

VIRTUAL JUSTICE

Online Courts During COVID-19

**ALBERT FOX CAHN, ESQ. &
MELISSA GIDDINGS**

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INTRODUCTION

The suspension of in-person court across the country has prompted the legal profession to turn to technology, with many judges now conducting business remotely via video and teleconferencing to ensure ongoing access to justice. Courts at all levels, from local trial courts to the Supreme Court of the United States, have chosen to permit legal proceedings to move forward using remote technology, with new methods and techniques being developed rapidly.¹

On March 31, the Judicial Conference of the United States announced that it had “temporarily approved the use of video and teleconferencing for certain criminal proceedings and access via teleconferencing for civil proceedings during the COVID-19 national emergency.”² In April, the United States Supreme Court determined that it would “hear oral arguments by telephone conference on May 4, 5, 6, 11, 12 and 13 in a limited number of previously postponed cases.”³ While video was not made available, CSPAN streamed audio of the arguments.⁴

Earlier this year, the “Coronavirus Aid, Relief, and Economic Security Act” (CARES Act) allowed chief judges to authorize, with the consent of defendants, the use of video or telephone conferencing in certain criminal proceedings in response to the COVID-19 pandemic.⁵ Courts have interpreted this authorization to include traditional participants, such as defendants, lawyers, probation and pretrial services officers, and court personnel, as well as observers of such proceedings, such as victims, family members, the public, and the press, by remote access. The language in the Act provides that the authorization of video and telephone conferencing will either end 30 days after the date on which the national emergency ends, or the date when the Judicial Conference finds that the federal courts are no longer materially affected.⁶

In New York, trial courts initially focused on conducting “arraignments, bail applications, orders of protection and other essential and emergency criminal, family and civil matters” using

¹ See Rebecca Pirius, *Virtual Criminal Court Appearances in the Time of the Coronavirus*, NOLO (May 6, 2020), <https://www.nolo.com/legal-encyclopedia/virtual-criminal-court-appearances-in-the-time-of-the-coronavirus.html>; Nicole Black, *COVID-19 Forces the Legal Profession’s Hand and Technology Adoption Increases Exponentially*, ABOVE THE LAW (Apr. 16, 2020), <https://abovethelaw.com/2020/04/covid-19-forces-the-legal-professions-hand-and-technology-adoption-increases-exponentially/>.

² *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, U.S. COURTS (Mar. 31, 2020), <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic>.

³ Press Release, Supreme Court of the United States (Apr. 13, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20.

⁴ Oral Arguments, CSPAN, <https://www.c-span.org/supremeCourt/>.

⁵ *Judiciary Provides Public, Media Access to Electronic Court Proceedings*, U.S. COURTS (Apr. 3, 2020), <https://www.uscourts.gov/news/2020/04/03/judiciary-provides-public-media-access-electronic-court-proceedings>.

⁶ *Judiciary Authorizes Video*, *supra* note 2.

remote methods.⁷ But by the end of April, New York State Courts expanded that effort to include pending tort, asbestos, commercial, matrimonial, trusts and estates, felony, family and other cases.⁸

Remote hearings and trial have not been seamless proceedings, and this nationwide experiment in virtual justice has the potential to cause significant harm to perceived and actual fairness, as well as to individual rights to privacy, in the course of determining best practices. As courts increasingly adopt emerging technologies in response to COVID-19 they are certain to consider long-term uses.⁹ The legal community must work to ensure fairness to all parties and the integrity of the process when technology is used in the courtroom. Key questions include whether the court's chosen platform provides adequate security, both in terms of who has access and how data is stored; how access rights will be managed or limited in instances that call for heightened confidentiality; whether the platform offers private options for consultations between counsel and their clients during the course of a proceeding; whether and how participants can display documents or other media to other participants; and whether a session or any involved correspondence or display is recorded.

I. Platforms in Use

In the first weeks of moving proceedings online, many courts across the country have turned to videoconferencing platforms already in wide use. As of the end of April, Iowa is using GoToMeeting; New York, Oregon, and Puerto Rico are using Skype for Business; Oregon and Wyoming are using Microsoft Teams; Colorado, New Hampshire, Oregon, Pennsylvania, Tennessee, Utah, and Virginia are using WebEx; and Alabama, Michigan, New Jersey, Tennessee, and Texas are using Zoom.¹⁰

A number of other litigation-focused platforms are also on the market. Courtcall, one of the most frequently used teleconferencing platforms prior to the pandemic, has seen a sharp increase in requests for remote hearings in March and April.¹¹ Courtcall users have access to audio and video conferencing capabilities, as well as choosing between "Open Court" and "Privacy" mode (where

⁷ Press Release, N.Y. State Unified Court System, *Virtual Courts Expanded Beyond the Limited Category of Essential and Emergency Matters* (Apr. 13, 2020), https://www.nycourts.gov/LegacyPDFS/press/PDFs/PR20_15virtualcourtstortsetc.pdf.

⁸ See David Brand, *All Court Functions Are Now Conducted Remotely in New York*, QUEENS EAGLE (Apr. 7, 2020), <https://queenseagle.com/all/all-court-functions-are-now-conducted-remotely-in-new-york>.

⁹ See, e.g., Raychel Lean, *Get Used to Online Litigation: It Could Become Florida's New Normal*, LAW.COM (Mar. 25, 2020), <https://www.law.com/dailybusinessreview/2020/03/25/get-used-to-online-litigation-it-could-become-floridas-new-normal/>.

¹⁰ See *Coronavirus and the Courts*, NAT'L CTR. FOR STATE COURTS, <https://www.ncsc.org/newsroom/public-health-emergency>; *Tennessee Judges Take Lead in Using Technology to Weather Pandemic*, COURT NEWS (Apr. 23, 2020), <https://us1.campaign-archive.com/?e=b2dc395411&u=726c22e195595bb5150eb4c3b&id=96df3947ea>.

¹¹ *Courts Across the Country Are Returning to CourtCall's Business Grade Solutions*, PR NEWswire (Apr. 16, 2020), <https://finance.yahoo.com/news/courts-across-country-returning-courtcalls-210200958.html>.

calls can only be heard by a specified participant). A Courtcall operator connects litigants and judges and handles adding or dropping parties.

Smaller tech companies provide a variety of court-related services, from discovery management and document review¹² to verification services for images and digital documents.¹³ Palm Beach County, Florida has been utilizing an AI-empowered software to classify and docket e-filed documents. Their use of the software has gradually expanded over time, and the system is now docketing around 12,000 filings a week.¹⁴ Courts in Michigan have been using Matterhorn, a cloud-based platform, to facilitate online dispute resolution for traffic and civil infractions, warrant resolution, for small claims cases, to assess ability to pay, and for domestic/family cases.¹⁵ In Jefferson Parish, Louisiana, courts are using a LawDroid-supported text-based chatbot to check in on probationers, and Documate to support remote entering of pleas.¹⁶ These capabilities are likely to be incorporated more widely as courts adapt to and expand their virtual efforts.

II. Current and Anticipated Issues

There are several immediate concerns with virtual court proceedings.¹⁷ Many litigants and defendants lack the hardware and / or internet connectivity to participate. There are also significant privacy threats from the integrated recording capability on many video conference platforms. Courts must account for the digital divide as well as security vulnerabilities, potential fraud, and the risk of manipulated audio / video in evaluating online courts.

A. Recording and public access

In making court proceedings easier to access remotely, there is a loss of practical obscurity – an idea recognizing that “there is a privacy interest in information that is not secret but is otherwise

¹² See, e.g., *NightOwl Discovery Recognized Among the 20 Most Promising Legal Technology Solution Providers of 2016* by CIO Review, Bus. Wire (Jun. 21, 2016), <https://www.businesswire.com/news/home/20160621005049/en/NightOwl-Discovery-recognized-20-Promising-Legal-Technology>.

¹³ See Jason Tashea, *Some States Are Allowing People and Companies to Use Blockchain to Authenticate Documents*, ABA J. (Sept. 1, 2019), <https://www.abajournal.com/magazine/article/best-evidence> (discussing companies like TruePic and Attestiv that provide digital document verification services).

¹⁴ Lisa Embley, INTRODUCTION TO AI FOR COURTS, NAT’L CTR. FOR STATE COURTS, 10 (Mar. 2020), https://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/2020-04-02%20Intro%20to%20AI%20for%20Courts_final.ashx.

¹⁵ See About Us, MATTERHORN, <https://getmatterhorn.com/about-us/>. See also JUST TECHNOLOGY, CTR. FOR COURT INNOVATION 38 (Mar. 2019), <https://justiceinnovation.org/sites/default/files/media/documents/2019-03/just-technology.pdf>.

¹⁶ Bob Ambrogi, *How One Tech-Savvy Judge Jury-Rigged an Online Court*, LAWNEXT (Apr. 27, 2020), <https://www.lawsitesblog.com/2020/04/on-the-latest-lawnext-how-one-tech-savvy-judge-jury-rigged-an-online-court.html>.

¹⁷ See Veronica Combs, *Judges and Lawyers Learn Zoom Rules in Real Time During Coronavirus Crisis*, TECHREPUBLIC (Apr. 23, 2020), <https://www.techrepublic.com/article/judges-and-lawyers-learn-zoom-rules-in-real-time-during-coronavirus-crisis/>.

difficult to obtain.”¹⁸ While the right to a fair and public trial is constitutionally guaranteed, remote proceedings necessarily change the nature of open courtrooms. A typical trial has natural barriers to third-party observation such as time and travel built in, which are missing when courts utilize platforms like YouTube and Zoom to broadcast proceedings. Physical courtrooms also afford privacy protections missing from remote court, as observers are less likely to remain anonymous or successfully tape proceedings when present in person. When court is conducted online, anyone can watch, and nothing technically prevents a viewer from recording a hearing for personal use.¹⁹

For example, in Texas, courts balance the need to be the exclusive retainer of court transcripts against the need for public accessibility to hearings by streaming proceedings live on YouTube before deleting the videos. Ahead of a proceeding, Texas courts provide an access code for the meeting, a teleconference line for those without computer access, and its YouTube channel for live streaming.²⁰ The Administrative Director of the Texas Office of Court Administration has said that some judges begin their virtual hearings by forbidding anyone participating or watching from recording.²¹ In New York, state courts spokesman Lucian Chalfen confirmed that the plan for more virtual court conferences doesn’t include any provision for the public or press to obtain remote access, and that also is not currently under consideration.²²

If virtual court is open to the public for remote viewing and security cannot control for viewers’ uses of video capturing technology, there is potential for rebroadcasting, recording testimony, and photographing shared evidence by anyone with internet access, which violates party and witness privacy rights. Improper recordings can occur even if public access is controlled and monitored, like in New York, because judges or court officers may not be able to determine or limit the participants involved in a proceeding. With any number of participants, a virtual court may struggle to determine if someone is making an unauthorized recording, let alone identify whom and impose proper sanctions.

Outside of public recording, there is the question of whether a recording of virtual proceedings will be incorporated into the official court record, and how and where custodians will maintain that record. Technical questions about this storage include the physical location of the stored data (e.g., is it on court servers, it is held by a third-party data storage center), the encryption

¹⁸ Patrick C. File, *A History of Practical Obscurity: Clarifying and Contemplating the Twentieth Century Roots of a Digital Age Concept of Privacy*, 6 U. BALT. J. MEDIA L. & ETHICS 4 (2017).

¹⁹ See Shelly Banjo, *Digital Courtrooms Put Justice on YouTube, Zoom*, BLOOMBERG (Apr. 7, 2020), <https://www.bloomberg.com/news/newsletters/2020-04-07/digital-courtrooms-put-justice-on-youtube-zoom>.

²⁰ Maggie Burreson, James Carlos McFall, and Brian Oates, *COVID-19 and Cameras in the Courtroom: Could the Pandemic and Emerging Technologies Usher in a New Era of Judicial Transparency?*, JD SUPRA (Apr. 21, 2020), <https://www.jdsupra.com/legalnews/covid-19-and-cameras-in-the-courtroom-67237/>.

²¹ Angela Morris, *Judges Rush to Learn Video Conferencing as Shelter-In-Place Orders Spread Across Texas Metros*, LAW.COM (Mar. 24, 2020), <https://www.law.com/texaslawyer/2020/03/24/judges-rush-to-learn-video-conferencing-as-shelter-in-place-orders-spread-across-texas-metros/?slreturn=20200231060744>.

²² Bridget Murphy, *Advocates: Public Access to Virtual Courtrooms Worrisome as NY Expands Electronic Proceedings*, NEWSDAY (Apr. 11, 2020), <https://www.newsday.com/news/health/coronavirus/coronavirus-nassau-courts-1.43782179>.

of that data, and the technical access controls placed around it. This reflects an ongoing concern with maintaining online court records. If a request for court records need not be made in person at a courthouse, but instead can be completed online, parties' and witnesses' risk personal information that may routinely be recorded, where it would be redacted from traditional court transcripts.²³

B. Communications between counsel and client

To tackle the issue with private communications between counsel and their clients, platforms offer options such as breakout or sidebar rooms, direct instant messaging, or separate audio lines for in-trial communications. With each, there remains the question of how they are secured and whether those interactions are recorded. If a chosen platform does not have these capabilities, attorneys may need to resort to requesting a break so they may speak to their clients, or clients may struggle to alert their attorney to a question they may have.

Texas courts are also utilizing Zoom's "breakout rooms" function to purportedly create a private space for attorneys to speak with their clients; the court coordinator in Houston creates these breakout rooms for each case number on a docket.²⁴ However, the "private" designation deserves close scrutiny. Hosts of Zoom meetings may still manage these breakout rooms, and the aforementioned risks of unauthorized recording still apply. Further, Zoom technology has security issues; the company has previously misrepresented its product's level of security and has not been clear about when robust encryption features will be rolled out for all users.²⁵ Zoom also offers auto-transcription features for conversations that may convert a user's speech to text and provide it to meeting hosts without a user's knowledge.²⁶ All of these privacy and security risks, if known to the counsel or to the client, could influence the candor needed in these interactions. But perhaps worse is an alternative scenario in which counsel and client communicate under a false belief that their communications are not at risk of interception or recording.

Similarly, tele- and video-conferencing platforms limit the ability of an attorney to approach the bench and discuss legal issues with the judge and opposing counsel without being heard by witnesses or non-party observers. Private communication options may thus introduce concerns

²³ See Jacquelyn Burkell & Jane Bailey, *Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties and Witnesses' Personal Information*, FIMS PUBLICATIONS 144 (2017), <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1164&context=fimspub> ("[M]aintaining a default in favour of presumptive access could have devastating consequences for privacy, without substantially contributing to the fundamental underlying objective of the open court principle: that is, transparency and accountability of the justice system.").

²⁴ Morris, *Judges Rush to Learn Video Conferencing*, *supra* note 21.

²⁵ Nick Statt, *Zoom Says Free Users Will Get End-to-End Encryption After All*, VERGE (Jun. 17, 2020), <https://www.theverge.com/2020/6/17/21294355/zoom-security-end-to-end-encryptoin-beta-release-july-2020-new-feature>.

²⁶ Jon Porter, *This Tool Automatically Transcribes Your Zoom Meetings as They Happen*, VERGE (Apr. 23, 2020), <https://www.theverge.com/2020/4/23/21232385/otter-ai-live-video-meeting-notes-zoom-transcription-annotation-teams>.

about *ex parte* communications. It is difficult, if not impossible, for a court to conduct a sidebar conference without including unwanted participants or sacrificing client comfort.

C. Remote identity verification and potential for fraud

Parties to an online court proceeding may be asked to verify their identity by providing sensitive personal information, biometric data, or facial scans. Judges in Marion County, Oregon already sign into their virtual court systems using facial recognition.²⁷ Video manipulation software, including ‘deepfake’ technology, poses problems for both verifying that litigants or witnesses are who they say they are during virtual proceedings and preventing any party from claiming their representations were fraudulent after the proceedings.

Courts in the United States may draw from international counterparts in China, just as many other U.S. institutions have drawn from Chinese responses to COVID-19. To verify the identification of parties, courts may use an approach seen in China, where the Beijing Internet Court requires litigants to set up an online account using their national identity cards and a facial recognition system before bringing a case remotely.²⁸ So long as a litigant’s biometric features and the data on their ID match their information as registered with the capital’s public security bureau, they can add their contact details and information related to the case to the virtual system. In August 2019, at the end of its first year of operations, the Beijing Internet Court had remotely identified litigants in this manner over 200,000 times.²⁹ Other courts in China ask litigants to download a mobile application from the court’s website to their remote device for use during a hearing.

D. Transmission of sensitive files

Virtual courts must grapple with how evidence is introduced, authenticated, and stored. Beyond evidentiary concerns, documents and payments associated with various court hearings will need to be transmitted to other parties and the court, and litigants must ask themselves if they are prepared to upload personal files or transmit fees via online court websites run both by government agencies and an opaque web of private vendors.

Presenting witness testimony during a virtual hearing may require compelling a witness to appear or administering an oath to a remote witness. As of now, it is unclear whether a court may compel a witness to appear electronically at a remote hearing, even if that witness is within close proximity to the courthouse. Existing laws governing subpoena process were written with in-person court

²⁷ Embley, *AI FOR COURTS*, *supra* note 14.

²⁸ Cao Yin, *Cybercourts Ease Judicial Workloads, Provide Better Rulings*, CHINADAILY (Apr. 8, 2020), http://www.chinadaily.com.cn/a/201904/08/WS5caa8ba7a3104842260b4c40_2.html.

²⁹ Guodong Du, *How the Beijing Internet Court Develops and Runs its IT System: Inside China’s Internet Courts Series-04*, China Justice Observer (Oct. 6, 2019), <https://www.chinajusticeobserver.com/a/how-the-beijing-internet-court-develops-and-runs-its-it-system>.

hearings in mind, and courts may not have the inherent power to compel other actions, such as virtual attendance, without the passage of new statutes.

E. Ease of use and technology error

Participants who are unfamiliar with the platform used to facilitate remote hearings are likely to make mistakes, such as having trouble connecting, speaking on mute, or sharing confidential information. Such mistakes can have a determinative impact on the proceeding. Virtual proceedings may be particularly challenging in large, multi-party cases as the risk of technological interruptions or errors as well as human interruptions (e.g., cross-talking) or errors (e.g., speaking on mute) increases.

Even without user-based error, the technology itself can malfunction or fail to meet the needs of every party. Longstanding platforms still sometimes suffer from poor image or sound quality, and insufficient bandwidth can exacerbate those issues. Glitches disrupt the flow of trial and hearings, as participants may need to interrupt a speaker to alert them to an issue or a speaker may need to repeat information or verify that it was conveyed. Interruptions also may lead to unreliable transcription from a court reporter who is trying to follow the speaker. If a speaker has a distinctive dialect or accent, virtual transmission of their speech creates a greater likelihood of errors or misinterpretation in the court record, either on the part of court reporters or AI transcription technology. This problem, which is already seen during in-person court proceedings, can have far-reaching and harmful consequences for a defendant.³⁰

III. Emerging Technologies

To meet the needs of the parties involved in a virtual court proceeding, companies are developing artificial intelligence, leveraging biometric indicators, and building up existing streaming and speech translation technologies. Many court technology systems today already utilize one or more forms of AI, and many are likewise turning to new methods for the submission of court documents.

A. Blockchain

Even before the pandemic created a demand for virtual court-assisting technologies, states such as Vermont, Arizona, Ohio, and Delaware allowed parties to use blockchain to authenticate evidence, relevant documents, and signatures.³¹

As blockchain grows in popularity to secure and validate records, users should consider security vulnerabilities and privacy issues unique to this technology. Proponents of blockchain say its value is found in decentralized storage that guarantees the immutability and transparency of a

³⁰ See, e.g., John Eligon, *Speaking Black Dialect in Courtrooms Can Have Striking Consequences*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/2019/01/25/us/black-dialect-courtrooms.html>.

³¹ Jason Tashea, *Some States are Allowing People and Companies to Use Blockchain to Authenticate Documents*, ABA J. (Sept. 1, 2019), <https://www.abajournal.com/magazine/article/best-evidence>.

record. But decentralization means a greater attack surface for potential hackers, and the immutability of a blockchain record means it can be impossible to reverse a malicious event, such as a fabricated transaction. Access to blockchain data is controlled by a user's unique key, though if a user does not store that key safely then anyone who gains access to the key can access the record. It is easy to imagine a blockchain-utilizing litigant who is not on the bleeding edge of technology to store their key on an unencrypted flash drive, on a shared computer, or in a notepad kept in plain view – any one of which is vulnerable to theft or hacking.

Another implication for court records and litigation-specific documents using blockchain is the perpetuity of the data. Once written onto a blockchain, the data resides there permanently. If a court requires personal data be retained for no longer than necessary, or if a litigant does not want that data affiliated with a record beyond what is needed for authentication purposes, they cannot control the deletion of the data, as immutability is an oft-touted selling point decentralization. To allow for deletions would require less decentralization, and as decentralization diminishes so too do the purported security benefits. While blockchain may ensure reliability, it is squarely at odds with privacy considerations.

B. Deepfakes

Distrust around digital records has persisted with the advent and ease of photoshopping. Altered evidence can still be introduced if the authenticating party is itself fooled or is lying. In the coming years, courts must also be mindful of emerging AI technology around deepfakes, which allows a user to manipulate images and audio in real time. While this technology is nascent today, it is rapidly advancing and may soon pose a potent threat to trust in online communication.

Programs such as Avatarify – publicly available as code on Github – superimpose another's face onto a user in real time and is already being utilized on conferencing platforms.³² While face-swap technologies like Avatarify use an algorithm trained on another's image, usually requiring several photos of the person's face that you're trying to animate, technology like First Order Motion approaches deepfakes inversely, manipulating a user's photo by way of video of another person without any prior training on the target image.³³

AI software companies like SenseTime can create deepfakes from audio sources by using a third party's audio clip and video of the user to generate footage of the user saying the words from the recording. This can not only allow a person to fabricate their identity but can allow a litigant or witness to use their own voice to make the claim that they said something different than what the opposing party claims.

³² Samantha Cole, *This Open-Source Program Deepfakes You During Zoom Meetings, in Real Time*, VICE (Apr. 16, 2020), https://www.vice.com/en_us/article/g5xagy/this-open-source-program-deepfakes-you-during-zoom-meetings-in-real-time.

³³ Samantha Cole, *Facebook Takes a Stand on Political Deepfakes, a Problem That Doesn't Exist*, VICE (Jan. 7, 2020), https://www.vice.com/en_us/article/939wpx/facebook-new-deepfakes-policy.

Not only can successful deepfakes find their way into evidence, potentially condemning the innocent or exonerating the guilty, but the mere existence of deepfakes allows litigants and their attorneys to cast doubt on video or audio that is legitimate.³⁴

IV. The Digital Divide

Perhaps the most obvious area of concern in moving court hearings and trials online is the digital divide, which perpetuates unfairness in access to proceedings or timely case resolutions due to disparities in tech ownership or familiarity. A low-quality internet connection or outdated hardware can result in transmission delays, degraded sound and image quality, and loss of connectivity, making a litigant look less truthful and persuasive.³⁵

Not all litigants or their attorneys have access to the same technological capabilities. Similarly, not every geographical region has bandwidth or internet speeds that can facilitate video conferencing, and poor audio or visual quality winds up prejudicing the disadvantaged party. Low-income residents in both rural and urban areas are likely to be impacted by the digital divide. Rural Americans may also live in digital deserts, or entire communities that are not served by a single internet provider; in 2019, the FCC estimated that 5 million Americans lived in such deserts.³⁶ A still larger subset of the population lacks access to high-speed or broadband internet, and as their neighbors remain sheltered in place at home, the bandwidth available for video conferencing only diminishes.

National origin also affects the likelihood of home access to the internet and digital technology. According to 2013 US Census data, 84.7% of English-speaking households have access to a computer, and 75.5% of that population have some internet subscription; however, only 63.9% of limited English-speaking households have computers, and only 51.4% have some internet subscription.³⁷

It can be argued that two major digital divides exist: an access divide and a skills divide.³⁸ Poor literacy in internet use and digital technology may affect not only procedural efficacy, but the perception of fairness in virtual court. Studies have shown that both case outcome and the ease of

³⁴ See Theodore F. Claypoole, *AI and Evidence: Let's Start to Worry*, NAT'L LAW REV. (July 17, 2020), <https://www.natlawreview.com/article/ai-and-evidence-let-s-start-to-worry>.

³⁵ The Legal Assistance Foundation of Metropolitan Chicago & The Chicago Appleseed Fund for Justice, VIDEOCONFERENCING IN REMOVAL PROCEEDINGS: A CASE STUDY OF THE CHICAGO IMMIGRATION COURT, 37, 45-6 (2005), http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf.

³⁶ Amrita Khalid, *America's Digital Divide is Even More Urgent During the Pandemic*, QUARTZ (Apr. 9, 2020), <https://qz.com/1836040/americas-digital-divide-is-more-urgent-during-a-pandemic/>.

³⁷ Alison Rogers, *Building the Superhighway for Information and Commerce: How the e-Government Can Save Money by Building Bridges Across the Digital Divide*, 22 MICH. J. RACE & L. 163, 166 (2016). See generally Joshua Friedman & Gary Norman, *The Norman/Friedman Principle: Equal Rights to Information and Technology Access*, 18 TEX. J. ON C.L. & C.R. 47 (2012).

³⁸ See, e.g., France Bélanger & Lemuria Carter, *The Impact of the Digital Divide on e-Government Use*, Communications of the ACM, Vol. 52 No. 4, 132-35 (2009), <https://cacm.acm.org/magazines/2009/4/22970-the-impact-of-the-digital-divide-on-e-government-use/fulltext>.

use of an online system correlate to litigants' perceived fairness of court proceedings and their emotion toward court officials.³⁹

A recent letter from various legal services organizations around New York City asks the Office of Court Administration to be mindful of the potential adverse impact of virtual appearances on pro se litigants. In writing the letter, the organizations were concerned with a lack of meaningful participation due to technological obstacles, going so far as to recommend that cases involving pro se parties be excluded from virtual appearances for nonessential matters unless the parties specifically request otherwise.⁴⁰

A. Immigration court as an example

U.S. courts have been exercising video-conference hearings for decades, but the extent of video conferencing in civil and criminal court proceedings is still fairly limited. A corner of the justice system where remote hearings has been conducted with frequency is immigration removal hearings.⁴¹ The Immigration and Nationality Act allows for the use of videoconferencing in conducting removal hearings. Virtual hearings inevitably skew the perceptions and behavior of the involved parties by either removing or over-emphasizing non-verbal cues, failing to properly simulate normal eye contact, or exaggerating features. This can obstruct the fact-finding process and prevent accurate assessments of credibility and demeanor based on common in-person experiences. One study of immigration removal hearings conducted by video conference found that nearly 45% of these hearings suffered from image freezing, transmission delays, or poor sound quality, which affected the transmission and resulted in "the immigrant appear[ing] less truthful" and "emotions less clearly communicated."⁴²

Respondents relying on interpreters had a greater frequency of problems created or exacerbated by videoconferencing and were more likely to receive negative dispositions.⁴³ Interpretive difficulties generally affect the quality and ultimate outcomes of immigration proceedings,⁴⁴ and these problems are only exacerbated if communication with an interpreter and a respondent must be mediated through tele- and video-conferencing equipment.

Research suggests that factfinders evaluate televised testimony as less credible than in-court testimony, and that "testify[ing] through a video monitor is less persuasive because it is a less direct

³⁹ Youyang Hou et al., *Factors in Fairness and Emotion in Online Case Resolution Systems*, ACM Conference on Human Factors in Computing Systems (2017), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2995&context=articles>.

⁴⁰ *Email: Implementation of Virtual Court Appearances in Nonessential Matters*, New Yorkers for Responsible Lending (Apr. 15, 2020), <http://www.nyrl.org/wp-content/uploads/2019/01/2020.4.15-NYRL-Ltr-re-virtual-appearances.pdf>.

⁴¹ Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J.L. & PUB. POL'Y 331, 342-43 (2016).

⁴² VIDEOCONFERENCING IN REMOVAL PROCEEDINGS, *supra* note 35.

⁴³ *Id.*

⁴⁴ See, e.g., Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 505-15 (1992).

form of communication.” For instance, a debriefing session found that jurors had difficulty following the video-conferenced testimony of a non-English speaker, and in a study of virtual immigration hearings, attorneys expressed concern that “videoconferencing undermined the judge’s ability to assess the immigrant’s credibility” and complained that “split-second delays in the video transmission made the image ‘choppier’ in a subtle way and made the immigrant appear less truthful.” Relatedly, “judges were likely to feel more emotionally distant from and apathetic to an immigrant on a television screen”, implying that even without notable technological difficulties, videoconferencing is likely to have a detrimental effect on a respondent.⁴⁵

B. Due process considerations

Research has suggested that video testimony is less effective than in-person testimony at conveying crucial information, and technical problems can adversely affect respondents. Distortion created in the course of virtual proceedings violates due process, particularly when it is outcome determinative. While technology may be one means of improving access to courts, such access can be devalued if it does not amount to a meaningful chance to be heard.⁴⁶

Defense attorneys, legal scholars, and judges have argued that the use of tele- or videoconferencing impairs the fairness and integrity of criminal proceedings in a variety of ways.⁴⁷ Remote appearances diminish the court's ability to assess matters such as credibility, competence, understanding, physical and psychological wellbeing, and voluntariness of any waivers of rights that the defendant may be called upon to make. Any combination of these determinations raises serious procedural due process concerns.

Studies comparing credibility judgments and other assessments of live versus televised child witnesses have found that the method of receiving the testimony affected witness ratings; in one study, mock jurors rated child witnesses who testified in person as more accurate, intelligent, attractive, and honest than children who testified on closed circuit television.⁴⁸

Physical separation inevitably impairs the effectiveness of counsel. When an attorney and their client are physically separated during a hearing, the defendant cannot discretely communicate with or pass notes to counsel, which represents an infringement of the Sixth Amendment right to counsel. The deprivation of an in-person confrontation between a testifying witness and a defendant arguably violates the Sixth Amendment's Confrontation Clause.

⁴⁵ *Developments in the Law – Access to Courts*, 122 HARV. L. REV. 1151, 1185 (2009).

⁴⁶ *Id.* at 1155-56.

⁴⁷ Shari Diamond et al., *Centennial Symposium: A Century of Criminal Justice: II. “Justice” in Action: Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 878-79 (2010).

⁴⁸ Holly K. Orcutt et al., *Detecting Deception in Children's Testimony: Factfinders' Ability to Reach the Truth in Open Court and Closed-Circuit Trials*, 25 LAW & HUM. BEHAV. 339 (2001); see also Gail S. Goodman et. al., *Face-to-Face Confrontation: Effects of Closed Circuit Technology on Children's Eyewitness Testimony*, 22 LAW & HUM. BEHAV. 165 (1998).

Remote conferencing between attorneys and their incarcerated clients is even more dubious. Sherry Levin Wallach, an attorney with the Westchester County Legal Aid Society, says that “as it exists, any video conferencing done with our clients [in prison] is ‘on the blocks,’ meaning that for them it’s not private. Without that privacy, very little can get accomplished — you can’t even do a full initial interview of an individual.”⁴⁹

Communicating via remote means from the beginning greatly reduces the quality of the attorney-client relationship, as in-person interactions foster trust and build the relationship necessary for effective assistance. Attorneys cannot fully gauge a client’s mental and emotional state remotely, and neither party can use nonverbal cues to communicate during a proceeding – both of which are necessary to effective communication.⁵⁰

Attorneys and their detained clients are likely to be discouraged by the numerous logistical and technical difficulties associated with litigating cases virtually, such as unpredictable interruptions in the video feed and the impossibility of confidential attorney-client communication. Physical separation from other participants such as judges and prosecutors may result in a defendant’s decreased understanding of their rights, and remote judges and counsel may struggle to advise them of those rights effectively. Litigants are also more likely to waive those rights if physically separated from the courtroom audience, including family and members of the community offering support.⁵¹

A study conducted in Cook County, Illinois, found that felony defendants appearing virtually experienced a 51-percent increase in the average bond amount set at the bail hearing during the study period, which significantly exceeded the 13-percent increase in bond amount experienced by the felony defendants who appeared in person for bail hearings.⁵² Litigants may decline to participate in remote video appearances if they perceive the virtual court system as unjust.

Fairness and due process protections are perhaps more obvious concerns for remote criminal hearings, but civil litigants should also consider whether and how they can present the same case remotely as they would in person. A virtual hearing does not provide the same experience or nonverbal information as an in-person hearing.

Finally, virtual courts pose an issue for the public right of access. For many courts, remote hearings are difficult to make available to the public with the same level of access that in-person hearings in a public courthouse allow. Some courts may allow hearings to be recorded and posted

⁴⁹ Matthew Krumholtz, *Criminal Lawyers Scramble to Deal with New Challenges Amid Coronavirus*, N.Y. STATE BAR. ASSOC. (Mar. 20, 2020), <https://nysba.org/criminal-lawyers-scramble-to-deal-with-new-challenges-amid-coronavirus/>.

⁵⁰ See Jamiles Lartey, *The Judge Will See You on Zoom, but the Public is Mostly Left Out*, MARSHALL PROJECT (Apr. 13, 2020), <https://www.themarshallproject.org/2020/04/13/the-judge-will-see-you-on-zoom-but-the-public-is-mostly-left-out>; Kacey Marr, *The Right to “Skype”: The Due Process Concerns of Videoconferencing at Parole Revocation Hearings*, 81 U. CIN. L. REV. 1515, 1533-34 (2013).

⁵¹ Ingrid Eagly, *Remote Adjudication in Immigration*, 109 NW. U.L. REV. 933, 934 (2015).

⁵² Brian Jackson et al., *Future-Proofing Justice*, RAND CORP. 23 (2017), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1700/RR1748/RAND_RR1748.pdf.

online, while others may allow the public to view a streamed proceeding in a controlled area. While courts struggle to prevent the public from making unauthorized recordings, it cannot come at the expense of public accountability, which has long served as a crucial check on the courts.

V. Best Practices

Courts should clearly communicate what technologies they use and how individuals' personal information will be impacted, empowering participants to hold operators of virtual court to account for errors and abuses.⁵³ New technology should also ensure that mistakes can be quickly detected and rectified.

Courts must go beyond conventional terms of service, ensuring that every person whose privacy is impacted by virtual courts can provide truly informed consent. When the judiciary falls short of this, burying far-reaching terms in lengthy legalistic documents, they undermine the integrity of the judiciary itself. As an example of what not to do, Michigan Cyber Court's user agreement long-stated that "[g]iven the nature of this online process and the state of the art of internet-based communications technologies, parties should assume that information provided through the course of the mediation will not be kept confidential, unless otherwise agreed."⁵⁴

Courts should be especially sensitive to the confidentiality of litigants and evidence, such as conversations protected by the attorney-client privilege and evidence subject to a protective order. Computer hacking concerns are only heightened with the use of new technology when conducting a remote hearing involving sensitive information, financial data, and the like. To guard against potential hacking of any digital portion of remote litigation, an independent government watchdog must conduct routine and impartial security audits. There must be contingency plans for malfunctions and system failures, both during virtual proceedings and in the long term. To prevent litigant error or uncertainty, there is a need to standardize across jurisdictions when it comes to preserving, securing, and storing data – particularly when it comes to maintaining official court records.

Attorneys must also assess potential privilege issues triggered by remote proceedings. If a chosen platform allows party monitoring in its user agreement, participants may unknowingly waive privilege by engaging in attorney-client communications in virtual breakout rooms or private chats. Courts have held in the past that third-party electronic monitoring may reduce a party's reasonable expectation of privacy, and courts should address these issues on the front end by agreement with participants and the technology provider before engaging in remote proceedings to mitigate any risk of later claims.⁵⁵

⁵³ JUST TECHNOLOGY, *supra* note 15.

⁵⁴ Saby Ghoshray, *Charging the Future of Online Dispute Resolution: An Analysis of the Constitutional and Jurisdictional Quandry*, 38 U. TOL. L. REV. 317, fn.12 (2006).

⁵⁵ See Barrett Robin, *Coronavirus: What Happens to My Lawsuit Now?*, DLA PIPER (Apr. 1, 2020), <https://www.dlapiper.com/en/europe/insights/publications/2020/04/coronavirus-what-happens-to-my-lawsuit-now/>.

Many people still have huge difficulties in accessing the technology required to appear virtually. As stated by FCC Commissioner Jessica Rosenworcel, the scope of the digital divide exposed during COVID-19 is "an inflection point for action."⁵⁶ While some internet service providers are working to expand their coverage or bandwidth as vast swaths of America move online, we shouldn't have to rely on industry generosity for internet access. To reduce the impact of the digital divide long term, lawmakers and judges at every level of our legal system must come together to support the national infrastructure needed basic and meaningful access to virtual courts. In the immediate, virtual appearances should be voluntary only. Just as e-filing experienced initially failed to consider the needs of unrepresented parties, so too will virtual court. There should thus be a presumption that pro se litigants are excluded from virtual appearances unless they specifically request to "opt in" to virtual participation.

Public access must be meaningful. Practical considerations include ensuring that the listing information for all virtual hearings is available online and that the public has controlled access to a means to view virtual hearings in real time.⁵⁷ But making virtual court proceedings publicly accessible "could have devastating consequences for privacy, without substantially contributing to the fundamental underlying objective of the open court principle: that is, transparency and accountability of the justice system."⁵⁸ Policy responses should involve balancing the need for open courts and respect for the privacy interests of court participants. To the extent that a jurisdiction does not authorize proceedings to be recorded, courts will need to take special precautions to ensure that virtual participants do not make and disseminate any unauthorized recordings.

Virtual court cannot provide the same experience or non-verbal information as an in-person hearing. Any provision of remote access must take into account privacy, fairness, and due process concerns as this technology is introduced.

⁵⁶ WEBINAR: WHAT'S BEING DONE TO ADDRESS THE GROWING U.S. DIGITAL DIVIDE?, BROOKINGS INST. 19 (Apr. 8, 2020), https://www.brookings.edu/wp-content/uploads/2020/04/20200408_digital_divide_transcript.pdf.

⁵⁷ See Justin Safayeni, *Even in the Age of COVID-19, Justice Requires Open Courts*, CTR. FOR FREE EXPRESSION (Mar. 31, 2020), <https://cfe.ryerson.ca/blog/2020/03/even-age-covid-19-justice-requires-open-courts>.

⁵⁸ Amy Salyzyn, "Trial by Zoom": What Virtual Hearings Might Mean for Open Courts, Participant Privacy and the Integrity of Court Proceedings, SLAW (Apr. 17, 2020), <http://www.slw.ca/2020/04/17/trial-by-zoom-what-virtual-hearings-might-mean-for-open-courts-participant-privacy-and-the-integrity-of-court-proceedings/> (quoting Jane Bailey and Jacquelyn Burkell). See also Bailey & Burkell, *supra* note 23.



**SURVEILLANCE TECHNOLOGY
OVERSIGHT PROJECT, INC.**

40 RECTOR STREET
9TH FLOOR
NEW YORK, NY 10006
WWW.STOPSPYING.ORG