

**Testimony before the
Commission to Reimagine the Future of New York's Courts –
Pandemic Practices Working Group**

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The New York State Defenders Association (NYSDA) is a non-profit, membership organization with more than 1,600 members. Our mission is to improve the quality and scope of public defense representation. For over four decades, NYSDA has received state funding to operate the Public Defense Backup Center, which provides resources and support to defenders around the state who practice in criminal and family courts. Our services include research assistance, training, publications, our Public Defense Case Management System, and other legal support. We also run the state-funded Veterans Defense Program (VDP), which provides training, support, and legal assistance to promote trauma-informed effective representation of veterans and service members in New York State's criminal and family court systems. NYSDA thanks the Commission for the opportunity to present written testimony to supplement our testimony at the June 7, 2022, public hearing on the technology, practices and policies adopted by the Unified Court System in response to the COVID-19 pandemic.

Introduction

NYSDA recognizes the tremendous challenges that the Unified Court System, attorneys, litigants, and members of the public have faced since the start of the pandemic. And we understand that the court system had limited options when protecting the health and safety of judges, court personnel, and those who enter the courts daily while also ensuring the administration of justice. We commend the court system's efforts to reflect on the practices adopted during the pandemic.

The pandemic has provided an opportunity to rethink how our courts function, and how the system can best serve litigants and the public while simultaneously ensuring justice. Our testimony focuses on criminal and family courts, the courts where public defense attorneys most often practice. With respect to those courts, we strongly recommend that the court system and the Commission start from the perspective of litigants whose lives and families are impacted by those proceedings. People who lack financial resources face multiple compelling challenges in navigating the legal system. They especially need the courts to enforce the constitutional and statutory due process rights, equal protection rights, and the right to the effective assistance of counsel guaranteed to all. The judiciary must guarantee that these rights are given precedence when making any decisions about court operations. Some of the changes we recommend will require approval by the legislature and the executive and we urge those two branches of government to also be mindful of the purposes of the court system and the rights afforded to individuals under the federal and state constitutions and statutes. We also urge all concerned to keep at the forefront the commitments made in recent years to ending the systemic racism seen throughout the legal system.

Litigants' Rights in Criminal and Family Courts

NYSDA supports defenders across the state, including attorneys and offices in urban, suburban, and rural jurisdictions. Our work to ensure quality representation for all informs this testimony, which centers on clients. While some of the challenges particular jurisdictions and courts faced during the pandemic and beyond are different, one of the things that remains constant is that the representation provided to public defense clients is detrimentally affected when courts deny these individuals the ability to appear in person for proceedings that have an impact on the outcomes of their cases. This applies in both criminal and family court cases.

Regarding criminal cases, NYSDA has opposed and continues to oppose the use of virtual/remote communication for holding non-emergency criminal court proceedings deemed critical stages, and for any proceedings, absent the consent of the person whose case is being heard. See [Virtual/Remote Court Appearance at a Critical Stage of Criminal Proceedings Is Not the Correct Answer to Any Long-Term Question](#) (NYSDA November 23, 2020); [Statement in Opposition to Audio-Visual Arraignments](#) (NYSDA 2012).

The NYS Office of Indigent Legal Services (ILS) and the Chief Defenders Association of New York have both taken similar positions. Since March of 2020, ILS has issued several statements emphasizing the importance of in-person arraignments/first appearances. In its [statement](#) dated June 29, 2021, ILS restated its position that “representation at arraignment must be in person.” Further, ILS observed that “conducting arraignments virtually is a temporary, emergency exception to the legal requirements of personal appearance by the defendant, and in person representation by counsel. When virtual arraignments are no longer a public health necessity, justified by a valid Executive Order, in-person arraignments must resume ... in-person representation must be provided in compliance with the Hurrell-Harring Settlement and Executive Law § 832 (4).”

The Chief Defenders Association of New York issued a [statement](#) in opposition to virtual arraignments in response to a proposal by then-Governor Cuomo to make virtual arraignments permanent. Their statement noted, among other things, that virtual arraignments deprive the accused of effective assistance of counsel and devalue the Constitution and the solemnity of the Court process.

Our position regarding virtual appearances in family court is similar to our position on criminal proceedings. Family court cases often involve the separation of parents from their children or allegations that may result in incarceration. Substantive proceedings, including initial appearances, hearings, and trials, must remain in person. For other proceedings, virtual appearances may be appropriate, if the parties consent and the necessary technology and other supports are in place to ensure full participation. While the pandemic may have led to improved technology, that technology is unable to replicate the experience of having client and attorney together in the courtroom facing the judge who will make decisions that will affect the client’s life.

Pre-pandemic studies have shown that virtual appearances have a negative impact on litigants in a variety of proceedings. For example, in Cook County, Illinois, researchers determined that the judges imposed substantially higher average bond amounts following the implementation of video appearance for defendants at bail hearings.¹ “The results of the Cook County Bail Study show that the defendants were significantly disadvantaged by videoconferenced bail proceedings held between 1999 and 2009.” Other studies have found that video appearances in immigration hearings led to a higher likelihood of deportation.² As this Commission develops recommendations, we urge

¹ See Shari Seidman Diamond, Locke E. Bowman, Manyee Wong, Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. Crim. L. & Criminology 869 (2010), available at

<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7365&context=jclc>.

² See Brennan Center for Justice, *The Impact of Video Proceedings on Fairness and Access to Justice* (September 10, 2020), available at <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court>.

its members to examine the available studies and work with researchers to learn about the impact of the policies and procedures that New York's court system implemented during the pandemic.

Litigant Consent to Appear Virtually in Non-Critical/Non-Substantive Stages

As for non-critical or non-substantive proceedings, a key principle is that remote appearances should only be held when the individual litigant consents after consultation with counsel. We recognize that there are occasions when a client may prefer to proceed virtually. But client consent must be freely given, without pressure by the court or counsel to proceed virtually, which they may consider more efficient for some participants, but not necessary for litigants.³

Attorney-Client Relationship and Confidentiality

Attorney-client relationships are built on trust and communication. Many clients are skeptical of the attorneys assigned to represent them. When clients "meet" their lawyers via video or phone, and not in person, particularly at the first court appearance, the ability to develop a rapport is significantly hampered. We are not promoting rushed meetings in crowded court halls, but do ask the Commission to consider the advantages of in-person meetings before court appearances, which can allow counsel to address clients' pre-court questions and concerns. Ongoing virtual communication can supplement but must not replace in-person communication.

Although some technological innovations have made it possible for a degree of private communication between attorney and client during virtual appearances, these options are not the same as the one-on-one conversations that are possible when the attorney and client are together in person. As one article noted, "[t]here is ... an indication that judges may not be fully aware of the extent to which videoconferencing is impacting attorney-client interactions. In Professor Turner's Texas survey, for example, 63% of defense attorneys said that remote court interfered with attorney-client confidentiality, but only 21% of judges agreed."⁴

We cannot lose sight of the fact that ensuring private, in-person communications between clients and their attorneys is a key element in the fair administration of justice. Police and corrections agencies have to transport incarcerated people to court, and may prefer that appearances be virtual, but the costs and time associated with transportation cannot take precedence over the fundamental right to counsel.⁵

³ During the pandemic, we heard numerous examples of inefficiencies caused by virtual appearances. Some court appearances took significantly longer than they would have in person. Problems included lack of familiarity with the technology, technology failures and glitches, lack of internet access or service that was insufficient to support participation both via video and audio, and participants not having the right link to join the proceeding.

⁴ Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 Northwestern University Law Review 1875 (2021), available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1461&context=nulr> (citing Jenia I. Turner, *Remote Criminal Justice*, 53 Texas Tech. Law Review 197 [2021]).

⁵ Regarding transportation costs, the authors of one study wrote: "[I]t is crucial to note the tension between these efficiencies and the desirability of reducing in-person access to defendants. ... And, of course, any efficiency gains do not address defendants' desire to attend in person, their rights to do so, or any humanization benefits that may accrue from their in-person attendance." [Footnotes omitted.] Stanford

Technology

The ‘digital divide’ has had a significant impact on the right to counsel and access to justice. Client access to technology has been a significant challenge in criminal and family courts. Public defense clients often cannot afford the cost of the technology required for virtual appearances. Or, if they do have a smartphone or other device, they may not have an internet connection that is reliable and has fast enough speeds to allow them to participate via video and audio. In some rural areas of the state, reliable internet and cell phone services are not available to clients, attorneys, or local courts. Clients may not have enough minutes/data to join a full proceeding, and they may face choosing between virtual participation and the ability to communicate with family, work, and medical providers. Further, they may not have an appropriate and private setting to participate without interference or noise. Similar problems plague smaller courts even for in-person proceedings,⁶ but virtual appearances may only change, not solve, such problems.

The court system has not been able to ensure that litigants have access to the technology needed for remote appearances. Some courts have directed public defense offices to take on the responsibility of providing technology and user support. Underfunded and understaffed defense providers cannot meet those needs and should not be expected to do so. Further, even if institutional offices managed to assist many clients during the pandemic, they cannot be expected to continue to divert scarce resources, and lawyers acting as assigned counsel may have no resources to provide assistance. We recognize and appreciate the court system’s efforts to establish community sites where technology is available for free, but those sites are not widely available and it unclear whether virtual appearances at those locations are sufficiently private. The court system must do better.

Perception and Credibility of People Appearing by Video

In addition to the barriers that virtual communications can set up for the attorney-client relationship, we also have significant concerns about the way the court and others involved in a case, *e.g.* prosecutors, child protective services (CPS) case workers, and attorneys for CPS,

Criminal Justice Center, *Virtual Justice? A National Study Analyzing the Transition to Remote Criminal Court* (August 2021), available at <https://www-cdn.law.stanford.edu/wp-content/uploads/2021/08/Virtual-Justice-Final-Aug-2021.pdf>.

⁶ Many local courts faced other problems during the pandemic. Some town and village courts do not have sufficient and appropriate facilities to comply with pandemic protocols. Courts that were overcrowded before the pandemic did not have adequate areas for litigants to wait for their cases to be called. For example, to comply with social distancing protocols, the Rotterdam Town Court had to limit the number of litigants in the courtroom at one time. Because the court did not have any other waiting areas, litigants had to wait outside the building in an uncovered parking lot. This situation continued for months, with people standing outside at night in the cold rain and other inclement weather, sometimes for hours. The problem was not addressed until a mediate report on the inadequate and dehumanizing conditions at the court. See Paul Nelson, [*Coronavirus distancing rules kept them out of court, so they stood in the rain for hours*](#), Times Union (December 2, 2020).

We question whether town and village courts will be able to meet future technology and space needs, particularly if we have another COVID-19 surge or other public health emergency. The Commission should consider alternatives to the town and village court system, at least for criminal cases.

perceive people who appear virtually.⁷ In the fast-paced criminal and family courts, it is hard enough for all involved to focus on the human being whose freedom or family is at issue. This is even more challenging when some or all of those who are participating in the appearance are on screens. It is more difficult to have eye contact and to observe body language and facial expressions through videoconferencing technology.

Other circumstances may lead judges and court personnel to develop negative impressions of people who are appearing remotely, which may have a conscious or unconscious impact on their decisions. These circumstances include:

- A participant who is unfamiliar with the technology may need instructions and reminders during a court appearance, which can delay the proceeding.
- Those with less reliable or slow internet service may have their video feed freeze or experience audio glitches, time delays, and dropped connections.
- Lighting, camera angles, distance from a screen, and other factors can influence perception.
- Depending on the mechanism for private attorney-client conversations, there may need to be multiple pauses in the proceeding, which may intimidate or discourage clients from asking questions or seeking a private conversation, and may (consciously or otherwise) negatively affect the reactions of the other participants toward those clients.

Impact on People of Color

In assessing the policies and procedures implemented during the pandemic, the Commission must be mindful of the impact on people of color. Two years ago, the [*Report from the Special Adviser on Equal Justice in the New York Courts*](#) reported that “[o]ver and over, we heard about the ‘dehumanizing’ and ‘demeaning cattle-call culture’ in New York City’s highest volume courts,” which includes family and criminal courts. A disproportionate percentage of people charged with crimes and parents subject to child protective proceedings in family court are Black and brown. The criminal and family court closures and delays during the pandemic exacerbated the “second-class system of justice for people of color in New York State” that the Special Adviser found in 2020. Virtual proceedings may well intensify this problem.

Confrontation of Witnesses at Hearings and Trials, Jury Selection and Jury Trials

The court system must ensure that its policies and procedures do not interfere with constitutional rights such as the Confrontation Clause, the right to an impartial jury, and the right to a jury of one’s peers. Articles that have explored these issues include the following.

- Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 Northwestern University Law Review 1875 (2021); and

⁷ Reports and articles that have collected research and information about perception of people on video include: Stanford Criminal Justice Center, *Virtual Justice? A National Study Analyzing the Transition to Remote Criminal Court* (August 2021); and Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 Northwestern University Law Review 1875 (2021).

- Stanford Criminal Justice Center, *Virtual Justice? A National Study Analyzing the Transition to Remote Criminal Court* (August 2021)

Veterans Treatment Courts

Well-run Veterans Treatment Courts (VTCs) can have a tremendously positive impact on the veterans who participate in them. One of the key elements of VTCs is the peer-to-peer support provided by veteran mentors. Another is the opportunity for connection with other veterans in the program, the judge, and treatment court personnel. During the pandemic, some VTCs have not been able to maintain the veteran mentor component of the program. Many veterans have struggled with the absence of mentors, and some suffer severely without this support.

Courts had to adjourn appearances or switch to virtual appearances. Virtual appearances do not replicate the human connections and support that exist among all those who are usually present during VTC proceedings. Because VTCs are intended to help participants get the help they need, the court system must establish policies and procedures that will achieve that goal. Otherwise, they are setting participants up for failure.

Court Scheduling

Virtual proceedings of any sort must not be used to avoid dealing with the court system's scheduling problems. Before the pandemic, many courts had significant issues with scheduling. Large numbers of cases were calendared for the same time, and attorneys and their clients were expected to appear at that time without any idea of how long they may have to wait. This situation has not changed much since the pandemic started. Some courts have worked to set staggered appearance schedules, which have improved wait times. But given case backlogs and some courts that are not in session every day (particularly in town and village courts), the problems are expected to continue for months and possibly years.

Individuals in criminal and family court are more likely to agree to appear virtually if the choice is between appearing in person, which may include travelling a long distance to the court and waiting for hours for their case to be called, and appearing virtually, which takes a fraction of the time. But if they knew that their case would be called promptly and they were able to speak with their attorney privately and ask questions, they might choose to appear in person.

There are also times when the court appearance will not involve anything of substance, such as when an adjournment will be requested and a new appearance date set. In those situations, a party may elect to have their attorney appear without them. Courts should not require individuals to appear, in person or virtually, for these administrative matters. Further, the court system should consider whether those types of proceedings even necessitate an appearance by counsel. There may be matters that could be more efficiently addressed through a written status update to the court.

For example, in *Virtual Criminal Courts*, the authors noted:

Perhaps scheduling or discovery conferences can be more often conducted using email, or between the parties, as in some courts, rather than compelling appearances of defendants and law enforcement. These discussions far too often view virtual proceedings from a

perspective of court efficiency, and not the public interest: whether the social costs of the underlying proceedings and outcomes are just. If the burdens of conducting in-person appearances are not justified, then that begs the question whether the burdens of the underlying enforcement practices are themselves justified. Constitutional rights ensure robust process at a range of critical stages of the criminal process. If those constitutional requirements cannot be met, then charges should not be pursued.⁸

We urge the Commission to examine ways to address scheduling, such as reducing unnecessary appearances, that can lead to greater efficiency without the need to resort to virtual appearances for substantive proceedings.

Increased Funding for Family Courts and Family Defenders

Before the pandemic, family courts and public defenders appearing in family court did not have sufficient resources to address the volume of family court cases. Throughout the pandemic, family court cases have been seriously delayed and the existing backlogs have grown. The State must direct significant resources to the family courts and to the attorneys who provide public defense representation to family court litigants who cannot afford counsel. Without additional resources, parents cannot possibly receive effective representation and courts cannot ensure due process. This will cause even more needless separation of parents and children, and the burden will fall hardest on families of color.

Public Information

During the pandemic, the court system issued regular administrative orders that set rules and adjusted policies and practices. Some orders addressed matters statewide, while others were county or judicial district specific. The court system used various means of distributing those orders, but there was no central location for all the orders, even after the administrative orders' pages were added to the nycourts.gov website. Public defenders, legal aid attorneys, assigned counsel, and members of the private bar did not have timely access to these orders. The legal profession was able to fill in the gaps through listservs, emails, and websites. Like other bar associations and organizations, NYSDA staff spent significant amounts of time locating these orders and posting them on our website. But unrepresented people and members of the public were left in the dark. That cannot happen again. Once issued and distributed to court personnel, orders should be promptly posted on the court system's website in a prominent location so that everyone has the same information. And the court system must ensure that there is a way for the legal profession and the public to ask questions about the orders.

⁸ Deniz Arıturk, William E. Crozier & Brandon L. Garrett, *Virtual Criminal Courts*, The University of Chicago Law Review Online (November 2020), available at <https://lawreviewblog.uchicago.edu/2020/11/16/covid-ariturk/>.

Conclusion

Virtual court proceedings, while convenient at times for judges, court staff, attorneys, and litigants, often interfere with fair and equitable proceedings—and with justice. Convenience and efficiency do not trump constitutional rights. There are serious due process and equal protection considerations that must be at the forefront during any planning on the future of the courts. We appreciate your willingness to hear from NYSDA and ask that you incorporate our comments into your future planning.