



NAPD STATEMENT ON THE ISSUES WITH THE USE OF VIRTUAL COURT TECHNOLOGY¹

May 29, 2020

Rarely have courts experienced such rapid and fundamental change as the expansion of virtual court technology. The use of telephonic and video communication in the courtroom is not new, but the pace at which courts have adopted new technology is staggering.² A crisis should not be used to advance untested and unwise systems. New technology should be used only when it either enhances access to justice or avoids a shutdown of access that clearly would be worse than the temporary limitations posed by the technology, or where a client exercises their right to proceed.

What is the issue with use of virtual court technology? Whether court takes place virtually or in-person, all people charged with a crime are innocent unless proven guilty. Defendants in a criminal case are the principal stakeholders for whom the fabric of our country's jurisprudence has gradually developed as protection from injustice. In the rush to implement new technology, defendants stand to lose a fair trial. Society stands to lose the constitutional protections designed to create a system of justice. As Justice Scalia said, "[w]e are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings."³

This document is organized in four sections: (1) guiding values; (2) constitutional considerations in virtual court; (3) minimum requirements for the implementation of virtual court; (4) special considerations for public defenders. The first three sections are intended for judges and policymakers as input from the defense bar on the implementation of virtual court. These sections describe standards that at least minimally satisfy due process and fair trial protections for the public defender's client. The final section is aimed at public defenders who may be grappling with the changes virtual court brings to the practice of law.

¹ The National Association for Public Defense represents 22,000 public defenders from around the country who work to expand access to justice, in and out of the courtroom. To learn more, visit www.publicdefenders.us.

² The first video phone hearing was in 1972 in Illinois. CAMILLE GOURDET, AMANDA R. WITWER, LYNN LANGTON, ET AL. COURT APPEARANCES IN CRIMINAL PROCEEDINGS THROUGH TELEPRESENCE: IDENTIFYING RESEARCH AND PRACTICE NEEDS TO PRESERVE FAIRNESS WHILE LEVERAGING NEW TECHNOLOGY 3 (RAND Corporation, 2020), https://www.rand.org/pubs/research_reports/RR3222.html.

³ *Maryland v. Craig*, 497 U.S. 836, 870 (1990) (5-4 decision) (Scalia, A. dissenting).

Guiding Values

I. New technology should safeguard human dignity.

Every person in the criminal justice system deserves humane, just treatment. Use of new technology should be limited unless it can preserve the humanity and dignity of the participants, especially that of the client.

II. All clients should have access to quality video and audio technology that ensures meaningful participation in virtual court.

Courts must ensure that defendants are not prejudiced by a lack of access to technology. Courts must ensure defendants can meaningfully participate in the process.⁴ Defendants should not be charged fees for virtual access that would not exist for in-person access.⁵ They should have effective access to counsel and access to family members.

Most people prosecuted in the criminal justice system qualify for public defenders.⁶ Indigent defendants may not have the technology to appear in virtual court or fully participate in hearings remotely.⁷ Clients should be free of distractions happening in the video room such as jail personnel speaking to other defendants, or movement within the room.⁸

⁴ *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985) (“[J]ustice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake,” quoted in Edie Fortuna Ciminio, Zina Makar & Natalie Novak, *Charm City Televised and Dehumanized: How CCTV Bail Reviews Violate Due Process*, 45 U. OF BALTIMORE LAW FORUM 57 (2004).

⁵ *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (holding that “there can be no equal justice where the kind of trial a man gets depends on the amount of money he has. [Black, J., majority]”); *Mayer v. City of Chicago*, 404 U.S. 189, 189 (1971) (indigent plaintiffs are entitled to a transcript at the city’s expense in order to prepare an appeal of a criminal conviction for a petty or quasi-criminal offense).

⁶ In 2000, the Bureau of Justice Statistics estimated that public defenders and appointed counsel represented 82% of defendants in State court charged with felonies. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), <https://www.bjs.gov/content/pub/pdf/dccc.pdf>.

⁷ “Roughly three-in-ten adults with household incomes below \$30,000 a year (29%) don’t own a smartphone. More than four-in-ten don’t have home broadband services (44%) or a traditional computer (46%). And a majority of lower-income Americans are not tablet owners.” Monica Anderson & Madhumitha Kumar, *Digital divide persists even as lower-income Americans make gains in tech adoption*, PEW RESEARCH CENTER: FACT TANK (May 7, 2019), <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/> (last visited June 15, 2020).

⁸ Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1108 (2004) (“[A] panoramic shot of the defendant in the remote location will include distracting elements of the physical space around the defendant. That raises the question of whether the *1109 distraction will improperly influence the perception of those in court or, conversely, whether those in court should be aware of the distracting elements in the defendant’s environment that might influence the defendant’s behavior and concentration.”).

Regardless of basic access to technology, when an accused is not physically present, the judge “loses the opportunity to respond to the immediacy of the [client’s] human presence and the gravity of the proceeding is diminished.”⁹ Virtual courts may result in worse outcomes for defendants, because they limit communication between the defendant and the judge, their attorney, and other parties.¹⁰ Statistically substantial worse outcomes for defendants will give rise to valid complaints that the proceedings are unconstitutional.¹¹

Clients should never be forced to waive their appearance in court. But clients should have the opportunity to waive their appearance for ministerial settings.

Whether virtual or in person, defendants have a due process right to understand the proceedings against them. Further, to support the legitimacy of the virtual court process, principles of procedural justice should be followed.¹² Courts are responsible for protecting due process in the virtual courtroom. Prior to the proceeding, courts must provide adequate time for defenders to effectively explain and demonstrate the virtual process to the defendant. Courts and defenders should account for the individual circumstances of each defendant and their ability to understand the proceedings.¹³

Constitutional Considerations

III. Constitutional rights are not optional in virtual court.

Virtual courts must guarantee that new technology does not diminish the sacred constitutional rights guaranteed to each individual when accused of a crime. These rights, include, but are not limited to:

a. The Right to Counsel

Virtual court can impede attorney-client communication. Such interference can result in a constitutional violation of the right to counsel. A defendant is entitled to participate and assist in his or her defense. Defendants must have the right to privileged communications with their counsel before, during, and after each virtual hearing. Failure to provide time and space for consultation between attorney and client is a violation of a defendant’s right to effective counsel.¹⁴

⁹ Shari Seidman Diamond, Locke E. Bowman *et al.*, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 879 (2010).

¹⁰ *Id.*

¹¹ *Id.*

¹² Research clearly shows that procedural justice matters more than whether or not people agree with a decision or regard it as substantively fair.” Tracey Mears & Tom Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L. J. F. 525, 527 (2013-2014).

¹³ This is of particular concern in juvenile court proceedings.

¹⁴ See *Geders v. U.S.* 425 U.S. 80 (1976) (holding that one’s Sixth Amendment right to counsel is violated when barred from speaking to one’s attorney for seventeen hours during an overnight

b. The Right to Cross-Examine and Confront Witnesses

Virtual court fundamentally transforms how evidence is presented. Studies show that video communication can dehumanize remote participants.¹⁵ Further, videoconferencing reduces the amount of information that the trier of fact receives to judge the credibility of witnesses.¹⁶ These changes present a real danger to the right to confront and cross-examine witnesses under the Sixth Amendment of the United States Constitution. When considering whether to allow remote testimony, Justice Scalia remarked “[v]irtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.”¹⁷

While federal law creates some exceptions for live testimony, states may have stricter confrontation rights under their constitutions.¹⁸ The widespread use of remote witnesses will violate these state statutory and constitutional rights.

c. Compulsory Process, Due Process, and Equal Protection

Virtual courts require broadband access to participate meaningfully with both video and sound.¹⁹ Yet access to such high-speed internet varies widely across the country, and many parts of the country lack access to broadband services at all.²⁰ Even where available, clients cannot afford the cost required to maintain internet services. With the transition to virtual court, many individuals are left quite literally unable to access the new, digital courthouse. Yet defendants have a due process right to be present at critical stages of criminal proceedings.²¹ Further, important witnesses may be unable to

recess during trial). *But see Perry v. Leeke*, 488 U.S. 272, 284-85 (1989) (where trial court ordered defendant not to speak with attorney during 15-minute recess did not violate Sixth Amendment right to counsel).

¹⁵ MIN KYUNG LEE, LAURA A. DABBISH, NATHANIEL FRUTCHER, *MAKING DECISIONS FROM A DISTANCE: THE IMPACT OF TECHNOLOGICAL MEDIATION OF RISKINESS AND DEHUMANIZATION* (2015), <https://www.researchgate.net/publication/268812146>.

¹⁶ Bowen Poulin, *supra* note 8 at 1108. (“There are three areas in which technology inevitably skews the perception of others. First, choices about camera shots influence perceptions of others. Second, video presentations always either strip some nonverbal cues from the communication or overemphasize them. Finally, video presentations do not replicate normal eye contact.”)

¹⁷ Factfinders ability to assess credibility remotely is impeded when testifying witness is a small image on a screen and cues, body language, visual pauses, and other aspects are lost in a virtual environment. See Richard D. Friedman, *Proposed Amendments to Fed. R. Crim. P. 26: An Exchange: Remote Testimony* (U. of Michigan Law School Scholarship Repository, Summer 2002), quoting Scalia, J., at 703.

¹⁸ See generally *Price v. Commonwealth*, 31 S.W.3d 885 (Ky. 2000).

¹⁹ Zachary M. Hillman, *Pleading Guilty and Video Teleconference: Is a Defendant Constitutionally ‘Present’ when Pleading Guilty by Video Teleconference*, 7 J. HIGH TECH. L. 41 (2007) (“Even if a court system employs the latest technology, equipment drawbacks create other concerns, including misleading camera shots, nonverbal cues that may be lost in transmission, and loss of eye contact.”).

²⁰ In 2018, 22.5% of all American households did not have a desktop or laptop computer, and 37.3% of American households that earned less than \$20,000 a year did not have an internet subscription. U.S. Bureau of the Census. *Types of Computers and Internet Subscriptions*. 2018 American Community Survey (TableID: S2801). Available at <https://data.census.gov/>.

²¹ *United States v. Gagnon*, 470 U.S. 522, 526 (1982) (citing *Snyder v. Massachusetts*, the Court held that a defendant has a due process right to be present at a proceeding “whenever his presence has

provide important testimony because they do not have access to internet services.

Court systems that ignore the digital divide stand to make it worse. They violate a defendant's right to due process, equal protection, and compulsory process under the law.

d. The First and Sixth Amendment right to a public trial

Public access to court guarantees that a defendant is not sentenced in secret. The First and Sixth Amendments to the United States Constitution guarantee public proceedings. If states conduct hearings via videoconferencing technology and fail to provide a way for the public to view the proceedings, they violate these important rights.

Minimum Requirements for Implementation

IV. Virtual court should only be used in certain circumstances.

a. Non-adversarial hearings and agreed sentencings may be held virtually, but protections must be in place.

Certain types of routine, non-adversarial matters may be held virtually, including first appearance settings, status conferences, agreed sentencing dispositions, and diversionary proceedings where no statement of guilt is required to be made on the record.²² These proceedings include those that are not adversarial (agreed upon results) or where the interest in advocating for liberty from incarceration outweighs the impact of a speedy but virtual appearance (in some jurisdictions, this may include bail hearings). However, these hearings must meet certain minimum requirements, outlined below.

b. Serious contested hearings should not be virtual.

Virtual court technology should not be used for serious contested hearings such as motions challenging the constitutionality of a seizure of evidence or the ultimate determination of a prosecutor's burden at trial.²³ For these

a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" or when "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."); *see also, e.g., see also, e.g., Hillman, supra* note 19.

²² Given the limitations of virtual court technology, and the results of the 2010 study on bail determinations by Diamond, Bowman, *et al.*, clients should retain the right to demand a prompt in-person bail hearing. *See* Diamond, Bowman *et al.*, *supra* note 9 at 879 (video bail hearings result in worse outcomes compared to in-person bail hearing).

²³ *Craig*, 497 U.S. at 850 (the right to face-to-face confrontation under the Sixth Amendment is not absolute, but it may only be modified "where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."); *United States v. Yates*, 438 F.3d 1307, 1319 (11th Cir. 2006) (video testimony of Australian witnesses violated Sixth Amendment Confrontation Clause); *State v. Thomas*, 376 P.3d 184, 194-95 (N.M. 2016).

hearings, counsel, the judge, witnesses and fact finder all should be physically present to make a full assessment of credibility.

c. Jury trials should not be virtual.

Current technology cannot meet the practical or constitutional requirements for jury trials.²⁴ In a virtual jury trial, the client is denied the ability to meaningfully observe and participate.²⁵ Defendants should be able to see all the trial participants, including jurors, in person to make their own judgments and how they wish their trial to proceed and thereby aid in their defense.²⁶ If a defendant chooses a virtual jury trial, changes in *voir dire* and jury selection will be required to ensure that jurors are not biased because of the new technology.

d. Clients should always retain the right to choose virtual court.

The client retains the ultimate decision on how to proceed with their case.²⁷ There may be situations where a virtual trial—even a jury trial—may be in the client’s best interest. Public defenders should respect the right of the fully advised defendant to choose how their case is resolved.

If a client decides to proceed with virtual court, they must not be required to sign waiver of rights in any form related to the virtual court forum. A defendant’s rights—constitutional, statutory, and common law—shall not be diluted in any way by the virtual medium. Defendants must not be forced to waive the right to complain if an unforeseen event arises during the virtual hearing.

V. Virtual courts must follow the following minimum requirements.

a. Defendants must have adequate notice of online proceedings.

²⁴ *Gagnon*, 470 U.S. at 526 (a defendant has a due process right to be present at a proceeding “whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge” or when “the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.”). This is because video conferencing alone inherently has prejudicing effects that are likely to impact a jury’s image of the defendant. Bradley M. Okdie, Rosanna E. Guadagno *et al.*, *Getting to know you: Face-to-face versus online interactions*, 27 *Computer in Human Behavior* 153, 156-57 (2011) (“Participants who interacted face-to-face reported liking their partners more than participants who interacted over the computer. . . . With respect to self-centeredness, those interacting [face-to-face] felt their partners were less self-centered than when interacting with them via [computer-mediated communication].”)

²⁵ See Hillman, *supra* note 19.

²⁶ *Id.* at 57. (“Another significant concern raised by the technology itself occurs even if the technology is operating properly. The interaction between defendant and judge is severely limited, and as a result, a number of non-verbal and visual cues can be lost during transmission.”)

²⁷ MOD’L RULES OF PROF’L CONDUCT r. 1.2 (AM. BAR ASS’N 2002). (“In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”).

Courts should not rely solely on electronic communication—such as e-mail—to provide notice of a hearing.²⁸ The court should take sufficient steps to ensure that notice is provided electronically and physically mailed to a defendant. A court should not revoke a defendant’s bail on the unverified electronic notice alone.²⁹ Electronic notice should include text messaging and email.

b. Attorney-client communication must be private and unrecorded.

Defendants must have the right to have privileged communications with their counsel before, during, and after each virtual hearing.³⁰

The right to counsel includes a private setting for attorney-client communication.³¹ In-person representation remains the best practice. Studies have noted virtual court technology could have a negative impact of the attorney-client relationship.³² If a lawyer must be in a different location than her client, there should be a mechanism for real-time, private communication during the hearing. Clients and counsel both should have the opportunity to stop the proceeding at any time to confer and should be advised of their opportunity to do so.

Public defenders should research the virtual court systems that they may use in their jurisdictions and should express any concerns they may have with confidentiality on the record. The court should make accommodations to ensure confidentiality so that the impartiality of the courts is not questioned.³³ Courts should audit procedures that protect attorney-client communications and look for sanctions if a violation occurs, including dismissing charges. Courts should share the results of the audit with the defense. Defenders should have the opportunity to conduct an independent

²⁸ See *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972) (minimum due process, including an in-person hearing to contest the issue, is required when significant restrictions on liberty interest might result from a court decision).

²⁹ *Id.*

³⁰ *Geders*, 425 U.S. at 88-89 (1976) (holding that one’s Sixth Amendment right to counsel is violated when barred from speaking to one’s attorney for seventeen hours during an overnight recess during trial); *But see Perry v. Leeke*, 488 U.S. 272, 284-85 (1989) (where trial court ordered defendant not to speak with attorney during 15-minute recess did not violate Sixth Amendment right to counsel); *Doe v. Ayers*, 782 F.3d 425, 443 (9th Cir. 2005) (“A lawyer needs to know the nature of the testimony he will elicit, and a witness needs to understand the proceeding in which he is participating.”).

³¹ MOD’L RULES OF PROF’L CONDUCT r. 1.4(a), (c) (AM. BAR ASS’N 2000). (Unless an exception applies, “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . [(a)].” In addition, “[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client [(c)].”).

³² Gourdet, Witwier, Langton, et. al., *supra* note 2 at 5.

³³ MOD’L RULES OF OF JUDICIAL CONDUCT R. 2.2 (AM. BAR ASS’N 2020) (“A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.”)

audit of the confidentiality procedures, including access to all files, all data, and records of all access.³⁴

c. Court documents must be accessible.

Before a virtual hearing takes place, lawyers should have access to criminal histories, pretrial release history, the results of any pretrial assessment instruments, probable cause statements and other information describing the nature of the alleged offense, police reports if available, and have sufficient time in advance of the hearing to discuss the information with the client to be adequately prepared to address bond and pretrial release.³⁵

d. Clients must be accessible.

If virtual hearings are routine, defenders need access to their incarcerated clients.³⁶ Courts must ensure that jails have an adequate number of secure, confidential video meeting room spaces so that defenders are able to confer with their clients before, during, and after hearings without delay. The court must take prompt action to ensure clients remain accessible. Adequate notification must be provided to counsel.

e. Courts must ensure witnesses do not violate court rules remotely.

Unlike in a regular court setting, it is often impossible to tell if a witness on video court is being coached off screen or violating a separation of witnesses rule. In addition to customary measures, courts must take measures in every hearing to admonish participants of these important rules. They should even go as far as to directly question witnesses about off-screen communication. Courts should act if they discover that violations have occurred.

f. Client consent should be made on the record.

Some jurisdictions and federal court require the consent of the defendant before proceeding with a virtual hearing.³⁷ Remote hearings that implicate

³⁴ Records of access must include the identity of the person who accessed the data, date, time, and other identifying information, including I.P. or MAC address.

³⁵ *Griffin*, 351 U.S. at 24. (Frankfurter, J., concurring) (“If [a state] has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity.”); *Bearden v. Georgia*, 461 U.S. 660, 664 (1983) (“[T]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has,” citing *Griffin*).

³⁶ *Geders*, 425 U.S. at 88-89 (1976) (“Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance. “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to *89 be heard by counsel. . . . (A defendant) is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he (may) have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.” *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 64, 77 L.Ed. 158, 170 (1932).”).

³⁷ CARES Act. 18 U.S.C. § 15002(b)(4) (“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.”).

constitutional rights should only be conducted with the expressed consent and knowledge of the client.

g. The defendant's on-screen image should be humanized.

Studies have shown that the use of videoconference can affect one's perception of the participants in the proceeding.³⁸ In fact, in recent recommendations published by the RAND Corporation, it was a "threshold question" as to whether "telepresence technology" would "make the defendant appear less truthful or trustworthy, thereby diminishing the defendant's credibility and potentially increasing the likelihood of harsher case outcomes."³⁹ Many videoconferencing technologies have been set up in jails in a manner that dehumanizes the client's image through poor lighting, bad framing, background sounds, and shackling.⁴⁰ Public defenders should have a strong role in determining the implementation of virtual court so that clients are viewed in the best light possible and given the same opportunities as other defendants to appear in good lighting, framing and a professional background. For detained clients, the Court has a duty to ensure proper courtroom decorum in the virtual setting.

h. Virtual courts should have discretion to limit public access where there may be harm to the client, especially in juvenile settings.

Many of the technologies used to achieve transparency for virtual courts—such as YouTube—have the capability to create a permanent record in the internet that can never be undone. Especially for young defendants, who can be victims of cyberbullying, this remains a grave concern. This also poses a danger to anyone who may qualify for an expungement.

At a minimum, live streaming of court proceedings should include text that prohibits recording. The admonition should include reference to either an appropriate prohibiting criminal offense, detention, or finding of criminal contempt. If possible, clients should have a voice in whether the proceedings are broadcast over the internet.

Certain proceedings should never be posted. Live streamed proceedings that are saved, either in the cloud or on a hard drive, should be limited in their access and only used for the purpose of persevering the record for purposes of an appeal or other authorized court proceedings. If a record is expunged,

³⁸ Hillman, *supra* note 19; Diamond, Bowman *et. al. supra* note 9; Okdie, Guadagno *et al., supra* note 24 at 156-57.

³⁹ Gourdet, Witwier, Langton, *et. al., supra* note 2 at 6.

⁴⁰ The circumstances of a criminal court proceeding may be so prejudicial as to infringe on someone's due process rights. *Estelle v. Williams*, 425 U.S. 501, 512 (1976) (finding "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes" based in part because "compelling the accused to stand trial in jail garb operates usually against only those who cannot post bail prior to trial."); *but see Holbrook v. Flynn*, 475 U.S. 560, 572 (1986) (finding that a criminal defendant was not denied his constitutional right to a fair trial when, at his trial with five codefendants, the customary courtroom security force was supplemented by four uniformed state troopers sitting in the first row of the spectator's section).

the recording must be erased. A client's perspective should always be sought and considered by the court before determining whether to live stream or post proceedings for the public view.

i. Parties should have the opportunity to review, receive, and exchange documents and exhibits necessary for the hearing.

Virtual courts are limited in the amount of documentation able to be shown at one time on the screen. This can create a danger that the defendant may not have access to all the materials being used at the hearing. Virtual courts should allow sufficient time for participants—and especially the client—to view all materials and submit evidence as necessary.

Virtual courts must also treat potential evidence for what it is, *potential* evidence. Materials should not be viewed prior to a proper foundation at a hearing unless the parties consent to a pre-viewing due to the nature or extent of the materials in question.

j. Family members and community advocates should be included in online hearings as active participants.

Clients' family and friends play an important role in criminal proceedings. These supporters show triers of fact and sentencing authorities that the individual has community ties and in advocating for favorable rulings, especially at bail and sentencing. Many viewing platforms currently in use do not allow court viewers to show the presence of these supporters. Supporters should be allowed to attend proceedings and be present in the virtual courtroom, not simply view the proceedings live via live streaming.⁴¹

k. Court administrators should consult with directly impacted individuals when assessing the value of video court.

Directly impacted individuals are best situated to determine if new technology will likely benefit the cause and representation of a client. They have experienced both the helpful and harmful effects of the technology first-hand. Without this perspective, courts run the risk of implementing systems that will degrade the quality of justice and undermine confidence in the system.

l. Copies of the video proceedings should be retained by the court only.

Some jurisdictions have implemented virtual court but retain only the transcript as record of the proceeding. Given this new method of communication, courts should retain recordings of virtual hearings, especially in the early stages of adoption. This includes providing the video to any appellate court upon appeal.

Regardless of other statutory timeframes, parties should have the opportunity to review the record and correct any incongruities between the video

⁴¹ If the court is concerned about potential disruptions from family members or advocates, the court should create a standard admonition that governs courtroom etiquette, just like in real-life.

proceeding and the court record. The parties should always have access the recording of the proceedings. Any non-party must obtain court permission to access the record. At the same time, virtual hearings live-streamed over the internet should be removed immediately after the hearing ends. In cases where portions of the proceedings are accidentally streamed and/or recorded, those recordings should be deleted immediately on request of any party or on the court's own initiative.

m. The press should have access to virtual courts.

Transparency is critical to court proceedings.⁴² The press should maintain the same level of access in virtual court that they held previously. The laws related to recording differ from jurisdiction to jurisdiction, and public defenders should be mindful of when press is helpful to their client's case, and when it may result harm.

n. Open access should not create a permanent record that erases the effect of expungement or a sealed record.

The right to public access needs to be balanced. It is important for the public to observe proceedings to provide transparency in our criminal proceedings. Video appearances provide more access than what was often available pre-COVID-19. At the same time, courts should be especially mindful of what recordings are left up on live-streaming websites such as YouTube, where the recordings could be used for harmful purposes.

For Practitioners

VI. Public defenders should prioritize in-person communication whenever possible.

The trust between an attorney and a client is sacred. Video conferencing can be useful to communicate basic information to clients such as an explanation of court procedures, general discussions about the charges, and the gathering of information for bond hearings. With the present technology, however, there is no assurance that these communications are confidential.

Further, in-person contact with clients should remain the goal, even if virtual courts and videoconference become permanent. Defender offices should set criteria for number and frequency of in-person visits that emphasize the value of face-to-face communication.

⁴² *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 (1980) ("Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."); see also U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial.").

VII. Public defenders should work with researchers to study the impact of virtual court on clients and case outcomes.

More research is needed about virtual court.⁴³ Public defender offices and researchers should work together to further examine the full impact on clients as well as case outcomes.

VIII. A new and more just court system is possible.

Many aspects of our criminal justice system are inhumane, inefficient, wasteful, and harmful to our clients. Public defenders can help chart a path forward, advocating for new technology while maintaining fundamental principles of justice.

Sincerely,

Derwyn Bunton
Chair, NAPD Steering Committee

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⁴³ See generally Gourdet, Witwier, Langton, et. al., *supra* note 2, which outlines many of the outstanding legal research needs in this area.

TIPPING THE SCALES TOWARD JUSTICE

