



The NDNY-FCBA's CLE Committee
In Partnership with Syracuse University College of Law
Presents:

“Impact of COVID-19 on Federal Litigation in NDNY”

Tuesday, March 16, 2021

1:00 p.m. – 2:00 p.m.

R.S.V.P. by Wednesday, March 10, 2021

Because of COVID-19 related restrictions, this CLE will be offered in a virtual setting, via Zoom. A link for the Zoom CLE will be provided to registered attendees.

Program Description:

Courts and practitioners alike have spent the past year navigating unprecedented challenges and adapting to litigating cases during the unprecedented COVID-19 pandemic. Join us to discuss the changes in federal litigation in the past year, in both the civil and criminal context, including pre-trial detentions, compassionate and early releases, remote hearings, depositions and mediations. How are these issues being handled in the NDNY in the short term, and which changes might be here to stay?

Presenters:

Andrew T. Baxter - U.S. Magistrate Judge, NDNY

Brenda K. Sannes - U.S. District Judge, NDNY

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Impact of COVID-19 on Federal Litigation in NDNY has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for **1 hour of CLE credit, for Professional Practice.**

The Northern District of New York Federal Court Bar Association has been certified by the New York State Continuing Legal Education Board as an Accredited Provider

of continuing legal education in the State of New York.

A code will be provided at a particular point in the program, which can be used to claim CLE credit for participation in the webinar.

This program is appropriate for newly admitted and experienced attorneys. This is a single program. No partial credit will be awarded.

This program is complimentary to all Northern District of New York Federal Court Bar Association Members.

GOALS AND CHECKLIST

FOR RESTARTING IN-PERSON GRAND JURIES, JURY TRIALS AND RELATED PROCEEDINGS



**PRODUCED BY THE COMMISSION TO REIMAGINE
THE FUTURE OF NEW YORK'S COURTS**
JULY 2020

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I. Each court should generate its own plan, based on local conditions, that prioritizes health and safety when restarting in-person grand juries, jury trials and related proceedings.

II. General goals to keep in mind:

- A. Health and safety of all visitors and staff.
- B. Clear and up-to-date communications to all interested parties.
- C. Limit courthouse occupancy and interaction among those present.
- D. Dedicate exclusive space for jury trials and jury assembly/deliberations.
- E. Limit courtroom use and the need for interaction in the courtroom.
- F. Strict adherence to all legal and constitutional requirements.



III. Checklist for Developing A Restart Plan for Grand Juries, Jury Trials and Related Proceedings

A. When and how to restart trials

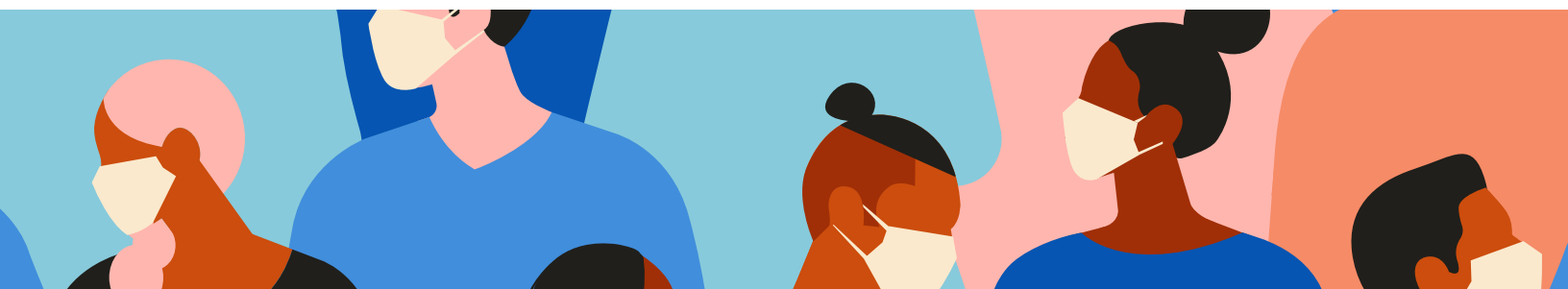
1. What is the status of the health emergency in your county? Consult local and state health officials and assess whether reopening is yet feasible in your community.
2. Consult all guidance from the Office of Court Administration (OCA) on required and recommended safety measures in light of the COVID-19 pandemic and ensure that plans and protocols for restarting jury trials and other jury procedures are consistent with that guidance.
3. What jury trials need to go forward or take priority?
 - a. Criminal cases:
 - i. matter continued because of pandemic;
 - ii. speedy trial issues; and
 - iii. the accused is detained.
 - b. Civil cases:
 - i. prior continuances of trial dates;
 - ii. filing date;
 - iii. nature of the relief sought; and
 - iv. circumstances of the parties.
 - c. Determine whether parties would consider a bench trial.
4. Before in-person trials restart, consider best practices for, and implementation of, social distancing:
 - a. Consult with local and state health officials on *voir dire* procedures, conducting trial, and maintaining safe distances for all participants.
 - b. Create a diagram of the courtroom and other space intended for use by juries in consultation with health officials to accommodate social distancing and create a safe environment that instills confidence in jurors, staff, lawyers, witnesses, victims and all other participants that the health of all participants has been fully considered.
5. For criminal cases, coordinate with local law enforcement to ensure that safe transportation of incarcerated defendants is possible, or if virtual appearances are appropriate and feasible.



6. Determine where jury trials will take place, considering the following:
 - a. Security;
 - b. Connectivity (internet, A/V and other resources for wired courtroom capabilities);
 - c. Restroom access and procedures that allow for social distancing;
 - d. Safe entry and egress through elevators or stairwells; and
 - e. Safe means of moving about within the facility.
7. Operations during the pandemic must not impede defense counsel's Sixth Amendment obligations, including compliance with ethical obligations under relevant Rules of Professional Conduct.
8. Create a press release from the court (and health officials, if possible) outlining amended procedures designed to ensure social distancing.

B. Courthouse and Courtroom Access

1. Require appropriate screening for visitors (including temperature checks or other screening before entry into the courthouse, as described in the June 30, 2020 OCA Memorandum to District Executives and New York City Chief Clerks).
2. Establish daily procedures to assess the health of those entering the courtroom.
3. Provide hand sanitizer at court entrances, in the courtroom and at other touchpoints in courthouse.
4. Provide masks and other personal protective equipment (PPE) as recommended by health professionals.
5. Establish procedures for cleaning the courtroom and jury spaces every night.
6. High-risk individuals should not be required to appear in court, nor should such individuals suffer any penalty or loss of rights for declining to participate.
7. Consider ways to limit the number of court staff on site (for example, staggering hours while allowing remote work for others).
8. Consider ways to appropriately limit public entry for non-essential matters.
9. If the courthouse has an elevator, post a notice stating the maximum number of people who can safely (with appropriate social distancing) use the elevator at one time.



10. Consider making stairways more accessible to reduce elevator traffic.
11. Consider ways to ensure appropriate access for persons with disabilities (e.g., masks for speakers may be problematic for those with hearing loss).
12. Use every possible communication medium (e.g., website, courtroom door signs with quick response (QR) codes, press releases, Facebook, Twitter) to broadcast the message that the Court considers health and safety as the top priority and has taken concrete steps to address the risks.

C. Initial Communications with Jurors

1. Inform prospective jurors of the steps the Court is taking to ensure their safety and how the process will work to address health concerns and provide them with the opportunity raise any specific issues (for example, whether they believe they are in a high-risk category for COVID-19 infection).
2. Provide a statement about the long tradition of jury trials and how continuance of jury trials is essential to our justice system.
3. Consider recording a statement from a Judge for jurors informing them that the trial will be proceeding and what precautions have been taken to ensure their safety.

D. Jury Pools

1. Determine how many jurors the Court needs to call, keeping in mind likely increases in deferral requests and absentees.
2. Consider pre-screening questions specific to COVID-19 or other common disqualifying issues to reduce the number of jurors required to come to the courthouse.
3. Create and disseminate a juror deferral policy that addresses COVID-19 issues.
4. Consider a more liberal deferral policy that avoids excusing jurors from duty (for example, permitting a one-time deferral without any required explanation). A more liberal deferral policy could also be provided for jurors in high-risk categories (e.g., senior citizens, respiratory condition, diabetes) who provide appropriate documentation as set forth in published guidelines.
5. Consider a more forgiving policy for jurors who fail to appear, while also impressing upon them that they cannot ignore or fail to respond to a summons.



6. Keep appropriate records concerning jurors who are excused or whose service is deferred.
7. Encourage all members of the jury to limit their travel and exposure to large groups and high-risk situations (e.g., keep jurors up-to-date on social distancing and safety guidelines).

E. Jury Reporting and Selection

1. Consider having jurors report later in the day, or in a staggered fashion, to avoid rush-hour commuting and use the time for other court business.
2. Consider ways to reduce exposure. For example, have each jury panel report directly to the courtroom rather than to the jury assembly room and use a staggered schedule for jury panels to report.
3. Consider ways to reduce the time and number of jurors needed for in-person *voir dire*. For example, consider case-specific *voir dire* questionnaires that jurors complete remotely. Answers could serve as a basis for making for cause or peremptory challenges without the need for the juror to appear.
4. Consider remote initial screening to identify jurors who will be excused because of time, hardship, or a for-cause conflict.
5. Consider impaneling extra alternates or extending service for grand juries to reduce the need for new panels to be picked, where permitted under the law.
6. Establish a process for reviewing juror identification that limits the need for close interaction and physical exchange of documents.
7. Consider establishing or revising existing protocols for sick jurors to accommodate jurors that test positive for COVID-19 while serving.
8. Ensure that changes to existing policies for both grand and petit juries are documented and communicated to jurors and interested parties.
9. Establish methods for private inquiry with jurors by judge and counsel.



F. Conduct of Trial

1. Consider courthouse space and other available local facilities for trial and jury assembly and deliberations, and whether physical modifications are necessary and feasible to ensure compliance with social distancing and other necessary health protocols.
2. Consider ways to keep groups from congregating in the courthouse.
3. Consider conducting pretrial proceedings (e.g., pretrial hearings, resolution of pretrial motions) virtually either by phone or video, if possible.
 - a. If a pretrial hearing is to be conducted by video in a criminal matter, secure the accused's voluntary and informed waiver;
 - b. Consider a pretrial proceeding with health officials and counsel to discuss all procedures for conducting trial.
4. Establish procedures for jurors during trial and deliberations, including:
 - a. Identification of alternative spaces in courthouse for deliberations if traditional jury rooms do not provide sufficient distancing (consider leaving jurors in the courtroom, locked for deliberations, rather than using the jury room);
 - b. Juror seating should comply with required social distancing protocols;
 - c. Do not collect or have jurors return any pens or pads that may be provided;
 - d. Limit collection of jurors' personal items, including phones (consider requiring jurors' phones be placed on the floor under their chairs to ensure they are not using their phones inappropriately);
 - e. Reduce common touch points in jury deliberation space. Items touched by everyone should be removed from the jury room, and a daily cleaning regime should be instituted;
 - f. Do not allow jurors to congregate during breaks or for meals;
 - g. Limit access to the well of the courtroom or other areas near jurors;
 - h. Use appropriate masks and other PPE.
5. Establish rules for lawyers during trial that address:
 - a. Appropriate use of masks and other PPE, including rules for those speaking in court;
 - b. Removal of all items from counsel table at the end of the day;
 - c. Responsibility for advising all witnesses and clients of courtroom procedures and ensuring witnesses and clients that attend trial are healthy;
 - d. Procedures for sidebars and/or alternatives to sidebars;
 - e. Procedures for ensuring confidential attorney-client communications where social distancing is required.



6. Consider protocol for presentation of evidence that:
 - a. Requires exhibit lists and exhibit marking in advance of trial, and deposition designations and objections thereto to be exchanged and addressed in advance (with good cause exception);
 - b. Requires written submissions or telephone/video conference to resolve as many evidentiary disputes as possible in advance of trial;
 - c. Uses electronic means for presenting exhibits if possible (including, but not limited to, screens/ELMO projectors), and avoids hard copy documents and other physical exhibits where possible (use caution in avoiding publishing exhibits to the jury that have not been admitted as evidence);
 - d. To the extent hard copy documents need to be used, requires copies be made so that one document is not handled by everyone (taking into account authentication issues);
 - e. Avoids exchange of evidence, papers or other physical objects among jurors and others;
 - f. Requires 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;
 - g. Encourages stipulations on facts and evidentiary issues (e.g., foundation objections) to reduce the need for witnesses;
 - h. Considers use of video testimony, where necessary/feasible and constitutionally permissible;
 - i. Establishes a procedure for live witnesses that:
 - i. Designates an area for each witness to wait before they testify, while ensuring effective sequestration where necessary;
 - ii. Provides guidelines for appropriate PPE before and during testimony;
 - iii. Designates areas for counsel and prohibits lawyers from approaching a witness.
7. Determine rules for spectators in the courtroom based on available space, including:
 - a. Family members of litigants;
 - b. Crime victims and their families;
 - c. Press or other media (consider use of pool reporter if significant media attention is anticipated);
 - d. Other members of the public and courthouse staff (consider livestreaming, where available).



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Trial Procedures for the First Civil Jury Trial in the Northern District of New York with COVID-19 Precautions

Judge Mae A. D'Agostino

A. Pre-Trial & Jury Panel Communication

In the weeks leading up to the trial, I examined state and local statistics of COVID-19 infection rates and hospitalizations to ensure that there was not an increase in cases. The Court consulted an infectious disease specialist to ensure that the proposed plan limited risk to all involved with the trial. The physician walked through the facility, following the path that a juror would follow, from the entrance of the courthouse through the locations for juror orientation and into the courtroom and jury room. During the pre-trial conference, I explained to the parties the precautions that were implemented and various trial procedures, which are set forth in detail below.

With respect to the protocol for the jury pool, communication regarding COVID-19 precautions began with their initial summonses. Below is an excerpt from the initial jury summons:

The COVID-19 pandemic has caused the entire country to press “pause” on many activities of normal life, including jury service. The court has been working hard to prepare for a restart of jury operations. As jurors return to the courthouse, the safety of our staff and jurors remain the Court’s overriding priority. To this end, we will be closely following national and local guidelines. Jurors will be required to wear a face mask to enter the building. You may bring your own mask, or the court will provide you with one. Jurors who fail to comply will be denied entry and will not receive payment for their attendance. Our jury meeting spaces have been modified to allow for appropriate distancing and hand sanitizing stations are located throughout the building. Cleaning staff will be disinfecting public areas regularly and high touch surfaces will be sanitized frequently throughout the day. When you report, we will do our best to minimize your wait time and your contact with others. If you are currently under self-quarantine, you may request a postponement by using the form below. If you have any questions or concerns about your service, please contact the Jury Administration Office at (315) 234-8520.

Any juror who contacted the Jury Administrator with concerns over COVID-19 were deferred to a different jury term. Jurors over the age of 70, without childcare, physically or mentally unable to serve, or doctors/nurses/first responders were automatically deferred. Two weeks prior to trial, the following email was sent to all the jurors who responded to the jury summons:

The court is committed to the safety and well-being of our jurors as we continue to provide essential judicial services. In preparation for your arrival, the court has been modifying our procedures to comply with the recommended guidelines from the CDC and local health authorities. If at any time during your term you test positive for COVID-19 or you have close contact with someone who has tested positive for COVID-19, please contact the Jury Administration Office

immediately to be rescheduled. You can contact the Jury Administrator by email to jury@nynd.uscourts.gov or by phone (315) 234-8520.

Thirty-seven jurors were selected and told to report for the August 18th trial. Jurors received a letter from the Chief Judge outlining, in detail, the safety protocols that were put in place. The selected jurors then received the following phone message when they called in for instructions five days before trial:

This is the U.S. District Court Jury Administration Office. You are scheduled to report on August 18th at 8:30/10:00AM. As jurors return to the courthouse, the safety of our staff and jurors remain the Court's overriding priority. To prevent the risk of infection, we have implemented aggressive policies and are taking extra precautions to protect your health. All jurors are required to wear a mask to enter the building. If you do not have a mask, one will be provided to you. Please adhere to all posted guidelines and cooperate with social distancing markers. Please do NOT report if you have any symptoms of illness, if you have had direct contact with someone that has tested positive for COVID-19 in the past 14 days, or if you have traveled to one of the restricted states for which New York State requires a mandated self-quarantine period. Instead, please call the Jury Administration Office at (315) 234-8520 to be rescheduled. We look forward to welcoming you to the federal courthouse. Thank you for your participation during this challenging time.

The day before trial, jurors were sent the following message:

This is the U.S. District Court Jury Administration Office. You are scheduled to report for jury selection on Tuesday, August 18th. Please do not report if you have any signs of illness. This includes a fever, chills, cough, sore throat, shortness of breath, difficulty breathing, loss of taste or smell, muscle pain, headache, runny or congested nose, or diarrhea. If you have any of these symptoms, please call the Jury Administration Office at (315) 234-8520 to be rescheduled. We ask that you please do your own temperature screening prior to reporting. Upon entry to the Courthouse, you will be asked to complete a health screening questionnaire and provide your temperature reading taken within the previous 24 hours. Thank you for your cooperation as we work together to stay healthy.

Of the thirty-seven selected jurors, only three were excused prior to trial for COVID-19 related reasons.

B. Courtroom and Jury Room Setup

As shown in the pictures below, plexiglass partitions were installed on each counsel table, around the witness box, and between the Courtroom Deputy and Court Reporter. Air circulation for the courtroom and jury room was substantially increased and specialized air filters were installed in the vent system.



Fig. 1: Counsel Tables with Plexiglass



Fig. 2: Witness Box with Plexiglass

The chairs in the jury box were separated by at least six feet and were numbered. The chairs were made of an easy to clean pleather fabric.



Fig. 3: Jury box with numbered seats

As shown below, the jury room was configured so that each juror was separated by more than six feet. The jury room also had two attached bathrooms that could only be accessed by the jurors. The jury room and bathrooms were cleaned every night.



Fig. 4: Jury room with separated tables

C. Jury Orientation and Selection

Upon arrival, jurors were provided with a PPE kit that included personal hand sanitizer, disinfectant wipes, and disposable masks. Face shields were available upon request. All individuals, including jurors and court personnel, were required to wear a mask at all times. Jurors followed designated pathways to and from the courtrooms, which were roped off and easy to follow. At all times, jurors followed seating plans that were developed prior to trial to ensure that appropriate social distancing was maintained.

Jurors arrived in two waves, arriving approximately one and a half hours apart. This staggering of the jury panel was done to ensure that social distancing could be maintained during juror orientation and selection. Prior to security screening, jurors were asked to report their temperature for that morning. The temperatures were noted on a juror list and stored with the Court in the event that contact tracing became necessary. Although no juror reported a fever, if the juror had reported a fever, he/she would have been turned away before going through security screening.

The first group, which consisted of approximately nineteen jurors, reported to one of the un-used courtrooms for juror orientation. Prior to entry, the jurors were checked in by Court personnel and provided a juror information form on a clipboard and their PPE bag. The jurors were then escorted into the courtroom by designated Court personnel. The seats were separated by at least six feet, and jurors stayed in their seats until they were called into the courtroom for jury selection. The clipboards with the juror information form were collected by Court personnel. Jurors were instructed to keep the pens that they used and the clipboards were sanitized. The second group of jurors, which consisted of approximately ten people, reported to an entirely different room and went through the same process. Each group was instructed to report to their designated room on breaks to minimize contact with jurors from a different group. The second group congregated in the room that would become the jury deliberation room. Therefore, after the second group of jurors was excused following jury selection, the room was sanitized and re-arranged before the jury began to use it.

D. Trial

During trial, every person who entered the courtroom was required to complete a daily questionnaire and provide the form to the courtroom deputy. For the first day, the questionnaire asked about whether the individual was experiencing COVID-19 symptoms, had come in contact with someone with COVID-19, or had traveled to areas on the mandatory quarantine list within the last fourteen days. For the remaining days, the questionnaire inquired as to whether the individual had come in contact with someone with COVID-19 or experienced any symptoms associated with COVID-19 in the last 24 hours. Each day, every person who entered the courtroom, including court personnel, was required to take their temperature before coming to court. Everyone was advised that if they had a temperature over 100.4, they were not permitted to enter the courthouse.

The jury room and courtroom were sanitized every night after trial. Microphone covers were placed on every microphone in the courtroom. The witness box was sanitized after each use of the box and the microphone cover was replaced. Attorneys were required to remain at their tables throughout the entire proceeding. No use of the central podium was permitted. As previously mentioned, every person in the courtroom was required to wear a mask throughout the trial. However, witnesses were given the option to remove their mask once they were seated in the witness box. Once the witness' testimony was complete, the witness was required to re-apply their mask before leaving the witness box.

Exhibits during trial were electronic and were displayed using courtroom technology. This system allows the courtroom deputy to control where the exhibits are displayed. Screens are placed at each counsel table, in the witness box, with the judge and the courtroom deputy, and multiple screens are placed throughout the jury box.

E. Jury Deliberations

Once the jury retired to deliberate, evidence binders were sanitized and provided to the jury. All evidence was left on a central table with gloves and Clorox wipes. Jurors were instructed to use gloves when handling the evidence.



Fig. 5: Evidence table in jury room with gloves and Clorox wipes.

Once deliberations began, jurors were instructed to bring their own lunch and snacks. No food was provided to the jurors. Each juror was provided a copy of the Court's instructions and a verdict sheet. Finally, when announcing the verdict, the verdict sheet was handled only by the courtroom deputy and myself, with both of us wearing gloves.

F. Post-Trial Feedback from Jurors

After the trial, the jurors were asked if they felt comfortable during the trial or if they had any suggestions to improve the COVID-19 precautions. The jurors expressed that they felt comfortable and safe at all times and did not offer any suggestions for improvement.

Personal Note from Judge D'Agostino:

Every minute of every day, I remained hopeful that no COVID-19 cases were reported for anyone who attended trial. Whether or not to go ahead with trials during the COVID-19 pandemic is a heavy decision. If anyone associated with the trial had become ill, that is something that I would have to live with. It is important to recognize that if a presiding judge decides to proceed with a trial, you must be prepared to deal with consequences that could be catastrophic.

VIRTUAL DEPOSITIONS – CAN'T LOOK BACK NOW

Covid-19 has substantially changed the landscape of federal and state litigation. Depositions, for example, are now primarily being conducted virtually using audio and video technology (such as Zoom, WebEx and Skype) to avoid the spread of infection that may occur from an in-person deposition (with numerous individuals, gathered in tight quarters, for extended periods of time). Virtual depositions are likely to become more ingrained in federal and state litigation once the pandemic is over because of significant advancements in technology, the ease with which virtual depositions can be conducted, and the cost efficiencies they generate.

The proliferation of virtual depositions in such a short period of time means litigants are navigating novel issues on a daily basis, including establishing a framework for consistent rules and procedures to govern them. The purpose of this report is to enumerate best practices when conducting virtual depositions. Accordingly, below is a list of provisions that may be incorporated into stipulations between counsel for parties and non-parties governing virtual depositions.

- **Court Reporter.** The stipulation should provide that: (i) a court reporter may administer the oath to a witness remotely (even if the court reporter is not in the physical presence of the witness);¹ (ii) the transcripts and video recordings may be used by or against all parties in the litigation;² (iii) the recorded video provided in digital form by the court-reporting service may be used as if it were recorded by a certified videographer and each side waives objections based on authenticity;³ and (iv) the individual administering the oath to the witness shall ask the witness to swear that the witness is who the witness claims to be.
- **Cooperation.** The stipulation should provide that the parties and any non-parties involved in the virtual deposition will cooperate on technical issues regarding the digital file (*e.g.*, assuring audio and video quality, displaying exhibits, ascertaining that only those portions of the deposition that are on record should be recorded, and affixing time stamps) and work collaboratively in good faith with the video-conferencing service to assess each witness's technological abilities and to troubleshoot any issues in advance of the deposition. Federal Rule of Civil Procedure 30(b)(4) provides that a remote deposition in a federal proceeding is permitted by stipulation of the parties or order of the court. Non-parties would be subject to this stipulation or order because they generally may not refuse to proceed with a deposition merely on the grounds that they object to the manner of recording set forth in the subpoena, although in rare circumstances they may seek a protective order.⁴ The

¹ This would comply with Federal Rule of Civil Procedure 28 and New York Civil Practice Law and Rules 3113(d).

² This would be in accordance with Federal Rule of Civil Procedure 30(b)(5) and New York Civil Practice Law and Rules 3117.

³ This would be under Federal Rule of Civil Procedure 29(a) and 22 NYCRR 202.15.

⁴ According to the 2005 Advisory Committee Note to Federal Rule of Civil Procedure 45, "A subpoenaed witness does not have a right to refuse to proceed with a deposition due to objections to the manner of recording. But under rare circumstances, a nonparty witness might have a ground for seeking a protective order under Rule 26(c) with regard to the manner of recording or the use of the deposition if recorded in a certain manner."

stipulation should further provide who will bear the burden of ensuring that the witness has the proper software, hardware, and other relevant equipment to attend a deposition by video conference; when that technology will be made available to the witness; and a mechanism for a “test run,” if needed.

- Vendor. The stipulation should provide for the name of the court reporting service and platform used to record the deposition. Unless otherwise agreed, the stipulation should require that the witness and all counsel be displayed on the platform at all times during the deposition, except when one or more counsel must be taken off to display an exhibit. The stipulation should also state that counsel may elect to have a technical specialist attend the deposition to address technical issues and administer any virtual breakout rooms or an exhibit specialist to ensure that exhibits are properly displayed during the deposition. The stipulation should provide that confidential information may be disclosed to any such specialists involved in the deposition without violating any confidentiality restrictions.
- Exhibits. The parties may stipulate to the timing under and means by which deposing counsel could send the witness and defending counsel exhibits to be potentially marked during the deposition. Such means may include: (a) sending them, pre-marked, by overnight courier in a sealed envelope or banker’s box(es) in advance of the deposition; (b) making them available through a pre-arranged FTP or file-sharing site or emailing pre-marked exhibits to the witness, defending counsel, all attending counsel, and the court reporter in advance of the deposition; (c) using a video-conferencing platform or other electronic application for presenting exhibits which will enable deposing counsel to share exhibits with the witness, court reporter, and all counsel attending; or (d) any other means agreeable between counsel. For hard-copy exhibits transmitted in advance, the stipulation should provide that the sealed exhibits must remain sealed and unopened until the deposition begins and the witness is instructed on the record to open a sealed hard-copy exhibit (at which time others in possession of sealed exhibit folders may open the sealed exhibit, as well). The parties should also provide for a mechanism to address last-minute exhibits not provided to the witness or defending counsel in advance.
- Witness Notes. Witnesses should testify on the record that they do not have any notes or documents available to them while the deposition is pending, except that which they disclose and provide to all parties. Any documents reviewed, or notes made, by witnesses while on the record shall be preserved and made available to all parties, appropriate non-parties and counsel.
- Witness Communications. The stipulation should provide that there should be no unrecorded conversations between the witness and any counsel involved in the case during a remote deposition while the witness is on the record. All counsel may be asked to confirm on the record and at the beginning and end of each deposition that they will not communicate and have not communicated with the witness while the witness is on the record other than in the presence of the court reporter and videographer. However, nothing in the stipulation should prevent a witness from seeking advice regarding the application of a privilege or immunity from testifying during the course of a deposition, nor should the stipulation prevent defending counsel from initiating a private communication off the record with a witness for the purpose of determining whether a privilege should be asserted or for another authorized purpose, so long as defending counsel first states his or her

intention on the record before initiating such communication. Nothing in the stipulation should prevent the questioner from asking the witness at any time who else, if anyone, is in the room with the witness.

Virtual depositions are becoming more prevalent in federal and state litigation every day, causing a major shift in the manner in which cases are litigated on a rapid basis. It is important that litigants adapt and embrace technology permitting the use of virtual depositions in place of in-person ones. In anticipation of a virtual deposition, parties and non-parties should enter into a clear stipulation to ensure the deposition is streamlined, minimizes the risk of technical problems, focuses on maintaining the integrity and reliability of the record, and governs the conduct of the parties and non-parties involved. A copy of a model stipulation incorporating is set forth in Exhibit A to demonstrate how these objectives may be achieved.

October 28, 2020

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Persons marked with an asterisk are principal authors of the Report.

EXHIBIT A
REMOTE DEPOSITION STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned counsel for Plaintiffs, on the one hand, and counsel for Defendants, on the other hand, that:

Purpose of this Stipulation. In light of the ongoing Covid-19 pandemic, the Parties and Non-Parties shall meet, confer, and cooperate with one another regarding the scheduling of Depositions and the procedures for taking Depositions. Parties agree to take reasonable steps, in good faith, to enable witnesses, Deposing Counsel, Defending Counsel, and Attending Counsel to complete Depositions in a manner that takes into account and accommodates, as necessary, the needs of dependent care and personal health and safety.

Definitions

“Attending Counsel” means any legal counsel for a Party or Non-Party that is attending a Deposition, other than Deposing Counsel or Defending Counsel.

“Court Reporter” means an individual retained by the Party or Parties taking a Deposition to transcribe the Deposition who is authorized to administer oaths under either federal or state law.

“Defending Counsel” means the legal counsel for the Party, Parties, Non-Party, or Non-Parties being deposed who is principally defending the Deposition. For a witness who is represented by personal and company counsel for the purpose of his or her Deposition, both personal and company counsel shall be treated as “Defending Counsel.”

“Deposing Counsel” means the legal counsel for the Party or Parties noticing a Deposition.

“Deposition” means any deposition upon oral examination taken pursuant to Federal Rule of Civil Procedure 30 or any court order in the litigation.

“Exhibit” means any document or electronically stored information that is marked as an exhibit at a Deposition.

“Party” or “Parties” means any plaintiff, any defendant, and any of their current or former employees, executives, officers, or directors.

“Non-Party” or “Non-Parties” means all natural or legal persons that are not Parties from whom a Party is seeking a Deposition in the litigation.

In-Person Depositions

Nothing in this Stipulation shall prevent a Deposition from proceeding in person if Deposing Counsel, Defending Counsel, and the witness agree.

If the noticing Party, the responding Party or Non-Party, and the witness agree, a Deposition may take place in person at an agreed upon location with the noticing Party, responding Party or Non-Party, witness, court reporter, and videographer appearing in person.

All Parties and appropriate Non-Parties should confer in advance to ensure that only those attorneys who plan to question or represent the witness will appear in person. Any other Party may participate in any in-person Deposition by telephone or via video conference.

Deposing Counsel and Attending Counsel intending to participate by telephone shall cooperate in good faith to facilitate such participation.

Remote Depositions

Notice of Remote Deposition: Any Party may notice a Deposition to be taken remotely pursuant to the terms of this Stipulation by so indicating in the notice of deposition. All objections to the use and admissibility of the transcript or video of a Deposition taken pursuant to this Stipulation based solely on the fact that the Deposition was taken by remote means are deemed waived. The Party that noticed the Deposition shall be responsible for procuring a written transcript and video recording of the Deposition. The Parties and any Non-Parties shall bear their own costs in obtaining a transcript or video recording of the Deposition and copies of any Exhibits.

Notice of Change from In-Person to Remote Deposition: If a Deposition was previously anticipated or agreed to be an in-person Deposition, the witness or that person's attorney may request the Deposition be changed to a remote Deposition. Such a request to change the format for the Deposition should be provided as soon as reasonably practicable, but no later than seven days in advance of the Deposition. The Parties and any appropriate Non-Party will work cooperatively and timely to arrange for the necessary logistics required for the change in format of the Deposition.

Remote Administration of Oath and Recording of Video: The Parties agree that a Court Reporter may administer the oath to a witness remotely, even if the Court Reporter is not in the physical presence of the witness. Further, if a Court Reporter is not authorized to take oaths in the place of examination pursuant to Federal Rule of Civil Procedure 28, the Parties agree that (i) extenuating circumstances warrant proceeding with the administration of such oaths remotely and (ii) the transcripts and video recordings may be used by or against all Parties in the litigation to the same extent that would otherwise be permissible under applicable court orders, rules of court, rules of procedure, and rules of evidence, including Federal Rule of Civil Procedure 30(b)(5). The Parties further stipulate, pursuant to Federal Rule of Civil Procedure 29(a), that the recorded video provided in a digital file by the court-reporting service or platform vendor may be used as if it were a recording prepared by a certified videographer and that each side will waive any objections based on authenticity. The individual administering the oath to the witness shall ask the witness to swear that the witness is who the witness claims to be, and, if appropriate, have the witness show identification.

The Parties and any appropriate Non-Party will cooperate on technical issues regarding the digital file (*e.g.*, assuring audio and video quality, displaying exhibits, ascertaining that only those

portions of the deposition that are on record should be recorded, and affixing time stamps). The time shown on the transcript and video shall be the local time in the place where the witness is located. Absent a special need, the witness will not have access to or use of a real-time feed from the Court Reporter at any time during the Deposition. Both the Court Reporter and the Deposition vendor or videographer will maintain an official record of the Deposition. Accordingly, both will need to agree when proceedings are on or off the record. Once proceedings go on the record, absent extenuating circumstances, all Parties and appropriate Non-Parties must agree before the record stops.

Video-conferencing: Where the witness, Defending Counsel, or the Deposing Counsel are appearing for the Deposition remotely, then a video-conferencing service will be used, and such video may be recorded for later use in proceedings in this case, including trial. The video-conferencing software must have sufficient security features in place to prevent the public disclosure of protected information designated under the Confidentiality Order in the litigation. The Parties and any appropriate Non-Parties will discuss any further details related to the video-conferencing service in advance of the Deposition, and, if there are any disagreements, will raise those with the Court. To the extent possible, the video-conferencing service should display the witness, Defending Counsel, and Deposing Counsel on the video screen at all times, unless one or more counsel must be taken off screen to display an Exhibit; however, the witness should always be on screen. Statements by the witness, Deposing Counsel, Defending Counsel, Attending Counsel, the Court Reporter, and the videographer shall be audible to all participants, and they should each strive to ensure their environment is free from noise and distractions.

The Parties and any appropriate Non-Party will cooperate on technical issues regarding the digital file (*e.g.*, assuring audio and video quality, displaying exhibits, ascertaining that only those portions of the deposition that are on record should be recorded, and affixing time stamps). Deposing Counsel and Defending Counsel shall meet, confer, and cooperate to ensure that the witness has technology sufficient to attend a Deposition via remote means. If necessary, this shall include arranging for the witness to participate in a “test run” of the Deposition video-conferencing software at least three business days or five calendar days before the scheduled date of the Deposition (whichever is longer).

Vendor and Platform

Plaintiffs are using _____ for court reporting, videography, and remote video deposition services in this case. _____ intends to use the _____ platform, which allows for the witness, Attending Counsel, Deposing Counsel, Defending Counsel, Court Reporter, and videographer to participate in a Deposition without attending the Deposition in person. Defendants are using _____ for court reporting, videography, and remote video deposition services in this case. _____ intends to use the _____ platform, which allows for the witness, Attending Counsel, Deposing Counsel, Defending Counsel, Court Reporter, and videographer to participate in a Deposition without attending the Deposition in person. _____’s and _____’s cost structures for the services being rendered are attached to this stipulation. To the extent any Deposition will proceed using a service other than as set forth above, details regarding the video conferencing to be used for each Deposition will be made available to all Parties and any appropriate Non-Parties at least five business days before the Deposition.

Deposition Recording

In addition to recording the Deposition by stenographic means, the deposing Party may record the Deposition by video. The video recording shall be limited to the witness; however, this provision is separate from, and does not supplant, Section ___ above as to the individuals that should be *displayed* (rather than recorded for the official Deposition video) during the Deposition. Deposing Counsel is responsible for ensuring that the remote means used for a Deposition allow for the Court Reporter to accurately record the witness's testimony. Either Deposing Counsel or Defending Counsel may elect to have a technical specialist attend a Deposition taken by remote means to ensure that technical issues are dealt with in a timely manner and to administer any virtual breakout rooms. Deposing Counsel may also elect to have an exhibit specialist attend a Deposition taken by remote means to ensure that Exhibits are properly displayed during the Deposition. If Deposing Counsel uses an exhibit specialist, Deposing Counsel will act in good faith to make their exhibit specialist available to assist the Defending Counsel or other Parties or appropriate Non-Parties to present any Exhibits to the witness during cross-examination or redirect. For purposes of clarity, Confidential or Highly Confidential information may be disclosed to such technical or exhibit specialists during the course of a Deposition without violating the Court's Confidentiality Order, and such technical and exhibit specialists shall be bound by the Confidentiality Order.

Exhibits

Generally: Deposing Counsel shall be responsible for ensuring that any Exhibits that they wish to mark and use at the Deposition can be shown to the witness and Defending Counsel in a manner that enables the witness and Defending Counsel to independently review the Exhibits during the course of the Deposition. Such means of marking and using Exhibits for the Deposition shall include, by way of example: (a) using a video-conferencing platform or other electronic application for presenting Deposition Exhibits (*e.g.*, Remote Counsel/Cameo, eDepoze, or Zoom screen-sharing) which enables Deposing Counsel to share Exhibits with the witness, Court Reporter, Defending Counsel, and Attending Counsel; (b) sending via overnight courier sealed courtesy copy or pre-marked Exhibits to the witness (and Defending Counsel, if requested) in advance of the Deposition; (c) making available via a pre-arranged FTP or file-sharing site or emailing pre-marked Exhibits to the witness, Defending Counsel, Attending Counsel, and the Court Reporter in advance of the Deposition; or (d) any other means to which the Deposing Counsel and Defending Counsel agree. If the remote means used do not permit marking of Exhibits remotely, Deposing Counsel shall either pre-mark Exhibits or direct the witness and other attendees as to how Exhibits should be marked.

Electronic Exhibits: A Party may use electronic Exhibits in connection with a Deposition so long as the Party provides notice to the witness and Defending Counsel and arranges for the technology to permit the presentment of the electronic Exhibit at the Deposition to the witness, Defending Counsel, and Attending Counsel. The Parties will provide electronic copies of Exhibits introduced during the course of a Deposition, either via email, deposition exhibit software, or via a pre-arranged FTP or file-sharing site, to ensure that Defending Counsel and Attending Counsel may participate in the Deposition. Similarly, where an Exhibit is used electronically and was not

provided in hard copy before the Deposition, the Parties will provide electronic copies of that document by the same means described in the previous sentence. Deposing Counsel shall not begin questioning a witness concerning an electronic Exhibit until that Exhibit has been received by Defending Counsel and Attending Counsel.

Hard-Copy Exhibits: At the sole discretion of the noticing Party, a remote Deposition may be conducted using sealed, pre-marked, hard-copy paper Exhibits as the official Exhibits. Such hard-copy Exhibits shall be transmitted so that they are received at least by noon of the business day before the Deposition (with tracking information available upon request) to the witness, Defending Counsel, and the Court Reporter. Upon delivery, each recipient shall confirm by email to Deposing Counsel receipt of the Exhibits. Anyone receiving sealed hard-copy Exhibits agrees pursuant to this Stipulation that the sealed Exhibits must remain sealed and unopened until the Deposition begins and the witness is instructed on the record to open a sealed hard-copy Exhibit (at which time others in possession of sealed exhibit folders may open the sealed exhibit, as well). Deposing Counsel may ask the witness and others receiving sealed exhibits to confirm on the record that no exhibit was opened prior to the time they are opened during the Deposition. At the conclusion of a Deposition, any unused exhibits will remain sealed and, within two business days, shall be returned, unopened, to the counsel who provided those exhibits with a prepaid, self-addressed return shipping label or envelope. All counsel planning on questioning the witness with an Exhibit will attempt in good faith to include in their hard-copy set all the exhibits on which they plan to question the witness; however, nothing in this Stipulation is intended to prevent, nor in fact prevents, counsel from preparing for the Deposition until the time that it occurs or from introducing during the Deposition additional Exhibits not previously transmitted in hard copy.

Courtesy Hard Copies for Depositions Conducted with Electronic Exhibits: Upon request by the witness or Defending Counsel, courtesy hard copies of Exhibits will be provided to the witness and Defending Counsel at an agreed upon time (*e.g.*, 48 hours) prior to the Deposition. Voluminous exhibits upon which only a portion of the document will be the subject of questioning (beyond authentication and evidentiary questions) need not be transmitted in hard copy and may be presented electronically, but Deposing Counsel will provide excerpts of key portions of the document as part of the hard-copy courtesy set. If these hard copies are delayed in arriving, the Parties and any appropriate Non-Parties will meet and confer on rescheduling the Deposition, if necessary. All counsel planning on questioning the witness with an Exhibit will attempt in good faith to include in the courtesy hard copies all the Exhibits on which they plan to question the witness. For the avoidance of doubt, the official Exhibit will remain the electronic copy presented to the witness and all participants.

Last-Minute Exhibits: The Parties recognize that there may be last-minute Deposition Exhibits, which are not able to be provided to the witness or Defending Counsel in advance. Nothing in this Stipulation is intended to prevent, nor in fact prevents, Deposing Counsel from preparing for the Deposition until the time that it occurs or from introducing during the Deposition additional Exhibits not previously transmitted in hard copy. Questioning about a last-minute Exhibit shall not commence until Defending Counsel has received a copy of the exhibit electronically via one of the electronic methods specified in this Stipulation.

Witness Notes

Witnesses will testify on the record that they do not have any notes or documents available to them while the Deposition is on the record, other than any that are disclosed and provided to all Parties and appropriate Non-Parties. Any documents reviewed, or notes made, by witnesses while on the record shall be preserved and made available to all Parties, appropriate Non-Parties and counsel. Upon conclusion of the Deposition, the Court Reporter will make available or circulate the Exhibits to all counsel attending the Deposition.

Witness Communications

There should be no unrecorded or unnoted conversations between the witness and any counsel involved in this case (including Defending Counsel) during a remote Deposition while the witness is on the record, and Deposing Counsel may ask the witness and Defending Counsel to certify, on the record, that no such conversations have taken place. Further, witnesses in Depositions taken pursuant to this Stipulation shall not use or consult any means of communications while on the record during the Deposition (other than audio and video communications used to conduct the Deposition itself), including, without limitation, electronic communications (email, text, social media, or the chat function in a video-conferencing system) and other communications (telephone). All counsel attending the Deposition will also stipulate, on the record and at the beginning and end of each Deposition, that they (and any individual working with them) will not communicate and have not communicated with the witness orally, in writing, or electronically (including, but not limited to, emails, texts, or posts). Nothing in this Stipulation prevents a witness from seeking advice regarding the application of a privilege or immunity from testifying during the course of a Deposition taken pursuant to this Stipulation. Nothing in this Stipulation prevents Defending Counsel from initiating a private communication off the record with a witness for the purpose of determining whether a privilege should be asserted or for another salutary purpose (e.g., admonishing the witness to answer the question asked), provided Defending Counsel first states Defending Counsel's intention on the record before initiating such communication. Nothing in this Stipulation shall prevent Defending Counsel from being physically present in the same room as the witness regardless of whether a Deposition is treated as in-person or remote under this Stipulation.

During breaks in the Deposition, the Parties may use a breakout room feature provided and controlled by the video-conferencing service, which simulates a live breakout room and may be used to discuss a topic the deponent should not hear. Conversations in the breakout rooms shall not be recorded. Off-the-record communications are or are not discoverable to the extent permitted under the rules and practices in the court where the case is pending.

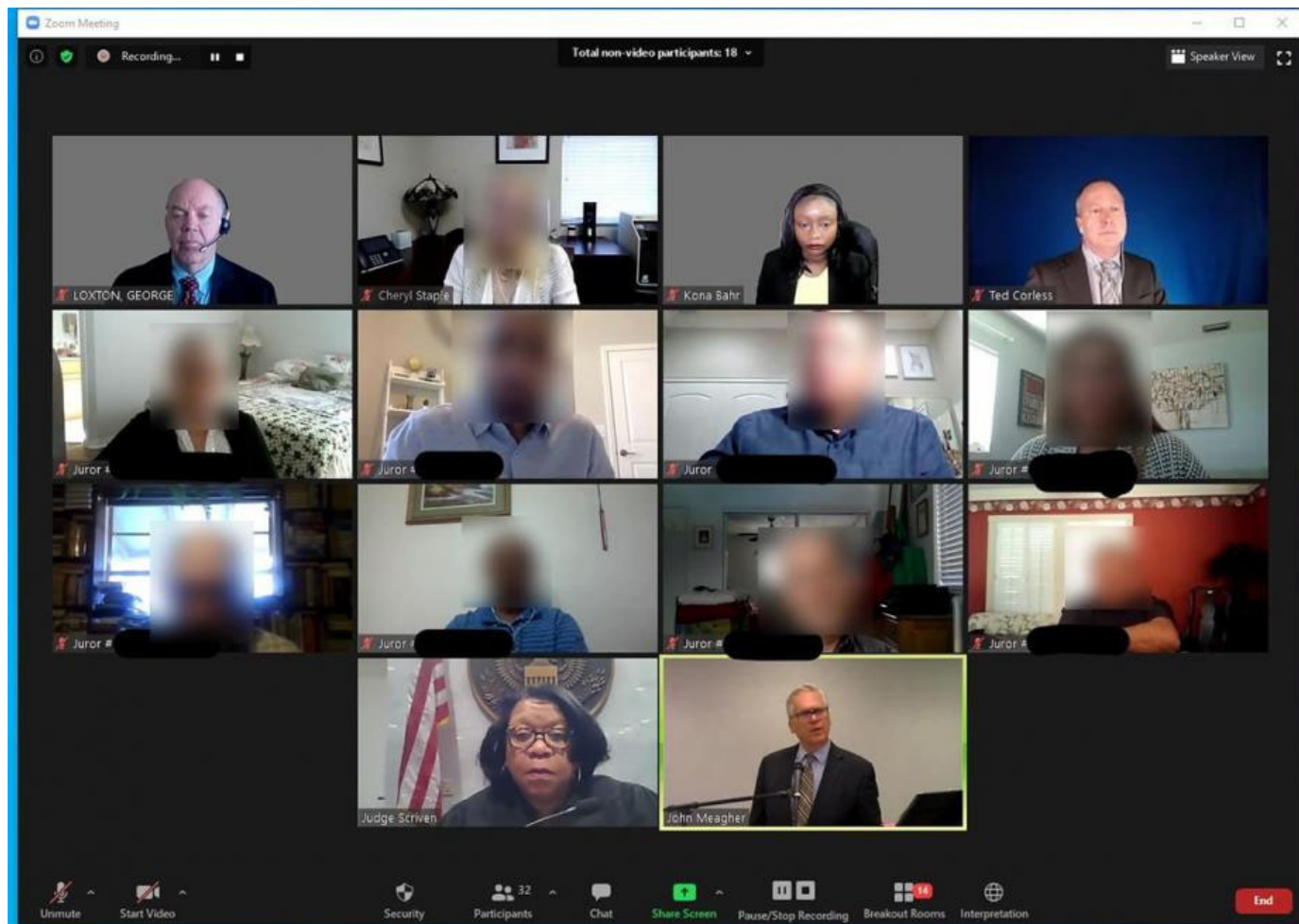
Technical Audio or Visual Issues

Should technical issues, such as audio or video issues, prevent the Court Reporter, witness, Deposing Counsel, or Defending Counsel from reliably seeing one another, hearing one another, or, in the case of the Court Reporter, transcribing the testimony at any point during a Deposition taken pursuant to this Stipulation, the Deposition shall be recessed until the technical issue is resolved. Should technical issues prevent the Court Reporter from reliably hearing or transcribing the testimony at any Deposition taken pursuant to this Stipulation and such technical issue cannot be remedied in a timely manner, Deposing Counsel, Defending Counsel, and Attending Counsel shall meet, confer, and cooperate with one another to address the problem, including, but not limited to, rescheduling or continuing the Deposition. These provisions shall not be interpreted to compel any Party or appropriate Non-Party to proceed with a Deposition where the witness cannot hear or understand the other participants or where the participants cannot hear or understand the witness. The Parties and any appropriate Non-Parties will also act in good faith to account for any time lost to technical issues to permit the deposing Party to use the full time it is permitted for the Deposition.

If a technical issue prevents Defending Counsel from hearing a question or interposing a timely objection on the record, then Defending Counsel shall notify the Deposition attendees as soon as possible (*e.g.*, by using the chat features of the video conference or emailing counsel). Defending Counsel's objection to that question is preserved if (i) the objection is asserted promptly on the record after the technical issue is resolved, or (ii) if the technical issue cannot be resolved and the Deposition is continued, the objection is asserted in writing to Deposing Counsel, Attending Counsel, and the Court Reporter within three business days of receiving the rough or final transcript, whichever comes first, that includes the question at issue.

As Pandemic Lingers, Courts Lean Into Virtual Technology

Published on February 18, 2021



A screenshot shows a recent virtual civil trial conducted by Judge Mary S. Scriven, of the Middle District of Florida. The jurors' faces are obscured.

As she started a civil jury trial in early October, Judge Marsha J. Pechman looked across her federal courtroom in Seattle, Washington. It was completely empty.

The litigants and their lawyers beamed in via video. So did her law clerks, and the court reporter tasked with transcribing the trial. Most strikingly, the eight jurors deciding the case also were participating by video from their homes.

Since the pandemic first closed many courts, one of the most significant adjustments made by federal courts has involved the use of electronic communications. Under provisions of the CARES Act, a COVID-19 relief law passed last March, federal courts began conducting routine procedural

hearings, such as first appearances for criminal defendants, by telephone and video hookups.

As the coronavirus (COVID-19) has dragged on, a small number of courts have adapted electronic proceedings to meet more challenging situations. Several courts have conducted virtual bench trials, which do not require a jury. In a few cases, courts holding high-profile hearings have needed to stretch virtual technology to accommodate large numbers of listeners. In perhaps the most ambitious experiment yet, the Western District of Washington recently began holding all-virtual jury trials in civil lawsuits.

"Video jury trials are a tool that can be used, and it's a tool we need to use unless we are going to be backed up forever and ever," said Pechman, who has heard four virtual civil jury trials in recent months. "It has worked better than my initial expectations, all the way around. The jurors have been very, very diligent. They've cleared themselves of distractions and worked hard to pay attention."

Electronic proceedings also have shown vulnerabilities. In one of Pechman's trials, proceedings were suspended when a windstorm cut some jurors' internet connections. And during a high-profile election case in Pennsylvania, a telephone outage interrupted audience audio.

Overall, however, judges said the virtual proceedings were fair and efficient.

"I think it worked just as well as in person," said U.S. District Judge Indira Talwani, of the District of Massachusetts, who has conducted two non-jury trials that brought together witnesses from multiple countries. "The convenience of not having to travel here was enormous. Absolutely it was an effective way to deliver justice."

At least five courts have scheduled virtual civil jury trials, with jurors serving from home. In addition to the Western District of Washington, the Middle District of Florida and the District of Minnesota have conducted virtual civil jury trials. In the Districts of Kansas and Rhode Island, litigants settled their disputes before virtual jury trials began.

"It flowed seamlessly from jury selection through deliberations," said Judge Mary S. Scriven, of the Middle District of Florida, who presided over a five-day all-video civil trial in late January. "I would do it again in a heartbeat. There were no more glitches than are typically seen in an in-person trial."

Other courts have adopted a mix of tactics. In the District of Connecticut, jury members in one civil case were selected virtually from home but then came to court for an in-person trial.

The following are examples of how some courts have used electronics to deliver justice in more complex court situations.

Bench Trials in Boston

Bench trials are one of the simplest forms of federal trials because they do not require juries. In addition to deciding questions of law and procedure, the judge also determines the verdict.

But before Judge Indira Talwani conducted two bench trials in late August, her court in Boston had to use an entirely new technical structure to support trials with witnesses testifying from other continents. In one, an international child custody dispute, a parent would be participating from Armenia, while a separate business dispute involved possible witnesses from London and China.

"I issued a protocol of procedures," Talwani said. "I didn't want everyone there and not having checked their bandwidth, and things like that. So my courtroom deputy played a critical role in doing a test run with everyone."

Pretrial conferences also gave participants a chance to test the system. In addition to witnesses, the court had to connect Armenian interpreters into the child-custody case. Because the online video service had a translation function, listeners could choose to follow the trial in English, Armenian, or hear both languages.

The child custody dispute went smoothly, except for one hitch.

"The father who was making his custody claim was sitting with a well-positioned photograph of him and his daughter on the desk. That would not have happened in the courtroom," Talwani said. "That's a lesson I've learned. The witnesses need to be encouraged to appear as if they were on the witness stand and not think of it as an opportunity to color the proceeding."

The makeshift virtual format had significant pros and a few cons, Talwani said. On the negative side, litigants can't see each other in person, but in both cases she heard, the opposing sides knew each other well, reducing that concern.

On the plus side, seeing the full faces of witnesses on a screen 18 inches away, instead of viewing them at an angle in the witness box, provided a better view.

The biggest advantage was convenience for participants.

"For these parties, the difference of not having to travel here was enormous," Talwani said. "To be able to do all of that without everyone having to spend the travel time worked very well. If people



District Judge Indira Talwani, District of Massachusetts

are cost conscious, it would make a huge difference.”

Virtual Civil Trials in Seattle and Florida

A senior judge for the Western District of Washington, Marsha Pechman first conducted a virtual bench trial in June. Her immediate takeaway: “I was stunned by how well it went off.”

When Pechman began to draft a manual for judges and lawyers on virtual bench trials, Chief Judge Richard Martinez asked her to expand her focus to include virtual jury trials, in which jurors would hear the case from home using virtual technology. The request forced her to consider legal and technical questions that literally had no precedent in the federal Judiciary.

“I had the Ninth Circuit librarians look for case law, and the answer is, there’s nothing out there,” Pechman said. “We only found a few futuristic articles by legal scholars.”

As she and other judges looked more closely, they concluded that while criminal trials probably needed to be conducted in person, because defendants have a constitutional right to confront their accusers, lawyers already were allowed to take civil depositions by video. The court decided that civil jury cases would stand up to any appeals.

Assembling virtual juries raised additional questions. Pechman was especially worried that the requirement to use computer equipment might skew the jury pool, reducing the number of elderly and low-income jurors. The court made provisions to train jurors without computer skills, and to lend computers to those who lacked suitable equipment.

In the four virtual jury trials she has conducted, Pechman was surprised to find that it was easier to assemble diverse juries. For some jurors, not having to travel a hundred miles or more to a federal courthouse was a major advantage.

In one case, a windstorm temporarily knocked out a juror’s connections. But, Pechman noted, in-person trials also experience disruptions, such as jurors getting delayed in traffic. The jurors deliberated virtually, rendering million-dollar-plus verdicts in two cases, and deciding in favor of the defendant in a third. A fourth case ended in a settlement after eight days of trial.



Senior Judge Marsha J. Pechman, Western District of Washington

"I debriefed each of the jurors. We asked if you feel like you can pay attention while you're sitting in your own home. The jurors overwhelmingly said yes," Pechman said. "I know the lawyers would say this guy was sitting in his laundry room, and this lady was sitting on her bed, but the point is, we invaded their house, and they found the best space they could in order to pay attention."

Pechman has shared her experiences and resource materials with other courts. Judge Scriven, of the Middle District of Florida, "only slightly modified" a handbook provided by the Western District of Washington in setting up her trial, an insurance case.

"The jurors commented that they appreciated the ability to see the exhibits and see and hear the witnesses clearly because everything was magnified on the screen," Scriven said. "We even had a doctor/fact witness appear in full COVID-19 protective gear from the hallway of the hospital where she worked."



Judge Mary S. Scriven, Middle District of Florida

Virtual Media Access in Pennsylvania

Perhaps the greatest stress test of virtual courtroom technology occurred in November, when an election law case in Williamsport, Pennsylvania, attracted national attention.

Under the CARES Act, which was passed by Congress early in the pandemic, federal courts were permitted to conduct most court proceedings by telephone and video hookups. In an unprecedented step, the federal Judiciary ensured the constitutional guarantee of public trials by making call-in lines available to the media and public, not just lawyers and litigants, in almost all federal proceedings.

In routine cases, that has posed little if any strain on federal courts. The Middle District of Pennsylvania, for instance, relied on WebEx technology with a call-in capacity of 200 to 300 listeners. But with the filing of *Trump v. Boockvar*, which challenged Pennsylvania's presidential voting results, the court knew it needed more lines, but it wasn't clear how many.

Concerned that national organizations might circulate online hearing information, potentially flooding the call-in lines and blocking access to some reporters, the court initially boosted its capacity to 4,000 listeners, and then raised it to 8,000 the morning of the hearing.

"This was clearly not a time for half measures. You either go big or go home," said Chief Judge John E. Jones III.

For more than an hour, the system seemed to hold. Most or all of the 8,000 lines were in use, accommodating a far greater audience than normally could listen in, and the hearing was proceeding without incident. Then an AT&T server failed, plunging the public audio into silence.

"It was an unbelievably stressful time," said Peter J. Welsh, Clerk of Court for the Middle District. "When we realized it wasn't just a few lines, we called AT&T, and they said they could fix it in five minutes. Five minutes turned to 10, and then 15. We notified the courtroom deputy."

By the time U.S. District Judge Matthew W. Brann called a recess, the hearing had proceeded 25 minutes without public audio. Once repaired, the AT&T audio performed without incident for the rest of the hearing. The court addressed the audio gap by posting a transcript of the proceeding on its website, and Jones also issued a public statement.

"The transcript went a long way toward cleaning things up," Jones said. "People wanted to know what they missed and what had happened. They had to have some account of it."

Even with the audio interruption, Jones believes the public and media benefited from increased access.

"Despite the hiccup of the dropped lines, members of the press thought that on balance, the court did do a good job," Jones said. "It may have been imperfect, but it was still awfully effective under the circumstances."



Chief Judge John E. Jones III, left, and Clerk of Court Peter J. Welsh, Middle District of Pennsylvania

Moving Forward

The long-term role of electronic court proceedings remains unclear. While virtual trials in civil cases remain a rarity, a Feb. 5 how-to seminar hosted by the Western District of Washington attracted more than 900 participants from more than 60 district courts.

Under the CARES Act, the Judiciary will end most electronic proceedings once the pandemic emergency is declared over. Until then, judges agreed in interviews, telephone and virtual hookups will play an important role in moving cases forward.

Chief Judge John R. Tunheim, of the District of Minnesota, said virtual civil trials are likely to be

needed even after more people receive vaccinations. That is because anti-COVID-19 measures, such as plexiglass barriers and social distancing, will greatly reduce courtroom capacity, and criminal cases must be tried in person.

"We will only have one courtroom in Minneapolis and one in St. Paul for trials," Tunheim said, "so the ability to do civil trials virtually while we catch up on our criminal trial backlog will be very helpful."

And despite inevitable wobbles, judges said virtual strategies have preserved the essentials of justice during the nation's worst health crisis in a century.

"I have no backlog. Every single case I had set in 2020 got tried in 2020," Pechman said of her virtual civil jury trials. "I tell my fellow judges this may be the only way the wheels of justice will still turn."

Jones was pleased that a critical case proceeded without delay, but also without sacrificing public access.

"The best of it was the fact that in the middle of a pandemic, Judge Brann could conduct this massive preceding, that literally had national import, and finish the case in two weeks," Jones said of the Pennsylvania election lawsuit. "We operated in a way that promoted the Third Branch, and that's the way it should be."

Read the Series

This is the fifth in a series of articles about how federal courts are working to recover from the COVID-19 crisis.

- [View the stories in the series \(/news/2020/07/02/coronavirus-covid-19-response-and-recovery#COVID_recovery\).](#)
- [Find other coronavirus-related articles \(/news/covid-19-related-news-articles\).](#)

One Hundred Sixteenth Congress of the United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Friday,
the third day of January, two thousand and twenty*

An Act

To amend the Internal Revenue Code of 1986 to repeal the excise tax on high cost employer-sponsored health coverage.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the "Coronavirus Aid, Relief, and Economic Security Act" or the "CARES Act".

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

- Sec. 1. Short title.
- Sec. 2. Table of contents.
- Sec. 3. References.

DIVISION A—KEEPING WORKERS PAID AND EMPLOYED, HEALTH CARE SYSTEM ENHANCEMENTS, AND ECONOMIC STABILIZATION

TITLE I—KEEPING AMERICAN WORKERS PAID AND EMPLOYED ACT

- Sec. 1101. Definitions.
- Sec. 1102. Paycheck protection program.
- Sec. 1103. Entrepreneurial development.
- Sec. 1104. State trade expansion program.
- Sec. 1105. Waiver of matching funds requirement under the women's business center program.
- Sec. 1106. Loan forgiveness.
- Sec. 1107. Direct appropriations.
- Sec. 1108. Minority business development agency.
- Sec. 1109. United States Treasury Program Management Authority.
- Sec. 1110. Emergency EIDL grants.
- Sec. 1111. Resources and services in languages other than English.
- Sec. 1112. Subsidy for certain loan payments.
- Sec. 1113. Bankruptcy.
- Sec. 1114. Emergency rulemaking authority.

TITLE II—ASSISTANCE FOR AMERICAN WORKERS, FAMILIES, AND BUSINESSES

Subtitle A—Unemployment Insurance Provisions

- Sec. 2101. Short title.
- Sec. 2102. Pandemic Unemployment Assistance.
- Sec. 2103. Emergency unemployment relief for governmental entities and nonprofit organizations.
- Sec. 2104. Emergency increase in unemployment compensation benefits.
- Sec. 2105. Temporary full Federal funding of the first week of compensable regular unemployment for States with no waiting week.
- Sec. 2106. Emergency State staffing flexibility.
- Sec. 2107. Pandemic emergency unemployment compensation.
- Sec. 2108. Temporary financing of short-time compensation payments in States with programs in law.
- Sec. 2109. Temporary financing of short-time compensation agreements.

or internationally, including costs associated with the extended filing season and implementation of the Families First Coronavirus Response Act: *Provided*, That such funds may be transferred by the Commissioner to the "Taxpayer Services," "Enforcement," or "Operations Support" accounts of the Internal Revenue Service for an additional amount to be used solely to prevent, prepare for, and respond to coronavirus, domestically or internationally: *Provided further*, That the Committees on Appropriations of the House of Representatives and the Senate shall be notified in advance of any such transfer: *Provided further*, That such transfer authority is in addition to any other transfer authority provided by law: *Provided further*, That not later than 30 days after the date of enactment of this Act, the Commissioner shall submit to the Committees on Appropriations of the House of Representatives and the Senate a spending plan for such funds: *Provided further*, That such amount is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

THE JUDICIARY

SUPREME COURT OF THE UNITED STATES

SALARIES AND EXPENSES

For an additional amount for "Salaries and Expenses", \$500,000, to prevent, prepare for, and respond to coronavirus, domestically or internationally: *Provided*, That such amount is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES

SALARIES AND EXPENSES

For an additional amount for "Salaries and Expenses", \$6,000,000, to prevent, prepare for, and respond to coronavirus, domestically or internationally: *Provided*, That such amount is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

DEFENDER SERVICES

For an additional amount for "Defender Services", \$1,000,000, to remain available until expended, to prevent, prepare for, and respond to coronavirus, domestically or internationally: *Provided*, That such amount is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

ADMINISTRATIVE PROVISION—THE JUDICIARY

VIDEO TELECONFERENCING FOR CRIMINAL PROCEEDINGS

SEC. 15002. (a) DEFINITION.—In this section, the term "covered emergency period" means the period beginning on the date on

which the President declared a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID-19) and ending on the date that is 30 days after the date on which the national emergency declaration terminates.

(b) VIDEO TELECONFERENCING FOR CRIMINAL PROCEEDINGS.—

(1) IN GENERAL.—Subject to paragraphs (3), (4), and (5), if the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID-19) will materially affect the functioning of either the Federal courts generally or a particular district court of the United States, the chief judge of a district court covered by the finding (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court), upon application of the Attorney General or the designee of the Attorney General, or on motion of the judge or justice, may authorize the use of video conferencing, or telephone conferencing if video teleconferencing is not reasonably available, for the following events:

(A) Detention hearings under section 3142 of title 18, United States Code.

(B) Initial appearances under Rule 5 of the Federal Rules of Criminal Procedure.

(C) Preliminary hearings under Rule 5.1 of the Federal Rules of Criminal Procedure.

(D) Waivers of indictment under Rule 7(b) of the Federal Rules of Criminal Procedure.

(E) Arraignments under Rule 10 of the Federal Rules of Criminal Procedure.

(F) Probation and supervised release revocation proceedings under Rule 32.1 of the Federal Rules of Criminal Procedure.

(G) Pretrial release revocation proceedings under section 3148 of title 18, United States Code.

(H) Appearances under Rule 40 of the Federal Rules of Criminal Procedure.

(I) Misdemeanor pleas and sentencings as described in Rule 43(b)(2) of the Federal Rules of Criminal Procedure.

(J) Proceedings under chapter 403 of title 18, United States Code (commonly known as the "Federal Juvenile Delinquency Act"), except for contested transfer hearings and juvenile delinquency adjudication or trial proceedings.

(2) FELONY PLEAS AND SENTENCING.—

(A) IN GENERAL.—Subject to paragraphs (3), (4), and (5), if the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID-19) will materially affect the functioning of either the Federal courts generally or a particular district court of the United States, the chief judge of a district court covered by the finding (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit

that includes the district court) specifically finds, upon application of the Attorney General or the designee of the Attorney General, or on motion of the judge or justice, that felony pleas under Rule 11 of the Federal Rules of Criminal Procedure and felony sentencings under Rule 32 of the Federal Rules of Criminal Procedure cannot be conducted in person without seriously jeopardizing public health and safety, and the district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice, the plea or sentencing in that case may be conducted by video teleconference, or by telephone conference if video teleconferencing is not reasonably available.

(B) APPLICABILITY TO JUVENILES.—The video teleconferencing and telephone conferencing authority described in subparagraph (A) shall apply with respect to equivalent plea and sentencing, or disposition, proceedings under chapter 403 of title 18, United States Code (commonly known as the "Federal Juvenile Delinquency Act").

(3) REVIEW.—

(A) IN GENERAL.—On the date that is 90 days after the date on which an authorization for the use of video teleconferencing or telephone conferencing under paragraph (1) or (2) is issued, if the emergency authority has not been terminated under paragraph (5), the chief judge of the district court (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court) to which the authorization applies shall review the authorization and determine whether to extend the authorization.

(B) ADDITIONAL REVIEW.—If an authorization is extended under subparagraph (A), the chief judge of the district court (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court) to which the authorization applies shall review the extension of authority not less frequently than once every 90 days until the earlier of—

(i) the date on which the chief judge (or other judge or justice) determines the authorization is no longer warranted; or

(ii) the date on which the emergency authority is terminated under paragraph (5).

(4) CONSENT.—Video teleconferencing or telephone conferencing authorized under paragraph (1) or (2) may only take place with the consent of the defendant, or the juvenile, after consultation with counsel.

(5) TERMINATION OF EMERGENCY AUTHORITY.—The authority provided under paragraphs (1), (2), and (3), and any specific authorizations issued under those paragraphs, shall terminate on the earlier of—

(A) the last day of the covered emergency period; or

(B) the date on which the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President under the

National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID-19) no longer materially affect the functioning of either the Federal courts generally or the district court in question.

(6) NATIONAL EMERGENCIES GENERALLY.—The Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the “Rules Enabling Act”), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.).

(7) RULE OF CONSTRUCTION.—Nothing in this subsection shall obviate a defendant’s right to counsel under the Sixth Amendment to the Constitution of the United States, any Federal statute, or the Federal Rules of Criminal Procedure.

(c) The amount provided by this section is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

DISTRICT OF COLUMBIA

FEDERAL FUNDS

FEDERAL PAYMENT FOR EMERGENCY PLANNING AND SECURITY COSTS IN THE DISTRICT OF COLUMBIA

For an additional amount for “Federal Payment for Emergency Planning and Security Costs in the District of Columbia”, \$5,000,000, to remain available until expended, to prevent, prepare for, and respond to coronavirus, domestically or internationally: *Provided*, That such amount is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

INDEPENDENT AGENCIES

ELECTION ASSISTANCE COMMISSION

ELECTION SECURITY GRANTS

For an additional amount for “Election Security Grants”, \$400,000,000, to prevent, prepare for, and respond to coronavirus, domestically or internationally, for the 2020 Federal election cycle: *Provided*, That a State receiving a payment with funds provided under this heading in this Act shall provide to the Election Assistance Commission, within 20 days of each election in the 2020 Federal election cycle in that State, a report that includes a full accounting of the State’s uses of the payment and an explanation of how such uses allowed the State to prevent, prepare for, and respond to coronavirus: *Provided further*, That, within 3 days of its receipt of a report required in the preceding proviso, the Election Assistance Commission will transmit the report to the Committee on Appropriations and the Committee on House Administration of the House of Representatives and the Committee on Appropriations and the Committee on Rules and Administration of the Senate:

U.S. District Court
N.D.N.Y.
Filed
March 3, 2021
John M. Domurad, Clerk

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK**

GENERAL ORDER #58

**REVISED April 29, 2020; May 13, 2020; June 12, 2020; August 6, 2020;
October 8, 2020; December 4, 2020; February 24, 2021; March 3, 2021**

IN RE: CORONAVIRUS COVID-19 PUBLIC EMERGENCY

WHEREAS, the Governor of the State of New York has declared a public health emergency through the State;

WHEREAS, the Center for Disease Control and Prevention has advised people to take precautions in light of the COVID-19 virus (Coronavirus) outbreak, and has noted that the best way to prevent illness is to avoid being exposed to the virus;

AND

IT IS HEREBY ORDERED, effective immediately, that:

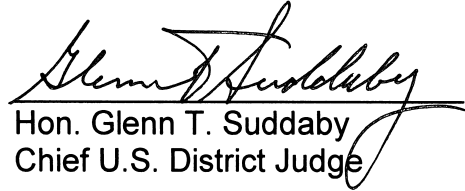
- 1) All civil jury selections and jury trials scheduled to commence now through **April 5, 2021** before any district or magistrate judge in any courthouse in the Northern District of New York are continued pending further Order of the Court. All criminal jury selections and jury trials scheduled to commence now through **May 15, 2021** before any district or magistrate judge in any courthouse in the Northern District of New York are continued pending further Order of the Court, subject to a review of the COVID-19 infection rates;

- 2) Case-by-case exceptions to the postponements may be ordered at the discretion of the Court after consultation with counsel.
- 3) With regard to criminal trials, due to the Court's reduced ability to obtain an adequate spectrum of jurors and the effect of the above public health recommendations on the availability of counsel and court staff to be present in the courtroom, the time period of the continuances implemented by this General Order will be excluded under the speedy Trial Act, as the court specifically finds that the ends of justice served by ordering the continuances outweigh the best interests of the public and each defendant in a speedy trial, pursuant to 18 U.S.C. §3161(h)(7)(A).
- 4) Criminal matters before magistrate judges, such as initial appearances, arraignments, detention hearings (and appeals to district judges from detention orders), and the issuance of search warrants, shall continue to take place in the ordinary course.
- 5) This order does not affect the Court's consideration of civil or criminal motions that can be resolved without oral argument or handled by telephone or video conference.
- 6) All mass public gatherings, other than court proceedings, are suspended at all courthouses and federal buildings in the district. This includes, but is not limited to group tours and visits, moot courts and mock trials, bar group meetings, seminars, and naturalization ceremonies.

The Northern District of New York courthouses remain open for all other business. Staff in the Clerk's office are available by telephone, mail will be received, and public counters remain open for filings. Electronic filings may still be made through the CM/ECF system. The public is encouraged to continue utilizing court services while following all applicable public health

guidelines. This order will remain in effect until **May 15, 2021** unless otherwise revised or extended by the Court.

Dated this 3rd day of March, 2021 at Syracuse, New York



Hon. Glenn T. Suddaby
Chief U.S. District Judge

U.S. District Court
N.D.N.Y.
Filed
February 24, 2021
John M. Domurad, Clerk

**UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW
YORK**

GENERAL ORDER #59

**April 3, 2020
Revised May 13, 2020
Revised June 12, 2020
Revised August 6, 2020
Revised October 8, 2020
Revised December 4, 2020
Revised February 24, 2021**

**IN RE: CRIMINAL CASE OPERATIONS IN RESPONSE
TO CORONAVIRUS
COVID-19 PUBLIC EMERGENCY**

WHEREAS this Court continues to evaluate its response to the spread of the COVID-19 virus, and recognizes the need to assist in the preservation of public safety and health while effectively administering justice during this period of national emergency; and

WHEREAS the Judicial Conference of the United States (JCUS) has found under the CARES Act, H.R. 748 (CARES Act), that emergency conditions due to the national emergency declared by the President will materially affect the functioning of the Federal courts generally;

NOW THEREFORE, the Court hereby adopts the following Order:

1. This Court recognizes that emergency conditions exist throughout this District, as found by the JCUS under the CARES Act;

2. This Court authorizes on its own motion the use of video teleconferencing, or telephone conferencing if video teleconferencing is not reasonably available, in the criminal procedures specifically enumerated in Section 15002(b)(1) of the CARES Act, to wit:

- a. Detention hearings under section 3142 of title 18, United States Code;
- b. Initial appearances under Rule 5 of the Federal Rules of Criminal Procedure;
- c. Preliminary hearings under Rule 5.1 of the Federal Rules of Criminal Procedure;
- d. Waivers of indictment under Rule 7(b) of the Federal Rules of Criminal Procedure;
- e. Arraignments under Rule 10 of the Federal Rules of Criminal Procedure;
- f. Probation and supervised release revocation proceedings under Rule 32.1 of the Federal Rules of Criminal Procedure;
- g. Pretrial release revocation proceedings under section 3148 of title 18, United States Code;
- h. Appearances under Rule 40 of the Federal Rules of Criminal Procedure;
- i. Misdemeanor pleas and sentencings as described in Rule 43(b)(2) of the Federal Rules of Criminal Procedure; and
- j. Proceedings under chapter 403 of title 18, United States Code (commonly known as the "Federal Juvenile Delinquency Act"), except for contested transfer hearings and juvenile delinquency adjudication or trial proceedings.

3. This Court finds on its own motion, under Section 15002(b)(2) of the CARES Act, that felony pleas under Rule 11 of the Federal Rules of Criminal Procedure and felony sentencings under Rule 32 of the Federal Rules of Criminal Procedure cannot be conducted in person without seriously jeopardizing public health and safety, and thus the use of video teleconferencing, or telephone conferencing if video teleconferencing is not

reasonably available, is permitted in such cases;

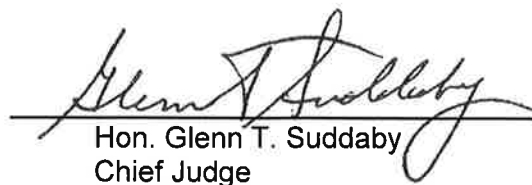
4. Under Section 15002(b)(2)(A) of the CARES Act, any judge presiding in a particular case who authorizes the use of video teleconferencing or telephone conferencing if video teleconferencing is not reasonably available under paragraph 3 of this Order, must find for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice. Under Section 15002(b)(4) of the CARES Act, this authorization may occur only with the consent of the defendant, or the juvenile, after consultation with counsel. The presiding judge in the case may authorize remote means including but not limited to participation of defense counsel in the video or telephone conference to facilitate consent of the defendant; and

5. This Court recognizes that it is required under Sections 15002(b)(3)(A) and (B) of the CARES Act to review the findings and authorizations made in this Order no later than ninety (90) days after its initial Order or any subsequent renewal.

This Court will review its initial findings and authorizations under this Order no later than May 1, 2021.

6. Absent exceptional circumstances, the above-referenced proceedings shall be conducted with the defendant in correctional facilities and/or U.S. Marshal's detention areas with Northern District of New York approved videoconference or telephone conference capabilities.

Dated this 24th day of February 2021 at Syracuse, New York


Hon. Glenn T. Suddaby
Chief Judge

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

GENERAL ORDER #60

**April 1, 2020
Revised December 4, 2020**

**IN RE: CORONAVIRUS COVID-19 PUBLIC EMERGENCY
ORDER CONCERNING INTERIM VOUCHERS IN CJA**

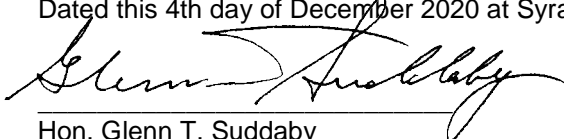
Due to the impact of the unprecedented Covid-19 pandemic, and to mitigate the economic impact upon District Court Criminal Justice Act panel members and service providers, the Court allows until further notice the filing of interim vouchers for compensation in a manner as outlined below:

1. Pending further order of the Court, and notwithstanding any previous order entered in any specific case, any Criminal Justice Act panel member or service provider who has been appointed to represent a defendant or witness in the Northern District of New York, or to provide services in connection with such an appointment, may submit interim vouchers for services provided and expenses incurred, as follows:

- a) An interim voucher may be submitted for services provided and expenses incurred up to and including December 4, 2020;
- b) Vouchers may be submitted for services provided and expenses incurred after December 4, 2020, on an interim basis; provided, however, that such vouchers shall not be submitted for periods of time shorter than two months.
- c) No interim voucher may be submitted in an amount less than \$250.00; provided, however, that vouchers for court reporters or interpreters may be submitted regardless of the dollar amount.

2. This Order shall remain in place as an emergency measure until further order of the Court.

Dated this 4th day of December 2020 at Syracuse, New York


Hon. Glenn T. Suddaby
Chief Judge

July 31, 2020 PRACTICE POINTS

Five Tips for Conducting Remote Video Depositions

With these simple tips in mind, you should avoid most basic video-depositions pitfalls.

By Mihai Vrasmasu and Vanessa Offutt

Share:



We are monitoring the coronavirus (COVID-19) situation as it relates to law and litigation. Find more resources and articles on [our COVID-19 portal](#). For the duration of the crisis, all coronavirus-related articles are outside our paywall and available to all readers.

COVID-19 has changed the way we practice law. Attorneys today must find new ways to conduct discovery and meet case deadlines while simultaneously adhering to various stay-at-home orders. Remote video depositions are one of several useful tools for doing so. Here are five practical tips to consider when scheduling and taking remote video depositions.

Participant location and document requests. A typical deposition will include the deponent, court reporter, opposing counsel, deposing counsel, and sometimes an interpreter and a videographer. Agree ahead of time where each participant will be located during the deposition, whether each will be appearing remotely or whether some will be socially distancing in the same

room. And make sure the deponent will be in a quiet, well-lit area.

To avoid any misunderstandings, your deposition notice should specify that the deposition is being taken remotely via video. The notice should also state where the deponent will be located and how the other participants will appear. We have used the following language without incident in numerous remote video depositions: “At their option, the witness and her counsel will appear in person at her counsel’s office. Defense counsel, a court reporter, and an interpreter will participate in the deposition by videoconference.”

Finally, if you are seeking documents from the deponent, request that they be produced several days before the deposition. This will give you a chance to review and, if appropriate, use them during the deposition.

Avoid technical issues. When scheduling the deposition, ensure that the deponent has access to a computer or tablet with a video camera and the minimal technical requirements to run necessary software. It is also essential that the deponent has access to a suitable internet connection. If he or she does not, ask your court reporting service to provide a tablet and a mobile wi-fi hotspot. More and more court-reporting services offer this option today. If yours does not, seek one that does.

It is also important to perform a test run a few days before the scheduled deposition. The court reporter should assemble the deponent and all other participants on the video-deposition platform to ensure that there are no technical issues. This includes confirming that the participants can upload and share exhibits, checking internet speed, and testing audio and video functions.

Before the deposition, you should also familiarize yourself with the video-deposition platform so that you can easily navigate it during

the deposition. Take some time to run the platform and acquaint yourself with its most important functions, such as exhibit-screen sharing. This is also a good opportunity to confirm that your background and lighting are video-friendly.

3 Record the video. Remote-video depositions are generally not automatically recorded. Unless there is some strategic reason not to, you should tell the court-reporting service ahead of time that you want it video-recorded. A video can prove invaluable, particularly if the deponent is unavailable at trial or if something unexpected occurs during the deposition. And because the deposition is being conducted via video anyway, there should not be much of an upcharge for this option.

4 Close unrelated programs. Only the video-deposition platform should be open during the deposition. Close your email, web-browser, Microsoft Word, and any other programs you usually keep open. This will eliminate the chances of you inadvertently displaying to everyone your confidential e-mails, your deposition outline, or any other sensitive materials. We have seen this happen. Trust us; you do not want it to happen to you.

5 Preliminary instructions. At the outset, right around the time when you instruct the deponent about the deposition rules, we suggest broaching the issue of potential outside interference. Questions and instructions such as the following have proven helpful to us:

- Is anyone else in the room with you?
- If anyone else comes into the room at any time, please let me know.
- Are you looking at anything other than the screen upon which the deposition is being taken (*e.g.*, a notepad, cellphone, documents, papers)?
- Unless I instruct you otherwise, please do not look at anything else

while we are on the record.

- Answer all questions by yourself. Do not look to anyone or anything else for help in answering questions. If you cannot answer a question by yourself, let me know.
- You agree not to communicate with anyone else, besides me, in any way while we are on the record? This includes not checking email, text messages, or any other forms of communication.

With these simple tips in mind, you should avoid most basic video-depositions pitfalls. Good luck!

[Mihai Vrasmasu](#) is a partner and [Vannessa Offutt](#) is an associate in the Miami, Florida, office of Shook, Hardy & Bacon LLP.

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Hon. Andrew T. Baxter
U.S. Magistrate Judge



Andrew T. Baxter is a United States Magistrate Judge for the Northern District of New York in Syracuse. At the time of his appointment in January 2010, he was the Interim United States Attorney for the Northern District of New York. Judge Baxter earned an A.B. in Economics from Princeton University in 1978 and a J.D. from Harvard Law School in 1981.

Andrew T. Baxter served as a federal prosecutor in the U.S. Attorney's Office in Syracuse from 1988, at various times holding the positions of Senior Litigation Counsel, Chief of the Criminal Division, and First Assistant U.S. Attorney. Judge Baxter was an Assistant U.S. Attorney in the District of New Jersey from 1984 through 1988, after engaging in the private practice of law in Philadelphia for three years.

Hon. Brenda K. Sannes

U.S. District Judge

Brenda K. Sannes is a United States District Judge for the Northern District of New York. At the time of her appointment in 2014 she was the Appellate Chief in the United States Attorney's Office in that district.

Judge Sannes earned her B.A. degree magna cum laude, with distinction in the English Department, from Carleton College in 1980. She earned her J.D. degree magna cum laude from the University of Wisconsin Law School in 1983 where she was an articles editor for the law review and was elected to the Order of the Coif.

From 1983 to 1984, Judge Sannes clerked for the Honorable Jerome Farris on the Ninth Circuit Court of Appeals. From 1984 to 1988, she was litigation associate in a law firm in Los Angeles. In 1988, she became an Assistant United States Attorney in Los Angeles. During her time in that office she served as a Deputy Chief in the Narcotics Section and later as the Anti-Terrorism Advisory Council Coordinator. She moved to Central New York in 1994 and was an Assistant United States Attorney in the Northern District of New York from 1995 until her judicial appointment in 2014. She served as the Appellate Chief from 2005 until her appointment to the bench.



Lisa Peebles joined the Northern District of New York Federal Public Defender's Office in August 1999. She was appointed First Assistant Public Defender in 2005 and Interim Federal Public Defender in November 2010. She was officially appointed as the Federal Public Defender for the Northern District of New York in 2013. She is a native of Cleveland, Ohio, and has practiced law in the Syracuse area for the past 26 years. She received her undergraduate degree from Akron University and her law degree from Syracuse University.

Lisa worked as a clerk in the United States Attorney's Office in Syracuse while attending law school. Upon being admitted to the Bar, she worked as an assistant public defender from 1993-1994 in the Jefferson County Public Defender's Office. Thereafter, she operated a private practice with emphasis on criminal defense matters. She has tried more than 50 cases to verdict, including both civil and criminal. She has handled numerous appeals in the Second Circuit Court of Appeals. Lisa has dedicated her career to indigent defense work and in 2014 she was awarded the Thurgood Marshall Award for outstanding criminal practitioner by the NYSACDL.



Mara Afzali represents public and private sector clients in a variety of civil litigation matters in state and federal court and has successfully argued on behalf of clients through motions, at hearings, trials, administrative proceedings and on appeal. She also routinely advises clients in litigation prevention strategies and risk mitigation. Her experience includes:

- Handling business and commercial disputes (breach of contract, business torts, breach of fiduciary duty, professional liability claims);
- Defending employers against allegations of discrimination, retaliation, constitutional and civil rights violations, and labor law violations;
- Preparing tax assessment challenges and appeals; and
- Petitioning on behalf of not-for-profit organizations to obtain Attorney General and/or judicial approval for mergers and asset sales.

Prior to joining the legal profession Mara spent more than a decade working at an independent alternative elementary school specializing in self-directed learning and fostering student-led conflict resolution. This experience provides her with a unique perspective on problem-solving and a dynamic ability to negotiate and mediate disputes on behalf of her clients. In addition to her work at Bond, Mara serves as a First Lieutenant in the United States Army (Reserves) Judge Advocate General (JAG) Corps.



Nicolas Commandeur was appointed in 2014 to be an Assistant United States Attorney in the Northern District of New York, serving in the criminal division. From 2001 to 2014, he was with the New York City law firm of Patterson Belknap Webb & Tyler LLP, first as an associate and later as a partner. Prior to that, he served for one year as a judicial law clerk to the Honorable Robert L. Carter of the United States District Court for the Southern District of New York. He earned a B.A. in philosophy from the University of Florida in 1997, and a J.D. from New York University School of Law in 2000.