreter Program Manager shall provide a written report of the investigation results along with a recommendation on any action to be taken to the State Court Administrator within sixty (60) days of the complaint or start of the investigation.

The report and recommendation shall be provided to the Language Interpreter by certified mail at the same time it is provided to the State Court Administrator. The Language Interpreter shall have fifteen (15) days from receipt to respond to the report and recommendation of the Court Interpreter Program Manager.

D. Upon receipt of the report and recommendations of the Court Interpreter Program Manager and the Language Interpreter's response, if any, the State Court Administrator may take any of the following actions in order to protect the integrity of the Court Proceedings and the safety of the public:

1. Dismiss the complaint;

2. Issue a written reprimand against the Language Interpreter;

3. Specify corrective action with which the Language Interpreter must fully comply in order to remain on the Interpreter Roster, including, but not limited to, the completion of educational courses and/or retaking one or more parts of the of the interpreter orientation, written exam, or oral proficiency interview;

4. Suspend the Language Interpreter from the Interpreter Roster for a

specified period of time, or until corrective action is completed; or

5. Remove the Language Interpreter from the Interpreter Roster.

E. Written notice of any actions taken by the State Court Administrator will be sent via certified mail to the Language Interpreter and the complainant. Written notice will also be provided to Judicial Officers and court staff if sanctions are imposed against the Language Interpreter.

VII. REMOTE INTERPRETING

Remote interpretation may be utilized to facilitate access to the courts by LEP persons as may be determined by the court.

VIII. RECORDING OF PROCEEDING

The court may order that the testimony of the person for whom interpretation services are provided and the interpretation be recorded for use in verifying the official transcript of the Court Proceeding. If an interpretation error is believed to have occurred based on a review of the recording, a party may file a motion requesting that the court direct that the official transcript be amended and the court may grant further relief as it deems appropriate.

VIII. ACCESS TO SERVICES

Based on current Policy, court interpreting services are only provided in the cases detailed under Sections II(A) through II(C). Current Policy reflects a commitment to consistency and fairness in the provision of interpreting services for LEP persons statewide, a recognition of the serious nature and possible consequences of Court Proceedings for individuals who come in contact with the courts, and the need to allocate limited financial resources most effectively.

IX. FACILITATING THE USE OF LANGUAGE INTERPRETERS

To facilitate the use of the most qualified Language Interpreter available, the Wyoming Supreme Court or its designated agent(s) shall administer the training and testing of Language Interpreters and post the Interpreter Roster on the judicial website of active status interpreters who are Professionally Certified or Registered Interpreters as defined in this Policy.

X. APPENDIX A

Policies regarding payment of interpreters are contained in Appendix A of this Policy. Appendix A may be amended from time to time as necessary. Amendments to Appendix A may be made without requiring the reissuance of this Policy.

APPENDIX A

I. PAYMENT OF LANGUAGE INTERPRETERS AND OTHER LEP RELATED SERVICES

A. Compensation Rate for Language Interpreters. The recommended compensation rate for Language Interpreters working as independent contractors is:

(1) Professionally Certified: $55/hr.

(2) Registered: $40/hr.

(3) Qualified: $25/hr.

Based on the Language Interpreter's certification status and the language availability in the judicial district, the court may appoint a Language Interpreter at an hourly rate in excess of those established in this Appendix A.

B. Payment for Travel Time. At the discretion of the judge, a Language Interpreter may be paid the State of Wyoming's allowable mileage reimbursement rates or half the hourly Language Interpreter rate for travel time. In extraordinary circumstances, the Language Interpreter may be paid the full hourly Language Interpreter rate for travel when round trip travel exceeds one hundred fifty (150) miles.

C. Overnight Travel. In the case of trials or hearings exceeding one day duration, Language Interpreters may be compensated for food and lodging at the standard rate established by the Wyoming Supreme Court when round trip travel of one hundred twenty (120) miles or greater is required to secure the best qualified Language Interpreter. To receive reimbursement for food or lodging expenses, the Language Interpreter must receive authorization from the court for the expenses in advance of the actual expenditure. Reimbursement of allowed food and lodging expenses will be made only if itemized receipts are provided and expenses are within the allowable ranges as defined by the State of Wyoming fiscal procedures.

D. Cancellation Policy. A Language Interpreter whose assignment is cancelled within seventy-two (72) hours of the assignment start time shall be paid for the scheduled time up to a maximum of sixteen (16) hours as determined by the presiding judge in the cancelled matter. If the assignment is cancelled with more than seventy-two (72) hours' notice, the scheduling court is under no obligation to pay a cancellation fee.

APPENDIX B

Interpreter's Code of Ethics

Canon 1: Accuracy and Completeness

Interpreters shall render a complete and accurate interpretation or sight translation, without altering, omitting, or adding anything to what is stated or written, and without explanation.

Canon 2: Representation of Qualifications

Interpreters shall accurately and completely represent their certifications, training, and pertinent experience.

Canon 3: Impartiality and Avoidance of Conflict of Interest

Interpreters shall be impartial, unbiased and shall refrain from conduct that may give an appearance of bias. Interpreters shall disclose any real or perceived conflict of interest.

Canon 4: Professional Demeanor

Interpreters shall conduct themselves in a manner consistent with the dignity of the court and shall be as unobtrusive as possible.

Canon 5: Confidentiality

Interpreters shall keep confidential all matters interpreted and all conversations overheard between counsel and client. Interpreters should not discuss a case pending before the court.

Canon 6: Restriction of Public Comment

Interpreters shall not publicly discuss, report, or offer an opinion concerning a matter in which they are or have been engaged, even when that information is not privileged or required by law to be confidential.

Canon 7: Scope of Practice

Interpreters shall limit themselves to interpreting and translating, and shall not give legal advice,express personal opinions to individuals for whom they are interpreting, or engage in any other activities which may be construed to constitute a service other than interpreting or translating while serving as an interpreter.

Canon 8: Assessing and Reporting Impediments to Performance

Interpreters shall assess at all times their ability to deliver their services. When interpreters have any reservation about their ability to satisfy an assignment competently, they shall immediately convey that reservation to the appropriate judicial authority.

Canon 9: Duty to Report Ethical Violations

Interpreters shall report to the proper authority any effort to impede their compliance with any law, any provision of this code, or any other official policy governing court interpreting and legal translating.

Canon 10: Professional Development

Interpreters shall continually improve their skills and knowledge, and advance the profession through activities such as professional training and education, and interaction with colleagues and specialists in related fields.

Appendix 7

SUPREME COURT OF WYOMING

Language Interpreter Policy

This policy governs language interpreters by the courts and offers guidelines for access to the courts by persons with Limited English Proficiency.

I. DEFINITIONS

A. Court Proceeding- Any hearing, trial, or other appearance before the circuit court, district court, chancery court, and the Wyoming Supreme Court in an action, appeal, or other proceeding conducted by a Judicial Officer.

B. Indigent Party- A party found by the court to be indigent pursuant to the fiscal standards established by the Wyoming Supreme Court, Rule 44(d) and (e) of the Wyoming Rules of Criminal Procedure, or other applicable statute.

C. Judicial Officer- A justice, judge, or magistrate authorized to preside over a Court Proceeding.

D. Language Interpreter – A language interpreterwho is an independent contractor pursuant to contract or is an independent contractor as defined by IRS Revenue ruling 87-41. A language interpreter may be Professionally Certified, Registered, or Qualified as defined below. Judicial Branch employees are not considered Language Interpreters as defined by this Policy.

E. Limited English Proficient ("LEP") Person- An individual who does not speak English as their primary language and who has limited ability to speak or understand the English Language.

F. Professionally Certified Interpreter – A Language Interpreter who has achieved certification by a recognized interpreter certification program and who is on a roster of interpreters, if any, maintained by another jurisdiction. Professionally Certified Interpreters are listed on Wyoming's Interpreter Roster, maintained by the Wyoming Supreme Court and posted on the Wyoming Judicial Branch website. Professionally Certified Interpreters must attend Wyoming's interpreter orientation program.

G. Qualified Interpreter – A Language Interpreter who is not Professionally Certified or Registered , as defined above , but has been qualified by the local

court. Qualified Interpreters are not listed on the Interpreter Roster maintained by the Wyoming Supreme Court.

H. Registered Interpreter – A Language Interpreter who has not achieved certification but has met minimum professional competency standards, as outlined below. Registered Interpreters are listed on the Interpreter Roster maintained by the Wyoming Supreme Court and posted on the Wyoming Judicial Branch website.

To receive the designation of a Registered Interpreter in the State of Wyoming the interpreter shall:

1. Attend the Wyoming Interpreter two (2) day orientation, ethics and skill building workshop;

2. Complete and return the Wyoming Interpreter Service Provider Interest Form;

3. Pass the Wyoming Interpreter written exam with a score of eighty percent (80%) or higher;

4. Pass Oral Proficiency Interview (OPI) with a score of Advanced- Mid or better; and

5. Take the Wyoming interpreter oath.

II. APPOINTMENT OF LANGUAGE INTERPRETERS

A. The court shall appoint and pay for language interpretation in Court Proceedings relating to the following case types, subject to Section II(C):

1. Felony and Misdemeanors
2. Forcible Entry or Detainer

3. Juvenile Delinquency and CHINS

4. Protection Orders involving domestic abuse

5. Abuse and Neglect

6. Paternity and Support when covered under Title IV-D of the SocialSecurity Act

7. Relinquishment and Termination of Parental Rights

8. Mental Health- Title 25

9. For a deaf or mute individual pursuant to Wyo. Stat. Ann. § 5-1-109(c)

B. The court may appoint and pay for an interpreter for any LEP party to a Court Proceeding where the person's indigency has been determined.

C. For those cases listed in Sections II(A) and II(B), the court may pay for language interpretation services in the following circumstances:

1. During Court Proceedings when an individual related to a case, a victim, witness, parent, legal guardian or minor charged as a juvenile is a LEP person, as determined by the court.

2. To facilitate communication outside of the Judicial Officer's presence to allow a Court Proceeding to continue as scheduled, including pretrial conferences between defendants and prosecuting attorneys to relay a plea offer immediately prior to a court appearance.

3. During contempt proceedings when loss of liberty is a possibleconsequence.

4. During mental health evaluations performed for the purpose of aiding the court in determining competency.

D. The court shall not arrange, provide, or pay for language interpretation to facilitate communication with attorneys, prosecutors, or other parties related to a case involving LEP individuals for the purpose of gathering background information, investigation, trial preparation, client representation, or any other purpose that falls outside of the immediate Court Proceedings, except as delineated in Section II(C). Prosecutors and attorneys are expected to provide and pay for language interpretation that they deem necessary forcase preparation and general communication with parties outside of Court Proceedings.

E. For cases other than those listed in Sections II(A) through II(C) above, the parties may provide and arrange for their own interpretation services. Failure by the parties to provide and arrange for language interpretation services in these cases will not require a continuance of the case.

III. QUALIFICATIONS OF LANGUAGE INTERPRETERS

A. All Language Interpreters provided by the courts shall sign an oath to abide by the Code of Professional Responsibility for Interpreters.

B. To ensure that Court Proceedings are interpreted as accurately as possible, courts are strongly encouraged to appoint a Language Interpreter according to the following preference list: (1) Professionally Certified Interpreters; (2) Registered Interpreters; and (3) Qualified Interpreters.

C. When an interpreter is not listed on the Interpreter Roster maintained by the Wyoming Supreme Court or not a Professionally Certified or Registered Interpreter on the roster of another jurisdiction, the court shall conduct a *voir dire* inquiry of the interpreter to determine the interpreter's credentials prior to initiating a Court Proceeding. The *voir dire* inquiry applies to family members and friends used as interpreters. The court shall make the following findings in open court on the record:

1. A summary of the unsuccessful efforts made to obtain a Professionally Certified or Registered Interpreter; and

2. That the proposed interpreter appears to have adequate language skills, knowledge of interpreting techniques, and familiarity with interpreting in a court setting; and

3. That the proposed interpreter has read, understands, and will abide by the Interpreter's Code of Ethics, attached as Appendix B to this Policy.

IV. ASSIGNMENT OF MORE THAN ONE LANGUAGE INTERPRETER

A. Absent exigent circumstances, the court should arrange, provide and pay for two (2) or more Language Interpreters during the following proceedings to prevent interpreter fatigue and the concomitant loss of accuracy in interpretation:

1. Court Proceedings scheduled to last three (3) hours or more; or

2. Court Proceedings in which multiple languages other than English are involved; or

3. Court Proceedings in which sign language interpreters are needed for an individual who is deaf, mute, or hearing impaired that are scheduled for more than one (1) hour.

B. When two (2) Language Interpreters are used, one will be the proceedings interpreter and the other a support interpreter. The proceedings interpreter provides language interpretation services for all LEP parties and witnesses, while

the support interpreter is available to assist with research, vocabulary, equipment or other issues. The proceedings interpreter and the support interpreter shall alternate roles every thirty (30) minutes.

C. If two (2) Language Interpreters are not reasonably available as set forth in Section IV(A), the Language Interpreter should be given no less than a ten (10) minute break for every fifty (50) minutes of interpreting.

D. The following guidelines and limitations apply to the utilization of more than one interpreter:

1. Language Interpreters are bound by an oath of confidentiality and impartiality, and serve as officers of the court; therefore, the use of one Language Interpreter by more than one individual in a case is permitted.

2. The court is not obligated to appoint a different LanguageInterpreter when a Language Interpreter has previously provided interpreter services during a Court Proceeding for another individual in a case.

3. Any individual may provide and arrange for interpretation services to facilitate attorney-client communication if interpretation services exceeding those provided by the court are desired.

V. USE OF COURT PERSONNEL AS INTERPRETERS

A. A court employee may not interpret Court Proceedings except as follows:

1. Prior to using a court employee as an interpreter, the court shall make findings in open court on the record summarizing the unsuccessful efforts made to obtain a Language Interpreter who is not a court employee.

2. The court employee will not be paid wages or benefits in addition to the employee's regular compensation as a court employee. The court employee will not receive any interpreter service fees established in this Policy.

VI. INVESTIGATION OF COMPLAINTS AND IMPOSITION OF SANCTIONS

An interpreter should be one whose record of conduct justifies the trust of the courts, witnesses, jurors, attorneys, parties, and the public.

Language Interpreters are not entitled to interpret on behalf of the courts or in Court Proceedings. Instead, the provision of interpretation services by Language Interpreters rests within the discretion of each Judicial Officer.

A. Similarly, Professionally Certified and Registered Interpreters are not entitled to have their names included on the Interpreter Roster. The Interpreter Roster is maintained at the discretion of the Wyoming Supreme Court. The Wyoming Supreme Court authorizes the State Court Administrator to investigate complaints and impose sanctions against Language Interpreters to protect the integrity of Court Proceedings and the safety of the public. Sanctions may be imposed when:

1. The Language Interpreter is unable to adequately interpret the Court Proceedings;

2. The Language Interpreter knowingly makes a false interpretation;

3. The Language Interpreter knowingly discloses confidential or privileged information obtained while serving as a Language interpreter;

4. The Language Interpreter knowingly fails to disclose a conflict of interest;

5. The Language Interpreter fails to appear as scheduled without good cause; or

6. If a sanction is determined appropriate in the interest of justice.

B. A complaint against a Language Interpreter must be in writing, signed by the complainant, and delivered via mail or email to the Court Interpreter Program Manager at:

Wyoming Supreme Court
c/o Court Interpreter Program Manager
2301 Capitol Ave.
Cheyenne, WY 82002

interpreters@courts.state.wy.us

The complaint shall state the date, time, place, and nature of the alleged improper conduct. The complaint shall include the names, titles, and telephone numbers of possible witnesses. If the complainant is unable to communicate in written English, the complainant may submit the complaint in his/her primary language.

The Court Interpreter Program Manager may take immediate action, upon receipt and review of the complaint, if deemed necessary to protect the integrity of the courts, including immediately suspending the Professionally Certified or Registered Interpreter from the Interpreter Roster for the pendency of the investigation and consideration of the complaint. In any case where the Court Interpreter Program Manager deems it necessary to suspend the Professionally Certified or Registered Interpreter from the Interpreter Roster, notice shall be sent

by certified mail to the Language Interpreter.

C. Upon receipt by the Court Interpreter Program Manager of a written complaint against a Language Interpreter or to further the interest of justice, the Court Interpreter Program Manager shall conduct an investigation into the alleged improper conduct of the Language Interpreter. The Court Interpreter Program Manager shall seek and receive such information and documentation as is necessary for the investigation. The rules of evidence do not apply to this evaluation and consideration of complaint, and the Language Interpreter is not entitled to representation by counsel. The Court Interpreter Program Manager shall provide a written report of the investigation results along with a recommendation on any action to be taken to the State Court Administrator within sixty (60) days of the complaint or start of the investigation.

D. The report and recommendation shall be provided to the Language Interpreter by certified mail at the same time it is provided to the State Court Administrator. The Language Interpreter shall have fifteen (15) days from receipt to respond to the report and recommendation of the Court Interpreter Program Manager. Upon receipt of the report and recommendations of the Court Interpreter Program Manager and the Language Interpreter's response, if any, the State Court Administrator may take any of the following actions in order to protect the integrity of the Court Proceedings and the safety of the public:

1. Dismiss the complaint;

2. Issue a written reprimand against the Language Interpreter;

3. Specify corrective action with which the Language Interpreter must fully comply in order to remain on the Interpreter Roster, including, but not limited to, the completion of educational courses and/or retaking one or more parts of the of the interpreter orientation, written exam, or oral proficiency interview;

4. Suspend the Language Interpreter from the Interpreter Roster for a specified period of time, or until corrective action is completed; or

Remove the Language Interpreter from the Interpreter Roster.

E. Written notice of any actions taken by the State Court Administrator will be sent via certified mail to the Language Interpreter and the complainant. Written notice will also be provided to Judicial Officers and court staff if sanctions are imposed against the Language Interpreter.

VII. REMOTE INTERPRETING

Remote interpretation may be utilized to facilitate access to the courts by LEP persons as may be determined by the court.

VIII. RECORDING OF PROCEEDING

The court may order that the testimony of the person for whom interpretation services are provided and the interpretation be recorded for use in verifying the official transcript of the Court Proceeding. If an interpretation error is believed to have occurred based on a review of the recording, a party may file a motion requesting that the court direct that the official transcript be amended and the court may grant further relief as it deems appropriate.

IX. ACCESS TO SERVICES

Based on current Policy, court interpreting services are only provided in the cases detailed under Sections II(A) through II(C) Current Policy reflects a commitment to consistency and fairness in the provision of interpreting services for LEP persons statewide, a recognition of the serious nature and possible consequences of Court Proceedings for individuals who come in contact with the courts, and the need to allocate limited financial resources most effectively.

X. FACILITATING THE USE OF LANGUAGE INTERPRETERS

To facilitate the use of the most qualified Language Interpreter available, the Wyoming Supreme Court or its designated agent(s) shall administer the training and testing of Language Interpreters and post the Interpreter Rosters on the judicial website of active status interpreters who are Professionally Certified, or Registered Interpreters as defined in this Policy.

XI. Appendix A

Policies regarding payment of interpreters are contained in Appendix A of thisPolicy. Appendix A may be amended from time to time as necessary. Amendments to Appendix A may be made without requiring the reissuance of this Policy.

APPENDIX A

I. PAYMENT OF LANGUAGE INTERPRETERS AND OTHER LEP RELATED SERVICES

A. Compensation Rate for Language Interpreters. The recommended compensation rate for Language Interpreters working as independent contractors is:

(1) Professionally Certified: $55/hr.

(2) Registered: $40/hr.

(3) Qualified: $25/hr.

Based on the Language Interpreter's certification status and the language availability in the judicial district, the court may appoint a Language Interpreter at an hourly rate in excess of those established in this Appendix A.

B. Payment for Travel Time. At the discretion of the judge, a Language Interpreter may be paid the State of Wyoming's allowable mileage reimbursement rates or half the hourly Language Interpreter rate for travel time. In extraordinary circumstances, the Language Interpreter may be paid the full hourly Language Interpreter rate for travel when round trip travel exceeds one hundred fifty (150) miles.

C. Overnight Travel. In the case of trials or hearings exceeding one day duration, Language Interpreters may be compensated for food and lodging at the standard rate established by the Wyoming Supreme Court when round trip travel of one hundred twenty (120 miles or greater is required to secure the best qualified Language Interpreter. To receive reimbursement for food or lodging expenses, the Language Interpreter must receive authorization from the court for the expenses inadvance of the actual expenditure. Reimbursement of allowed food andlodging expenses will be made only if itemized receipts are provided and expenses are within the allowable ranges asdefined by the State of Wyoming fiscal procedures.

D. Cancellation Policy. A Language Interpreter whose assignment is cancelled within seventy-two (72) hours of the assignment start time shall be paid for the scheduled time up to a maximum of sixteen (16) hours as determined by the presiding judge in the cancelled matter. If the assignment is cancelled with more than seventy-two (72) hours' notice, the scheduling court is under no obligation to pay a cancellation fee.

APPENDIX B

Interpreter's Code of Ethics

Canon 1: Accuracy and Completeness
Interpreters shall render a complete and accurate interpretation or sight translation, without altering, omitting, or adding anything to what is stated or written, and without explanation.

Canon 2: Representation of Qualifications
Interpreters shall accurately and completely represent their certifications, training, and pertinent experience.

Canon 3: Impartiality and Avoidance of Conflict of Interest
Interpreters shall be impartial, unbiased and shall refrain from conduct that may give anappearance of bias. Interpreters shall disclose any real or perceived conflict of interest.

Canon 4: Professional Demeanor
Interpreters shall conduct themselves in a manner consistent with the dignity of the court andshall be as unobtrusive as possible.

Canon 5: Confidentiality
Interpreters shall keep confidential all matters interpreted and all conversations overheard between counsel and client. Interpreters should not discuss a case pending before the court.

Canon 6: Restriction of Public Comment
Interpreters shall not publicly discuss, report, or offer an opinion concerning a matter in which they are or have been engaged, even when that information is not privileged or required by lawto be confidential.

Canon 7: Scope of Practice
Interpreters shall limit themselves to interpreting and translating, and shall not give legal advice, express personal opinions to individuals for whom they are interpreting, or engage in any other activities which may be construed to constitute a service other than interpreting or translating while serving as an interpreter.

Canon 8: Assessing and Reporting Impediments to Performance
Interpreters shall assess at all times their ability to deliver their services. When interpreters have any reservation about their ability to satisfy an assignment competently, they shall immediately convey that reservation to the appropriate judicial authority.

Canon 9: Duty to Report Ethical Violations
Interpreters shall report to the proper authority any effort to impede their compliance with any law, any provision of this code, or any other official policy governing court interpreting and legal translating.

Canon 10: Professional Development

Interpreters shall continually improve their skills and knowledge, and advance the profession through activities such as professional training and education, and interaction with colleaguesand specialists in related fields.

Appendix 8

Rule 3. Commencement of Action.

A civil action is commenced by filing a complaint with the court, unless the action has been dismissed pursuant to Rule 4(w), in which case the action is commenced when the complaint is filed, so long as it is served within 90 days of the applicable statute of limitations.

Comment:

One purpose of amending the Wyoming Rules of Civil Procedure is to promote as much uniformity between the Federal Rules of Civil Procedure and the State Rules of Civil Procedure. However, Wyoming substantive law has a savings statute. Wyo. Stat. Ann. § 1-3-118. Therefore, the Committee has amended Rule 3 to account for Wyoming's Savings Statute and Wyoming Supreme Court interpretations of that statute as it relates to the applicable statutes of limitations.

It is the Committee's intent that Rule 3 applies the same as its Federal counterpart. If a matter is dismissed pursuant to Rule 4(w), a plaintiff would still have the entire statute of limitations (plus 90 days, to get the matter served) to take advantage of Rule 3's "look back" effect without adding one year to the otherwise applicable statute of limitation. The Committee concludes that this is consistent with the Wyoming Supreme Court's interpretation of Wyo. Stat. Ann. § 1-3-118 in Hoke v. Motel 6 Jackson, 2006 WY 38, ¶ 16, 131 P.3d 369, 378 (Wyo. 2006)

Appendix 9

Wyoming Rules of Civil Procedure, Rule 16
Rule 16. Pretrial Conferences; Scheduling; Management.

(a) Purpose of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; ~~and~~

(5) facilitating settlement; and

(6) exploring removal to chancery court if the action is eligible.

Appendix 10

Rule 40.1. Transfer of trial and change of judge.

. . .

(b) *Change of Judge. –*

(1) *Peremptory Disqualification*. –

. . .

(H) *Notice of Assignment.* – No later than five (5) days after a complaint is filed, and after any re-assignment, the clerk of court shall enter a notice of assignment of judge and provide notice to all parties of record.