A PRIMER ON VIRTUAL COURT PROCEEDINGS IN THIS BRAVE NEW WORLD

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With the spread of the coronavirus pandemic and the issuance of stay at home orders, courthouses across the United States closed. While the executive and legislative branches of government continued to operate during the initial stages of the pandemic, the judicial branch was, in essence, paralyzed. Movement on current cases was little to none, yet new cases continued to be filed. In Florida, jury trials were suspended on March 13th. The judicial system had to do something to prevent the system coming to a "grinding halt" in the words of Florida's Chief Justice Charles Canady.[1] "We all understand that the protection of the liberty and the prosperity of our people depends on a healthy, functioning court system", Canady said.[2]

Having fought it for many years for a variety of reasons, suddenly the courts were forced to embrace technology to conduct proceedings of all kinds. As the trend gains a foothold, many judges and lawyers are finding that the available technology can function well-enough that they foresee virtual court proceedings continuing even after the pandemic is behind us. They note benefits in efficiency for the courts and attorneys, economic benefits for litigants, and even personal benefits for attorneys whose travel will be minimized. Judge George Jirotka of Florida's Sixth Judicial Circuit noted he has fewer canceled hearings. He experiences at least one in person hearing every two weeks that is canceled because an attorney is caught in traffic.

Most times, change does not come quickly with courts as they are apt to study and discuss change at great lengths before taking steps to do things differently. While technology was thrust upon the courts because of the pandemic, lawyers can expect that rules and procedures governing the use of virtual court proceedings will be studied and adopted after the pandemic is over. In surveying judges, mediators, and trial lawyers, we repeatedly heard that virtual court proceedings in many jurisdictions are here to stay. Indeed, in Florida, a retired judge of the Eleventh Circuit Court of Appeals and a group of lawyers have already proposed an amendment to Florida's rules that is designed to promote a greater use of virtual proceedings.[3] One of the lawyers, Brett Schlacter believes that courts will learn an invaluable lesson from the pandemic. "Lawyers tend to be behind in technology and very hesitant to change. But I think this is a perfect opportunity to springboard to a complete transformation of the legal system."[4] So, trial lawyers will need to learn how to be as effective virtually, as in the courtroom.

First, a little history. The idea of video conferencing was first introduced to the world at the 1964 World's Fair by AT&T. In the 1970's, it became available for public use, but was expensive and not readily available. In the late 1970's, the author participated in an ABA funded study on the use of video conferencing by the courts. While some saw the efficiencies of using this technology for court hearings, for the most part, courts did not embrace it. In 1992, Macintosh released the first video conferencing software for personal computers. In 1995, it became available on Windows. However, the courts and lawyers continued to resist using this technology for court

proceedings. Some courts continue to resist technology. Even today some courts do not allow electronic filing. And, despite having been shut down since March, they still have not embraced the use of technological alternatives to conduct court proceedings.

However, many of us should expect to be called upon to attend virtual hearings, as this is clearly a methodology that is not going to go away. We heard that loud and clear from the many attorneys, judges, and mediators we interviewed about their experiences in the past few months with virtual court proceedings. In sharing their experiences, we hope to provide litigators with practical ideas for how to be an effective advocate at virtual court proceedings.

Federal Courts' Response to the Pandemic

The U.S. Supreme Court, during the pandemic, has conducted oral arguments by telephone, even with the sounds of a flushing toilet during its first telephonic argument. The Eleventh Circuit authorized its panels to hear oral arguments by audio or teleconferencing instead of in person.[5] These oral arguments are live-streamed to the public at no cost.[6]

The CARES Act has granted federal courts the authority to hear certain criminal proceedings remotely.[7] If the defendant consents, the presiding judge may authorize video or telephone conferencing. Following the CARES Act and other guidance, federal district courts have implemented orders providing for virtual proceedings within their jurisdictions. For example, the Southern District of Florida "strongly encouraged" individual judges to conduct court proceedings by telephone or video, granting them discretion whether or not to continue to hold hearings, conferences, and bench trials.[8]

State Courts' Response to the Pandemic

Many state courts have approached the pandemic similarly. In Florida, all in-court proceedings were suspended in March. But during Phase 1 of the reopening of the courts, the chief judges of each circuit were given authority to allow court proceedings, excluding jury trials, telephonically or virtually. In the 9th Judicial Circuit Court of Florida, each judge adopted their own procedures for virtual hearings. Some judges ordered that all civil and probate proceedings be held by either video or telephone conference. In New York, the state court system began virtual court operations in criminal and family court in March.[9]

What Platforms are Available?

Hearings, depositions, mediations and other court proceedings have all been conducted using a variety of platforms. In our survey, we found that lawyers, judges and mediators have used the telephone, Zoom, WebEx, Skype, FaceTime, GoToMeeting, Cisco and Microsoft Teams. Judge George Jirotka of Florida's Sixth Judicial Circuit, expressed a strong preference for virtual hearings. He has found that there is a greater tendency for people to talk over one another when conducting a phone hearing. As for virtual platforms, a survey of judges in Indiana and our unscientific survey both showed a strong preference for Zoom for all types of court proceedings.[10]

Some states have specified what platform they will use. Alabama, Michigan, New Jersey, and Texas are using Zoom; New York, Oregon, and Puerto Rico are using Skype.[11] In Florida, the chief judges of each circuit have determined which platform to use. In some cases, they have left it up to each individual judge. Some judges leave it up to the attorneys.

Preparation for a Virtual Court Proceeding

Whatever platform is used for a virtual court proceeding, expect the proceeding to take longer than if it were held in person. We heard from many that you should expect it also will take longer to prepare for a virtual proceeding. It is important to test the technology that is going to be used prior to the hearing, deposition, or mediation. And, make sure that your client and witnesses test on their ends prior to the proceeding as well. The author had an evidentiary hearing where our two witnesses did not try out the court's remote platform. When it came time to log on for the bench trial, they could not get access. Ultimately, they had to provide their testimony telephonically and it was less effective.

It is also important to pay attention to where you, your client and witnesses will "attend" a virtual proceeding. Make sure everyone will be in locations with no distractions. We had one judge tell us about hearings where attorneys' children walked into the background. We heard from others about lawn mowers, phones ringing and dogs barking that were picked up on the audio. Stephen Todd, a litigator for Hillsborough County, Florida, attended a 7 day virtual non-jury trial. At times, you could hear dogs barking or birds tweeting. Clearly distracting.

Consider using earbuds with a microphone. Check and make sure everyone's camera functions well and that they have a dependable internet connection. In some cases, different types of computers or tablets do not interface well with different platforms. For example, on an iPad, there are limitations to the number of people that can be seen at any one time using Zoom. The author was unable to connect to Webex using his iPad, reinforcing the point that it is crucial for you, your clients, and your witnesses to test the technology ahead of time. Finally, many have experienced an echo when two people access a virtual proceeding from the same room. So, if you want your client nearby, place him or her in a separate room.

Also, you will want to pay attention to the camera angles and objects and backgrounds that will appear on the screen. This is especially true with so many working from home. Be mindful of what the judge is going to see in his or her screen when you are speaking.

With the setup of many computers, the camera actually faces up, showing the person's head and the ceiling. This can be distracting. In one virtual proceeding I attended, one participant had the camera pointing to the ceiling which showed a fan circulating. It was extremely distracting. Consider raising the level of, your computer, so the camera is level with your eyes.

Talking over one another was a common concern of the judges we spoke to, especially in evidentiary hearings. Doing so challenges the attorney to make contemporaneous objections that are properly being heard and ruled on. Judge Bailey, a trial judge in Florida, observed that, "Often, lawyers are not looking at their screens but down at their files, their outlines and notes, or simply

out the window, and cannot see the judge is hollering "Stop! Stop!" because an objection has been made and the audio stays with the witness rather than obeying the judge."[12]

Lauren Purdy, a litigator with the Gunster law firm, observed that "It's easy to drift off and turn your head to speak to someone else in the room or down the hallway. It's easy to forget that your expressions and reactions are more obvious when everyone is on a screen than in person in the courtroom where the court's attention will only be on the person speaking. So, being mindful of these differences has been important for me."

Also, pay close attention to your background. You want to avoid anything that might be distracting. Is there a photograph on the wall behind you? A window with a distracting reflection? Consider either a blank wall or a virtual background. Zoom allows you to create your own virtual background with a photograph. Judge Jirotka uses a virtual background—a photo of his courtroom, with the court seal and flags behind him. He also wears his robe. He believes that this contributes to the sanctity of the proceedings. But do not use a virtual background that might be inappropriate or distracting. Judge Miskel of the 470th District Court of Collin County, Texas, told a story where a party had a virtual background of a photograph he hoped to put into evidence during the hearing. The judge had to ask him to change his background.

While it seems like this should not need to be said, with lawyers working from home, some judges noted that lawyers have not been dressing appropriately for court proceedings. One trial judge in Florida wrote "judges would appreciate it if the lawyers and their clients keep in mind these Zoom hearings are just that: hearings. They are not casual phone conversations. It is remarkable how many ATTORNEYS appear inappropriately on camera. We've seen many lawyers in casual shirts and blouses, with no concern for ill-grooming, in bedrooms with the master bed in the background, etc. One male lawyer appeared shirtless and one female attorney appeared still in bed, still under the covers. And putting on a beach cover-up won't cover up the fact that you're poolside in a bathing suit. So, please, if you don't mind, let's treat court hearings as court hearings, whether Zooming or not."[13] Dress the way you would if the proceeding was in person.

Additionally, you should consider lighting—your light source should be in front of you, not behind you. Both Zoom and WebEx have a preview feature, allowing you to see your video feed before any judge, client, or opposing counsel will. If your proceeding will have a lot of participants, use a device with a sizable screen. It can be difficult to navigate between all participants on a phone or tablet.

Judge Keith Meyer of Florida's 6th Judicial Circuit stresses the importance of identifying yourself when you are speaking, speaking slowly, and making sure you do not speak over people. He also noted that when people have logged into a hearing using their computer and phone, there have been technical issues. Frequently, this can cause an echo when the person speaks. Generally, the audio works better if those that are not speaking mute themselves. Just remember to hit unmute when you want to speak.

Depositions

Virtual depositions work pretty well and far better than a telephonic deposition. But like other virtual court proceedings, some litigators noted that it is not quite the same as being in the room with the witness. Rob Brazel, an attorney for Hillsborough County, Florida noted that "it's not quite the same in assessing the witnesses' credibility as when you are in person with them. He also noted "the flow of a deposition… becomes more important when on video, because dead airtime on camera feels much more awkward to everyone than when you pause in person to review a document or change exhibits. In person, you might just call for a break if you need to find some other exhibits or want to change topics in your questioning. I'm less likely to want to take a break on camera because the break time seems harder to regulate and I don't really know where the witness is going or what he or she is doing during the break."

Ellie Neiberger, an attorney in our Miami office, believes that virtual depositions make it easier for witnesses who are difficult or evasive to engage in evasive tactics. They may feel emboldened by the physical distance and comfort in their own home or office rather than an attorney's office or another more formal setting. They can easily disrupt the examining attorney by saying they are having trouble hearing or that they are having technical difficulties.

So, although virtual depositions can certainly save the client money and the attorney travel time, after the pandemic has passed consider these concerns when deciding which depositions are best held virtually.

When conducting a virtual deposition, you have to manage video streaming, real-time transcription, and document handling, all remotely.[14] To mitigate these challenges, you should practice managing all the "moving parts" of a deposition well before the actual deposition.[15] During a deposition, care must be taken to keep private matters private. It is all too easy to accidently share a privileged document when sharing your screen or unmute yourself during a privileged conversation.[16]

The virtual depositions that we have conducted have used the court reporter's selected platform. The court reporter can control who can enter the deposition. In the remote depositions that the author has attended, the parties have agreed to allow the court reporter to swear-in the witness remotely, and the court reporter has read a statement into the record to that effect. If you are conducting a deposition remotely and the parties will not agree to the swearing-in of the witness virtually, you may need to arrange someone to be present with the witness to swear him or her in.

As for exhibits, we have submitted exhibits to the court reporter in advance of the deposition, and then allowed the court reporter to share them virtually, if we decide to use them during the deposition. There are also programs available which allow exhibits to be uploaded and shared during the course of the deposition. For example, Exhibit Share allows exhibits to be preloaded and then marked and shared by the attorney questioning the witness during the deposition with the other attorneys and witness. The exhibits are kept private until the attorney chooses to use them. In addition, the exhibit can be shared on the screen, allowing the examining attorney to focus questions on certain portions of the exhibit. [17]

If you are concerned that a witness you are deposing might receive coaching during the deposition, make sure to ask who else is in the room with the witness. You might want to consider

requiring any other person located in the room, including an attorney representing the witness, to be on the video as well as the witness.

Finally, pay close attention to the audio, making sure the court reporter accurately records the witness' testimony. Todd, the Hillsborough County attorney, had a deposition where his client gave an answer that was not entirely audible, but the court reporter did not ask the witness to restate his answer. So, Todd asked his client to restate the answer so the court reporter could properly report his testimony. For this reason, if you are defending a deposition be sure to have the witness exercise the right to read the deposition if it is transcribed and provide an errata sheet.

Handling Exhibits at an Evidentiary Hearing

As stated previously, virtual hearings require even more preparation than a hearing in person. With an evidentiary hearing, you have to plan ahead what exhibits you may choose to use. Judges have different preferences as to how they wish to handle exhibits for remote hearings. Whatever their preference, it is likely that prior to the hearing, you will be required to share with the opposing counsel and witnesses the exhibits you intend to use at the hearing.

In one evidentiary hearing the author participated in, the judge required that all exhibits be submitted to the judge and opposing counsel three days prior to the hearing, with the exhibits being Bates-labeled consecutively. He also required that the exhibits be electronically filed in that fashion with the clerk. We provided a copy of our exhibits to our two witnesses in the same fashion, so we could refer to Bates-labeled pages during their testimony, thus ensuring that the judge, attorneys and witness were looking at the same document.

Judge Meyer, who conducted a one-and-a-half-day virtual evidentiary hearing, recommends that all exhibits be provided as a PDF with bookmarks, so they are easy to navigate during the hearing. He has found that this makes the hearing run much smoother. The judge will appreciate your taking the time to prepare the exhibits, thus allowing him or her to be more attentive to your arguments. Judge Meyer also recommends submitting an index of your exhibits post-hearing, noting which exhibits were admitted and which were not, and where they can be found in the record.

Oral Arguments

Appellate courts seem to be well-positioned to conduct oral arguments remotely using technology. As noted above, the U.S. Supreme Court held oral arguments by telephone. The Florida Supreme Court and other appellate courts in Florida have conducted oral arguments by video technology. With exhibits not usually an issue and no witnesses to question, oral arguments may be better suited to being held remotely.

Florida's Fourth District Court of Appeal first held oral arguments by phone, but then switched to Zoom. One of the court's judges, Judge Dorian Damoorgian, described the difference as "comparing a bicycle to a Chevy". The court hears oral arguments on Tuesdays and Wednesdays. On Thursdays, they hold test runs for the judges. On Fridays, the lawyers for the following week's oral arguments check their ability to connect to the court's platform, check sound and video and

receive an explanation of the procedures from the clerk. The chief judge of each panel instructs the attorneys that if a judge drops off, they should continue with their argument and the judge will watch the recording. But if a lawyer drops off, the attorneys are advised to stop until the lawyer can reconnect.

Judge Damoorgian advises to be mindful of the time delay when a judge is asking a question. He suggests politely apologizing if you speak over a judge, and request the judge repeat the question. Judges understand that this will happen because of the delay in the audio.

As for use of virtual oral arguments in the future, Judge Damoorgian is not so sure. He thinks this needs to be studied with input from lawyers, judges and appropriate bar sections. New rules will need to be adopted addressing virtual oral arguments.

Mediations

In Florida, mediators are conducting mediations using Zoom, Webex, Skype, and Facetime, but it seems again that there is a strong preference for using Zoom. There is a version of Zoom that includes "breakout rooms", allowing the mediator to place parties in a separate "room", so that the mediator can speak with each party separately and privately during negotiations. One mediator we spoke with, Hilary High, creates a separate "breakout room" that she leaves empty and available if there is a need to speak with certain participants separately, such as if the lawyers wish to speak without their clients present.

In Ms. High's experience, once the parties get comfortable with the technology, she has found that the effectiveness of a remote mediation is no different than an in-person mediation. She notes that you can observe the body language, facial expressions, and voice volume and inflection just as well. She also noted that personality conflicts seem less likely to derail a remote mediation. My own experience is consistent with this observation. I attended a mediation in a case where there was quite a bit of enmity between the parties. That really did not permeate the mediation, seemingly because there was more "space" between the parties than if we had met in person.

But some litigators we spoke to expressed concern that online mediations make it more difficult to reach a settlement. Stephen Todd told us "I have had two virtual mediations; neither one came close to settling. I am not a fan of virtual mediations, because I think it is easier to say 'no' when you are appearing virtually. There is power to having to look someone in the eye when you are negotiating." Mediator Jim Betts, however, thinks that while sometimes it is more challenging with a Zoom mediation to engage the parties, he has found parties to be "somewhat more dispassionate and less angry in a Zoom mediation than they are in-person mediations…I find that my settlement ratio is approximately the same for Zoom mediations as it is for in-person mediations."

Mediators told us that remote mediations, like other virtual court proceedings, take longer. It is important to take extra time preparing. I have our clients try out the platform ahead of time. You will want to make sure they have an adequate internet connection, camera, and confidential location. This will avoid breaching the confidentiality of the mediation. In preparing for one mediation, we noted that our client's only available area was his dining room table, which was not

in an enclosed area. We decided to have him come to our office and "attend" the mediation from our conference room.

Another concern you need to address for virtual mediations is the possibility that the platform being used may allow the mediation to be recorded. Some states, like Florida, are "all parties' consent" states which require that all participants consent to being recorded. Other states are one-party consent states, such as New York, and only require one party to consent to recording. Consider having an agreement signed by the attorneys and all parties stating that they will not record the mediation and that at all times they will be in a confidential location so that no third party can hear the mediation. I insist that parties join the mediation by video and not just the audio. This allows you to observe their demeanor and may better guide your negotiating strategy.

Again, it seems that remote mediations will continue long after the pandemic is behind us. The Alternative Dispute Section of the Florida Bar recently recommended that online mediations continue to be an option. They note the convenience of allowing out of state parties, experts and others to participate in the mediation. [18] It not only saves money, but it becomes easier to schedule the mediation. Mediator Betts noted that initially he was hesitant to use online mediations. However, once he realized the pandemic was going to shut down in-person mediations for a substantial period, he embraced remote mediations. Within a few weeks, he was back to conducting mediations full-time.

Civil Jury Trials

Jury trials may be the last type of proceedings to use the new technology. Trial judges and lawyers we spoke with are reticent about conducting jury trials virtually. Judge Jirotka expressed concern about dealing with "remote" jurors. Potential jurors will need to be asked about their internet connection, computer capabilities, and if they have enough data to attend a jury trial of any length. Potential jurors without internet or technological abilities may be precluded from juror duty. Judge Jirotka worries that it will be difficult to keep jurors' attention during the trial, given their ready access to the internet for watching videos, or even searching for information regarding the subject of the trial.

A Texas court did hold a summary civil jury trial-a one day non-binding proceeding-over Zoom.[19] And, Florida's Supreme Court Chief Justice Charles T. Canady, has authorized five trial courts to test remote civil jury trials. The pilot program is intended to establish the framework for remote jury trials, and identify the logistical issues of trying cases remotely.[20] Justice Canady noted that cases cannot progress without the prospect of a trial. "Even things that aren't going to actually go to trial won't get determined until there is an immediate prospect of a jury trial…that's just the way our system works."[21]

After the Chief Justice authorized the pilot program, a Florida civil trial court conducted a hybrid, non-binding jury trial. Jury selection was conducted by Zoom, and the remainder of the trial was conducted in person, with proper social distancing. This allowed the court to limit the number of people who came to the courthouse. [22]

One trial lawyer, Murray Silverstein, noted that while the enhanced benefits of technology make non-jury proceedings more productive, the added expense of remote jury trials will make settling more attractive to plaintiffs. [23] And he believes that in the case of corporate defendants, they need to be concerned that the "remoteness would lessen a juror's reluctance to punish" a faceless corporation.[24]

Criminal trials are another matter. As discussed above, the CARES Act has authorized federal courts to conduct certain criminal proceedings remotely. These proceedings include detention hearings, initial appearances, preliminary hearings, waivers of indictment, arraignments, probation and supervised release revocation proceedings, pretrial release revocation proceedings, and appearances.[25] Additionally, teleconferencing can be used for guilty pleas and sentencing in certain cases.[26] But in *United States v. Williams*,[27] the Supreme Court held that one has a constitutional right to be physically present at one's sentencing. A prosecutor we spoke to said that it would not be fair to hold a criminal trial virtually, for either side.[28]

Thus, it seems unlikely that criminal trials will be held remotely. Some circuit courts in Florida are considering assigning all judges to criminal trials when the courts reopen to in-person proceedings to clear the backlog. That will only serve to delay even further the resumption of in person civil jury trials.

Conclusion

It seems that virtual court proceedings are here to stay, to some extent. The efficiency, cost savings and the advance of technology make them effective as a replacement for at least some in-person proceedings. But do not kid yourself, they are not the same as in-person proceedings. Judge Bailey put it well when he said, "At the end of the day, we conduct these hearings as best we can, knowing we're running on one of those miniature spare tires we pulled from the trunk rather than a 'real' tire. But it will get us to where we need to go if we decrease our speed and increase our caution and shorten our trip. Resolve as many issues as you can through negotiation and then buckle up. We'll get there, but it may get a little bumpy along the way."[29] And Judge Meyer, when asked if he foresaw the use of remote proceedings after the pandemic, stated "I am a people person but there is no denying the benefits of virtual hearings in terms of efficiency and productivity. With that said, I will not be moving exclusively to virtual hearings. There will remain many instances where in-person hearings will be the best route to getting a matter properly presented for decision."

Florida Chief Justice Canady made it clear that in Florida we should expect that remote proceedings are here to stay. He said, "We have learned a great deal from this experience that will benefit the court system long after we are beyond the constraints imposed by the pandemic. I believe that in future years when we look back on this difficult time, we will see that seeds were planted that helped our courts become more efficient and responsive."[30]

The challenge for trial lawyers will be to be effective in remote proceedings with the loss of the human connection that trial lawyers so rely on to be persuasive. They will need to find other ways to persuade jurors, judges, parties and witnesses in remote proceedings. As well they will

need to become skilled as to how best to keep their attention, when reading an email or searching the internet is only a click away, with no one to be the wiser. Think of the last time you showed a video deposition to a jury. How effective was that video deposition? It will be even more important to be succinct and to catch the court's attention early in your virtual presentation.

Attorneys will need to adapt to remote proceedings. By adapting to this new format, familiarizing yourself with this technology, and putting in some extra preparation, you can be effective in the Zoom courtroom. The challenge is to be like the famed CBS news anchor, Walter Cronkite, and feel like your audience has invited you into their living rooms, while keeping out any Zoom bombers.

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[2] *Id*.
[3] Jim Ash, *Proposal Aims to Make the Greater Use of Remote Technology in Court Permanent*, THE FLORIDA BAR NEWS (June 10, 2020), https://www.floridabar.org/the-florida-bar-news/proposal-aims-to-make-the-greater-use-of-remote-technology-in-court-permanent/.
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[5] *Oral Arguments by Audio or Teleconferencing*, Gen. Or. No. 45 (11th Cir. March 20, 2020).
[6] *Id.*
[7] CARES Act, H.R. 748, 116th Cong. § 15002 (2020).
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[16] Aron U. Raskas, *Taking Effective Remote Depositions*, THE FLORIDA BAR NEWS (June 12, 2020), https://www.floridabar.org/the-florida-bar-news/taking-effective-remote-depositions/.
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[22] Jim Ash, *11th Circuit Holds Florida's First Remote Jury Trial,* THE FLORIDA BAR NEWS (July 14, 2020), https://www.floridabar.org/the-florida-bar-news/11th-judicial-circuit-holds-first-socially-distanced-jury-trial/.
[23] Ash and Blankenship, *supra* note 21.
[24] *Id.*
[25] CARES Act, *supra* note 7.
[26] *Id.*
[27] 641 F.3d 758, 764 (6th Cir. 2011).
[28] *Remote Criminal Court Proceedings during COVID-19*, JUSTIA (May 2020), https://www.justia.com/covid-19/impact-of-covid-19-on-criminal-cases/remote-criminal-court-proceedings-during-covid-19/.
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[30] Ash, *supra* note 1.