



# Virtual Justice?

**A NATIONAL STUDY ANALYZING THE  
TRANSITION TO REMOTE CRIMINAL COURT**

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# EXECUTIVE SUMMARY

When the COVID pandemic hit the United States in March 2020, courthouses were forced to close alongside businesses, schools, and workplaces. But the criminal legal system could not completely shut down; core functions such as setting bail and appointing counsel needed to continue. And so courts around the country, despite historical resistance to cameras or recording devices in courtrooms, rapidly transitioned to virtual operations. Within the span of a few weeks—or even a few days—judges began conducting some criminal court proceedings on teleconferencing or videoconferencing platforms, Zoom foremost among them. In a handful of jurisdictions, courts went so far as to hold criminal jury trials over Zoom. This report examines the consequences of that switch to virtual hearings for criminal court through a quantitative study of defense attorneys and a qualitative study of judges, court administrators, defense attorneys, and prosecutors in three jurisdictions.

Because the pandemic hit so suddenly, there was no time to study the effects of fully virtual court—to review the literature, plan, pilot, and so on—before its implementation. But over the past year, this project has sought to learn from some of the defense attorneys, judges, prosecutors, and court staff who were swept up in this impromptu experiment. This study endeavors to provide policymakers with the data that they did not have time to gather prior to the COVID emergency.

The focus of this research, it bears emphasizing, is not COVID. The spread of the disease in prisons or courtrooms; its effects on police investigations, case processing, and probation offices; the results of socially-distanced court with plexiglass-enclosed witness stands—all of these phenomena are important and interesting areas for study, but they will ultimately be moot. It is virtual court that appears to have staying power. Unlike the other COVID workarounds, virtual court may continue to affect the lives of defendants and victims, of prosecutors and defense attorneys, of judges and court staff, for years to come. Context, of course, is important, and a few of the reported findings in this study may be inextricably intertwined with the pandemic.

Instead, this study focuses on “virtual” or “remote” criminal court: the use of teleconferencing and (especially) videoconferencing in lieu of in-person hearings in criminal cases. The range of criminal proceedings under study includes arraignments, bail hearings, administrative proceedings, evidentiary hearings, trials, pleas, sentencing, and probation/parole hearings. Some hearings may be fully remote or fully virtual, meaning that all participants appear via electronic means like teleconferencing or videoconferencing. But partially remote hearings—those in which some participants attend live and some attend via electronic means—also fall within the purview of this study.

This study includes both quantitative and qualitative components. The quantitative component consists of a survey, taken by hundreds of criminal defense attorneys around the country, which enabled the researchers to distill important trends exclusively within the defense bar. To be able to capture the depth and breadth of the changes resulting from the move to virtual court, we conducted a complementary but distinct qualitative study. This qualitative component focused on three discrete jurisdictions—Miami-Dade County, Florida; Milwaukee County, Wisconsin; and the Northeast Judicial District of North Dakota—where researchers conducted in-depth interviews with prosecutors, defense attorneys, judges, and court personnel. While this qualitative data cannot be generalized, it provides a rich and detailed insight into practitioners’ experiences with remote criminal court since COVID hit.

Given that the criminal legal system affects so many, and so unequally, policy changes must be made with care and attention. If videoconferencing affects or skews the criminal legal system in some way, for good or for ill, responsible policymakers must take account of these effects before they implement long-term policies. It is our hope that this research enables those policymakers to make more informed decisions, and ultimately better ones, about the functioning of criminal courts in a post-pandemic America.

Past research on videoconferencing as used both in court proceedings and in non-legal fields suggests that virtual proceedings can have negative consequences. Video-technology can distort or remove physical cues, exacerbate the results of bad lighting or sound quality, reduce trust, or impair emotional connection. All of these effects can have important implications for virtual court. A review of empirical studies about the remote administration of justice identifies some of the effects that may result from using videoconferencing for court proceedings. Key prior studies have found that

videoconferencing increases bail in criminal cases and decreases asylum grant rates in immigration cases. At least one major study has previously surveyed defense attorneys, prosecutors, and judges (in Texas) to assess the move to virtual court as a result of COVID. Past studies serve as a reminder that, though videoconferencing can often mirror the mechanics of an in-person judicial proceeding, it may lead to systematic distortions in case outcomes.

## **QUANTITATIVE STUDY COMPONENT: METHODS, DEMOGRAPHICS, AND ANALYSIS**

We conducted a national survey of National Association of Criminal Defense Lawyers (NACDL) members in late summer 2020. Our core objective was to capture practicing defense attorneys' perspectives on how the COVID-related rollout of virtual court proceedings has affected their practice and the criminal legal system. The survey contained 31 substantive questions and 10 demographic questions. Broadly speaking, we designed the survey to capture: (1) the types of criminal proceedings that are being conducted virtually; (2) the technology platforms and features being used in virtual proceedings; (3) what technological difficulties defense attorneys have faced in the shift to virtual proceedings; and (4) whether the shift to virtual proceedings has inhibited attorney-client communication or compromised access to justice.

Our survey sample consisted of 240 defense attorneys practicing in the state court system throughout the United States. Roughly half (47.3%) of the attorneys in our sample are institutional public defenders, with the majority of the respondents (63.7%) primarily handling non-capital felony cases. Approximately 11% of the attorneys primarily handle juvenile cases. A plurality of attorneys (42.9%) practice in urban areas, with 13.8% and 15.0% practicing in suburban and rural areas, respectively. Just over half (56.1%) of the respondents identified as male, and 81.7% of the respondents were white. Interestingly, 55.4% of the respondents have been practicing attorneys for at least 21 years, with only 11.3% having practiced for five years or fewer. In addition, our sample contains a disproportionately high percentage of respondents from Florida (13.8%), relative to both the national population (6.5%) and NACDL's membership as a whole (6.8%). We cannot claim that our final sample is nationally representative, or even that it is representative of the NACDL's overall membership class.

Nearly all of the defense attorneys surveyed (96%) used video-conferencing technology for criminal proceedings or communications with clients. The most widely used video-conferencing technology platform is Zoom, with 74.6% of attorneys using Zoom for virtual criminal proceedings. Defense attorneys have utilized a variety of features within Zoom and other video-technology conferencing platforms, including breakout rooms (51.3%), share screen (63.8%), and private chat (43.8%). Differences in the use of these features emerge between attorneys primarily practicing in urban, suburban, and rural jurisdictions. In particular, rural attorneys were substantially less likely to utilize both the share screen and private chat features built into most video-conferencing platforms. An overwhelming majority of our respondents reported experiencing technical difficulties during virtual proceedings, with the most pervasive problem being poor audio quality (78.3%), followed by poor video quality (60.4%).

Two-thirds of respondents (66.7%) reported that when initial appearances, arraignments, and bail-related hearings are conducted virtually, all of the key actors—the defendant, the defense attorney, the prosecutor, and the judge—appear virtually. Roughly 10% of attorneys reported that the defendant is typically the only actor appearing virtually, with just 2.9% of attorneys reporting that only the defendant and defense attorney usually appear virtually.

While a majority reported that they always or usually conduct first appearances virtually, this percentage drops dramatically for later substantive proceedings. Importantly, among initial criminal proceedings (first appearances and bail hearings), a higher percentage of attorneys report conducting these types of hearings virtually for in-custody defendants than for out-of-custody defendants. For instance, bail-related hearings always or usually occurring virtually for 72.2% of in-custody defendants and 46.1% of out-of-custody defendants. By the point of trial, the percentage of attorneys reporting that jury pre-screening, jury *voir dire*, or the actual trial are always or usually conducted using video-conferencing technology dips below 5% for both in-custody and out-of-custody defendants. Even though very few virtual trials have taken place, the data indicates that plea hearings and sentencing hearings often occur virtually, with statistically significant differences between proceedings involving in-custody and out-of-custody defendants.

Only a small percentage of attorneys have refused to conduct initial criminal proceedings (such as first appearances and bail hearings), change of plea hearings, and sentencing hearings virtually. A relatively large percentage of attorneys, however, have refused to conduct evidentiary hearings (21.2%) and trials (28.3%) virtually.

Survey respondents believe that both in-custody and out-of-custody defendants lack consistent access to the technology and private spaces conducive to virtual criminal proceedings.

Some 50.7% of attorneys reported that out-of-custody defendants have access to the internet all or most of the time; 67.3% of attorneys reported that out-of-custody defendants have access to smartphones all or most of the time; 35.3% of attorneys reported that out-of-custody defendants have access to a tablet or computer all or most of the time; and 56.4% of respondents reported that out-of-custody defendants have access to a private space all or most of the time. Survey respondents also reported that their in-custody defendants have more limited access to technology and private spaces than out-of-custody defendants.

Two-thirds of respondents (66.3%) agreed or strongly agreed that the shift to virtual proceedings hurt client communication. Among the attorneys who agreed or strongly agreed that attorney-client communication has been hurt, 81.1% reported that the shift to virtual proceedings inhibited their ability to engage in confidential conversations with their clients; 93.7% reported that the shift created difficulties building relationships with their clients; 83.7% reported that the shift adversely impacted attorneys' ability to share discovery with their clients; 67.9% reported that the shift made it more difficult to maintain contact with their clients; and 14.5% reported another difficulty.

Some 36.2% of respondents stated that for purposes of general communication, they are only rarely or sometimes able to reach their clients when needed. The results increased when we asked specifically about *confidential* client communications, with 49% reporting they are only rarely or sometimes able to reach their clients for confidential communications. Given that our survey also revealed that both in-custody and out-of-custody clients consistently lack access to private spaces and technology like the Internet, computers, and smartphones, these results are perhaps unsurprising. Taken as a whole, our data shows that—at least on a descriptive level—the shift to virtual proceedings has hurt attorneys' ability to communicate with their clients.

Given the numerous technological and attorney-client communication difficulties described above, it is perhaps unsurprising that the vast majority of respondents (77.9%) agree or strongly agree that the shift to virtual proceedings has compromised access to justice. Indeed, only 7.5% of respondents do *not* believe that the shift to virtual proceedings has compromised access to justice. When asked to describe how the shift to virtual proceedings has compromised access to justice, respondents shared several key themes. Respondents consistently reported that the shift to virtual proceedings dehumanized clients and decreased clients' trust in the criminal legal system. Many respondents also explained that the shift to virtual proceedings eliminated the productive hallway conversations that often occur between defense attorneys and both prosecutors and other court actors. Ultimately, our survey data highlighted the need for further qualitative research.

## **QUALITATIVE STUDY COMPONENT: METHODS**

To supplement the quantitative survey data, the research team also conducted in-depth qualitative interviews in three discrete jurisdictions. The qualitative portion of this study involved interviews with not only defense attorneys, but also prosecutors, judges, and court employees. Using a variety of axes, geographic location, population density, size, socioeconomic diversity, political leanings, degree of local funding, and court policies (i.e., whether the jurisdiction had used remote technology prior to COVID and how aggressively it was pursuing remote court during COVID), we selected three jurisdictions to study: Miami-Dade County, Florida; Milwaukee County, Wisconsin; and the Northeast Judicial District of North Dakota.

We solicited study participants using snowball sampling and targeted outreach. Our final sample consisted of 55 interviews and 59 participants: 12 interviews in Miami-Dade County, 21 in Milwaukee County, and 22 in the Northeast Judicial District of North Dakota. Twenty interviews were with defense attorneys, 15 with judges, 14 with prosecutors, and six with court personnel. We coded these interviews using qualitative interview software (Nvivo) pursuant to an iterative closed-coding scheme.

## **QUALITATIVE STUDY COMPONENT: ANALYTICAL THEMES AND TRENDS**

Interview data revealed a number of trends that held across the three jurisdictions. The perceived efficiencies and inefficiencies of virtual court comprised one of the largest themes of the study, with almost every respondent mentioning it in some way (see Chapter 6: Efficiencies and Inefficiencies). Respondents identified innovative procedures and uses of technology sparked by the pandemic. Numerous respondents discussed the time- and cost-savings of remote proceedings for attorneys, defendants, and the state—largely driven by saved travel time. Interviewees expressed mixed feelings about wait times and convenience, noting multitasking opportunities but mourning the loss of productive informal conversations in courthouse hallways. A handful of interviewees explicitly noted that efficiencies should not be the focus, at least not at the expense of the administration of justice.

Two-thirds of respondents across the jurisdictions worried that defendants lacked access to important technology for videoconferencing (see Chapter 7: Access to Technology). They expressed concerns about access to phones (especially in North Dakota), internet connections, computers, private spaces, cameras, and smartphone applications.

Respondents described access problems as predominantly generational (affecting older defendants) or economic (affecting poorer defendants). But interviewees were divided about whether they thought that remote technology had, on the whole, increased access and increased defendants' attendance rates, or decreased access and increased the number of failures to appear.

Around two thirds of interviewees also commented on the ways in which virtual technology affected their perceptions of and interactions with defendants and others in the courtroom (see Chapter 8: Dehumanization). Four respondents reported positive changes, such as a personalization of the defendant, or observed no differences—but even these interviewees had reservations. The bulk of interviewees felt that virtual technology operated negatively, resulting in an intangible loss, fewer nonverbal cues, a reduced ability to communicate, or a dampening of emotional connections. As a consequence, several interviewees expressed concerns about a lack of empathy for the defendant, which they worried would translate into harsher sentences and lower trust in the judiciary.

Issues of access, communication, and dehumanization in videoconferencing permeated the criminal process. Defense attorneys in the sample worried about their communications with their clients (see Chapter 10: Attorney-Client Communication). They often found it harder to access their clients and maintain confidentiality, they missed the instantaneous in-court communications, and they lamented the difficulties in building trusting relationships. Further, respondents of all types worried about the effects of videoconferencing for witness examinations (see Chapter 9: Remote Witnesses). Many found it harder to assess credibility, worried about witnesses being coached or influenced, and mourned the lack of testimonial formalities. But some respondents expressed lesser concerns for less important witnesses, while others noted that videoconferencing enabled the court to hear witnesses that it might not have heard otherwise.

Just over half of interviewees felt that the pandemic-induced switch to virtual proceedings had constitutional dimensions (see Chapter 11: Constitutional Issues), though some of the issues they discussed related more to COVID than videoconferencing per se. Respondents brought up Confrontation Clause issues most frequently, noting the importance of in-person connections, physical cues, and witness credibility. Some respondents mentioned access to counsel problems, notice and due process violations (often related to defendants' inability to access technology), and fair trial rights.

Almost all interviewees divulged their preferences about videoconference court in a post-pandemic landscape (see Chapter 12: Ultimate Preferences). Their preferences were intimately tied to the issues described in the earlier sections of the report. Most

interviewees felt that contested hearings, and especially trials, should be conducted in person; some of the strongest reactions in the study came from interviewees vehemently objecting to remote jury trials. A smaller number of interviewees felt that virtual technology should almost never be used post-pandemic, or that the criminal justice system should return to its pre-COVID technology usage. However, around two dozen prosecutors, defense attorneys, and judges felt that minor hearings (status conferences, calendars, and so forth) should remain virtual post-pandemic. Interviewees divided about plea hearings and especially sentencing hearings; many thought that either (or both) very serious sentencings or especially merciful sentencings should occur in person. And throughout, respondents advocated for flexibility in the use of virtual technology, according to the case-specific needs of the defendant and the attorney.

In addition to the overall findings, this report examined jurisdiction-specific trends. Respondents in Miami emphasized the use of Zoom interpreters, the presence of corrections officers in confidential videoconferences, and the efficacy of Zoom for at least some criminal depositions (see Chapter 13: Miami-Dade County). Respondents in Milwaukee spoke at length about the use of YouTube to livestream court proceedings in that jurisdiction, exploring how the use manifests efficiencies and technical challenges, whether it creates *too much* public access, and raising concerns about privacy and intimidation of courtroom participants (see Chapter 14: Milwaukee County). And in North Dakota, respondents were particularly concerned with access to phones, courtroom formality, and the benefits and disadvantages of audio- versus videoconferencing (see Chapter 15: Northeast Judicial District of North Dakota).

## **MOVING FORWARD**

The quantitative and qualitative findings of our study are broadly consistent with past literature on videoconferencing and virtual court proceedings. The data illuminate some promising practices for virtual court, namely, the appropriateness of audioconferencing versus videoconferencing, the importance of an optimal videoconferencing setup, and the need to ensure that defendants are not prejudiced by suboptimal setups and overly informal virtual mannerisms. The generalizability of and data within this study are admittedly limited. But future researchers have ample opportunities to make meaningful contributions to the literature and provide critically important information to policymakers moving forward. In particular, future research should examine whether and how virtual technology affects case outcomes, as well as work to understand the first-hand experiences of those whose cases were processed using virtual technology and how that might affect their perceptions of the criminal legal system.

# CHAPTER 1: INTRODUCTION

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*On March 6 [2020], I started hearing at the national level what was happening in Seattle. And because of what was happening in Seattle, that the whole town shut down. There was no traffic. All sorts of things were going on. The deaths started happening.<sup>1</sup>*

*So when it first started, and in March [2020], and we thought it was going to be like Ebola . . . we weren't sure what the heck this thing was. We just locked everything down. The courthouse locked down.<sup>2</sup>*

*The experiment happened to us. So we had to scramble, like all other jurisdictions did, trying to figure out what type of platform we could come up with very, very quickly.<sup>3</sup>*

COVID changed everything, and the criminal legal system is no exception. When the pandemic hit the United States in March 2020, courthouses were forced to close alongside businesses, schools, and workplaces. But the criminal legal system could not completely shut down; core functions such as setting bail and appointing counsel needed to continue.<sup>4</sup> And so courts around the country, despite historical resistance to cameras or recording devices in courtrooms,<sup>5</sup> rapidly transitioned to virtual operations. Within the span of a few weeks—or even a few days—judges began conducting some criminal court proceedings on teleconferencing or videoconferencing platforms, Zoom foremost among them. In a handful of jurisdictions, courts went so far as to hold criminal jury trials over Zoom.<sup>6</sup>

Fast-forward to spring 2021. After more than a year of illness and fear, after countless logistical and budgetary challenges for local courts and attorneys, after months of struggling with videoconferencing platforms and wrestling with unanswered questions about their constitutionality, the end of the pandemic appeared to be in sight. Vaccinations started in earnest,<sup>7</sup> and the Centers for Disease Control and Prevention (CDC) began lifting some COVID-related restrictions.<sup>8</sup> Several of the issues confronting the criminal legal system—how to socially distance in court, whether witnesses should wear masks when testifying, and so forth—seem likely to disappear in the near future. But not virtual court. Having embraced tele- and videoconferencing for over a year, some jurisdictions are considering whether and how to use virtual court post-COVID.<sup>9</sup>

Enter this study. Because the pandemic hit so suddenly, there was no time to study the effects of virtual court—to review the literature, plan, pilot, and so on—before its implementation. In the words of one court employee, “[t]he experiment happened to us,”<sup>10</sup> leaving courts to adapt as best they could in the moment. But over the past year, this project has sought to learn from some of the defense attorneys, judges, prosecutors, and court staff who were swept up in this impromptu experiment. This study endeavors to provide policymakers with the data that they did not have time to gather prior to the COVID emergency.

This report is the product of a policy practicum at Stanford Law School taught by Professor Robert Weisberg and Debbie Mukamal, Executive Director of the Stanford Criminal Justice Center, which included seven law students. In undertaking this work, the team was aided by staff from the National Association of Criminal Defense Lawyers (NACDL), the Association for Prosecuting Attorneys (APA), the National Center for State Courts (NCSC), and Research Triangle Institute International (RTI), who are collaborating under a grant from the Bureau of Justice Assistance to examine issues relating to the Sixth Amendment.<sup>11</sup>

The focus of this research, it bears emphasizing, is not COVID. The spread of the disease in prisons or courtrooms; its effects on police investigations, case processing, and probation offices; the results of socially distanced court with plexiglass-enclosed witness stands—all of these phenomena are important and interesting areas for study, but they will ultimately be moot. It is virtual court that appears to have staying power. Unlike the other COVID workarounds, virtual court may continue to affect the lives of defendants and victims, of prosecutors and defense attorneys, of judges and court staff, for years to come. Context, of course, is important, and a few of the reported findings in this study may be inextricably intertwined with the pandemic.

Instead, readers should expect this study to focus on “virtual” or “remote” criminal court: the use of teleconferencing and (especially) videoconferencing in lieu of in-person hearings in criminal cases. The range of criminal proceedings under study includes arraignments, bail hearings, administrative proceedings, evidentiary hearings, trials, pleas, sentencing, and probation/parole hearings. Some hearings may be fully remote or fully virtual, meaning that all participants appear via electronic means like teleconferencing or videoconferencing. But partially remote hearings—those in which some participants attend live and some attend via electronic means—also fall within the purview of this study.

Additionally, this research examines only criminal proceedings, not civil ones. Some of the findings are, perhaps, transferable. But aside from occasional stray remarks from interview participants, this report exclusively deals with criminal proceedings. We leave the consequences of virtual court on civil proceedings to other researchers.

This study includes both quantitative and qualitative components. The quantitative component consists of a survey, taken by hundreds of criminal defense attorneys around the country, which enabled the researchers to distill important trends exclusively within the defense bar. To be able to capture the depth and breadth of the changes resulting from the move to virtual court,

we conducted a complementary but distinct qualitative study. This qualitative component focused on three discrete jurisdictions—Miami-Dade County, Florida; Milwaukee County, Wisconsin; and the Northeast Judicial District of North Dakota—where researchers conducted in-depth interviews with prosecutors, defense attorneys, judges, and court personnel. While this qualitative data cannot be generalized, it provides a rich and detailed insight into practitioners’ experiences with remote criminal court since COVID hit.

The trends from the two components of the study mirror one another. Some of the themes that arose in the quantitative study, such as access to technology and attorney-client communication, are discussed in greater detail in the qualitative component and emerge as individual chapters in this report. Together, the quantitative and qualitative findings provide one of the most thorough portraits of virtual criminal proceedings to date.

We hope the findings of our study add important data into an even more important debate about American criminal justice. The justice system touches, without exaggeration, tens of millions of lives. Police make approximately 10 million arrests every year.<sup>12</sup> Over 2.1 million people are incarcerated in the United States, and another 4.4 million are serving probation and parole sentences.<sup>13</sup> Over 70 million individuals—roughly three out of every ten adults—have a criminal record.<sup>14</sup> These arrests and convictions are not, of course, evenly distributed in society; they attach to a group that is “overwhelmingly poor and disproportionately people of color.”<sup>15</sup> Put bluntly: “No other country in the world imprisons so many of its racial or ethnic minorities.”<sup>16</sup>

Given that the criminal legal system affects so many so unequally, policy changes must be made with care and attention. If videoconferencing affects or skews the criminal legal system in some way, for good or for ill,<sup>17</sup> responsible policymakers must take account of these effects before they implement long-term policies. It is our hope that this research enables those policymakers to make more informed decisions, and ultimately better ones, about the functioning of criminal courts in a post-pandemic America.

## CHAPTER 2: LITERATURE REVIEW

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To frame the possible consequences of the transition to virtual criminal court, it is necessary to survey at least two major bodies of research.<sup>18</sup> The first is research on videoconferencing, as used both in court proceedings and in non-legal fields. This literature explains some of the key ways in which videoconferencing can distort perception as compared with face-to-face communication. As Section I will discuss, differences such as eye contact, nonverbal communication, lighting, and geographic separation play a crucial role in human perception, with important implications for virtual court. The second body of research looks specifically at prior empirical studies about the remote administration of justice. As discussed in Section II, that research identifies some of the effects that may result from using videoconferencing for court proceedings. It also includes the other major study that has been conducted assessing the move to virtual court as a result of COVID.

The issues discussed here are not new. U.S. courts have been using video-conference hearings for over four decades.<sup>19</sup> One scholar, after reviewing a 2002 survey of all federal district courts, concluded that approximately 85% of those courts had access to videoconferencing equipment in at least one of their courtrooms.<sup>20</sup> State courts have been using videoconferencing since the 1990s, though the use of that technology to conduct court hearings varies considerably from state to state.<sup>21</sup> Administrative bodies use videoconferencing, too: In 2013 and 2014, one-third of hearings in Social Security Offices were conducted by video.<sup>22</sup>

### TECHNOLOGY AND PERCEPTION

Much has been written about the appreciable effects of technology on perception. Some of the research is dated, and technological advancements may mitigate some of the limitations previously identified in virtual meeting systems. Nonetheless, these studies remain important sources of knowledge, especially as they relate to decisions made about bail, evidence admissibility, sentencing, and parole by videoconferencing. Some of the issues discussed here were discussed during the interviews conducted for this study. All are important to keep in mind as long as virtual court remains a feature of the criminal justice system, and they are especially important for policymakers drafting guidelines for its future use.

## CAMERA ANGLES AND EYE CONTACT

In a 2004 article, Anne Poulin argued that videoconferencing technology “inevitably skews the perception of others” by altering the viewing angle, stripping or overemphasizing some nonverbal cues, and failing to replicate normal eye contact.<sup>23</sup> In the courtroom, “those observing the defendant can decide for themselves whether to hone in on a detail or to take in a more general impression of the defendant.”<sup>24</sup> Not so with videoconferencing. A wide camera shot that includes all or most of the defendant’s body may include distracting background elements that may divert the attention of the court.<sup>25</sup> By contrast, a headshot of the defendant will cut out many nonverbal cues and “increas[e] the negative impact of harsh facial features or unattractive expressions.”<sup>26</sup> Oftentimes, corrections personnel or judges make decisions about camera angles without understanding these impacts.<sup>27</sup>

Eye contact is especially significant, according to Poulin and others, for perceptions of truthfulness.<sup>28</sup> In American culture, a failure to make eye contact triggers feelings of distrust in an observer.<sup>29</sup> Videoconferencing can prevent participants from maintaining eye contact with each other. When a videoconferencing setup employs a monitor on which the judge is displayed and a camera that is not co-located with the monitor, it becomes impossible to look at the court and at the camera simultaneously. Setups comprised of computers with a video camera embedded on the monitor somewhat alleviate these concerns. But even so, it is not possible to look directly into the camera while also watching the court’s reactions.<sup>30</sup> Videoconferencing thus cannot perfectly replicate normal eye contact, which in turn can affect how participants perceive one another. And if the speaker addresses the camera to mimic eye contact, they may deliver testimony differently than when speaking to a live individual.<sup>31</sup>

## NONVERBAL CUES

Poulin identified the inability of videoconferencing to fully capture nonverbal cues as an “insurmountable limitation.”<sup>32</sup> Nonverbal cues, including gaze, posture, gestures, and tics, add “valuable content to human interactions” by conveying “mutual attention and responsiveness” and communicating “interpersonal attitudes.”<sup>33</sup> Videoconferencing cannot effectively convey the full range of these nonverbal cues such that, for example, a headshot will overemphasize facial expressions while omitting hand gestures and other body language.<sup>34</sup>

Whether body language actually correlates with credibility and whether the average person can accurately “read” others from body language is questionable.<sup>35</sup> Nonetheless, people, including judges and juries, tend to rely on their own interpretations of body language and demeanor in evaluating a person’s credibility.<sup>36</sup> Videoconferencing may distort the way that decision-makers like judges and juries evaluate body language because it “fails to adequately capture subtle changes in tone of voice and it often misrepresents body language, skewing 93% of the testimony’s meaning.”<sup>37</sup> Moreover, videoconferencing may “exaggerate or flatten” a person’s affect, and audio transmission may “cut off the low and high frequencies” of a person’s voice, both of which impair the factfinder in assessing credibility.<sup>38</sup>

In addition to hiding some nonverbal cues, videoconferencing might alter the way in which the cues that *are* visible are perceived. One review of the impact of virtual collaboration explained that remote communication might exacerbate the fundamental attribution error, a cognitive bias that occurs when one attributes a person's actions to his or her disposition as opposed to the environmental circumstances.<sup>39</sup> For example, an observer might attribute fidgeting, diverted gaze, or similar behaviors to a person's guilt, rather than acknowledging that a court proceeding mediated by videoconferencing technology could make someone feel uneasy or alienated.<sup>40</sup>

## LIGHTING

Lighting doesn't get much attention in legal literature, so to understand its effects, one can turn to cinemaphotography. Because of its power to affect mood and perception, lighting is a key element of visual production.<sup>41</sup> Indeed, the same person making the same expression can appear youthful and happy in one lighting condition and troubled or sinister in another.<sup>42</sup> Film literature and theory have consistently supported the notion that film lighting can have a significant impact on a viewer's emotional response to a narrative.<sup>43</sup> Images that are "highly shadowed, dark, and contrasting" are often associated with danger, mystery, and evil, and characters captured in this mode are meant to be interpreted as having "evil intentions, being manipulative, and untrustworthy."<sup>44</sup> It may also more negatively impact people with dark complexions for the same reasons. Conversely, bright lighting and less contrast provoke emotional responses like joy, happiness, and honesty; characters portrayed in this light are extolled as good-hearted and lovable.<sup>45</sup> The viewer is not necessarily conscious of the associations being made in their minds by the visual effects, but filmmakers take great pains to exploit the ways in which lighting can affect interpretations of the characters and narrative.<sup>46</sup>

Transferring these lessons to the use of video conferencing, it is likely that lighting can play an important role.<sup>47</sup> Poorly lit screens could lead others to unconsciously attribute negative qualities like manipulation or untrustworthiness to a person before a court. For many persons who are utilizing video conferencing, they may have few choices when it comes to lighting conditions. And many more lack a core awareness over the impact lighting may be having on how they are perceived by others.

## AUDIO QUALITY

The audio quality on a videoconferencing (or teleconferencing) call may also distort judges' and attorneys' perceptions. As with lighting, there is little research about the effects of sound quality in court, but research from other contexts proves illustrative. In a 2018 study, researchers altered the sound quality of two audio clips of scientists speaking about engineering, physics, and genetics.<sup>48</sup> They then asked participants to listen to one of the clips and rate the quality of the information being presented.<sup>49</sup> On average, participants rated information presented with poor audio quality worse than information with high audio quality,

despite identical content.<sup>50</sup> They viewed the speaker as less intelligent, less credible, and less likable and rated the research as less important when listening to a clip with low audio quality.<sup>51</sup> The study underscored the issue of communication fluency, the notion that the ease with which information is processed can influence how people assess the quality of the information and the speaker.<sup>52</sup> Researchers note that making listeners aware of why audio quality is poor can help mitigate some of the bias against speakers but still emphasize the importance of ensuring good audio quality.<sup>53</sup>

The results of this study and general theories about communication fluency suggest that the quality of audio may have important implications for courts. Low-quality audio in court hearings might lead judges or attorneys to distrust witnesses, including defendants, undervalue their statements, just as participants discounted the scientists' talks. High audio quality demands a strong, reliable internet connection. In-custody defendants are restricted to the videoconferencing equipment that is available in the correctional facility, while out-of-custody defendants, particularly those who are indigent, may lack access to high-quality microphones or internet connections. Moreover, both in-custody and out-of-custody persons may be unable to escape background noise, which further distorts audio quality. These limitations may lead courtroom actors to perceive speakers less favorably.

## OVERALL EFFECTS

Practitioners and scholars have postulated about the overall effects of videoconference court on decision-makers and litigants but have not reached a consensus. Some have noted that, when “the defendant is not physically present,” the “fact-finder loses the opportunity to respond to the immediacy of the defendant’s human presence and the gravity of the proceeding is diminished, arguably causing a violation of procedural and substantive due process.”<sup>54</sup> Others, including the Eastern District of Louisiana, have written that the “opportunity to continuously observe [the defendant] by video teleconference during the hearing is as effective as if [the defendant] were to appear in person before the Court.”<sup>55</sup>

Several studies may shed light on these very different perspectives. Instead of examining the effect of individual aspects of remote communication—eye contact, audio, and so on—these studies directly compare live and video communication. For example, a 1994 mock-trial study presented a child victim’s testimony to two sets of participants: One heard the testimony in person, and the other via videoconference.<sup>56</sup> Mock-jurors convicted the defendant in 60.8% of trials with videotaped testimony compared to 76.6% with in-person testimony, implying that the live testimony was more persuasive.<sup>57</sup>

Similar results follow from classroom studies. In 1995, John Storck and Lee Sproull found that engineering students who interacted only via videoconferencing formed impressions of their peers differently than those who talked face-to-face: The remote students relied “less on task competence information and more on communication competence information” in forming their opinions.<sup>58</sup> Moreover, students who interacted face-to-face developed more positive

impressions of their peers than those using videoconferencing.<sup>59</sup> In 2003, a different research team assigned undergraduates to either face-to-face or online conversations.<sup>60</sup> Participants in the face-to-face conversations reported a higher degree of closeness and self-disclosure with their conversational partners, a more satisfying experience, and a greater recall of fact.<sup>61</sup> A similar study in 2011 found that students in face-to-face conversations enjoyed their interactions more, rated their conversational partner more favorably, and experienced “higher feelings of oneness.”<sup>62</sup>

Videoconferencing introduces a slew of changes to human interaction and perception. These changes may affect how decision-makers evaluate witnesses, assess the character of defendants, weigh evidence, or decide cases. Proponents of videoconferencing note that it has brought efficiency and accessibility gains to the courts and therefore support the continued use of videoconferencing post-pandemic. Policymakers should carefully consider the effects of videoconferencing on the quality of criminal proceedings, especially as it relates to existing inequities in the criminal justice system. It is to these effects that we now turn.

## **EMPIRICAL STUDIES ON REMOTE COURT**

Numerous empirical studies apply the theories and findings discussed in the previous sections to videoconference court. This section does not purport to provide a comprehensive summary of all such studies. Instead, it provides a thorough overview of three illustrative studies, one of bail proceedings, one of asylum applications, and one of COVID-induced videoconferencing. The first two examples discussed below do not, of course, map exactly onto the videoconferencing proceedings spurred by COVID. But they serve as a reminder that, though videoconferencing can often mirror the mechanics of an in-person judicial proceeding, it may lead to systematic distortions in case outcomes. And the final example, which *is* a study of COVID-induced virtual proceedings, implies that similar distortions have taken place during the pandemic, at least within the study’s Texas-based sample.

### **COOK COUNTY BAIL STUDY**

Perhaps the most relevant empirical study on the use of videoconferencing technology is a 2010 study of bail hearings in Illinois after a policy change introduced remote hearings. In 1999, Cook County mandated that bail hearings for most felony cases be held using closed-circuit television procedure (CCTP) such that the defendant would appear remotely rather than in person.<sup>63</sup> At the time, Illinois was managing a substantial increase in crime: levels reached their peak in 1991 at 250% of the 1967 rate and stayed at more than double the 1967 level through 1998.<sup>64</sup> The videoconference policy was intended to decrease the resulting pressure on the court system, “reduc[ing] costs without disadvantaging defendants.”<sup>65</sup> Importantly, one class of offenses—very serious felonies such as homicides and sexual assaults—was exempted from the mandate.

Shari Diamond and her colleagues set out to determine the impact of the videoconferencing mandate on bail outcomes.<sup>66</sup> They found “a sharp increase in the average amount of bail set in cases subject to CCTP, but no change in cases that continued to have live hearings.”<sup>67</sup> Relying on bail outcome data from 1991 (eight years before the mandate) to 2007 (eight years after), the researchers found that the average bond for felonies subject to videoconferencing mandate increased by 51%. The average bond amount for felonies not subject to the mandate rose by only 13%.<sup>68</sup> When examined separately, homicides (which were not subject to the mandate) showed virtually no change in the average bond.<sup>69</sup>

The research team suggested a number of possible explanations for the bail discrepancies, though it could not isolate the precise causes with certainty. Low video quality or small monitors could have affected the ability of the judge to adequately view the defendant.<sup>70</sup> The low-contrast, black-and-white CCTP feed made defendants with dark skin particularly difficult to see.<sup>71</sup> The CCTP arrangement in the jails required defendants to look at a monitor—not at the camera—in order to see the judge and the courtroom; defendants thus appeared to be “avoiding direct eye contact.”<sup>72</sup> Defense attorneys, who were not co-located with their clients, had a limited opportunity to solicit information that would improve a client’s case for pre-trial release.<sup>73</sup> Finally, some inherent aspects of live, in-person interactions might affect credibility assessments.<sup>74</sup> If this is the case, the researchers note, videoconference hearings may threaten the quality of bail decisions and encourage dehumanization that results in harsher case outcomes.<sup>75</sup>

These findings have important implications for fact-finding and credibility judgments in remote regimes writ large. Courts have historically viewed observations of demeanor and evaluations of credibility as critical aspects of the factfinding process.<sup>76</sup> The “significant deference granted the initial factfinder flows directly from this principle,” as trial judges may make nuanced observations not captured in the written record.<sup>77</sup> As the Supreme Court noted in *United States v. Raddatz*: “In doubtful cases the exercise of [the original factfinder’s] power of observation often proves the most accurate method of ascertaining the truth.”<sup>78</sup> When a defendant appears on a video monitor, attorneys fear that there is a “diminution of the court’s ability to gauge such matters as the defendant’s credibility, his competence, his physical and psychological wellbeing, his ability to understand the proceedings, and the voluntariness of any waivers of rights that the defendant may be called upon to make— all of which raise serious procedural due process concerns.”<sup>79</sup> The empirical findings of Diamond et al.’s study are especially important because a lack of such evidence has led courts to reject due process concerns about remote justice prior to the pandemic.<sup>80</sup>

Of course, the precise applicability of Diamond et al.’s study to pandemic-related video conferencing is uncertain. The quality of videoconferencing equipment has drastically improved, and color videos are now the norm; however, poor Wi-Fi connectivity or outdated equipment—especially in underfunded jails—may cause low contrast, resolution, and overall quality even today. Additionally, pandemic-induced videoconferencing regimes, like the Cook County mandate, restrict contemporaneous attorney-client communication. But unlike CCTP, modern video conferencing platforms include the option for breakout rooms, wherein the attorney and client can communicate confidential information.

## IMMIGRATION COURT ASYLUM STUDY

Other empirical studies—including and especially a 2008 study by Frank Walsh and Edward Walsh—have evaluated the use of remote technology in immigration proceedings. In 1996, the Immigration and Nationality Act was amended to allow for videoconferenced removal hearings without the respondent’s consent.<sup>81</sup> Today, videoconferencing is commonly used in immigration proceedings; in many cases, respondents and judges interact solely via videoconference, with no in-person component.<sup>82</sup> Numerous articles and studies have reported on the negative effects of videoconferencing on immigration proceedings since the legislative change.<sup>83</sup>

Walsh and Walsh’s study set out to determine whether videoconference removal proceedings constitute a “McDonaldization” of justice, wherein the quantity of verdicts matters more than their quality.<sup>84</sup> Using data from the Executive Officer for Immigration Review (EOIR), the researchers found that the 2005 grant rate for asylum applicants whose cases were heard in person was 38.20%, while the grant rate for those heard by videoconference was 23.27%.<sup>85</sup> The 2006 numbers were even more disparate, with grant rates of 44.87% and 21.86%, respectively.<sup>86</sup> Even after controlling for the much larger number of in-person proceedings and the unequal rates of representation by counsel, the results were still statistically significant.<sup>87</sup>

The researchers concluded that videoconferencing “does not result in fair and efficient immigration hearings” because it “alters the way that a judge perceives an asylum applicant’s testimony and influences the outcome of a hearing.”<sup>88</sup> By way of explanation, they suggested that videoconferencing might stymie the emotional connection between the judge and the applicant.<sup>89</sup> Personal testimony is often the only tool available for applicants, many of whom lack the resources to provide other evidence or corroborating witnesses.<sup>90</sup> But when that testimony occurs by video, a judge may feel artificially distant from the applicant, form less of an emotional connection, and perceive the applicant as less credible.<sup>91</sup> If this “distance” reduces emotional connection regardless of the quality of the videoconferencing equipment, this may be an irreparable defect of videoconferencing, not just in immigration cases but in criminal cases as well.<sup>92</sup>

Making matters worse, judges may confuse the distorted “media images” provided by videoconferencing with reality; that is, judges (like all humans) may have trouble mentally compensating for the effects of videoconferencing.<sup>93</sup> While many believe “that the confusion of mediated life and real life . . . can be corrected with age, education, or thought,” a “great deal of evidence . . . shows this conclusion is not true.”<sup>94</sup> “If the image on the screen appears untrustworthy or unemotional, then the Judge will unconsciously think of the applicant as untrustworthy or unemotional.”<sup>95</sup> As Aaron Haas has noted, this conflation of media images with real life has “profound consequences.”<sup>96</sup> If nonverbal cues are essential to communication, videoconferencing distorts those cues, and an observer cannot distinguish videoconferencing from reality, then the observer may draw more negative conclusions about a speaker appearing remotely than one appearing in-person.<sup>97</sup>

Taken together, these studies suggest that policymakers should pay attention to the potential and identified consequences of videoconferencing as they develop nuanced policies for its use post-COVID; they also reinforce the need of additional evaluation to more fully understand the range of effects of video proceedings.

## TEXAS STUDY ON VIRTUAL COURT DURING COVID

Earlier this year, Jenia Turner published an important quantitative study of 568 defense attorneys, prosecutors, and judges who practice in Texas regarding their experiences with virtual court before and during COVID.<sup>98</sup> Turner's article provided a thorough review of the principal advantages and disadvantages arising from video proceedings as identified by courts, policymakers, and scholars.<sup>99</sup> Among the advantages she identified are cost savings and efficiency for defendants, lawyers, and witnesses, who can participate without having to travel to court.<sup>100</sup> She noted, though, that "[m]ore extensive and systematic studies are needed to determine whether and when [videoconferencing] yields net financial benefits, and how its costs and benefits are distributed."<sup>101</sup> In detailing the disadvantages that have been attributed to videoconferencing through surveys and other studies, she noted five areas of concern: (1) virtual court might impair the quality of defense representation; (2) defendants might have difficulty hearing, observing, or understanding proceedings; (3) defendants might become disengaged and lose confidence in the court system; (4) credibility assessments of defendants and witnesses might be impaired; and (5) lawyers, judges and jurors might be distracted or losing focus because of the demands of technology.<sup>102</sup> As with the advantages, she noted that further research is necessary to determine how these negative consequences play out across jurisdictions and different types of criminal proceedings.<sup>103</sup>

Turner's survey results indicate a large increase in the use of video-conferencing during COVID, with 92% of respondents participating in online proceedings since the pandemic.<sup>104</sup> Her respondents most commonly participated in remote bail, plea, and sentencing hearings.<sup>105</sup> When asked about the advantages associated with virtual proceedings, respondents agreed that they save time or resources, though there was variation between prosecutors, judges, and defense attorneys.<sup>106</sup> In addition, most of the survey respondents stated that virtual proceedings "help resolve cases more expeditiously" and "help end pretrial detention of defendants more quickly," though there was less agreement about these advantages than the time and resource savings benefits.<sup>107</sup> A majority of respondents also agreed that online proceedings have the benefit of increasing access to the public, with prosecutors more likely to recognize this advantage than defense attorneys.<sup>108</sup>

Turner also surveyed respondents about ten potential drawbacks of online proceedings. The drawbacks that respondents most frequently identified as being sometimes, often or always present were: (1) "online proceedings present special challenges in obtaining or preparing the relevant paperwork (e.g., signatures, fingerprints)"; (2) "the online setting makes it difficult for the parties to assess, and where necessary, challenge witness accounts or credibility"; and (3) "the online setting makes it difficult for the parties to present the case effectively."<sup>109</sup>

Agreement about these disadvantages varied by actor type, with a greater percentage of defense attorneys citing these disadvantages than prosecutors or judges;<sup>110</sup> these differences were statistically significant.<sup>111</sup> Judges and defense attorneys also identified attorney-client confidentiality as the fourth most common problem (prosecutors weren't asked about this disadvantage).<sup>112</sup>

Turner also surveyed respondents about the perceived effect of virtual proceedings on case outcomes, specifically if they were more likely to produce decisions more favorable to the defense, to the prosecution, or make no difference on the outcome.<sup>113</sup> Here again, she found significant differences depending on the actor: 72.% of defense attorneys believed that online proceedings led to worse outcomes for the defense, but only 5% of judges and prosecutors agreed. Most judges (81.5%) and prosecutors (75%) believed that virtual proceedings didn't affect the outcome of the proceeding.<sup>114</sup>

Finally, Turner surveyed respondents about their preferences for the use of online proceedings in the future, after COVID. 70.3% of prosecutors wanted to see online and video-conferenced proceedings used more frequently after the pandemic, as compared to 59.8% of judges and 47.6% of defense attorneys.<sup>115</sup> Among prosecutors, though, there was statistically significant variation between those who practiced in state and federal court: 37.5% of federal prosecutors wanted to see more online proceedings after the pandemic, compared with 72.9% of state prosecutors.<sup>116</sup>

As the use of virtual court is examined and considered for future use, it would be wise to bear in mind previous research. Being aware of previously documented benefits and shortcomings may shape policies and procedures, as well as establish future research to be undertaken. We now turn to findings from our research.

# CHAPTER 3:

## QUANTITATIVE ANALYSIS

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### SURVEY METHODOLOGY, DEMOGRAPHICS OF SURVEY RESPONDENTS

In late summer 2020, we conducted a national survey of NACDL members using the Qualtrics online survey platform. The purpose of quantitative research is to generate knowledge and observe the frequency of phenomena.<sup>117</sup> Our core objective was to capture practicing defense attorneys' perspectives on how the COVID-related rollout of virtual court proceedings has affected their practice and the criminal legal system. We beta-tested our survey with members of NACDL's Public Defense Committee and Rural Defender Steering Committee; the final survey contained 31 substantive questions and 10 demographic questions. Broadly speaking, we designed the survey to capture: (1) the types of criminal proceedings that are being conducted virtually; (2) the technology platforms and features being used in virtual proceedings; (3) what technological difficulties defense attorneys have faced in the shift to virtual proceedings; and (4) whether the shift to virtual proceedings has inhibited attorney-client communication or compromised access to justice. A full copy of the survey questions is provided in Appendix 2.

On August 25, 2020, NACDL emailed its membership indicating NACDL was partnering with the Stanford Criminal Justice Center on a study to assess the impact of the shift to virtual court proceedings and encouraging the completion of the survey. Almost 8,100 NACDL members received the survey.<sup>118</sup> According to internal data from NACDL, 2,427 of those initial recipients (roughly 30%) opened this email, with 162 of those 2,427 individuals (roughly 6.9%) clicking on the survey link 234 times. Two reminder emails were sent out by NACDL on August 31, 2020, and September 3, 2020, respectively. The National Juvenile Defender Center (NJDC) also sent the survey to its members on September 30, 2020, adding roughly 20 respondents to our full survey sample.

The Qualtrics survey response data shows that the survey was ultimately started 597 times and completed 330 times, meaning that the completion rate was approximately 55.3%. Before analyzing the survey data, we restricted our sample to defense attorneys who practice primarily in state court because our qualitative research focused solely on state court actors. We further limited our sample to individuals who completed 100% of the survey. The survey data generated by Qualtrics does not uniquely identify each *person* who started the survey, and our survey's "save and continue" option only saved respondents' answers for one week. As such, our full dataset potentially double counts individuals who started the survey at one

time but completed it more than a week later. It is unlikely that a defense attorney would have completed the entire survey multiple times, so restricting our final sample to respondents who completed 100% of the survey avoids this double-counting problem.

Our final sample contains 240 survey respondents. Roughly half (47.3%) of the attorneys in our final sample are institutional public defenders, with the majority of the respondents (63.7%) primarily handling non-capital felony cases. Approximately 11% of the attorneys in our final sample primarily handle juvenile cases. A plurality of attorneys (42.9%) practice in urban areas, with 13.8% and 15.0% practicing in suburban and rural areas, respectively.<sup>119</sup> Just over half (56.1%) of the respondents identified as male, and 81.7% of the respondents were white.<sup>120</sup> Interestingly, 55.4% of the respondents have been practicing attorneys for at least 21 years, with only 11.3% having practiced for five years or fewer.<sup>121</sup> In addition, our sample contains a disproportionately high percentage of respondents from Florida (13.8%), relative to both the national population (6.5%) and NACDL's membership as a whole (6.8%).<sup>122</sup> A detailed demographic breakdown of our final survey sample is provided in Tables 1–9 in Appendix 1.

The remainder of this section of the report is a quantitative analysis of our final survey sample. Before presenting our quantitative analysis, it is important to acknowledge the imperfections in our dataset. Our survey was sent exclusively to defense attorneys, and we cannot claim that our final sample is nationally representative or even that it is representative of NACDL's overall membership. Nevertheless, as far as we are aware, this is the only national survey of its kind, and our survey data paints a valuable—if only descriptive—picture of how the shift to virtual proceedings during the COVID pandemic has affected criminal defense attorneys and state-level criminal courts.

## **QUANTITATIVE RESULTS**

### **OVERALL TRENDS**

As is perhaps expected, nearly all of the attorneys surveyed (95.8%) report having used video-conferencing for criminal proceedings or communications with defendants facing criminal charges since the pandemic began.<sup>123</sup> This percentage is fairly consistent across the three main types of jurisdictions: urban, rural, and suburban. Nearly all attorneys practicing in urban areas (96.1%) and suburban areas (97.0%) indicated that they have utilized video-conferencing technology, with that percentage dropping slightly to 88.9% for attorneys practicing in rural areas. When proceedings are conducted virtually, they are usually live-streamed over the internet roughly 27.1% of the time.<sup>124</sup>

Amongst the survey respondents, the most widely used video-conferencing technology platform is Zoom, with 74.6% of attorneys using Zoom for virtual criminal proceedings.<sup>125</sup> In a distant second is WebEx, which has been used by 32.1% of the respondents. Defense attorneys have utilized a variety of features within Zoom and other video-technology conferencing platforms, including breakout rooms (51.3%), share screen (63.8%), and private chat (43.8%).<sup>126</sup> Notably, attorneys who have been practicing for five or fewer years were much less likely to report that they have used the private chat feature than more experienced attorneys. Only 29.6% of these newer attorneys have used private chat, while over 40% of the attorneys in all of the other length-of-practice brackets (6-10 years of experience, 11-20 years of experience, and 21 or more years of experience) have done so.

The use of the various video-conferencing technology features also differs between attorneys practicing in urban, rural, and suburban areas. In rural areas, a much lower percentage of attorneys reported using breakout rooms, share screen, and private chat. In rural areas, only 41.7% of attorneys reported using breakout rooms, relative to 50.5% in urban areas and 45.5% in suburban areas. Importantly, though, these differences are not statistically significant. We conducted simple chi-square tests to determine whether there are statistically significant differences in the percentage of survey respondents using breakout rooms by type of jurisdiction. The p-value from a chi-square test comparing rural and urban areas is 0.36, and the p-value from a chi-square test comparing rural and suburban areas is 0.75.<sup>127</sup>

The differences between the three main types of jurisdictions in the use of video-conferencing features are more striking when we focus on the use of the share screen and private chat functions. Rural attorneys were substantially less likely to utilize both the share screen and private chat features built into most video-conferencing platforms. Only 50.0% of attorneys in rural areas reported using share screen, relative to 65.1% in urban areas and 72.7% in suburban areas.<sup>128</sup> With respect to the use of private chat, less than a third (30.6%) of rural attorneys have used this feature, compared to 42.7% of urban attorneys and 51.5% of suburban attorneys. Only the difference between rural and suburban areas, however, is statistically significant.<sup>129</sup>

As depicted in Figure 1, an overwhelming majority of our respondents reported experiencing technical difficulties during virtual proceedings.<sup>130</sup> According to our full sample of respondents, the most pervasive problem was poor audio quality (78.3%), followed by poor video quality (60.4%). Issues of poor audio quality were especially prevalent in rural areas. Approximately 88.9% of attorneys practicing in rural areas reported experiencing poor audio quality in virtual proceedings, compared to 81.6% of urban attorneys and 63.6% of suburban attorneys. As with the use of the private chat feature, only the difference between rural and suburban areas is statistically significant.<sup>131</sup>

**Figure 1. Technological Challenges Created by the Shift to Virtual Proceedings (By Type of Jurisdiction)**

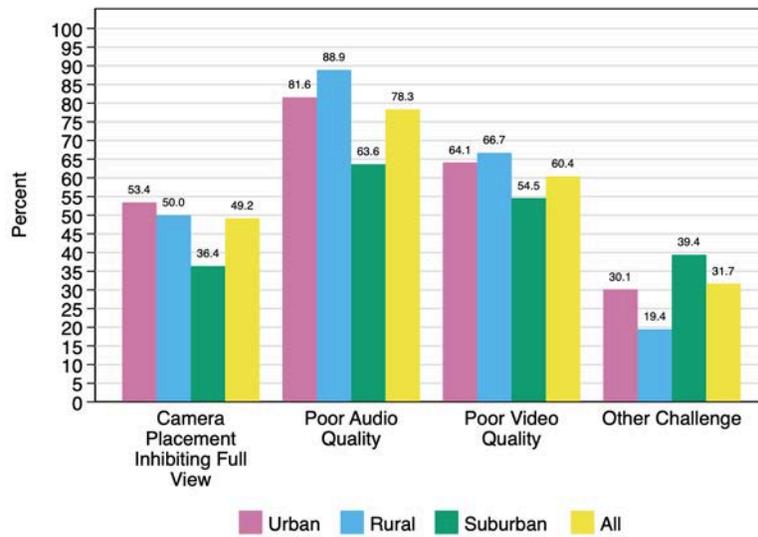
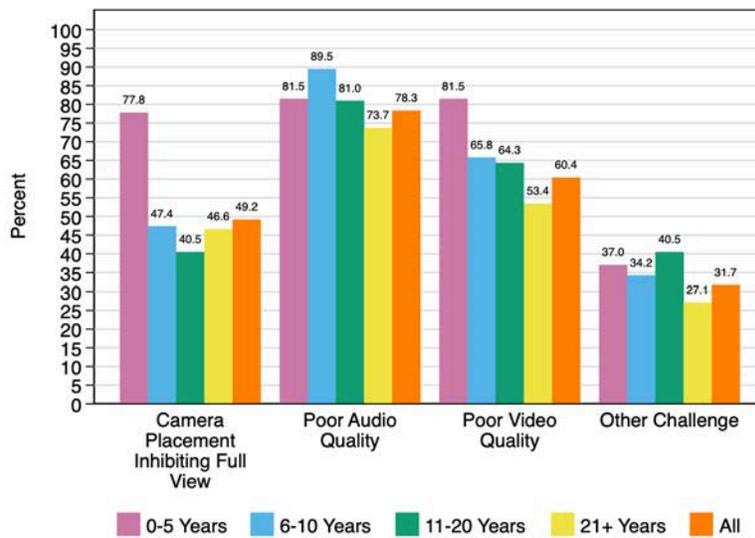


Figure 2 shows that attorneys with five or fewer years of practice were 58% more likely to report that camera placement inhibited full view than the average attorney (77.8% vs. 49.2%), and they were significantly more likely to report that camera placement inhibited full view than every other length-of-practice bracket.<sup>132</sup> These newer attorneys were also the most likely to report poor video quality, with 81.5% of attorneys with five or fewer years of experience responding that they have experienced poor video quality during virtual proceedings. Importantly, however, only the comparison between these newer attorneys and attorneys with at least 21 years of experience yielded a statistically significant result.<sup>133</sup>

**Figure 2. Technological Challenges Created by the Shift to Virtual Proceedings (By Length of Practice)**



## HYBRID USE OF VIDEO-CONFERENCING TECHNOLOGY

Two-thirds of respondents (66.7%) reported that when initial appearances, arraignments, and bail-related hearings are conducted virtually, all of the key actors—the defendant, the defense attorney, the prosecutor, and the judge—appear virtually.<sup>134</sup> Roughly 10% of attorneys reported that the defendant is typically the only actor appearing virtually, with just 2.9% of attorneys reporting that only the defendant and defense attorney usually appear virtually.

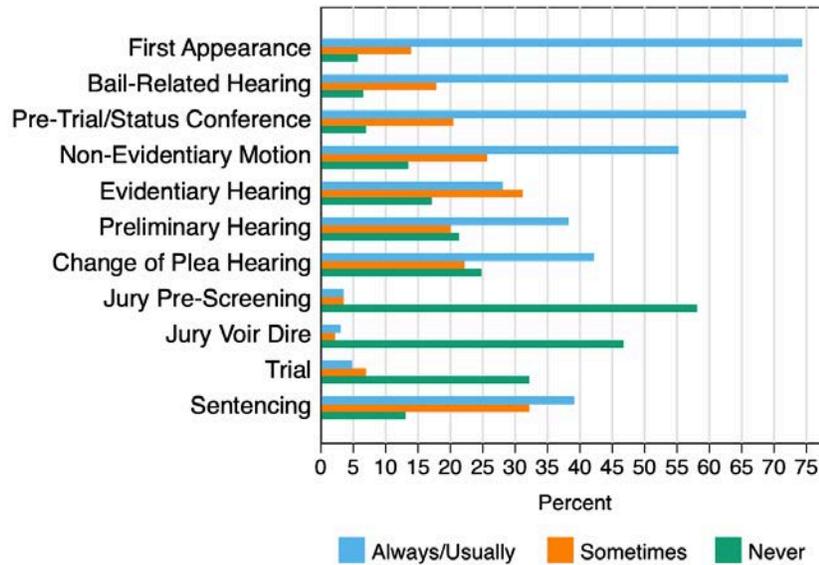
The picture is remarkably similar for subsequent criminal proceedings, which we defined in our survey as any criminal proceeding besides initial appearances, arraignments, and bail-related hearings.<sup>135</sup> For subsequent criminal proceedings, 61.3% of attorneys reported that all key actors appear via video-conferencing technology when the proceedings are conducted virtually. Moreover, 7.5% said that just the defendant appeared virtually, and 2.1% of attorneys responded that only the defendant and defense attorney usually appear virtually. Taken together, this data suggests that while hybrid use of video-conferencing does occur, it is rarely the case that the *only* key actors appearing virtually are the defense attorney and defendant.

## USE OF VIDEO TECHNOLOGY BY TYPE OF PROCEEDING

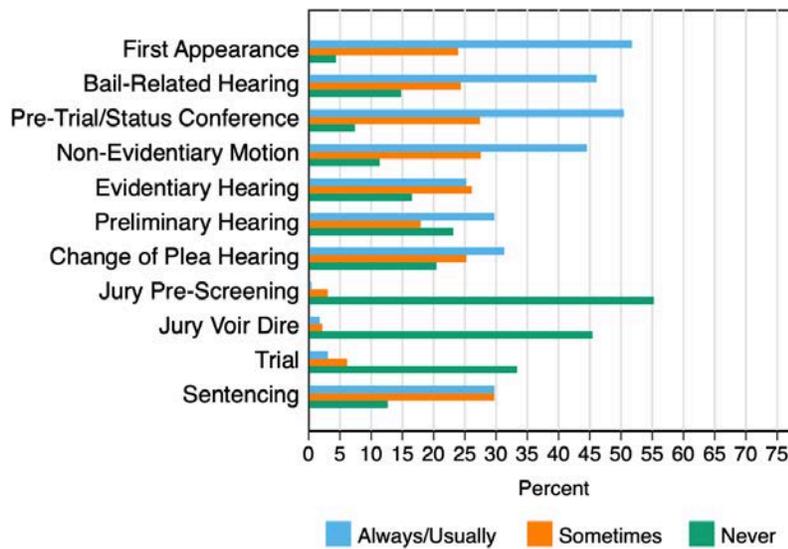
Figure 3 depicts the types of proceedings conducted virtually, and responses are demarcated by whether the defendant is in-custody or out-of-custody.<sup>136</sup> Figure 3 suggests that defense attorneys generally conduct initial criminal proceedings (such as first appearances and bail-related hearings) using video-conferencing technology. Importantly, though, even among these initial criminal proceedings, a higher percentage of attorneys report conducting these types of hearings virtually for in-custody defendants than for out-of-custody defendants. As shown by the blue bars in Figure 3, 74.4% of attorneys report that first appearances always or usually occur virtually for in-custody defendants, compared to 51.7% for out-of-custody defendants—a roughly 30% decrease that is statistically significant at the 5% level.<sup>137</sup> A similar trend exists for bail-related hearings, with bail-related hearings always or usually occurring virtually for 72.2% of in-custody defendants and 46.1% of out-of-custody defendants. As with first appearances, this sharp difference between in-custody and out-of-custody defendants is statistically significant at the 5% level.<sup>138</sup>

**Figure 3. Types of Proceedings Conducted Virtually Using Video-Conferencing Technology (By Defendant Type)**

**In-Custody Defendants**



**Out-of-Custody Defendants**



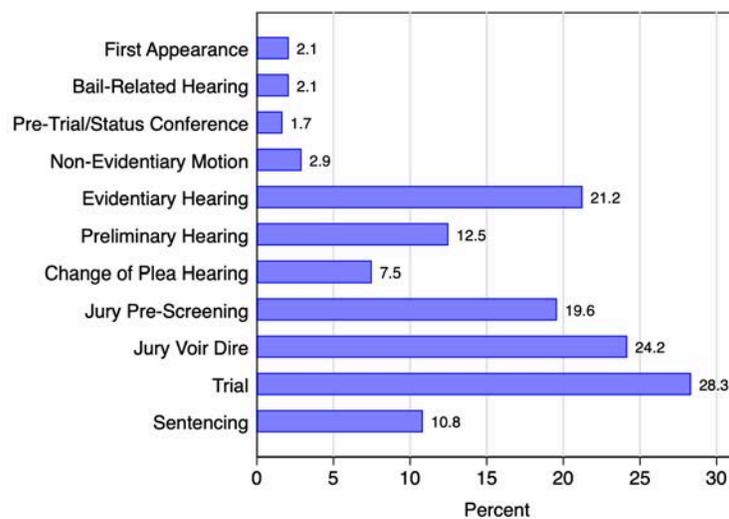
Regardless of whether the defendant is in-custody or out-of-custody, however, there is a sharp decrease in the percentage of defense attorneys conducting hearings virtually as the case progresses and the proceedings become more complex. Only 28.1% of attorneys report that evidentiary hearings are always or usually conducted virtually for in-custody defendants, and that percentage is similar (and statistically indistinguishable) for out-of-custody defendants (25.2%).<sup>139</sup> By the point of trial, the percentage of attorneys reporting that jury pre-screening, jury *voir dire*, or the actual trial are always or usually conducted using video-conferencing technology dips below 5% for both in-custody and out-of-custody defendants. Indeed, as

evidenced by the green bars in Figure 3, the data shows that a large percentage of respondents reported that these proceedings are *never* conducted virtually.<sup>140</sup>

Even though very few virtual trials have taken place, the data indicates that plea hearings and sentencing hearings often occur virtually. In terms of plea hearings, attorneys report that these hearings always or usually take place virtually 42.2% of the time for in-custody defendants and 31.3% of the time for out-of-custody defendants. For the purpose of sentencing, 39.1% of attorneys reported that in-custody defendants' sentencing hearings always or usually occur virtually, relative to 29.7% for out-of-custody defendants. For both plea and sentencing hearings, the sharp differences between in-custody and out-of-custody defendants are statistically significant.<sup>141</sup>

Figure 4 plots the percentage of defense attorneys who have refused to conduct each type of proceeding virtually, and the data from this survey question is consistent with Figure 3.<sup>142</sup> Only a small percentage of attorneys have refused to conduct initial criminal proceedings (such as first appearances and bail hearings), change of plea hearings, and sentencing hearings virtually. A relatively large percentage of attorneys, however, have refused to conduct evidentiary hearings (21.2%) and trials (28.3%) virtually.

**Figure 4. Proceedings You/Your Office Refused to Conduct Virtually**

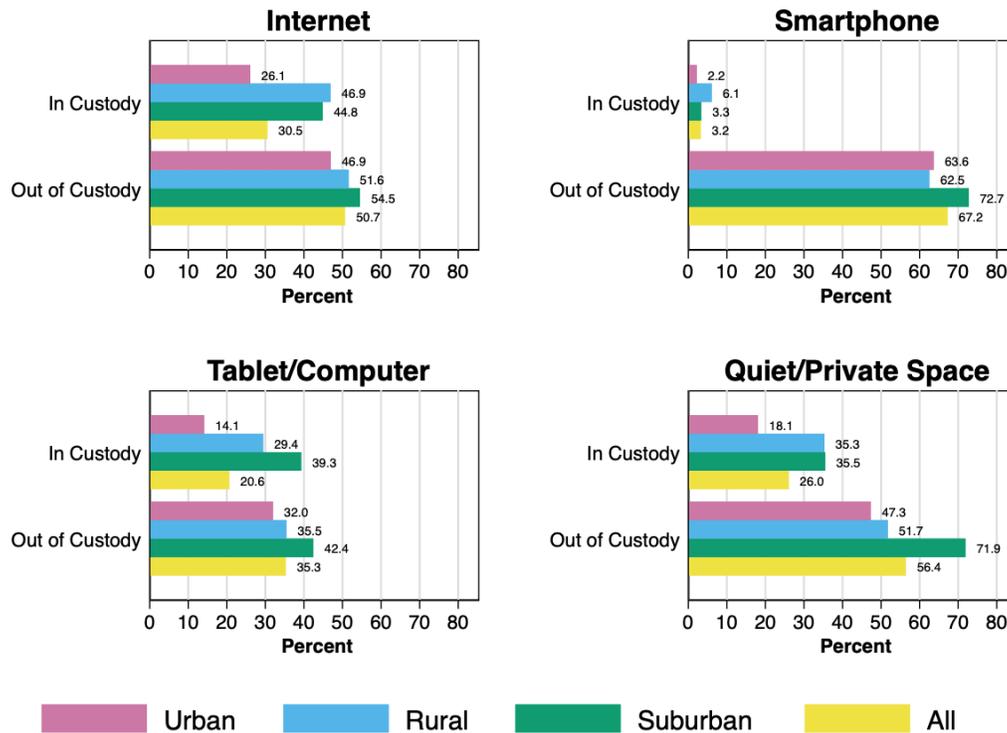


## DEFENDANTS' ACCESS TO TECHNOLOGY AND PRIVATE SPACES

As shown in Figure 5, our data indicates that survey respondents believe that both in-custody and out-of-custody defendants lack consistent access to the technology and private spaces conducive to virtual criminal proceedings.<sup>143</sup> In particular, 50.7% of attorneys reported that out-of-custody defendants have access to the internet all or most of the time; 67.3% of attorneys reported that out-of-custody defendants have access to smartphones all or most of the time; 35.3% of attorneys reported that out-of-custody defendants have access to a tablet or computer all or most of the time, and 56.4% of respondents reported that out-of-custody

defendants have access to a private space all or most of the time. Attorneys practicing in suburban areas tended to report that their out-of-custody defendants had better access to both technology and private spaces, but only the difference between the proportion of urban and suburban attorneys reporting that their out-of-custody defendants had consistent access to a private space is statistically significant.<sup>144</sup>

**Figure 5. Do Defendants Have Access to the Specified Technology or a Private Space All or Most of the Time?**



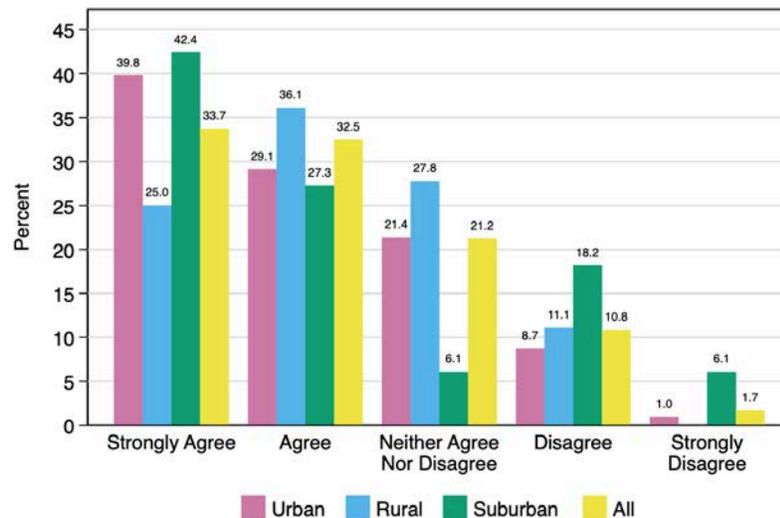
Our survey respondents also reported that their in-custody defendants have more limited access to technology and private spaces than out-of-custody defendants. Given that incarcerated individuals are prohibited from possessing cell phones, it is perhaps unsurprising that only 3.2% of attorneys noted that in-custody defendants have access to a smartphone all or most of the time. Similarly, only 30.5% of attorneys reported that in-custody defendants consistently have access to the internet—a 40% (and statistically significant) decrease relative to out-of-custody defendants.<sup>145</sup> Moreover, only 20.6% of attorneys reported that in-custody defendants are able to access a tablet or computer all or most of the time (compared to 35.3% for out-of-custody defendants), and 26.0% of attorneys reported that in-custody defendants consistently have access to a private space (compared to 56.4% for out-of-custody defendants). Both of these differences between in-custody and out-of-custody defendants are statistically significant.<sup>146</sup>

We also conducted hypothesis tests to assess whether there were any meaningful differences in technology access for in-custody defendants across jurisdiction types. Our survey respondents reported that in-custody defendants in urban areas were significantly less likely to have access to the internet all or most of the time than in-custody defendants in rural areas.<sup>147</sup> In addition, a significantly smaller percentage of attorneys in urban areas reported that their in-custody defendants had access to a computer or private space all or most of the time, as compared to both suburban and rural areas.<sup>148</sup>

## ATTORNEY-CLIENT COMMUNICATION

The shift to virtual proceedings also appears to have negatively impacted attorney-client communication. Roughly two-thirds of the respondents (66.3%) agreed or strongly agreed that the shift to virtual proceedings has hurt attorney-client communication.<sup>149</sup> Among the attorneys who agreed or strongly agreed that attorney-client communication has been hurt, 81.1% reported that the shift to virtual proceedings inhibited their ability to engage in confidential conversations with their clients; 93.7% reported that the shift created difficulties building relationships with their clients; 83.7% reported that the shift adversely impacted attorneys' ability to share discovery with their clients; 67.9% reported that the shift made it more difficult to maintain contact with their clients; and 14.5% reported another difficulty.<sup>150</sup>

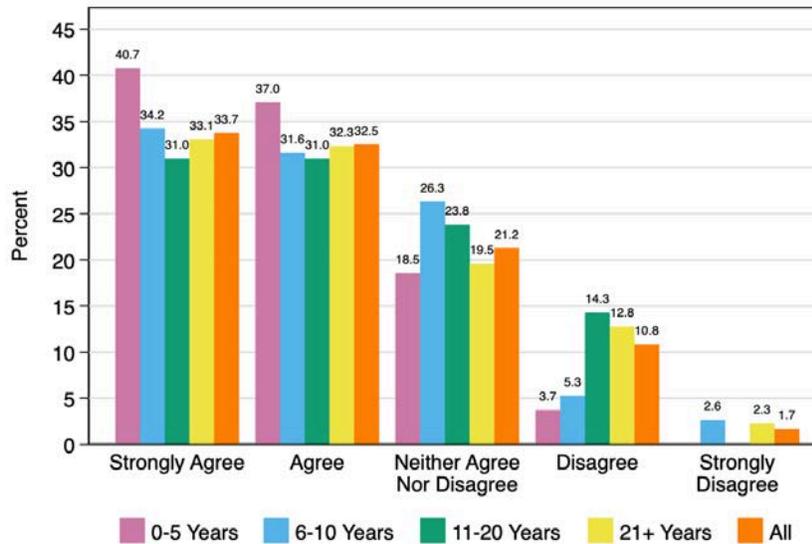
**Figure 6. Has the Shift to Virtual Proceedings Hurt Attorney-Client Communication? (by Type of Jurisdiction)**



Interestingly, Figure 6 shows that the percentage of attorneys who strongly agreed that communication has been hurt is highest in suburban areas (42.4%), compared to urban areas (39.8%) and rural areas (25.0%). None of these differences between jurisdiction types, however, are statistically significant.<sup>151</sup> Figure 7 breaks out respondents' answers by length of practice, rather than jurisdiction type.<sup>152</sup> Attorneys with five or fewer years of experience were more likely to report that they agreed or strongly agreed that attorney-client communication

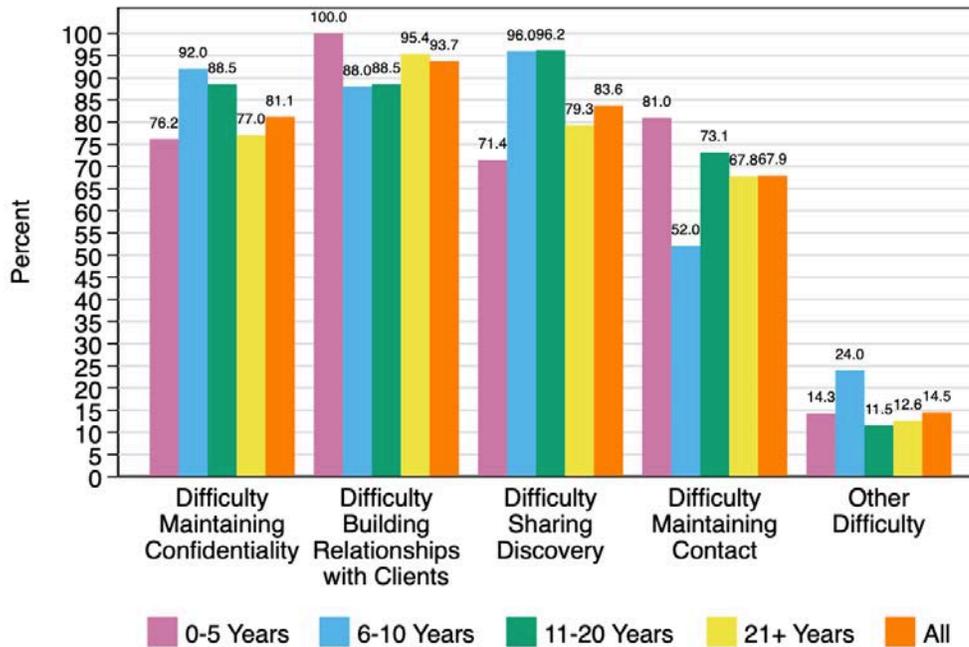
had been hurt than any other length-of-practice bracket, but these differences between newer and more experienced attorneys are not statistically significant.<sup>153</sup>

**Figure 7. Has the Shift to Virtual Proceedings Hurt Attorney-Client Communication? (by Length of Practice)**



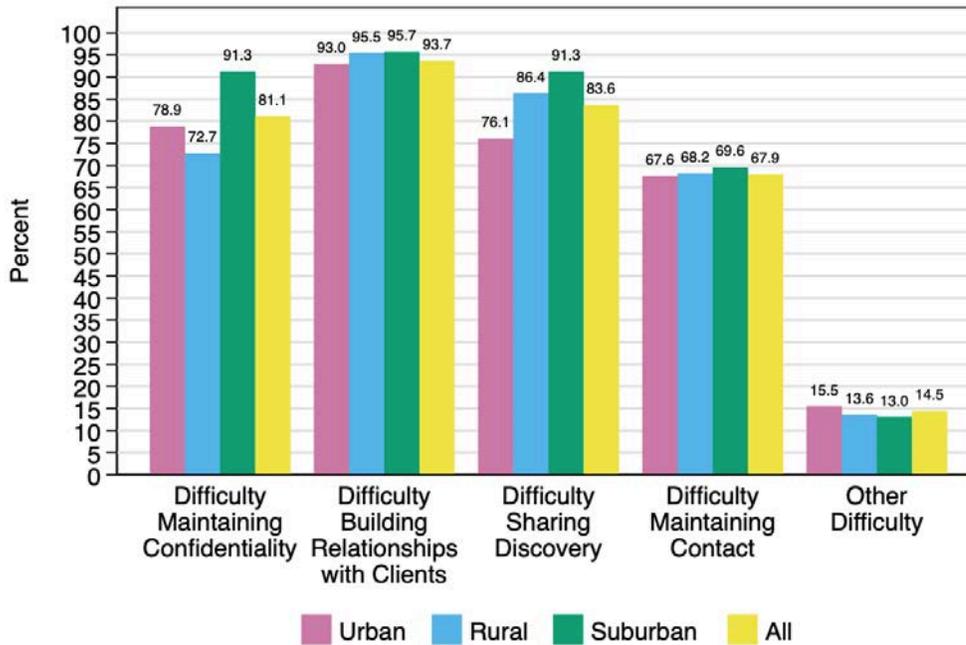
Building off Figure 7, Figure 8 plots the ways in which the shift to virtual proceedings has harmed attorney-client communication by years of practice.<sup>154</sup> The sample used to generate this figure was restricted to attorneys who agreed or strongly agreed that the increased use of video technology has harmed attorney-client communication. Attorneys with five or fewer years of experience were less likely to report difficulties in maintaining confidential communications or sharing discovery than all of the other length of practice brackets, but—as a whole—these differences were not statistically significant.<sup>155</sup> These newer attorneys were also more likely to report an increased difficulty in both building relationships with their clients and maintaining contact with their clients. Again, however, these results are largely statistically insignificant, and only the comparison between the percentage of newer attorneys reporting difficulties maintaining contact with their clients and the percentage of attorneys with 6-10 years of experience reporting difficulties maintaining contact with their clients generated a p-value of less than 0.05.<sup>156</sup>

**Figure 8. How Has the Shift to Virtual Proceedings Hurt Attorney-Client Communication? (by Length of Practice)**



We also examined whether the ways in which the shift to virtual proceedings has harmed attorney-client communication varies by type of jurisdiction.<sup>157</sup> As with Figure 8, the sample in Figure 9 is limited to attorneys who agreed or strongly agreed that the increased use of video technology has harmed attorney-client communication. Suburban attorneys were the most likely to report difficulties maintaining confidentiality (91.3%), as compared to attorneys in urban (78.9%) and rural (72.7%) areas, but none of these differences are statistically significant.<sup>158</sup> Attorneys practicing in urban areas were substantially less likely to answer that the shift to virtual proceedings created difficulties in sharing discovery than both rural and suburban attorneys. Roughly 76% of urban attorneys reported difficulties in sharing discovery, compared to 86.4% of rural attorneys and 91.3% of suburban attorneys. Again, however, chi-square tests comparing the jurisdiction types yielded p-values smaller than 0.05.<sup>159</sup>

**Figure 9. How Has the Shift to Virtual Proceedings Hurt Attorney-Client Communication? (by Type of Jurisdiction)**

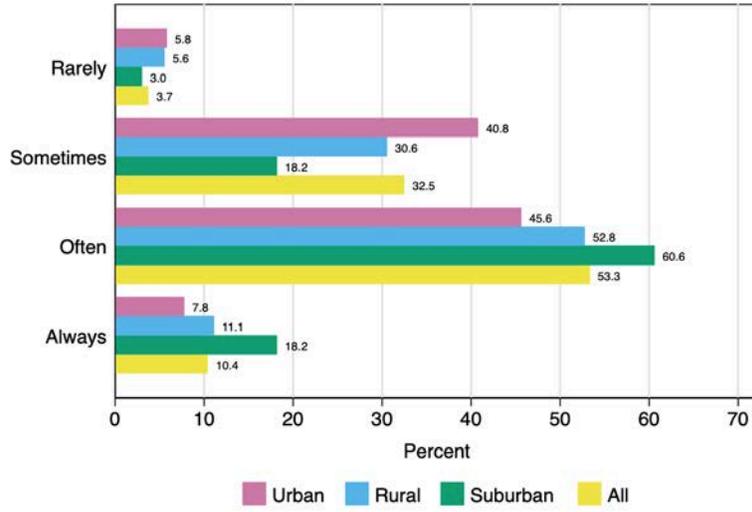


To dive deeper into the impact of the shift to virtual proceedings on attorney-client communication, we asked respondents several questions about the *frequency* at which they are able to reach their clients when needed. More specifically, we asked: (1) how often the attorneys are able to reach their clients when needed, regardless of the type of communication, and (2) how often they are able to communicate confidentially with their clients when needed.<sup>160</sup> Some 36.2% of respondents stated that for purposes of general communication, they are only rarely or sometimes able to reach their clients.<sup>161</sup> As displayed in Figure 10, 46.6% of attorneys practicing in urban areas reported that they could only rarely or sometimes reach their clients for general communication purposes. This percentage is higher than that in rural areas (36.1%) and suburban areas (21.2%), but only the difference between urban and suburban attorneys was statistically significant.<sup>162</sup>

The differences among jurisdiction types collapse when the type of communication is restricted to confidential communications. Figure 10 shows that urban attorneys were the most likely to report that they could only rarely or sometimes communicate confidentially with their clients when needed. Roughly 55.3% of urban attorneys answered “rarely” or “sometimes” when asked about their ability to communicate confidentially with their clients, compared to 50.0% of rural attorneys and 51.5% of suburban attorneys. Importantly, though, none of these differences between jurisdiction types are statistically significant.<sup>163</sup>

Figure 10. Frequency of Attorney-Client Communication (by Type of Jurisdiction)

General Communication



Confidential Communication

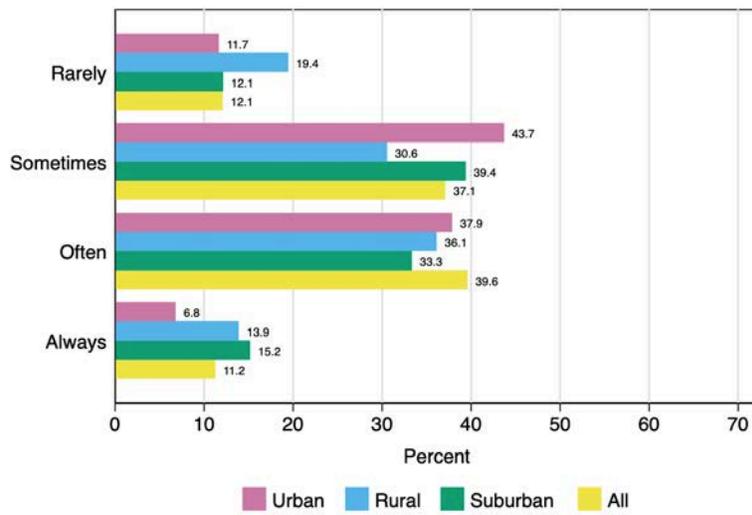
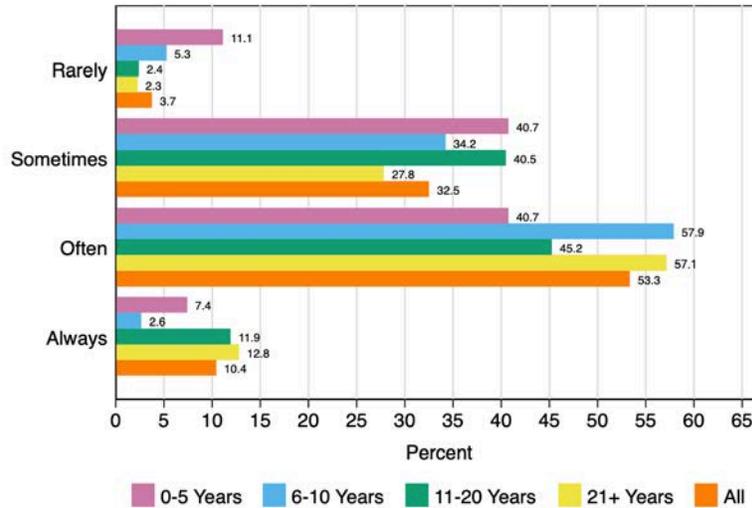


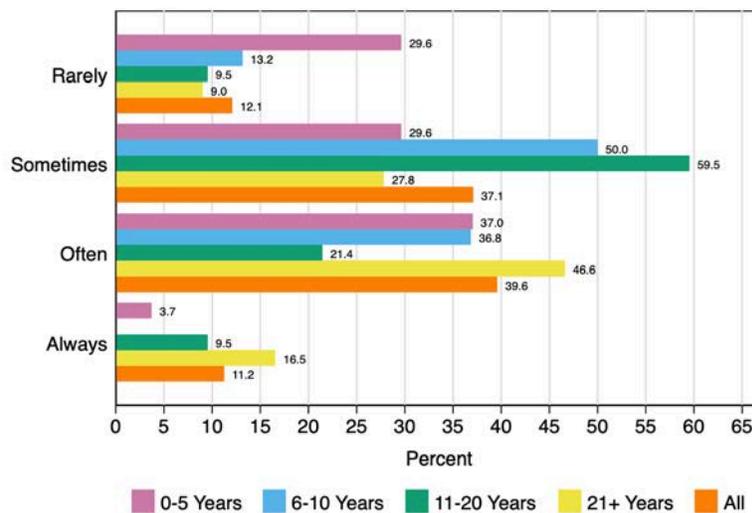
Figure 11 breaks down the responses by length of practice rather than jurisdiction type. A substantially larger percentage of attorneys with five or fewer years of experience reported that they are rarely able to reach their clients for *both* general and confidential communication purposes than any other experience bracket. Combining the “rarely” and “sometimes” responses, however, only the differences between attorneys with five or fewer years of experience and attorneys with more than 21 years of experience are statistically significant.<sup>164</sup>

**Figure 11. Frequency of Client Communication (by Length of Practice)**

**General Communication**



**Confidential Communication**



Unfortunately, we do not have a pre-pandemic comparison for Figures 10 and 11, and we recognize that the COVID pandemic has disproportionately affected indigent individuals. As such, the pandemic likely created more attorney-client communication obstacles than would exist if this shift to virtual proceedings had occurred in a pre-pandemic or post-pandemic world. Considering 66.3% of attorneys agreed or strongly agreed that attorney-client communication had been hurt *specifically by the shift to virtual proceedings*, however, the communication issues reported in our survey do not appear to be entirely driven by the pandemic-induced medical and economic crises. Thus, we believe that Figures 10 and 11 and the corresponding tables in Appendix 1 indicate that—at least on a descriptive level—the shift to virtual proceedings has hindered attorney-client communication.

## ACCESS TO JUSTICE

Given the numerous technological and attorney-client communication difficulties described in the previous sections of this quantitative analysis, it is perhaps unsurprising that the vast majority of respondents (77.9%) agree or strongly agree that the shift to virtual proceedings has compromised access to justice.<sup>165</sup> Figure 12 shows that only 7.5% of respondents do *not* believe that the shift to virtual proceedings has compromised access to justice. As displayed in Figure 13, a considerably higher proportion of attorneys practicing in urban areas (49.5%) strongly agree that the shift to virtual proceedings has compromised access to justice, compared to rural areas (36.1%) and suburban areas (39.4%), but these results were not statistically significant.<sup>166</sup> Moreover, per Figure 14, roughly 48% of attorneys with five or fewer years of experience strongly agreed that access to justice was compromised, a much higher percentage than any other length-of-practice bracket. Again, however, these differences lacked statistical significance.<sup>167</sup>

Figure 12. Has the Shift to Virtual Proceedings Compromised Access to Justice?

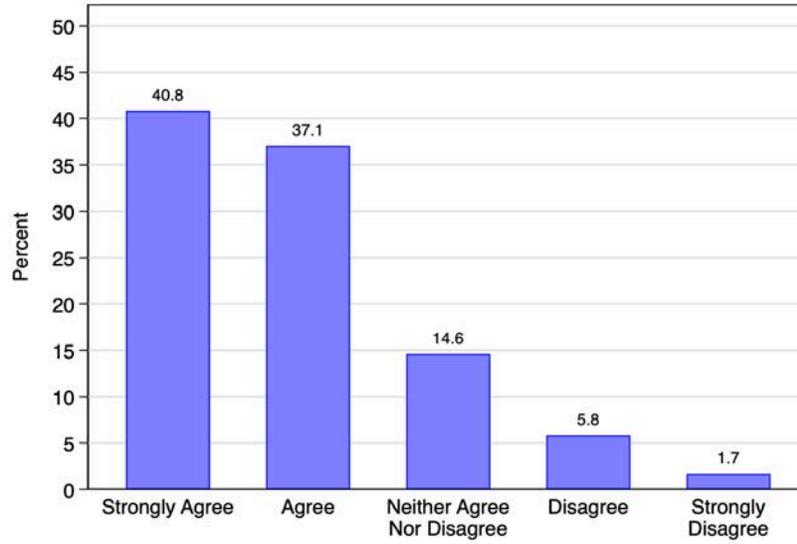


Figure 13. Has the Shift to Virtual Proceedings Compromised Access to Justice? (by Type of Jurisdiction)

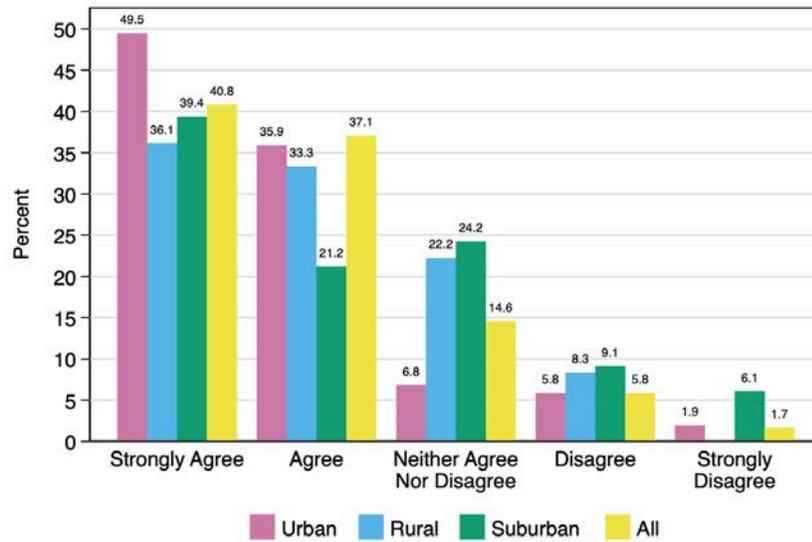
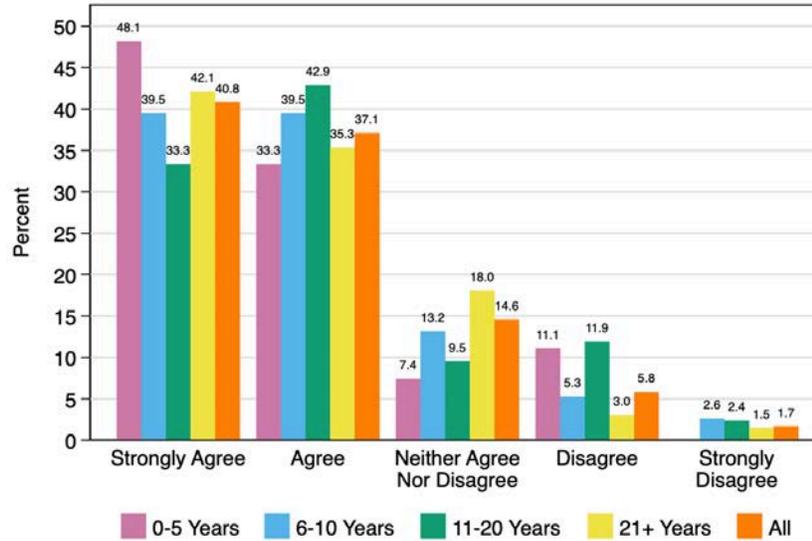


Figure 14. Has the Shift to Virtual Proceedings Compromised Access to Justice? (by Length of Practice)



We asked respondents who agreed that the shift to virtual proceedings has compromised access to justice to elaborate on their answer in a free-response question. The answers that we received were striking, and several key themes emerged from the responses. In addition to reporting technological and attorney-client communication issues, respondents consistently indicated that the shift to virtual proceedings has dehumanized defendants and decreased defendants' trust in the criminal legal system.<sup>168</sup> The respondents also frequently opined that the shift to virtual proceedings eliminated the productive hallway conversations that often occur between defense attorneys and both prosecutors and other court actors, placing further strain on an already backlogged system.<sup>169</sup>

This free-response data suggests that the shift to virtual proceedings has impacted the criminal legal system in ways that cannot be meaningfully captured in an online survey. Consequently, in order to fully understand the effects of the shift to virtual proceedings on state-level criminal courts, we need to combine our quantitative research with qualitative research. With this survey as a foundational backdrop, the remainder of this report takes a deep qualitative dive into the inner workings of the shift to virtual criminal proceedings in three jurisdictions: Miami-Dade County, Milwaukee County, and the Northeast Judicial District of North Dakota.

## CHAPTER 4: QUALITATIVE METHODS AND DATA

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To supplement the quantitative survey data, the research team also conducted in-depth qualitative interviews in three jurisdictions. The qualitative portion of this study involved interviews with not only defense attorneys but also prosecutors, judges, and court employees. A research team of seven Stanford Law School students, supervised by Professor Robert Weisberg and Debbie Mukamal, conducted and transcribed interviews between September 2020 and January 2021.<sup>170</sup> A subset of those students analyzed the interview transcripts and drafted this policy report over the following several months.

For readers unfamiliar with qualitative research, a brief introduction is warranted. The point of qualitative research is *not* to make statistically rigorous showings about the frequency of some belief or phenomenon within a given population. Indeed, it is all but impossible for findings to ever reach statistical significance given the typical sample size of qualitative research. The point of qualitative research is to explore (especially unknown or understudied) phenomena in-depth, with an eye to detail, to the meanings participants assign to events and the connections they draw between them.<sup>171</sup> The result is a less generalizable but richer and more nuanced understanding of a given phenomenon or population. The relative merits of qualitative and quantitative research, and the situations in which each method is most useful, have been debated extensively; such debates are beyond the scope of this paper. Suffice it to say that the research team believes that value can be derived from both quantitative research (*see* Chapter 3: Quantitative Analysis) and qualitative research.<sup>172</sup> Even if the latter is less generalizable than the former, readers in different jurisdictions may find the themes and ideas from the chosen jurisdictions illustrative—and the qualitative findings may provide fertile ground for further research.<sup>173</sup>

### STUDY POPULATION

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The study examined the perspectives and experiences of defense attorneys, prosecutors, judges, and court personnel. This study did *not* directly interview defendants in criminal cases. While their perspectives would provide invaluable information on the use of remote technologies in criminal cases, such individuals (and especially persons who are incarcerated) are a vulnerable population, and ethical research rules set strict conditions on access to such

populations. Given the time constraints of this study and the increased Institutional Review Board (IRB) requirements that accompany studies of this population, the team did not attempt to interview defendants—but their first-hand perspectives are a critical future study.

The identities of the individuals who participated are confidential and are not revealed in this report. Where necessary, interviewees' comments have been excerpted to remove comments that might identify them. A few interviewees gave the study permission to report their names despite the default of confidentiality. However, the research team has opted not to do so, as the disclosure of some names may enable the identification of other participants by process of elimination, especially in the smaller districts.

## **JURISDICTION SELECTION**

Seeking depth rather than breadth, the research team opted to conduct qualitative studies in three discrete jurisdictions rather than looking nationwide (in the style of the quantitative survey). The research team wanted a diverse set of jurisdictions that varied on particular axes, including geographic location, population density, size, socioeconomic diversity, political leanings, degree of local funding, and court policies (i.e., whether the jurisdiction had used remote technology prior to COVID and how aggressively it was pursuing remote court during COVID).<sup>174</sup> Of these, population density provided the most useful initial subdivision: The research team decided at the outset to aim for one large urban region, one rural region, and one small city or suburban region.

For the large urban region, the research team selected Miami-Dade County, Florida (henceforth referred to as “Miami”). Aside from satisfying one of the three population-density categories, Miami stood for its diverse population. It was also geographically diverse (i.e., on the south Atlantic coast) as compared to the other jurisdictions. Moreover, the research team had read that Miami had some familiarity with video technology pre-pandemic and that the civil courts, in particular, seemed to be using a lot of video technology during the pandemic.

For the moderately-sized jurisdiction, the team selected Milwaukee County, Wisconsin (henceforth referred to as “Milwaukee”). Milwaukee came to the researchers' attention as a county with an urban core and sprawling suburban and rural surroundings. As a jurisdiction that had not experimented much with video technology before COVID, Milwaukee was particularly attractive.

For the rural region, the team selected the Northeast Judicial District of North Dakota (henceforth referred to as “North Dakota”). The state of North Dakota became a focus early on for its rural character, its relatively conservative politics, its relatively high poverty rate, and its Native American population.<sup>175</sup> Selecting a jurisdiction within the state proved more challenging, as the very ruralness that attracted the team meant that most counties were too

sparsely populated to serve as the jurisdiction under study.<sup>176</sup> After discussing options with the executive director of North Dakota's indigent defense service, the team opted for a judicial district comprising 11 rural counties. The team recognized that differences between counties could add unwanted variation into the study. Nonetheless, given the minuscule sample sizes available in individual counties, the team concluded that a district was the only feasible choice. It selected the Northeast District for many of the same reasons it selected North Dakota: the rural and agricultural character of the region, the relative poverty level, and the tribal communities within its borders.

In-depth descriptions of each county or region, its criminal justice system, and its response to the COVID pandemic are included in Chapter 5: Background of the Three Jurisdictions.<sup>177</sup> At least one member of the research team attended or observed one or more virtual court sessions in each of these jurisdictions for additional background.

## **INTERVIEW METHODS AND DATA**

### **INTERVIEW METHODS**

Interviewers conducted semi-structured interviews in each jurisdiction. The research team collectively authored separate, but similar interview guides for defense attorneys, prosecutors, judges, and court employees. Draft interview guides for defense attorneys, prosecutors, and judges were each pilot-tested once with actors outside of the study populations (i.e., who lived and worked in jurisdictions other than the three under study). The final interview guides (which comprise Appendix 3) included a series of high-level questions to be addressed in each interview and sub-series of smaller questions to prompt further discussion where necessary.<sup>178</sup>

Interviews took place via Zoom or phone, as the ongoing pandemic precluded in-person interaction. Wherever possible, interviewees received an electronic copy of the consent form before the start of the interview.<sup>179</sup> Interviews were recorded subject to participants' consent; if a participant opted out of the recording, interviewers took extensive notes to capture as many of each interviewee's comments as possible.

All interviews followed the same general structure. First, interviewers reviewed the principles of voluntary consent, answered any questions, and asked for the participant's oral consent to participate in the study.<sup>180</sup> Interviewers next asked whether interviewees consented to recordings and, if not, if they consented to note-taking.<sup>181</sup> Only then did the interview proceed into substantive questions. Each interview concluded with a set of questions addressing job history, technological comfort levels, and demographics.<sup>182</sup> Most interviews lasted around an hour. In each jurisdiction, the vast majority of interviews included only one interviewee at a time. Four times (twice in North Dakota and twice in Milwaukee), student-interviewers conducted one interview with two participants.

The research team divided into three teams of two-to-three student researchers, with each team focusing exclusively on one jurisdiction. Within the Milwaukee and North Dakota teams, the students informally focused (though not exclusively) on particular actors: defense attorneys, prosecutors, or judges. The Miami team encountered unforeseen recruitment difficulties, further described in a few paragraphs, which reduced the overall number of interviews and the need for subdivision. In general, only one student conducted each interview, though a few early interviews were conducted by two student-interviewers together.

Snowball sampling served as the primary but not exclusive method of recruitment. In each jurisdiction, student-researchers leveraged the connections of the Stanford Law School faculty or one of the study's partners—namely, the National Association of Criminal Defense Lawyers (NACDL), the Association of Prosecuting Attorneys (APA), and the National Center of State Courts (NCSC)—to obtain initial interviews. At the conclusion of each interview, participants were asked whether there were any other practitioners in the jurisdiction who might be interested in participating. In each jurisdiction, student-researchers also identified eligible defense attorneys, judges, or prosecutors from internet research and emailed or called those individuals without direct connections. Finally, in North Dakota, student-researchers also contacted defense attorneys who appeared during their observations of remote court proceedings.

The Miami team encountered two major recruitment snags, which restricted the overall number of participants. First, the State's Attorney's Office (for which all of the county's prosecutors worked) had just one prosecutor willing to speak with our team. The Miami team therefore conducted only one prosecutor interview, and though this prosecutor was authorized by the office to speak on its behalf, the team could not collect a diverse set of prosecutorial perspectives. Second, the Miami-Dade County Office of Government Liaison and Public Relations expressed concerns about interviews with Miami's judges. The Office worried that the interviews might implicate judicial ethical canons, so judicial interviews in the county were postponed pending the Office's review of the interview guide. The Office eventually approved the interviews, but it required the team to refer all judicial interviewees to speak with them for pre-interview ethical guidance. Some judges declined to participate in the study after learning of this requirement, and others gave only limited interviews.

## INTERVIEW DATA

**TOTAL INTERVIEWS.** The report includes data from 55 interviews and 59 participants,<sup>183</sup> reflecting the fact that some interviews included two participants simultaneously. Twelve of those interviews were with participants in Miami-Dade County, 21 with those in Milwaukee County, and 22 with those in the Northeast Judicial District of North Dakota.<sup>184</sup> Twenty interviews were with defense attorneys, 15 with judges, 14 with prosecutors, and six with court personnel. The number of interviews and participants by jurisdiction and by actor type is displayed in the following table:

<b>Actor Type</b>	<b>Miami</b>	<b>Milwaukee</b>	<b>North Dakota</b>	<b>Total</b>
Defense Attorneys	6 interviews (6 participants)	8 interviews (9 participants)	6 interviews (6 participants)	20 interviews (21 participants)
Judges	4 interviews (4 participants)	6 interviews (6 participants)	5 interviews (5 participants)	15 interviews (15 participants)
Prosecutors	1 interview (1 participant)	6 interviews (6 participants)	7 interviews (7 participants)	14 interviews (14 participants)
Court Personnel	1 interview (1 participant)	1 interview (2 participants)	4 interviews (6 participants)	6 interviews (9 participants)
<b>Total</b>	<b>12 interviews (12 participants)</b>	<b>21 interviews (23 participants)</b>	<b>22 interviews (24 participants)</b>	<b>55 interviews (59 participants)</b>

Findings in the qualitative sections are reported according to the number and percentage of *interviews* rather than the number of *participants*.<sup>185</sup>

In 51 of the 55 interviews, participants consented to being recorded. However, only 49 of the recorded interviews were fully transcribed. In the remaining two interviews, technical errors caused all or part of the audio to be lost before transcription; in these instances, extensive interviewer notes were substituted for all or part of the transcript.<sup>186</sup> Four interviews were not recorded in the first place, but interviewers took contemporaneous notes as close to verbatim as feasible, and these notes were coded in lieu of a transcript.<sup>187</sup>

The number of interviews in this study, and especially in certain sub-categories, is small even for qualitative studies. Guest et al.'s oft-cited methodological research found that theoretical saturation in homogenous groups occurred after around 12 interviews.<sup>188</sup> While their research also found that as few as six interviews may be sufficient to gather "high-level, overarching themes,"<sup>189</sup> six subcategories in this study included fewer than six interviews. For this reason, the study does not generally attempt to comment on the smallest subcategories.<sup>190</sup> Instead, the bulk of the analysis takes place at the jurisdiction-wide level, the actor-wide level, or across all interviews. These categories (and especially the full dataset) are more heterogeneous, but subsequent coding revealed a considerable amount of thematic consistency across the interviews.

Of course, larger numbers would have been ideal and would have enabled greater certainty of theoretical saturation. But practical limitations made additional data collection infeasible.<sup>191</sup> Readers should therefore be aware that this study may have lacked sufficient interviews to capture all major themes or variations thereof.

The number of interviews with court personnel is particularly small. These interviews were something of a hybrid between semi-structured qualitative interviews and informational and expert interviews. Originally, the research team sought out interviews with higher-level administrative personnel; the planned course of action involved including those interviews in the data set but focusing on actors who were more frequently in court. However, snowball sampling in North Dakota led to interviews with a more diverse set of court employees

(including some who were in court often), resulting in a larger number of court personnel interviews there. Nonetheless, with only six total interviews of court personnel instead of Guest et al.'s recommended 12 or more,<sup>192</sup> the study can say little about the experiences of court personnel as a group. This is a ripe and important area for future research, as the findings from North Dakota implied that the voices of court officials offer unique insights that often go ignored.<sup>193</sup>

**MIAMI INTERVIEWS.** The Miami-Dade County team interviewed six defense attorneys, four judges, one prosecutor, and one court administrator.<sup>194</sup> Of the six defense attorneys, three were public defenders, two were private defense attorneys, and one worked at the Office of Criminal Conflict and Civil Regional Counsel. All of the judges sat within Florida's Eleventh Judicial Circuit, which encompasses Miami-Dade County. Three were active judges at the time of the interview, and the fourth had recently retired (after the start of the pandemic).

**MILWAUKEE INTERVIEWS.** The Milwaukee County team interviewed nine defense attorneys (over eight interviews), six prosecutors, six judges, and two court administrators (in one interview).<sup>195</sup> Of the defense attorneys, five were public defenders, and four were private defense attorneys, reflecting the fact that 60% of indigent defense cases in the jurisdiction are assigned to public defenders and 40% to private defenders.<sup>196</sup> Of the prosecutors, two were deputy district attorneys, and four were assistant district attorneys.

**NORTH DAKOTA INTERVIEWS.** The Northeast Judicial District of North Dakota team interviewed six defense attorneys, seven prosecutors, five judges, and six court personnel (over four interviews). The judges are all district court judges of general jurisdiction. Due to the district's small size, the team is not revealing the composition of the other groups (i.e., elected versus assistant prosecutor, public versus private defense attorney, or type of court employee).

## **TRANSCRIPTION, CODING, AND DRAFTING**

The research team transcribed the recorded interviews using automatic transcription software provided by JusticeText. The software created a computer-generated transcript, and members of the research team thereafter listened to the recordings and corrected errors in those transcripts.

Four members of the research team (including interviewers who had worked with each jurisdiction) conducted closed coding<sup>197</sup> of the transcripts and interview notes using the qualitative research software Nvivo.<sup>198</sup> Before beginning the coding process, the four-person team developed an initial codebook based on this project's focus areas and their impressions from the interviewing and transcribing process. At the outset of coding, each member of the team independently coded the same two transcripts; a comparison of the results revealed a high degree of inter-coder agreement and illuminated a few areas of disagreement, which were resolved.<sup>199</sup> Periodically during the coding process, the team convened to discuss and resolve

ambiguities in the code and to modify the codebook iteratively as additional transcripts were coded. The first such modification included nine edits to the codebook; the second included four.<sup>200</sup> The final codebook is located in Appendix 4.

Once the coding process was complete, the research team identified the most important major themes in view of the project's goals and the frequency with which each theme surfaced in the interviews.<sup>201</sup> Members of the research team divided the major themes among themselves. They then examined the relevant code families, re-read the relevant transcript portions, and used a combination of hand-coding and Nvivo search tools to refine the theme and sub-themes.<sup>202</sup> The results are reported in Chapters 6 through 12. Jurisdiction-specific findings can be found in Chapters 13, 14, and 15.<sup>203</sup> For readability, quotes have been edited to remove verbal tics (that is, "um," "eh," or "uh"); all other edits are indicated with ellipses or brackets.

# CHAPTER 5: BACKGROUND OF THE THREE JURISDICTIONS

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## MIAMI-DADE COUNTY

Miami-Dade County is a “large metropolitan portion of South Florida.”<sup>204</sup> In 2019, its estimated population was over 2.7 million, and its land area was just shy of 1,900 square miles.<sup>205</sup> Interviewees described the county as “a pretty colorful place,”<sup>206</sup> where the people are “very social”<sup>207</sup> and the professional culture is “more relaxed.”<sup>208</sup> One judge noted the warm weather,<sup>209</sup> and rightly so: Miami’s monthly average high temperatures range from 76 to 91 degrees Fahrenheit, and its average sunshine hours range from 209 to 280 hours per month.<sup>210</sup>

Miami prides itself on its diversity. As a court administrator stated, “Miami Dade County is a melting pot. My interpreter’s department sometimes has to specialize out for different languages. At one point or another, they’ve had to interpret for more than 50 languages. It’s definitely a melting pot.”<sup>211</sup> Another interviewee noted that there is a heavy “Latin American influence on Miami,” with a “large number of primarily Spanish speaking defendants, but occasionally Haitian-Creole or Portuguese.”<sup>212</sup>

Respondents in Miami also frequently commented on its vast geography and population.<sup>213</sup> As one defense attorney put it, “we’re very large. We’re very, very busy.”<sup>214</sup> This immense size can pose some difficulty, particularly when it comes to transportation:

Dade County is a very large county . . . and the distances are very far. I mean from one end to the county to the other . . . with traffic can take several . . . hours. So it’s a large county with a very poor transportation system. There’s no subway system. [T]here’s a bus system, and that’s it. Well . . . in certain neighborhoods, you have an overhead trams system. But it’s not a county that has a very well-connected transportation system.<sup>215</sup>

Another interviewee concurred: “So one end of the county to the other, I think it’s 50 miles or more. It’s big, and traffic is horrible. Pre-COVID, traffic was horrible,” and “public transportation is subpar.”<sup>216</sup> As a third emphasized, “the commute to the courthouse can be an hour or maybe more during rush hour. And then you have to look for parking.”<sup>217</sup>

## CRIMINAL LEGAL SYSTEM

Unsurprisingly given its vast size, Miami-Dade County is the only county in the Eleventh Judicial Circuit of Florida.<sup>218</sup> One public defender classified it as “extremely trial active”, estimating that “We try hundreds of cases a year in the felony division alone.”<sup>219</sup>

According to respondents, the Eleventh Judicial circuit is also “different than various other judicial circuits in Florida.”<sup>220</sup> One private defense attorney remarked:

[Miami-Dade is] an outlier for the state of Florida. So, you know, whereas a lot of the counties in Florida are much smaller, they have limited cases,... the courthouses aren’t as... populated during normal times, Miami-Dade is always an outlier as far as budget, as far as number of cases, as far as severity of cases.... [S]o it, just in its sheer size, it makes the challenge far more significant.<sup>221</sup>

The Eleventh Judicial Circuit has two main criminal divisions. The Circuit Criminal Division hears major criminal (felony) cases where the resulting penalty can be death or imprisonment in a state penitentiary for one year or more.<sup>222</sup> Meanwhile, the County Criminal Division hears “minor criminal misdemeanor cases, criminal traffic matters, municipal and county ordinance violations, and Civil Traffic Infractions.”<sup>223</sup>

Three types of defense attorneys may be appointed to represent an indigent client: an attorney from the Miami-Dade Public Defender’s Office, an attorney from the Office of Criminal Conflict and Civil Regional Counsel (“Office of Regional Counsel”), or a private counsel who is on the “wheel.”<sup>224</sup> Most cases start at the Miami-Dade Public Defender’s Office, get transferred to the Office of Regional Council if there is a conflict, and are transferred again to an attorney on the wheel if the Office of Regional Council also has a conflict.<sup>225</sup> The Office of Regional Council also has original jurisdiction over certain types of cases (for example, Marchman Act cases).<sup>226</sup> But the Public Defender’s Office covers almost all appointed cases—roughly 70,000 cases in any given year.<sup>227</sup> That office is led by Chief Elected Public Defender Carlos Martinez.

Criminal charges are prosecuted by the Miami-Dade State Attorney’s Office which, with over 1,200 employees, is the fourth largest district attorney’s office in the country.<sup>228</sup> Katherine Fernandez Rundle has been the Miami-Dade State Attorney since 1993.<sup>229</sup>

Despite the vast numbers of attorneys, Miami-Dade Criminal Court has been described as “maybe a little bit more informal because you have the same PDs, the same state attorneys, the same regional counsel assigned to particular judicial divisions. So they’re used to seeing each other every day. So it’s not like that strict formality in that sense.”<sup>230</sup> As one public defender put it, “The Richard E. Gerstein building, our justice building, is just a really social place.”<sup>231</sup>

## COVID RESPONSE

Initially, the courts were in mission-critical status but still functioning: From March 17 to 27, 2020, pursuant to numerous Eleventh Circuit Administrative Orders, public access was limited to only those coming in for a small subset of proceedings, such as first appearances.<sup>232</sup> Meanwhile, statewide administrative orders tolled the speedy trial rule and suspended jury proceedings, jury selection, and jury trials.<sup>233</sup>

Follow-up circuit orders postponed most other hearings, trials, and calendars through April 17, 2020 except for those proceedings which could be “effectively conducted remotely.”<sup>234</sup> Subsequently, the courts quickly transitioned to a remote system. On March 30, 2020 a new circuit-wide administrative order provided details on the implementation of a Zoom court system.<sup>235</sup>

After some adjustment period, most minor hearings proceeded virtually through Zoom, but these changes came gradually. One defense attorney explained,

[I]t’s been an incremental change. So it started with we were only doing bond hearings. And then it started with okay, we’re going to have bond hearings and arraignments virtually. And that was just one or two judges doing the arraignment calendar, doing the formal charging calendar. And then it changed to every judge is handling their own calendar, virtually via Zoom and try to treat it as much as you know, you could otherwise. We then got to the point where we were able to—the court system was able to equip the jail with Zoom so we could have hearings with in-custody clients without the clients actually being physically in court. Everyone else is over Zoom. And now we have it running where every judge has their morning calendar, just like they usually would.<sup>236</sup>

More substantive hearings such as Stand Your Ground hearings and probation violation hearings were also gradually phased in.<sup>237</sup> Still, many attorneys have resisted performing these more complex evidentiary hearings through the video platform.<sup>238</sup>

Generally speaking, the Miami-Dade County criminal justice system was uniquely well suited to handle a quick change to the virtual world. As explained by the prosecutor’s office:

We have a lot of experience handling crises which is something you would expect from a jurisdiction located where we are because we always have to be prepared for hurricanes. We have had phone trees for decades. We issue police radios to key people in the office every year during hurricane season and we all know how to use them. We have set up alternative processes and procedures in the past and pride ourselves on being flexible. We know the game and how to deal with crisis so when this came along we reacted much faster than the other jurisdictions because we had so much experience.<sup>239</sup>

The jurisdiction also had some video technology in place prior to the pandemic, though the prosecutor’s office had to contribute some old equipment to help outfit the courts for remote hearings.<sup>240</sup> In 2011, video equipment was installed in all three jail facilities for clients to communicate with their attorneys. A defense attorney noted the importance of this technology during the pandemic:

[W]hen the COVID pandemic hit, even though the jail shut down for outside visitors and for attorneys to visit their clients, we did not miss a beat because we already had video. Not only that, we have had a direct toll-free access from our clients, who are in custody, to our office. We've had that for 30 years. And so our clients were able to continue to get a hold of us, and we handle on any given year calls from the jail—about 120,000 phone calls. And that continued through COVID.<sup>241</sup>

The Public Defender's Office was also well-positioned to handle the COVID pandemic given its other pre-pandemic technology usage:

We were ahead of the curve because we've had [our] attorneys with laptops and with digitized files for five years now, since 2015. So when this [happened], we didn't even have to blink. All [we] had to do is tell the attorneys, take yourself home. So everybody can log in. We have everything on the cloud. We have all the files on the cloud, and we have our database management system expansion system on the cloud. So we really did not miss a beat in terms of the attorneys.<sup>242</sup>

Early in the pandemic, the Public Defender's Office had focused on obtaining pre-trial release for their clients. The office filed approximately 500 motions in mid-March 2020 in an attempt to release as many people from custody before the pandemic worsened.<sup>243</sup> Bail and bond practices shifted swiftly thereafter, as judges, prosecutors, and defense attorneys worked to reduce crowding in jail facilities.<sup>244</sup>

## MILWAUKEE COUNTY

Milwaukee County, located along the eastern shore of Lake Michigan, is the most populous county in the state of Wisconsin.<sup>245</sup> Its population was just over 945,000 people in 2019.<sup>246</sup> The county is comprised of a mixture of urban, suburban, and rural communities, from the city of Milwaukee (with nearly 600,000 residents) to small villages with populations of less than 2,000 people.<sup>247</sup> Speaking about the city of Milwaukee, one interviewee described its strengths and its flaws:

There's lots of good fun things to do, and it has a good city culture. But also, we come with a lot, a lot, a lot of baggage, including the fact that we're the most segregated city in the country, and that's still the case. We have a lot of poverty that is a big income separation between groups, and we're still extremely, extremely segregated.<sup>248</sup>

The problems cited by that respondent—high levels of poverty and segregation in the city of Milwaukee—are borne out by statistics and echoed by other respondents. According to the U.S. Census, 16.9% of the county’s residents lived in poverty in 2019.<sup>249</sup> Several Milwaukee interviewees described Milwaukee as the most segregated city in the United States.<sup>250</sup>

One elaborated:

[T]here’s a zip code, 53206, where, you see, where it looks like somebody dropped a bomb. When you look at every factor, every aspect of, that has an impact on people’s quality of life, it’s there. The highest unemployment rate in the state. The highest infant mortality. The highest, you know, in terms of life expectancy, you know, the lowest life expectancy. The highest rate of diabetes, heart disease. The highest rate of, you can think of every negative aspect, it’s just—But it’s all associated not only with the impact of poverty, unemployment, homelessness, but it’s also, you know, the common denominator is race, black people. Terrible, terrible, absolutely terrible public transportation. You know, the inability of people to be able to commute to areas that are more prosperous, or be able to live close, you know, in a different area. All of that has been basically denied to people in Milwaukee, is the, in my opinion, is the most segregated city in the U.S. It is absolutely sickening. You know what I mean? And I hope somebody hears this because it’s just not right.<sup>251</sup>

These perspectives align with official statistics: Both the city of Milwaukee and the greater metropolitan area are among the most segregated in the country.<sup>252</sup>

The effects of segregation and systemic racism can be observed within the criminal justice system, respondents noted. One defense attorney lamented: “Who is the majority black in the courtrooms? You walk in, white judge, white prosecutor, white defense attorney. All black people in the gallery. And it’s like, what is wrong with this picture?”<sup>253</sup> Another shared that “the incarceration rate for poor black youth, is something like 17.4%. Compared to 1.4% for white children of similar socioeconomic means.”<sup>254</sup> Racial inequality has affected the distribution of COVID cases, too. As one respondent explained, “We found out recently, the lower-income, the lower-income, you know, like communities, often the communities of color, the black and brown communities, are overrepresented in COVID numbers.”<sup>255</sup>

## CRIMINAL LEGAL SYSTEM

Wisconsin is organized into 10 judicial administrative districts.<sup>256</sup> Milwaukee County comprises a single district, the First Judicial District, which includes 47 judges.<sup>257</sup> Judges in Milwaukee County are elected for six-year terms and rotate between family, juvenile, criminal, civil, probate, or traffic court. Each rotation lasts a maximum of four years, and the criminal judges are divided into misdemeanor (including domestic violence) and felony units; the felony unit is further divided into gun court, drug courts, homicide and sexual assault, and general felony. The Chief Judge for the First Judicial District is Mary Triggiano.<sup>258</sup>

Milwaukee County courts have a bifurcated budget: They get their technology, hardware and software, from the State, while the wiring and internet come from the County.<sup>259</sup> As discussed below, the cost-sharing complicated and slowed efforts to rapidly move from in-person to video proceedings.

Most criminal cases in the county derive from the city of Milwaukee. “There are six neighborhoods in Milwaukee that [the District Attorney’s Office] really focus[es] on and ha[s] additional resources for.”<sup>260</sup> Milwaukee’s homicide rate is high; as a result, it is the only District Attorney’s office in the state with a dedicated homicide unit.<sup>261</sup> The homicide rate grew acutely during 2020. As one prosecutor shared: “[W]e’re somewhere between on average 85 to 110-115 homicides a year. [A] couple of years ago, we had 145 followed by 141, and that was a bad two years. But this year, I think we’re already at 170. . . And it’s November, and majority of that number has happened since April.”<sup>262</sup>

Milwaukee County benefits from an active Community Justice Council whose Executive Committee includes the Chief Judge, District Attorney, State Public Defender, County Executive, Mayor, Sheriff, Police Chief, U.S. Attorney, Corporation Counsel, Superintendent of the Milwaukee County House of Correction, and other community members.<sup>263</sup> The Council has a long-standing history of collaboration and working together on initiatives, like the MacArthur Foundation Safety and Justice Challenge Grant.<sup>264</sup> Some portion of the Community Justice Council and other invited experts formed a Recovery Committee to guide how to deal with COVID and re-open the courts.<sup>265</sup>

## COVID RESPONSE

On March 22, 2020, the Wisconsin Supreme Court issued two administrative orders suspending most in-person court proceedings<sup>266</sup> and postponing all civil and criminal jury trials until after May 22, 2020.<sup>267</sup> The First Judicial District had already begun the process of shutting down in-person proceedings by the time the Wisconsin Supreme Court issued its first COVID orders. Additional temporary orders in the First Judicial District outlined how Milwaukee County would proceed with mostly virtual court proceedings from March 23 to May 15, 2020, though individual judges retained some discretion.<sup>268</sup>

The Supreme Court’s orders notwithstanding, Milwaukee County courts did not completely close their doors. In an effort to minimize the incarcerated population during the pandemic, three criminal courts remained opened to process bail reviews and other matters related to in-custody defendants.<sup>269</sup> All matters requiring in-person appearances, including evidentiary hearings and trials, were suspended. Non-evidentiary hearings—scheduling conferences, status conferences, pretrial conferences, motion hearings, and oral decisions—proceeded through telephone or video conference, at the discretion of the individual judge. Wisconsin state law requires defendants to be present for criminal proceedings.<sup>270</sup> With the move to remote technology for many criminal proceedings, defendants have had to waive these rights, and most have agreed to do so.<sup>271</sup>

Felony jury trials slowly started to resume in the summer of 2020 when two courtrooms opened for criminal jury trials at minimal capacity. Two additional courts were opened for criminal jury trials in the fall.<sup>272</sup>

To maintain public access while the courts were completely or partially closed, the First Judicial District live-streamed proceedings on YouTube. The Chief Judge ordered that “[a]ll court record entries for cases scheduled for both Zoom and in-person hearings shall include information for the public on how to view the hearing including the web link to the judge’s YouTube channel.”<sup>273</sup> Milwaukee County’s decision to use YouTube accorded with the decisions of other courts in Wisconsin. As the Director of State Courts explained: “The [state] court system . . . is encouraging judges to livestream their proceedings.”<sup>274</sup>

Milwaukee County is emblematic of many counties throughout the United States in that, prior to the pandemic, it had not modernized its judicial infrastructure. It functioned through a predominantly paper-based system and used minimal technology during court.<sup>275</sup> Courtrooms had old speakers and poor acoustics,<sup>276</sup> the District Attorney’s office had no digital filing system,<sup>277</sup> and the police department had no protocol for remote charging conferences.<sup>278</sup> Not all judges had laptops, as many judges worked entirely on desktop computers located at the courthouse.<sup>279</sup> By all accounts, the system seemed to work fine prior to the pandemic. However, the lack of modern technology hamstrung the court’s pandemic response and necessitated swift changes with huge budget implications. For instance, in a scramble to get laptops for essential court personnel, the court clerk had to procure used laptops, many of which did not have cameras.<sup>280</sup> (The CARES Act eventually provided the courts with funding to purchase laptops, as well as plexiglass for the courtrooms.<sup>281</sup>) Transitioning to Zoom was also challenging, as the court had to procure Zoom licenses from the State (not the county), and the State initially provided the licenses only to the judges, who then had to assign their Zoom IDs to their clerks.

## **NORTHEAST JUDICIAL DISTRICT OF NORTH DAKOTA**

The Northeast District of North Dakota encompasses a vast geographic area, almost the entire northeast quadrant of the state.<sup>282</sup> Its biggest city is Devil’s Lake, which has a population of just over 7,000 people.<sup>283</sup> The overwhelming majority of the district is agricultural; residents “live and die somewhat with ag prices and subsidies within our community.”<sup>284</sup> The region is open, remote, and sparsely populated:

Well, first of all, it’s very rural. It’s beautiful. Alright, because it is, for people who aren’t used to it, they would probably go crazy. But, you know, it’s not unusual, you can drive, I can drive in the morning, my commute, and I can be alone on the road for miles and miles and miles and not see another car. Our farms are big in terms of acreage. The farmsteads are *in*, they’re not on, they’re, it’s not like when you drive along a highway that all the farmsteads are right on the highway. They’re not. They’re in a mile or a mile and a half. . . .

And, it's pretty, it's almost all agricultural based. The oil that you hear about in North Dakota is in western North Dakota. We're in eastern North Dakota, so we're not ranch—we're not ranchers either. We are, we are farmers of row, row crop farmers.<sup>285</sup>

And so to paint the picture, I, if you were to fly into North Dakota, especially now, as you're landing, you would think you're landing on the moon. I mean, it looks like, you know, it's just a sparse area. Bare spaces, wide-open spaces, and then a small town. . . . But we're wide open.<sup>286</sup>

But for all of its beauty, most of the region is poor. The two Native American reservations within the Northeast District are especially so. In the words of one judge:

[T]here's a reservation, or a Native American Nation up, the Turtle Mountain Reservation, north. . . . And they're Chippewa. And, and smack in between Ramsey and Benson County . . . is the Spirit Lake Reservation, which is Lakota. So we have that. So you have a, we have a spattering of Native Americans who are very poor. I mean, I couldn't explain to you, like, if you've ever been on a reservation or not, but they're just very, it's poor. Like it's, it's amazing to see. It's like a third world, and that's just, it's sad. It's the only way I could say it.<sup>287</sup>

A prosecutor expressed similar feelings from his time working on the Spirit Lake Reservation: “Oh, my gosh. I'd leave there some days crying. Okay. I mean, some of the atrocities. And I'm just like, I'm kind of a big, strong, tough guy. It's like, ‘Oh, my God, there's tears in my eyes. This is so sad.’”<sup>288</sup>

## CRIMINAL LEGAL SYSTEM

The criminal legal system in the Northeast District operates primarily on the state level.<sup>289</sup> Six district judges of general jurisdiction sit within the district, hearing criminal cases ranging from “a traffic infraction” to “a jury trial for a murder.”<sup>290</sup> While each judge primarily handles cases from one or more of the district's 11 counties, the judgeships are tied to the state, not the county.<sup>291</sup> Defense services are also tied to the state: One public defender from the state's defense agency serves the entirety of the district, and a few additional private attorneys contract with the state to serve indigent clients.<sup>292</sup> By contrast, prosecutors serve the counties: Each county elects one full- or part-time prosecutor (called a State's Attorney), with the exception of Towner and McHenry counties, which share one State's Attorney between them.

Even before the pandemic, the Northeast District used some remote technology. North Dakota courts have long been authorized to conduct electronic hearings via “reliable electronic means” under North Dakota Administrative Rule 52.<sup>293</sup> Courts most frequently used an Interactive Video Network, or IVN (pronounced “Ivan”), to connect with defendants or witnesses at the edges of the district or beyond it. However, despite the enabling rule and the availability of technology, courts used remote technology infrequently.<sup>294</sup>

## COVID RESPONSE

The Northeast District's pandemic response unfolded in two phases. During the first phase, the court administration instituted a teleconferencing (audio-only) platform called Global Meet.<sup>295</sup> That platform was in place from late March 2020 through the summer. In the second phase, the Northeast District transitioned (gradually, judge-by-judge) to Zoom.<sup>296</sup> It is worth noting, though, that COVID closures in North Dakota were somewhat decentralized and inconsistent. At times, judges could make individualized decisions about whether to hold court in person;<sup>297</sup> over the summer, a number of judges did so, including for socially distant in-person jury trials.<sup>298</sup> Similarly, under the state's guidance during the first several months of the pandemic, defense attorneys could choose whether and to what extent to conduct in-person interactions with clients.<sup>299</sup>

## CHAPTER 6: EFFICIENCIES AND INEFFICIENCIES

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The perceived efficiencies and inefficiencies of virtual court comprised one of the largest themes of the study, with almost every respondent mentioning it in some way. All actor types, across all three jurisdictions, chimed in on the efficiencies debate. Overall, much of the dialogue cited positive efficiency gains, with most interviewees focusing on reduced travel for attorneys and defendants. Debate about other efficiencies and inefficiencies arose with less frequency. But as a number of interviewees noted explicitly, gains in efficiency can come at a cost to the overall administration of justice.

### SPARKING INNOVATION

Some interviewees saw the transition to videoconferencing as an important innovation of the practice of criminal law. Mostly, these comments related to various efficiencies, which are discussed later in this section. But one Miami defense attorney felt especially strongly about videoconferencing's innovating value:

I mean, we are right now seeing a change in the way that we have practiced law for the last 250 years. . . . And, we're changing the way we practice law. We practiced law pretty much the same way since our country was founded. We go into a courtroom. We have these rules. Things have changed, but it's, this is the most drastic difference that I think our country has seen in the practice of law. And I don't think it's going anywhere. I'm able to now accept cases throughout the entire state a lot easier because of this.<sup>300</sup>

A number of interviewees, though, described innovations beyond the mere use of Zoom and its ilk: They described the use of technology in innovative ways and a greater openness to innovation beyond videoconferencing. According to these respondents, the dramatic shift to remote proceedings weakened resistance to change and opened up possibilities for innovation more broadly.

Respondents described using technology to do more than just connect with remote defendants or attorneys: They (or the courts or offices in which they practiced) used it to improve prior procedures and remove inefficiencies that existed before COVID. A Miami judge, for example,

noted that “family drug court” used Zoom to “engage [defendants’] family members a lot easier.”<sup>301</sup> And a North Dakota judge described using technology to eliminate a delay stemming from the need for out-of-state defendants to sign documentation in front of a judge:

Actually, I’ve done it three times now. . . . I go through everything with them about what’s involved in the voluntary consent, and I make sure that I’m comfortable that they’re not being pressured or threatened or anything like that to do it. They sign it, and then they hold it up. They hold up the paper and say I signed it. And then, they we provide them with a self-addressed, stamped envelope. They sign it, drop it in the mail. It shows up in my court the next day or the day after. And then as the judge, I conscribe it. I can say yes, they signed this in front of me on such and such a date. That was, that is something that is just so helpful.<sup>302</sup>

Innovations have extended beyond video technology, according to several respondents. A Milwaukee prosecutor noted that the pandemic had caused “more of a focus on how to make things run more effectively in the courts” and “laid a nice foundation of starting to get computers and better speakers and Wi-Fi and stuff in that courtroom.”<sup>303</sup> A Miami court employee also spoke of technological advances: “A lot of the court’s internal processes will definitely be more efficient now in having to upgrade our technology. The changes have been less about the Zoom and more about the other technological changes Zoom has spurred.”<sup>304</sup> She continued:

Working remotely has changed the job, but in a very positive way because I think the court system needed to advance technologically. . . . I think this pandemic has assisted the courts, moving them forward technologically which is a good thing. . . . Even paperwork – let’s say for example, before, you would have one of the case managers from mental health needing to walk up the order to a judge to have it signed. Now, they can email it. And we have the electronic signature.<sup>305</sup>

A Miami prosecutor, too, noted a shift “to a paperless situation,” leading him to conclude that “the lasting effects of COVID will be very positive over the long term.”<sup>306</sup> Similarly, in Milwaukee, the transition to remote court during the pandemic enabled greater digitalization of the office generally. As one prosecutor described:

[Before COVID], most everything has been done on paper. And that has started to change. . . . I shifted some of our, our other, I don’t know what to call them, day to day forms to a digital format. . . . And I think that those are also going to stay as permanent changes, just because they’re so much easier now. You don’t have to walk. You can get somebody a document instantaneously. That’s been very helpful. The other change that we did, our search warrants and requests for court orders, such as GPS warrants, subpoena duces tecum for phone records or for any kind of document subpoena—those have always been done on paper. . . . When COVID hit, we wanted, again, to reduce the transmission of paper between individuals. So, we shifted to a digital format.<sup>307</sup>

She concluded that “I feel like we’ve crossed over into the 20th, if not the 21st century” and that the changes stemming from COVID “have been adopted well by most of our staff.”<sup>308</sup> A second prosecutor agreed, noting that “we’ve taken the negative circumstances of the pandemic and tried to turn it into a positive by modernizing our office.”<sup>309</sup>

Even beyond technology, the pandemic and the transition to remote court has led to a reevaluation of court procedures. A Miami judge explained a willingness to reevaluate which procedures required a hearing:

[T]here was a tremendous amount of stuff that we handle in court live that we didn’t need to handle in court live, that could have been disposed of by agreed orders. . . . And now with what’s going on, COVID, it forced us to sort of examine those processes. . . . I think this has really kicked it up a notch. It made us realize, like, why are we bringing people in unnecessarily?<sup>310</sup>

She was not alone. A North Dakota defense attorney noted a potential innovation stemming from Zoom, which would allow indigent defendants to obtain appointed counsel sooner.<sup>311</sup> And a Milwaukee defense attorney described “the one good thing that’s come out of this pandemic”: “forc[ing] Milwaukee to look at a system that was not working” and prompting staggered case schedules (instead of assigning a single time to all hearings).<sup>312</sup> He also explained that he believed that staggering case times would result in huge taxpayer savings.<sup>313</sup>

It is important to note, though, that the innovative mindset did not trigger positive feelings in all respondents and that some respondents objected to the particular changes. Reacting to the transition to paperless files, for example, one prosecutor explained that digital discovery is harder to navigate and that big data dumps waste time.<sup>314</sup> Another explained that staggering court schedules limit “the number of cases they can actually get through in a day.”<sup>315</sup> These respondents illustrate that even if openness to change is a positive development, deciding on the proper (changed or unchanged) course of conduct is tremendously complex.

## **COSTS, TIME, AND SAVINGS**

### **COSTS AND SAVINGS WITHIN THE CRIMINAL JUSTICE SYSTEM**

**DIRECT COSTS.** Some respondents discussed the immediate financial costs of remote court. In Miami, a court employee noted that “[t]here have been a lot of IT expenses.”<sup>316</sup> A judge concurred, explaining: “I mean, before we didn’t even have the Zoom platform. So now—there is a cost involved.”<sup>317</sup> In North Dakota, a court employee noted that the teleconferencing package was “very costly because they are, my understanding is they’re paying long-distance phone lines, you know, for that.”<sup>318</sup> And in Milwaukee, a judge explained that, while they had “worked through” it, technology costs initially presented a problem:

But we had a real crisis, and it was especially acute in Milwaukee because we haven't spent a proportionate amount of whatever money we get on technology. . . . Milwaukee County was way behind the curve on that. There just wasn't the money for it. You know, the county's financially stressed as it is.<sup>319</sup>

**SAVINGS: ATTORNEY AND JUDGE TRAVEL.** Travel for attorneys and judges was a major concern: More than a third of interviewees discussed driving, traffic, parking, and travel time for these actors.<sup>320</sup> They almost exclusively noted that remote court and remote attorney-client communications were beneficial on those metrics. Driving was time-consuming, according to most respondents, and the travel time had various economic costs.

In the minority, two respondents noted that they found no difference in travel time or valued the time they spent in their cars. One North Dakota prosecutor, for example, “spent most [of his] time in the car driving with a headset on and telling [his] phone to call different people,” which hadn't “changed a whole lot.”<sup>321</sup> And one defense attorney explained that he benefited from travel overall:

I don't know if it's me, I like travel. I ride motorcycles, so that's kind of fun in the summertime to just be able to kind of mentally cut loose a little bit. . . . But windshield time, as I call it, windshield time, driving, is kind of a, I don't know, maybe a, a . . . meditation. And I have actually come up with decent arguments for clients or decent legal arguments when I'm traveling, thinking about a case.<sup>322</sup>

For these interviewees, remote court carried no extra efficiencies due to a reduction in travel time.

The majority of respondents discussing travel, though, cited it as a drawback of in-person court proceedings or client meetings; they considered the lack of travel associated with virtual interactions to be a time- and money-saving benefit. Across all three jurisdictions, respondents decried their pre-COVID travel routines and exalted the comparative efficiencies of going virtual.

In Miami, remote communication helped solve problems of traffic and parking. One defense attorney explained, “We don't have to drive, which the drive is a big deal. I mean, traffic in Miami sucks. And so I would have to leave really early to get a decent parking space at the courthouse.”<sup>323</sup> Other defense attorneys noted that, with remote technology, they didn't “have to drive out and waste an hour, an hour and a half, to two hours in traffic.”<sup>324</sup> And a court employee noted that “[i]t's much easier. Before [COVID], you would have to schedule [the meeting], and I'd have to drive to other courthouse, or I'd have to drive to the county IT department, which is down south. Even driving to a jail now is just, ‘Here's the Zoom link.’”<sup>325</sup>

In Milwaukee, too, respondents were concerned with travel time, traffic, and resulting costs and inefficiencies. One defense attorney noted the costs of traveling to one of the local jails, which are alleviated by video conferencing: “[I]t takes time to drive there, especially if there's

traffic. So if there's traffic, it will take you maybe half hour to get there and back. So it's an hour on the road for our lawyers."<sup>326</sup> A second agreed that the ability to video conference with the local jail was "huge," both because the facility is "30 minutes away" and because video-conferencing allows attorneys to more easily contact in-custody defendants within 48 hours.<sup>327</sup>

If anything, travel concerns were larger in North Dakota than in the other jurisdictions. Respondents connected attorney travel concerns with both the vastness of the state and the limited number of defense attorneys. Zoom and teleconferencing, they believed, helped alleviate that burden. The following examples are illustrative:

And with that ruralness, we have limited attorneys in some of our smaller jurisdictions. . . . They would have to also travel that far, which gives them a lot of windshield time and less time in court. Where with Zoom, they're able to appear remotely in a courthouse on the east side of our state, and then 20 minutes later, they can appear on the west side of our state. I think our defendants and people who are requiring attorneys are getting a better service.<sup>328</sup>

And some [judges], I believe, understand the toll that it takes on indigent defense attorneys to have to travel more than others. That's just how it is. I mean, we have six judges across 11 counties. . . . [I]t could be a little cumbersome if it's a 15-minute hearing and I have to drive three hours to get there.<sup>329</sup>

[O]ne of the benefits of [Zoom] is that there's a lot of defense attorneys that do not live in this area. The contracts that we have for indigent defense services, a couple of those attorneys come from Grand Forks, which is 45 miles away. And we have attorneys from Fargo. That's a couple hour drive away. We have attorneys that come from Devil's Lake. It's a 90-mile drive. And so they, those defense attorneys are, are liking that they don't have to put in all that windshield time. And they're very overstretched, honestly, our indigent defense counsel, those attorneys, there's not enough of them. And so what we can do to try to make things easier for them, I'm all, I'm all for it.<sup>330</sup>

[T]he indigent defense counsel here, we have two main ones and another one who does kind of half time, but they actually cover nine counties. They drive two hours for a 15-minute hearing when they have to be in person. . . . And this is what we're trying to change to make their lives a little more, not easier, but actually make it make sense so they don't have to be everywhere at once.<sup>331</sup>

As one North Dakota prosecutor noted, reduced travel time for defense attorneys can have far-reaching benefits: "Without drive time, that can speed along the process. Anytime a defendant can reach resolution, they have a right to have their case concluded. Anytime that you can aid in being more efficient without compromising defendant's rights or prosecution's rights—that's important."<sup>332</sup> Nor was defense attorney travel time the only travel concern respondents expressed. Two prosecutors, for example, noted that remote court saved them travel time as well.<sup>333</sup> And one noted that judges benefit from not having to travel to the remote parts of the district, and "judicial economy" favored virtual proceedings in those instances.<sup>334</sup>

Across the jurisdictions, interviewees felt that attorney travel time was particularly problematic in very minor hearings. Several respondents described instances of discrepancies between travel time and court time: “drive a two-hour round trip for a 15-minute hearing,”<sup>335</sup> “two hours up here and then two hours back for a 30-minute motion hearing,”<sup>336</sup> “a 15-minute hearing and I have to drive three hours to get there,”<sup>337</sup> or “four- or five-hours round trip to go to a 10-minute hearing.”<sup>338</sup> Others described discrepancies between the travel time and an essentially known outcome. A North Dakota defense attorney explained that, while he generally prefers to be in person with his client, “I wouldn’t want to have to drive all the way to Grand Forks to have a five-minute bond is set at, you know, \$20,000 goodbye type hearing.” And a Miami attorney recounted a typical frustrating situation where he knew the outcome beforehand:

“Judge, I need a continuance.” “Why . . . ?” “Well, because the state hasn’t given me discovery, and it’s the first time up.” “Okay, granted.” And then I’m done. Why do I need to waste all of that time driving and then sitting there, and waiting to be called for something that I know is gonna happen anyway? I mean, it’s just, it makes no sense, and it just, it makes everybody so pissed off, to be honest with you.<sup>339</sup>

Respondents reported that remote court has been especially useful in such situations. A North Dakota defense attorney explained the convenience to him of virtual court: “One thing I am trying to push for within our district is instead of me having to drive everywhere, it would be really great to appear from my office like this [remote interview].”<sup>340</sup> A pair of Milwaukee defense attorneys who work in several areas of the state reported that not having to drive is “nice” and elaborated: “I want to retain some of the Zoom stuff for, like, ministerial, you know, status conferences. . . . That’s just like, there’s no reason that we have to go to court.”<sup>341</sup> And a Milwaukee judge explained that “a number of hearings are just scheduling” or “theater” and “you might as well just do those on Zoom. It’s very efficient.”<sup>342</sup>

Several interviewees also pointed out that the switch to virtual hearings and the subsequent lack of travel saved money as well as time, two overlapping but distinct values. Two Miami attorneys described the benefits for their own finances: One noted that remote technology was “convenient” and “saved [him] a ton of money,”<sup>343</sup> while another described avoided parking costs.<sup>344</sup> Other interviewees noted savings for defendants. North Dakota judges explained that remote proceedings are “much cheaper for [private defense attorneys’] clients. Their clients were having to pay \$285 an hour for their attorneys to drive and be out of their office for that much more time.”<sup>345</sup> A Miami judge similarly noted the cost savings for defendants, as well as the opportunity for defense attorneys to use the saved time more productively:

[T]he forced transition to remote, this remote platform, has shown both judges and attorneys, some of the great benefits . . . for matters that in the past an attorney would drive an hour, and bill their client for that time or even if they’re working on a flat fee still to spend an hour to drive down here, wait in line here in the courtroom for their matter to just be reset two months out. . . . So I think it’s just more efficient. It allows the attorney to be more productive and be working on, in that time, be working on other matters or other items in in the same case.<sup>346</sup>

The same judge also noted that when the public defender has a conflict and a contract defense attorney is appointed, the fiscal savings go to the taxpayers.<sup>347</sup>

**SAVINGS: IN-CUSTODY TRANSPORT.** Seven respondents discussed one other category of travel and cost savings for the justice system: the time and money saved by videoconferencing in-custody defendants into court rather than physically transporting them.<sup>348</sup> As one North Dakota court employee explained, teleconferencing and videoconferencing “makes it a whole lot easier on the sheriff because he doesn’t have to try and arrange bodies going and picking up and dropping off and all of that stuff, and so they really appreciate that.”<sup>349</sup> A second court employee noted that some facilities—juvenile facilities in particular—are five hours away, resulting in 20 hours of driving for the transporting deputy.<sup>350</sup> And a third pointed out that the lack of transport is “a cost savings as well for the county.”<sup>351</sup>

In addition to transportation time and costs, two interviewees added safety into their analysis. A North Dakota court employee noted: “When you don’t have to transport, you lessen the risk of something occurring.”<sup>352</sup> A Milwaukee prosecutor added:

I think it’s just easier to be able to do the appearances for us: scheduling or an initial appearance, things like that through Zoom. It just makes more sense. I think it’s a more efficient use of time. I think even from a safety standpoint, it just makes sense, you’re not transporting people doing things like that. . . . And I still do think if we could do charging conferences remotely if we could get that, you know, as a standard, I think that will save not only us time, but it would probably save taxpayers time too, right?<sup>353</sup>

Respondents were particularly adamant about the benefits of not having to transport defendants from mental health facilities. For a North Dakota judge, that concern was purely about driving distance: The state hospital was “100 miles away,” resulting in “almost 400 miles” driven by the deputy sheriff.<sup>354</sup> But for two Milwaukee judges, the concerns also included what was best for the petitioner:

So they file their petition for conditional release . . . and the doctor says, no way is this person ready. Am I gonna bring that person down to Milwaukee for a hearing on that? Not if I don’t have to, because it’s not good for the patient, and it’s not, it’s not financially responsible of me. So, now, because everybody’s up to, so much more up to speed, we can do that by video. And it just makes much more sense to do it. It’s more humane. I mean, who, why would it in anybody’s world be good to bring someone who’s hospitalized down and put him in the Milwaukee County Jail? I just, that’s not very humane.<sup>355</sup>

Once again, though, it is crucial to note the tension between these efficiencies and the desirability of reducing in-person access to defendants. One judge lamented the “limited connection time with in-custody defendants” and that this “makes it necessary to just manage that time in a way that wasn’t required when defendants could be brought in live in person, you know, any day of the week.”<sup>356</sup> 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.<sup>357</sup>

## EFFICIENT INTERACTIONS WITH COURTS

As many respondents explained, in-person court involves inefficiencies and access to justice issues, most especially for out-of-custody defendants but also for victims. While in-custody defendants are transported (or not) by the state, out-of-custody defendants “entirely” bear the “economic burden” of “com[ing] to the courtroom” for in-person proceedings.<sup>358</sup> Remote court can improve the efficiency of the system, according to almost a third of respondents, by eliminating defendants’ and victims’ travel time, removing travel costs, and alleviating other expenses of in-person attendance, including lost wages and childcare.

**OUT-OF-CUSTODY DEFENDANTS.** Out-of-custody defendants, like attorneys, must find a way to physically get to the courthouse for their hearing. This is no small feat. Respondents in Milwaukee, for example, reported that public transportation to certain courthouses can take half a day.<sup>359</sup> Those in Miami similarly noted that “public transportation is subpar” and driving is not much better:

Pre-COVID, traffic was horrible. So you’re making people sometimes come here to the courthouse, and parking, by the way, is insufficient and really expensive. So somebody who works for a living, needs to work, is being forced to come to court, maybe a 20 or 30-mile ride, you know, that could take a couple of hours on public transportation. . . . And you know, all that time, all that expense for a hearing that might last a minute and a half, you know, or a reset.<sup>360</sup>

As with defense attorneys, driving can be particularly burdensome on out-of-custody defendants in North Dakota. One court employee explained that the “furthest courthouse that we oversee is 4.5 hours away. . . . So if that person as it happens, travels to one of the big cities, and they got a citation. They would have to drive that 4.5 hours to that courthouse.”<sup>361</sup> Moreover, as North Dakota interviewees noted, not everyone has a car.<sup>362</sup> One judge noted inequitable distribution of this problem: “[T]he Chippewa and the Lakota have a hard enough time getting to court from, from the reservations because sometimes they don’t have a car.”<sup>363</sup>

Defendants’ burden is more than transportation costs; lost wages and childcare costs also factor in. As one Milwaukee defense attorney noted, “people could wait in court, you know, all afternoon, finally get their case called at 4:30, and they’re taking off the whole day of work for that.”<sup>364</sup> A Miami defense attorney similarly noted:

Some of the public defender clients simply can’t afford to come to court all the time. You know, they don’t have transportation. It’s, they don’t have childcare at home, they’re working a 9 to 5 hourly wage job that they can’t tell their boss, “I got to go to court because I’ve got an open criminal charge.”<sup>365</sup>

As was the case with attorneys, respondents reported that in-person attendance requirements were especially inefficient for minor hearings. One Miami defense attorney noted that:

Miami-Dade, in particular, would have all these soundings and status conferences, and they were oftentimes 30-second hearings that were meaningless but would eat up the entire morning. A lot of judges would require your client to be present for their sounding, which: 1) is inconvenient, 2) if you have a client who has a job, has childcare issues, and has to do multiple sounding hearings over the course of, say, six months, they're gonna lose their job.<sup>366</sup>

A Miami attorney agreed that “in-person status hearings” were “a waste of time, particularly for poor people, to have to come to the courthouse, spend money on parking, miss an hour, two, three, four hours of work.”<sup>367</sup>

Respondents explained that virtual hearings can help alleviate the access barriers associated with in-person attendance. One Milwaukee defense attorney, who had found it “always very upsetting to me that we could not find a, you know, a technological way to be able to mitigate the impact that this was having on people’s lives,” discovered that proceedings could happen “very easily remotely.”<sup>368</sup> Two others agreed, citing the benefits of being able to phone into court:

I could say to the judge, “Hey, let me know. My client will have his phone with him. Let me know when you’re ready for him and he’ll connect in. So give me three minutes.” And so, instead of him having to take off, So maybe only has to take the last 20 minutes off of work. So it makes it a lot easier for my clients.<sup>369</sup>

[W]e had clients who had all manner of trouble getting themselves to court in a timely way. And that was because they had transportation problems. They had complicated family lives. They had children who were, you know, sick and couldn’t get to school. And they had to try to find some way to solve that problem the same morning that they were supposed to be in court. So for the clients who had cell phones and who were able, especially smartphones, right, were able to, to make appearances, Zoom appearances, we think we got some people into court and kept their cases moving along that maybe in the past we would have lost some of those people. . . .<sup>370</sup>

Similarly, one Miami judge hoped to “keep a large part of our practice efficiently on Zoom, where people don’t have to come to court and spend money on parking and wait in line and drag their clients into court . . . and people losing jobs and, you know, all that.”<sup>371</sup> A second had heard “judges and even defense attorneys” saying that remote court is “really much more user friendly for indigent individuals because . . . people can make their court day and not have to miss half a day of work” or use the “somewhat unreliable” public transportation system.<sup>372</sup> A Miami prosecutor agreed that the process is “much easier” when defendants “don’t have to schlep in to court in for an entire morning” for a speeding ticket.<sup>373</sup> And a North Dakota defense attorney noted that it “actually . . . worked out better” for a faraway client to call in over Zoom.<sup>374</sup>

Importantly, though, the comments discussed here do *not* deal with the access to technology issues sparked by virtual court, nor does this section directly compare these efficiencies with those issues. While quantitative analysis is most appropriate for that question, this study compares those issues as best it can in Chapter 7: Access to Technology. As that section discusses, respondents are essentially evenly divided in whether they expect defendants to appear more easily in remote court or in-person court.

**FAMILY MEMBERS, VICTIMS.** Nor are defendants the only ones said to benefit from the efficiencies of remote court. One drug court judge noted that Zoom court was “a lot easier” for defendants’ family members, as compared to the sometimes “onerous” process of in-person attendance.<sup>375</sup> And a Milwaukee prosecutor noted that Zoom was “easier on victims”:

I think in the past, victims didn’t necessarily want to come down to court to make a statement in regards to bail. But now, through Zoom, it’s so much easier for them to do that where they could just go onto their phone, make their appearance, and still do the rest of their day and not worry about missing half a day of work.<sup>376</sup>

The same efficiencies for out-of-custody defendants, then, can also extend to their families and to victims.

## CONVENIENCE AND WAIT TIMES

The foregoing subsections discussed the costs and savings associated with getting to remote court hearings—but what of the hearings themselves? Respondents generally cited two such efficiency themes: conveniences associated with such hearings and the amount of time spent in hearings, including the ability to multitask while waiting.

**CONVENIENCE.** Respondents mentioned (often in passing) a number of conveniences they experienced in remote hearings. Two North Dakota defense attorneys mentioned their preference for informal clothing options. One explained: “I just left court, right, I am in a sweat—I am in a hoodie sweatshirt and jeans. Okay? I hate suits. I hate suits and tie. So being able to have just left court and being in that and being able to wear this? Awesome, awesomesauce.”<sup>377</sup> A second preferred that “I don’t have to, you know, get all cleaned up and go down to the courthouse and stand around in a suit and tie.”<sup>378</sup> Not dissimilarly, one Milwaukee defense attorney found Zoom “nice, because instead of sitting in there and suffocating in non-air conditioning, I could sit in my office, and I could jump between video hearings and, like, I could sit here with a can of soda.”<sup>379</sup> And a Miami defender explained both the conveniences and inconveniences of Zoom. On the plus side: “I have a big conference room table, and I can have all my documents laid out in front of me as opposed to, say, being in the courtroom with just this tiny little lectern in front of me and trying to manage space.”<sup>380</sup> But as an aesthetic inconvenience, “I had to go on Amazon and get a ring light and I have to constantly move my computer because my conference room is backlit.”<sup>381</sup>

On the whole, though, these convenience factors seemed very minor to respondents. As the next subsections will illustrate, issues like the duration of hearings and the ability to multitask seemed more at the forefront of their minds.

**WAITING AND MULTITASKING.** Interviewees disagreed over whether remote hearings were generally longer and more delayed or short and more efficient, as compared with their in-person equivalents. Indeed, a number of interviewees gave mixed responses, indicating that certain things were less efficient and others more efficient or that inefficiencies might change over time.

In terms of inefficiencies, respondents noted that virtual hearings involve both waiting and glitches. A North Dakota prosecutor described a hearing that “took longer because all of a sudden we’re having to read documents [exhibits into the record] and . . . it was quite herky-jerky. . . . It wasn’t an effective hearing at all on that particular occasion.”<sup>382</sup> A Miami defense attorney explained that hearings can be “awkward” and “clunky,” and “even though Zoom’s very sophisticated technology, there could be a delay.”<sup>383</sup> One Milwaukee prosecutor described “a lot of sitting around and waiting.”<sup>384</sup> And as another prosecutor explained, that waiting can come with considerable uncertainties:

And so you could be waiting in that Zoom waiting room for I think, the longest I waited for was over two hours for my appearance to be called. . . . No one’s telling you, “This is what we’re waiting for.” Or you don’t even know if the other parties are in the waiting room or if there’s something else going on that, you know, results in your case not getting called. . . . You know, and the chances, maybe you have to go get a glass of water or something, and all of a sudden your case is on there and you’re not there and then you get skipped again. So those waiting rooms and those waiting times have been something that’s difficult for us to deal with. . . .

I can imagine that it can be very frustrating for a defendant or for a victim, you know, waiting for their case to be called. . . . [I]t’s not overly different than how you would handle it when we were in person, but I certainly could see how it is frustrating, especially when you don’t know. You know, the difference on Zoom typically, is that when you were in court, the clerk could at least tell you when your case was gonna be called. When you’re in the Zoom waiting room, you don’t really have a lot of that opportunity to communicate with the court or with the clerk to find out, you know, what the order of your case is.<sup>385</sup>

Other respondents cited delays stemming from workarounds and substitutes for live attorney-client communication.<sup>386</sup> A prosecutor in North Dakota explained that in teleconference court: “If the defense lawyer needed to consult with his client, we have to shut everything down. They’d have to do an independent phone call now. And then we’d have to come back on. It was quite cumbersome.”<sup>387</sup> A North Dakota defense attorney expressed similar sentiments about Zoom’s breakout rooms, noting that they are generally “a good thing” but “the court has

to, you know, move on. And leave the hearing and do somebody else while you converse, and it can really be time-consuming to get back in line.”<sup>388</sup> And a Miami defense attorney noted that breakout rooms and side phone calls “make these things go at a snail’s pace.”<sup>389</sup>

On the opposite side, several respondents (particularly in Milwaukee) found that remote hearings went more quickly than in-person hearings. According to a defense attorney, “waiting in court sometimes is shorter I think now. . . . [I]n general, I would say people are waiting a lot less.”<sup>390</sup> One judge thought, “that there’s an efficiency to Zoom, the statuses, and the pre-trials, they just go by very, very quickly, we’re not waiting. . . . I think, made things a lot more efficient.”<sup>391</sup> A second agreed: “[W]e can get so much done. I mean, you know, I had Zoom hearings this morning, Zoom hearings, and you can crank out 20 hearings in an hour, you know, on Zoom.”<sup>392</sup> And interestingly, the Milwaukee prosecutor who discussed the cons of wait times also noted that the hearings themselves can be shorter: “Doing [hearings] through Zoom . . . has helped considerably, because I think the amount of time that goes into those appearances is reduced.”<sup>393</sup>

Still, other respondents, like that Milwaukee prosecutor, expressed mixed opinions. One judge explained that “we do run through things at a nice pace” but also explained that calendars might “take a lot longer than you expect” because of the breakout rooms between defense attorneys and clients.<sup>394</sup> And two interviewees noting that the process was slower but thought that might be temporary. One Miami defense attorney explained:

I actually think practice is more difficult right now, but we’re also in the process of adjusting to it. Maybe, you know, six months from now I’ll be like, Oh, no, it’s so much easier. . . . But right now it’s actually makes it I feel like I’m working longer hours and twice as hard on stuff.<sup>395</sup>

A prosecutor in North Dakota concurred:

I think right now [remote proceedings are] slow. . . . So it’s hard to go ahead and tell, you know, I don’t know what the long term is gonna be. Maybe once we get used to it, it’ll, you know, expedite things, you know? . . . . I mean, maybe it will be a lot faster in the long run, but right now, it’s not normal. It’s not routine, in my opinion. So it’s not uniform, and that’s part of the reason it’s slowing it down.<sup>396</sup>

Finally, a group of respondents discussed the related efficiency gains of multitasking during hearings: However long the hearings were, attorneys were more efficient because they could work on other matters until their case was called (more so over Zoom than in the courtroom). One Milwaukee prosecutor noted that “in the meantime, I try to do the same things that I would do in my normal office time: work on motions, work on plea offers, that sort of thing.”<sup>397</sup> A Milwaukee judge similarly expected that “Zoom will, moving forward, be incredibly helpful for attorneys. I think it’ll allow attorneys to be more productive.”<sup>398</sup> A North Dakota defense attorney described talking to clients on the phone while waiting for his turn in Zoom court.<sup>399</sup> And according to a Miami defense attorney, the office’s Zoom plan “allows us to really be efficient” by using “multiple Zoom courtrooms simultaneously.”<sup>400</sup>

## INEFFICIENCIES AND SACRIFICES

But virtual hearings do not only spur efficiency gains, nor are efficiency gains necessarily welcome, according to some respondents. In addition to the negative side effects discussed previously (e.g., technology costs, mixed opinions about court wait times), respondents cited a number of predominantly negative aspects of virtual hearings.<sup>401</sup> Several such concerns are addressed in other sections. For the purposes of this section, we discuss concerns about additional work and missing interpersonal dynamics and foreshadow concerns about lower quality justice.<sup>402</sup>

### PREPARATION, TRACKING, AND MANAGEMENT

First, attorneys and court personnel spoke of the logistical difficulties of the virtual forum. Attorneys in North Dakota, for example, had to deal with new advanced exhibit-filing requirements. Opinions were mixed: One judge, for example, worried that the new requirements might hamstring already-busy defense attorneys but also described an attorney who unexpectedly liked having everything “lined up before the trial begins on both sides.”<sup>403</sup>

Other interviewees explained that the process of virtual hearings involved either more steps or new steps. A prosecutor in Milwaukee explained, “It’s just, as opposed to having, you know, four steps to get to court for a hearing—you know, make sure my witnesses are subpoenaed, make sure I know where to go—you have 18 steps to get there.”<sup>404</sup> And a defense attorney discussed the difficulties of memorizing Zoom rooms and preparing clients for virtual court:

I mean, we have to not only get on Zoom, every single one of the judges, you know, and there’s 44 of them, all of them have set up their own Zoom stuff. So there is no place to look up and see what your judge’s Zoom number is. Some of them change every week. Some of them keep the same thing. Some of them have passwords. Some of them don’t, and it’s not like you get a memo. . . . [A]nd you not only have to be on top of that, you have to make sure that your client, who has a flip phone and doesn’t know what the eff they’re doing, is on top of that. . . . I had one of my interns draw: this is what the internet is, this is how you do Zoom, and it’s literally a screenshot page by page, you know, for people who have no idea what they’re doing. And I have them call me and practice before we go in the court. . . . So there’s a lot to keep track of that you would never have to keep track of before.<sup>405</sup>

Feelings of “more steps” and increased busyness were especially common among court employees in North Dakota.<sup>406</sup> In an interview with two court employees, one explained that the judges “don’t really realize that it’s 56 more steps. You know, we’re still going to the same shed, but we’re having to go around the block 14 times.”<sup>407</sup> Her coworker elaborated:

It's really a lot of pressure. . . . I am always in the courtroom at least 30 minutes before every hearing. I usually shoot for about 45 to make sure that everything's up and running and everything is working. And if something's not, it takes a few minutes to, you know, try and figure out where the problem is. . . . [Judges] have absolutely no idea what [we] have done to make that happen. And I don't mean for this to be a negative, because this is the way it should be. They need to have their head in the law and the, you know, the rules and the jurisprudence and all of that stuff. They don't need to be worried about the little, you know, the 10,000 details that made that happen. But that does not minimize the fact that there were 10,000 details that made that happen.<sup>408</sup>

The coworkers agreed that the extra work had taken an emotional toll.<sup>409</sup> In a separate interview, another court employee explained that “it seems like it's harder now. . . . I answer so many calls [about Zoom] and have to sit and explain it all to them, how they're doing it. But it's explained in their notice of hearing, but they still don't understand.”<sup>410</sup> However, another court employee noted only a small increase in work (“a bit more paperwork”), which took “a minute or two more.”<sup>411</sup>

## IN-COURT INTERACTIONS

A number of respondents missed in-person interactions and felt that the quality of interactions within the justice system decreased. An entire subsection of this report is dedicated to respondents' views on the humanization and (overwhelmingly) dehumanization of defendants that occurred with the switch to virtual court.<sup>412</sup> Respondents described the loss of physical cues, emotional connection, or simply “something intangible” in the transition to virtual interactions.<sup>413</sup> Defense attorneys, too, described lost personal connection when their attorney-client relationships shifted from in-person to virtual.<sup>414</sup>

The loss of in-person dynamics is not restricted to these contexts. Thirteen interviewees mentioned the loss of informal case discussions in the courthouse between defense attorneys and prosecutors.<sup>415</sup> One prosecutor worried that the loss of informal conversations “has increased some of the adversarialness” and made it easier to misinterpret communications.<sup>416</sup> Other interviewees felt that this shift in communication had consequences for plea bargaining. As one defense attorney explained: “A lot of last-minute plea deals are negotiated right before a final dispo[sition] or a hearing . . . because of that ability to see [the prosecutor and client] in the courtroom right before the hearing.”<sup>417</sup> A Milwaukee prosecutor agreed:

I think that one of the biggest changes I've noticed with regards to plea bargaining is, now that we're not in court with a defense attorney, or seeing them, frequently, we don't have time to talk in person. And yeah, you'd be surprised that even just how sometimes the smallest in-person conversations can, how far they can go. I actually just had a hearing, an in-person hearing last, yeah, last week where the defense attorney on the hearing, I have another case with that same defense attorney, totally unrelated to the case for which we were in court for. But after the hearing, we were walking out of the courtroom, and she asked me if she could talk to me. And we actually had a very productive conversation about this other case that we weren't even there for in the first place. . . . And we were able to hash out some issues that otherwise may have just slipped through the cracks or been confined to an email, and maybe things get lost in translation.<sup>418</sup>

Without that informal, in-person conversation, cases are harder to resolve.<sup>419</sup> One judge thought that “cases that would otherwise resolve are taking a little bit longer to resolve just because the prosecutor and the defense attorney haven't had time to have a meaningful discussion.”<sup>420</sup> Six respondents—all in Milwaukee—noted that emails don't allow for the same kinds of communications.<sup>421</sup> And a few defense attorneys thought that their clients “got better plea deals, doing things face to face.”<sup>422</sup>

Respondents noted that relationships had weakened, too. One defense attorney in Miami lamented the lack of relationship-building with judges and court staff.<sup>423</sup> And one Milwaukee defense attorney noted the loss of a collaborative office environment:

Yeah, it's considerably easier than I mean, the missing part is, of course . . . not being in the office with my colleagues. Because a lot of what we do is talk about our cases and the learning process, and the brainstorming aspect of this is missing, you know. It was important, too . . . There's a productive aspect of it, but then the fact is, is that I missed the camaraderie. The going out to lunch. The conversations with, right. So those are the things that we've lost because of this.<sup>424</sup>

Still, others described the strange dynamics in virtual court. As one prosecutor explained it: “Everybody had to learn to be patient. There were lots of new questions: When do you raise an objection? How do you stop somebody else from talking politely?”<sup>425</sup> A defense attorney noted other “weird” dynamics: She could no longer approach the bench at the end of the hearing, and she could not smoothly indicate that she wanted to speak.<sup>426</sup>

## QUALITY OF JUSTICE

A final group of respondents expressed a variety of concerns generally involving the quality of remote court proceedings. All were worried that the efficiency gains of faster, remote hearings came at a cost, be it time and attention to defendants, effective advocacy, or justice writ large.<sup>427</sup> Among those concerned with defendants' understandings, one Milwaukee defense attorney explained that rushed remote court forced her to forgo conversations with her clients:

And prior to COVID, if there was an issue, if we were doing a plea and sentencing and the client had a question, and it was something I need to explain more, I would just ask the judge just to pass the case and give me 10 minutes to go in the hall with my client and talk to them. Now the judges are less, I guess, willing to pass the case for longer periods of time because they also don't want to sit on Zoom. So it's kind of like if the client has a bunch of questions, the case is just going to get moved to another date because they don't want to wait this long. I will say that's something, that's another issue we've been dealing with, is the judges allowing us the time that we need.<sup>428</sup>

A prosecutor in North Dakota also worried over whether defendants understood the process or were just rushing along. "So you just wonder, do they really, you know, they're just looking to get their ticket punched to get out of whatever setting they're in? Probably. So they agree, agree, agree. And that kind of bothers me."<sup>429</sup>

Other respondents connected in-person proceedings to increased efficacy. According to one prosecutor, "we went back to face-to-face because the Court, the judge and I think the court personnel and law enforcement and everyone saw that the more effective application of the judicial services by person-to-person."<sup>430</sup> One defense attorney in Miami discussed his effectiveness as an advocate in virtual court:

[O]verall, I just think I'm not as effective. I mean, but if you ask me exactly why, for this occasion, for this client, I can't tell you. And maybe nine times out of ten, I'm not. But I know in my head and in my heart that I am just not as effective an attorney and advocate in this virtual situation.<sup>431</sup>

Finally, other respondents expressed concerns about justice,<sup>432</sup> with three respondents explicitly invoking the term in this context and one other explicitly contrasting rights with efficiencies. One defense attorney in Miami worried that increased use of video technology would affect attorneys' capacities "to properly examine and think through really complicated questions of fairness and justice."<sup>433</sup> Another defense attorney, this time in North Dakota, noted that efficiency was not the goal:

[Remote technology has] been helpful for me as an attorney. But I'm sensitive to the fact that I think it can have a huge impact on my clients. I mean, just because it's good for me, it doesn't mean it's good for them. The goal is not for me to have an easier schedule. It's for them to get justice.<sup>434</sup>

A third defense attorney explained that some of the rights potentially compromised by virtual hearings—confrontation and jury trials—should not be compromised for efficiencies:

You know, there's a reason why we have to right confront the accusers. There is a reason why it's a jury trial. . . . You know, there's a reason that these things were put in place, so don't lose focus on those reasons just for the efficiency of getting the, the court's docket under control.<sup>435</sup>

Likewise, a prosecutor in North Dakota acknowledged that remote proceedings had positive consequences for money and time. He continued:

But the negatives, I mean, I'd rather spend that money and take that time. I don't want to say take that risk [of COVID transmission]. But, you know, the most thing I'm worried about is justice being done. So if a witness's testimony isn't being given as much weight as it should, and that would change the judge's opinion, I'd say, "Well, I don't care, I'd rather do it in person, and let's get it done that way." Because I think that's my number one job is to, you know, as a member of the government, to try to be as just as possible. So I put a lot of cost or weight on that versus other things.<sup>436</sup>

## CHAPTER 7: ACCESS TO TECHNOLOGY

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When courts transition from in-person proceedings to virtual ones, defendants (and other interested parties, including victims) face new access issues: Their access to technology maps directly onto their access to the courtroom and, thus, their access to justice. It is perhaps no surprise, then, that interviewees in all three jurisdictions expressed concerns about defendants' and victims' access to technology. Such concerns arose in nine out of 12 interviews in Miami (75%), 11 of 21 in Milwaukee (52%), and 17 of 22 in North Dakota (77%).<sup>437</sup>

The majority of respondents mentioned access-to-technology concerns—but not all respondents agreed that access-to-technology issues inhibited defendants' access to virtual court. A small subset of interviewees believed that access issues were nonexistent or minimal, at least for the “majority of people.”<sup>438</sup> One prosecutor in North Dakota, for example, didn't think access issues had “caused any hardship.”<sup>439</sup> One defense attorney from Miami had not “run into anyone who has said ‘I can't do [virtual hearings].’”<sup>440</sup> A second reported that his office had “enlisted pollsters,” who “came back with stats like close to 90% of [Miami-Dade] county [residents] actually have at least a phone, at least some form of technology to sign on.”<sup>441</sup>

Nor were access-to-technology concerns evenly distributed between judges, defense attorneys, and prosecutors.<sup>442</sup> Judges most commonly raised access-to-technology concerns and did so almost uniformly: 13 of the 15 judges in this study (87%) mentioned some such concerns.<sup>443</sup> Defense attorneys raised access-to-technology issues the second most frequently, in 15 of 20 interviews (75%).<sup>444</sup> Prosecutors, by contrast, raised access-to-technology issues in six of 14 interviews (43%).<sup>445</sup>

The appearance of different perceptions among these different actors should give us pause. More research is necessary to determine the robustness of the differences between defense attorneys, judges, and prosecutors. And should the results hold, they beg the question of why such differences exist. Are defense attorneys or judges exposed to information that prosecutors are not, or vice versa, resulting in different judgments across the groups?<sup>446</sup> Does one or more of the groups have a systematic bias, leading them to view access issues as more or less salient? And perhaps most importantly, which group is correct in their assessments of access-to-technology problems? This study provides no direct information about the *actual* frequency of defendants' technology access issues. But differences in *perceived* technology problems illustrate the uncertainty and thorniness of the issue: Even practitioners in the field have quite different assessments of the scope of the access problem, implying that the actual scope of the problem is difficult to assess. Given this uncertainty, criminal justice professionals and policymakers should be careful to question their assumptions about access to technology.

## ACCESSIBILITY CONCERNS

Most often, interviewees' concerns fell into one of four categories: access to phones (including smartphones, cell service, and minutes/plans), access to computers, access to the internet, and access to quiet or private spaces in which to log onto virtual court. The table below shows the number of interviews in which each concern was mentioned (plus a catch-all category)<sup>447</sup> by jurisdiction<sup>448</sup>:

Jurisdiction	Access to Phones	Access to Computers	Access to Internet	Access to Quiet Spaces	Other Access Concerns
Miami (n = 12)	2 (17%)	3 (25%)	4 (33%)	2 (17%)	2 (17%)
Milwaukee (n = 21)	7 (33%)	3 (14%)	8 (38%)	2 (9%)	4 (19%)
North Dakota (n = 22)	14 (64%)	7 (32%)	9 (41%)	1 (5%)	3 (14%)

As the chart illustrates, the concerns were not identical across jurisdictions. Interviewees from North Dakota expressed concerns about access to phones more than twice as frequently as interviewees from other jurisdictions.<sup>449</sup> Concerns about access to computers and access to quiet spaces also varied somewhat between jurisdictions. On the whole, though, the kinds of access-to-technology concerns expressed by respondents were similar across the jurisdictions.

**ACCESS TO PHONES.** Aside from North Dakota, only a few respondents expressed concerns about defendants with no phone access at all.<sup>450</sup> More often, access to phone concerns also involved access to smartphones specifically (as compared to flip-phones or landlines) or the availability of minutes. One Milwaukee judge, for example, was “mindful of the fact that there are groups of people who don’t have phones [or] minutes on their phones.”<sup>451</sup> Another noted that, despite good Zoom attendance overall, “a lot of individuals had issues in regards to not having smartphones, or not having data plans.”<sup>452</sup> In Miami, one defense attorney noted the importance of phones at shelters for clients who would not otherwise have access to a phone.<sup>453</sup>

**ACCESS TO COMPUTERS.** A number of respondents described defendants who “don’t have computers,”<sup>454</sup> do not have “the ability to have . . . a computer,”<sup>455</sup> do not have laptops,<sup>456</sup> or “who do not have a device.”<sup>457</sup> A few respondents specifically mentioned a lack of access to a computer with a camera.<sup>458</sup> And one judge explained that problems of both computer *ownership* and computer *access* were exacerbated by the pandemic: “[N]ot everybody has a computer. And so a lot of times, if you don’t have a computer, you have to go to like the library, the public library, utilize their computer. Well, you couldn’t. You can’t in COVID right now. There, that’s not really an available option.”<sup>459</sup> Finally, a few interviewees noted the absence of computers by reference to affirmative measures to provide such access. The court administrator in North Dakota, for example, explained that “we have tried to conceptualize setting up use of tablet computers to provide to, for temporary use, to litigants. We had, we had started to explore this concept in juvenile court.”<sup>460</sup>

**ACCESS TO THE INTERNET.** Several respondents noted a lack of access to Wi-Fi.<sup>461</sup> One Milwaukee judge emphasized that “everyone does not have the privilege of having Wi-Fi.”<sup>462</sup> Similarly, in North Dakota, a defense attorney noted that “there’s not really Wi-Fi spots available.”<sup>463</sup> Two prosecutors, one in North Dakota and one in Milwaukee, explained that defendants, victims, or witnesses do not always have Wi-Fi at their house,<sup>464</sup> and a third prosecutor described a victim who had to sit in the window and connect to the neighbor’s Wi-Fi in order to attend a hearing.<sup>465</sup> A Milwaukee defense attorney noted that “until we have any type of, like, city-wide Wi-Fi and, and stuff like that, it’s, it’s gonna be a struggle. Because some clients, yes, can Zoom on their phones and their internet connections are fine, and it works. But others not.”<sup>466</sup>

Other respondents focused on a lack of access to *quality* internet connections. A Milwaukee defense attorney noted that his clients “don’t necessarily have a stable internet connection.”<sup>467</sup> One Miami defense attorney noted that “we still have clients” who “don’t have high-speed internet. They have internet available, but a lot of times, we’re having to ask them to shut the video because the communication is unstable.”<sup>468</sup> Another believed that access to reliable internet posed a bigger problem than access to smartphones: “I do not think as many of my clients have high-speed internet as they have a, smartphones that have the capabilities to do what needs to be done.”<sup>469</sup>

A lack of reliable or high-speed internet, according to some respondents, can result in technical hiccups with potentially jarring consequences. A North Dakota judge explained that “things such a bandwidth (*sic*)” can cause “people being disconnected in the middle [of] trialing.”<sup>470</sup> And a Milwaukee judge summarized the potentially tragic consequences of internet hiccups:

[E]veryone’s been on a Zoom call or conference, where it freezes up or it might drop you, and someone is explaining something. Let’s say they’re explaining something, that did not happen in their view, but it freezes up and what comes out sounds like something did happen, for example. Then go the other way. Well, obviously, that’s a, you know, that could be a tragic error.<sup>471</sup>

**ACCESS TO QUIET SPACES.** A few attorneys noted that access-to-technology issues were exacerbated by a lack of private or quiet spaces. A defense attorney in Miami, for example, described having to make sure clients were alone and “ask the clients—and not every client has them—to put on headphones.”<sup>472</sup> Defense attorneys in Milwaukee described clients who “have to Zoom from my bedroom [or] I have to Zoom from the bathroom or the parked car, to have any modicum of privacy.”<sup>473</sup> And a defense attorney in North Dakota contrasted his ability to sit in his quiet office with the background noise present in many defendants’ spaces.<sup>474</sup>

## WHOSE PROBLEM?

Interviewees often explained that access-to-technology problems are unevenly distributed across society. Seven interviewees described these problems as generational,<sup>475</sup> and 21 described access gaps according to financial resources or across socioeconomic and demographic lines.<sup>476</sup> Defense attorneys were the most likely to make either connection<sup>477</sup>—but interestingly, almost every prosecutor who discussed access-to-technology issues connected them to race, class, or resource constraints<sup>478</sup>:

Access Issues	Defense Attorneys (n = 20)	Judges (n = 15)	Prosecutors (n = 14)
By Resources and Demographics	11 (55%)	5 (33%)	5 (36%)
By Generation	5 (25%)	1 (7%)	1 (7%)

**TECHNOLOGY ACCESS BY GENERATION.** Seven respondents noted that younger defendants have an easier time with technology<sup>479</sup> but described older defendants as lacking access to devices or technological knowledge. One judge in Milwaukee noted: “Some of my older, I would say 40+, 45+ individuals charged with crimes, they just cannot figure out Zoom.”<sup>480</sup> A North Dakota prosecutor said that “if I had a parent still here today and I told them how to get on a Zoom meeting, they would say ‘What? We didn’t even know how to turn on a computer.’ So generationally, I think it would affect access.”<sup>481</sup> A Miami defense attorney elaborated:

I think, more than anything else, it’s generational. My clients who are younger, you know, have absolutely no problem with it. They have a smartphone. They have the capability. They can click on the Zoom link. You know, I literally just text them the Zoom link, and they’ll show up for court if I need them to be in court. With some of the older clients, I think it becomes more problematic, just, you know, figuring out the technology and whether or not they actually have it.<sup>482</sup>

A defense attorney in Milwaukee described one of her “tech illiterate” clients in detail:

I have a client right now . . . and he’s only in his 60s, but he seems 20 years older, it’s what we call a hard 60. Poor guy. And he cannot do, I mean, he is completely tech illiterate. . . . And that’s been, that’s been a problem for a lot of my clients, not knowing how to use, how to download an app, you know.<sup>483</sup>

As other defense attorneys pointed out, generational access issues can be linked with other characteristics. One in Miami noted that “the people that don’t [have phones] are either going to be very elderly or very poor.”<sup>484</sup> Another pointed out that older defendants with prison sentences “left off in the land of beepers and cellphones being bricks,” and modern technologies like smart phones and texting are “foreign to them.”<sup>485</sup>

**TECHNOLOGY ACCESS BY RESOURCES AND DEMOGRAPHICS.** Twenty-one respondents described some degree of connection between access to technology and resources, class, or race. The simplest such comments noted that certain defendants or victims “don’t have the resources”<sup>486</sup> or “can’t afford” various kinds of technology.<sup>487</sup> Others describe access issues that occur “because a lot of people are poor”<sup>488</sup> or among “poor clients” who are “all public defender eligible.”<sup>489</sup>

Other interviewees more vividly described the “class implications” in “the use of all these technologies,” as when judges chastise defendants to take their hat off when they’re “on break in a side room at Burger King.”<sup>490</sup> One defense attorney explained, “I am sure that we have a number of clients, you know, who do not have a device and who do not have internet. I can say that for sure because we have about 900 or so clients who are homeless.”<sup>491</sup> A prosecutor in North Dakota elaborated:

The other thing is like I said, we live in a (*sic*) economic, economically poorer area. People don’t have phones, or if they have phones, they’re limited on how much they can use their phone because they’re going by minutes. They don’t have Wi-Fi. They don’t have somewhere where they can use free Wi-Fi to access a court hearing. . . . I mean, yeah, we don’t have people that have six or seven devices down the hallway. They do not have the internet in their house. They don’t have a house. They’re in a car. They’re in a building empty for the night. They don’t have a way to appear if it’s electronic only. And I don’t know that people advocate for themselves to be able to say that.<sup>492</sup>

On a similar theme, one judge connected access to technology with both poverty and race:

I think [Zoom] really disfranchises Native Americans because they don’t have the technology really to, to get that up. I mean that’s just the extreme poverty. So I really think, you know, in theory and on paper, it’s good to do the Zoom, but with certain populations and certain areas it disenfranchises certain, certain people. And by that, I mean the Native Americans. . . .<sup>493</sup>

Slightly over a third of all interviewees connected access-to-technology problems with a lack of resources, poverty, or race. As one defense attorney summarized: “[T]he economic story of COVID-19 is every bit as bad as a health story. And, you know, the people who were always hurt the most are the people at the bottom of that heap, so to speak.”<sup>494</sup> According to two defense attorneys, such access-to-technology problems are severe enough to raise constitutional due process concerns.<sup>495</sup>

## ATTENDANCE AND FAILURES TO APPEAR

Most respondents agree that access-to-technology issues affect at least some defendants—but how bad are those problems? Have they merely created a hassle, or have they presented *enough* of an access barrier to prevent defendants from accessing the courts? Alternately stated, what impact does remote technology have on defendants’ appearances in criminal cases?

This is a complicated question. This section has focused on the barriers to technological access affecting virtual court, but there are also access issues affecting in-person court, as discussed in Chapter 6: Efficiencies and Inefficiencies. How do those issues compare, and is one regime better at facilitating attendance and access to justice? A full answer would involve a statistical comparison of in-person and virtual attendance data across jurisdictions, controlled for a slew of other factors (including the health effects of the pandemic). This study cannot provide that. Indeed, respondents offer only the barest hint of an answer—but the question is important enough that the hint of an answer is worth exploring.

On the question of which forum—in-person or virtual—is most conducive to attendance, interviewees were sharply, and almost evenly, divided. The table below illustrates the number of interviews in which each perspective was voiced:

<b>Increased Appearances, Decreased Failures to Appear (FTAs)</b>	<b>Decreased Appearances, Increased Failures to Appear (FTAs)</b>	<b>Mixed</b>
8	7	5

The first group of respondents believed that remote appearances allowed defendants to appear when they would not have been able to do so otherwise. Some respondents expressed that opinion only tentatively. A defense attorney in North Dakota, for example, conceded that “it’s possible” virtual court has prevented failures to appear (FTAs): “Not a great amount, but there may be a limited amount possible as a factor.”<sup>496</sup> Others cited “anecdotal evidence” of “more people coming in, litigants coming into hearings in the criminal cases.”<sup>497</sup> One court administrator described his second-hand impressions in increased appearances:

I think, and this is just anecdotal, I have not researched it, but it’s just, in talking to a number of judges, listening and seeing what’s happening in court, we think that for gaining more appearances, that people are more comfortable appearing remotely. . . . I think we’re getting to more results, I think, to assist people with their own comfort level in how to work with the judicial system. So, you know, I think we’re facilitating justice in new ways.<sup>498</sup>

Still other respondents described increased appearances based on first-hand experience. One

court administrator described “seeing ‘Oh my God, there are more people appearing through Zoom than when we were live in person.’”<sup>499</sup> A North Dakota judge had a similar reaction:

And I would note that it seems to me, anecdotally, I don’t know that, I don’t have a really strong evidence, but it seems like we got a lot more compliance. It seems like people, people were calling in more. . . . If we have master calendar, there’d be 20 cases, you know, maybe we get 12 people and eight people don’t show up. When we switched to phones, got a lot better compliance of people calling in. Probably, less threatening. Or like, well, you know what? I don’t know why. I don’t know why. Maybe because it was novel. Who knows why they did? But they called in.<sup>500</sup>

Like that judge, many respondents offered potential explanations for the perceived increase in attendance. One Milwaukee judge connected increased virtual appearances in juvenile court with decreased transportation issues:

[Pre-COVID] there was a fairly high rate of non-appearance, either from mom or dad or whoever. And one of the challenges with the juvenile court system is it’s out, you know, by the zoo in Wauwatosa. Not always the easiest place for people that don’t have their own transportation to get to. . . . The bus, you know, you transfer, depending on where you’re coming in, it could take a half a day, you know, once you’re all done with it. So they found . . . that their participation rates are way up [on Zoom].<sup>501</sup>

Another respondent, a prosecutor in Milwaukee, explained that appearances had increased from 50% to 66-70% through a combination of remote court and joint messaging with the public defender’s office.<sup>502</sup> And one defense attorney in North Dakota connected appearance rates with a different incentive structure when “there is a warrant out for your client’s arrest”:

Pre-COVID, [the defendant] would have to show up in the court and appear in front of a judge. And as soon as their name is called, the courthouse is secured by the sheriff’s office. So the sheriff knows when that John Doe has court today at 1:30. John Doe has a warrant. So we’re just gonna wait in the back of the courtroom, and we’re gonna see if John Doe appears. So if they call John Doe’s case and he walks up there, and he appears, as soon as he’s done with court, they’re gonna place him under arrest and take him into custody because there’s a warrant. Well post-COVID, they can’t do that. . . . [Defendants], you know, they can appear in court while there’s an active warrant. And nobody’s coming to arrest him because nobody knows where they are. Because they’re on a Zoom call. . . . So that’s a, maybe a little bit of a pro is that you’re getting more appearances because the defendants actually willing to appear.<sup>503</sup>

Contrast this first group of respondents with the second group, who believed that appearances had decreased due to access-to-technology issues.<sup>504</sup> As with the first group, some respondents in the second group offered only speculation. One Milwaukee judge, for example, thought that “40+, 45+ individuals charged with crimes” who “just cannot figure out Zoom” experienced “appearance issues.”<sup>505</sup> And a North Dakota defense attorney recounted: “I do have clients that . . . have gotten bench warrants for non-appearance at hearings, and I can’t confirm or deny, but I think part of it may be they don’t have minutes available or they didn’t know that it was supposed to be by Zoom or by phone.”<sup>506</sup>

Other respondents, though, connected access-to-technology issues with discrete instances of failures to appear, especially in North Dakota. One prosecutor described missed appearances stemming from defendants’ difficulties navigating the phone system:

And there might be warrants issued for people who—or they called in, and they punched the code wrong. Or they called in too late, and the hearings were over. And there, there was, at least telephonically, there was nothing telling them that. So we would have hearings and find out that, you know, our hearings ended at 10:30 in the morning. Somebody called in at 10:35, sat on the phone for an hour waiting.<sup>507</sup>

And another prosecutor noted that “we have a large amount of people that haven’t shown up for court hearings since this started in March,” which he believed was “potentially” connected to access-to-technology issues:

Then we’ve seen that, with some of our defendants, I think one of them files a letter and said, “Hey, you guys, I understand you’re doing, you know, telephonic court appearances. I don’t have a telephone. What do you want me to do? I see there’s a warrant for me and mailed the letter in.”<sup>508</sup>

Perhaps most poignantly, one Milwaukee defense attorney described judges issuing bench warrants for failures to appear despite *contemporaneous knowledge* that the defendants were attempting to appear and experiencing technological problems:

[Defendants] don’t necessarily have a stable internet connection. So, you get some judges who are issuing bench warrants for clients who couldn’t connect. And I’m sitting there going. “Judge, I’m on the phone with them,” like, “I will conference call them in.” “No, they have to appear by video.” “Well, then we need to get in an adjournment so I can have them come to my office because we didn’t anticipate that they weren’t gonna be able to connect until we just tried, and it failed.”<sup>509</sup>

According to some respondents, the failures to appear have been just as unevenly distributed as the access-to-technology issues. The following exchange with a North Dakota judge, who believed there had “been a lot more failure to appears” but focused on distributional inequities, is illustrative:

JUDGE: I’d say I have about a 30% participation rate from Native Americans on Zoom.

INTERVIEWER: Okay, Okay.

JUDGE: Anecdotally. It seems like that. I’ve been keeping my sheets. I don’t know where they’re at, but I’ve been making notes.

INTERVIEWER: And just anecdotally, what, what was the sort of comparison percentage in before times?

JUDGE: I would say about 70%.

INTERVIEWER: Okay, so it’s sort of flipped.

JUDGE: Yep.<sup>510</sup>

Finally, a third set of respondents expressed mixed opinions. Two explained that access-to-technology issues sometimes delayed defendants’ appearances, though perhaps did not prevent them altogether.<sup>511</sup> One court employee noted that participation rates had changed over time: “The first time we had our very first phone hearings . . . we had pretty good attendance. The next time I bet 75% of people did not call in.”<sup>512</sup> One defense attorney made remarks that implied both a lack of access and increased access.<sup>513</sup> And one prosecutor emphasized that the effects go both ways:

In my county, there are a lot of failure to appears anyway, but, and that has kind of, you know, on the one hand . . . There may have been an increase. On the other, I think we may have had some appearances we might not have otherwise had because of, of—Well, probably the striking example was made, on a couple of occasions, the public defender has called his clients and has been able to get his client to the appearance by phone. When, you know, in essence, the last middle, last minute, been able to put an appearance together, which might not have taken place otherwise. So that’s kind of both sides of the spectrum also. There’s, there’s been some areas have got worse, but some, you know, we’ve been able to have some appearances that would not have otherwise taken place.<sup>514</sup>

Mixed responses like this illustrate the profoundly complicated relationship between remote court and defendants’ appearances. The consequences of remote court for appearances are, in all likelihood, multitudinous and conflicting. Still, understanding these effects is critical for future policy development, and this subject cries out for further research.

## COMPREHENSION AND ACCESS TO JUSTICE

The preceding sections have discussed actual access: whether defendants have the tools and knowledge to log on to remote court, and whether defendants are able to get to the physical courthouse. But access to justice has a comprehension component, too. Are defendants able to understand remote court as well as in-person court? As with the comparative attendance section, our study cannot answer the comprehension question fully, but our respondents provide hints of an answer.

On the one hand, at least one interviewee—a North Dakota court employee—expected comprehension to be better when proceedings took place remotely rather than in person. He thought that a familiar remote environment would be more conducive to “processing what is going on” than an intimidating courtroom:

So it’s, it’s my experience when seeing defense in the courtroom, many times, even if [the clients] are represented, there’s so much going on in there that without, you know, being able to process in a, I don’t know, comfortable is one way to look at it, where you’re able to go through, I guess mentally, and walk through what’s occurring. People in court, even experienced people that are people that are returned to court time and time again, it takes them, I think, a number of experiences before they’re actually processing what is going on with them. There’s an understanding there, but I think, remotely, I think they could have a better environment to actually process what’s happening.<sup>515</sup>

In the middle, a few judges worried that defendants might not understand the guilty plea process as well since they typically did not have their attorneys by their sides during remote court. One Milwaukee judge described her efforts to be “really cognizant” and encourage defendants to talk with their attorneys at the first sign of hesitation.<sup>516</sup> But the judges generally felt that they could recognize and correct a lack of understanding over videoconferencing.<sup>517</sup>

But on the other hand, several interviewees worried that defendants do not understand the proceedings as well over Zoom. A few respondents thought that defendants in Zoom waiting rooms might not understand why they had to wait<sup>518</sup> or that they would not be able to understand court proceedings as well because they could not watch earlier cases.<sup>519</sup> Still others thought that defendants might be more vulnerable over Zoom. One prosecutor thought that procedural safeguards might go over the heads of defendants who just “agree, agree, agree” when their attorney isn’t seated next to them.<sup>520</sup> A North Dakota defense attorney similarly worried that defendants, especially those with limited education, would not be able to understand the process:

I don't know [clients] they can read the judge because it's difficult to read language [remotely]. . . . And the other thing, it's kind of related. . . . [A] lot of my clients have educational limits, you know? A lot of the clients that are indigent, you know, 10th grade is the highest they've completed. So I wonder if there's some issues with understanding what's going on. Because they can't be in the room.<sup>521</sup>

A second defense attorney agreed, summarizing her feelings succinctly: "I think we're kidding ourselves if we think that our clients are understanding everything that's going on when we're doing things over Zoom."<sup>522</sup>

## CHAPTER 8: DEHUMANIZATION

Interviewees expressed substantial concern that *something* was lacking in virtual communications in the criminal justice system, as compared to their in-person equivalents.<sup>523</sup> Some interviewees gave abstract descriptions, noting the importance of looking others in the eyes or being present face-to-face. Others connected virtual communications with a diminution of important physical cues or body language, which impeded human interaction. Still others associated virtual interactions with decreased empathy, othering, and dehumanization of defendants. These responses are grouped together in this section because they express, more or less abstractly, the sense that there is something less *personal* and less *human* about virtual communication.

These concerns were present across all jurisdictions and all actor types. While coding for these ideas was particularly tricky,<sup>524</sup> the following table illustrates the approximate number of interviews in each jurisdiction where the theme arose:

	<b>Miami (n = 12)</b>	<b>Milwaukee (n = 21)</b>	<b>North Dakota (n = 22)</b>
Interviews with Humanization or Dehumanization Theme	8 (67%)	11 (52%)	17 (77%)

Thus, North Dakota interviews contained the theme most frequently and Milwaukee least frequently—but the concepts between interviewees were generally sufficiently similar to analyze together.<sup>525</sup> Similarly, the theme surfaced in interviews with prosecutors, defense attorneys, and judges,<sup>526</sup> as illustrated by the following table:

	<b>Defense Attorneys (n = 20)</b>	<b>Judges (n = 15)</b>	<b>Prosecutors (n = 14)</b>
Interviews with Humanization or Dehumanization Theme	12 (60%)	10 (67%)	11 (79%)

Interestingly, prosecutors were most likely to raise this response—and as with Access to Technology, the North Dakota prosecutors account for the bulk of the trend.<sup>527</sup> It is unclear whether this trend is meaningful or spurious (whether due to methodological bias or mere coincidence).<sup>528</sup>

## HUMANIZING AND CONNECTING

A small minority of respondents expressed the opposite feelings of the majority: They felt that virtual hearings made defendants appear more human,<sup>529</sup> or else that the teleconferencing technology was a good proxy for in-person interaction.<sup>530</sup> One judge (in treatment court) believed that “it always helps to see people in their own environments. You know, it humanizes them. It gives you a different perspective about who they are.”<sup>531</sup> And one defense attorney in Milwaukee described the dehumanizing procedures used to transport defendants to court for in-person proceedings, which ended with the transition to virtual court:

I remember seeing things that were absolutely demoralizing. Dehumanizing. People brought in chains, like animals practically. Locked in the bullpens, packed with people, for hours. The process was just absolutely horrific. [And] all of that, you know, because of the pandemic, has ended.<sup>532</sup>

Additionally, in contrast to the many interviewees who felt that something was lost in virtual communication, a few interviewees felt that videoconferencing was as good (or nearly as good) as in-person communication. One judge in Miami explained that she had “developed relationships with people over Zoom” that she had “never met before” and that she didn’t think Zoom “necessarily crushes the ability to connect.”<sup>533</sup> And a judge from North Dakota, who used to be “really a stickler” for in-person appearances, explained that she “could be satisfied” that she had “looked [defendants] in the eye” and “explained to them their rights” in video hearings.<sup>534</sup>

Even these respondents, however, expressed conflicting feelings, noting at other times that virtual communication could be dehumanizing or was otherwise not the equivalent of in-person communication.<sup>535</sup> And, as the following subsections will show, the positive responses of this group were not shared by the majority.

## INTANGIBLE LOSS

Many respondents shared the sense that there was *something* about in-person interaction that is missing from virtual interaction. Often, their descriptions centered around the concept of “people” or on the physicality of humans (that is, human bodies,<sup>536</sup> flesh,<sup>537</sup> eyes, faces, etc.). The similarity in language between respondents, and to some extent across jurisdictions,<sup>538</sup> is striking. Consider, for example, the following comments centering on people and personal contact (all emphasis added):

“You don’t have the . . . *person to person interaction*.”<sup>539</sup>

“But somehow their emotion, their capturing that in person . . . that just has a whole different impact than them videotaping it and playing it that way or appearing the Zoom into the courtroom. And again, that’s that *personal contact*.”<sup>540</sup>

“And it’s that *in-personal*, you know, the speech the judge gives you, the look you see in his eyes.”<sup>541</sup>

“We’re in the *people business*.”<sup>542</sup>

“We’re a *personal business*.”<sup>543</sup>

“And you know what, judging isn’t all, it isn’t just about punishment. . . . It’s *personal*.”<sup>544</sup>

Also, bear in mind the following comments stressing the importance of the face (emphasis added):

“You don’t have the *face-to-face interaction*. . . you can’t beat that person-to-person, *face-to-face interaction*.”<sup>545</sup>

“I think you lose something in the translation as far as, you know, person appearing telephonically or even by computer like this [interview] as compared to *being faced with face*.”<sup>546</sup>

“[It’s difficult to convey authority] without that *face-to-face contact* of, ‘Okay, people, now, all right, I mean this.’”<sup>547</sup>

“You miss that *face-to-face contact*.”<sup>548</sup>

“I can’t even begin to tell you how much I miss the *face-to-face contact*.”<sup>549</sup>

“Yeah, sometimes it’s just the interactions are clunkier because you’re not, you’re not, you’re not in person. I mean, you’re not, you’re not *face-to-face* with the person to sort of gauge their, their, I don’t know, their behavior.”<sup>550</sup>

“There’s something about a witness taking this stand . . . and seeing them *face-to-face*.”<sup>551</sup>

“You’re *face-to-face* with your accusers, you’re *face-to-face* with those prosecuting you, you’re *face-to-face* with the judge, and you’re *face-to-face* with the person who is supposed to be helping you.”<sup>552</sup>

“[Defense attorneys are] probably not going to go to that, that, that [jail] facility and have a *face-to-face sit down*.”<sup>553</sup>

“Being able to meet with the client *face-to-face* was very, very important. And now I can’t do that.”<sup>554</sup>

“I feel like I owe it, especially to someone who is going to get sentenced to jail, that I owe it to them to *look them in the face* in person.”<sup>555</sup>

“I think there’s something about being in the flesh, in front of a person. . . . I think there’s something about being there and being able to *look them in the face*.”<sup>556</sup>

Finally, consider the following comments about eye contact, pertaining to everyone from judges to witnesses to defendants (again, emphasis added):

“Maybe I take that for more than it’s worth with being in person, *looking people in the eyes* and doing that kind of stuff, but I think it means something, so.”<sup>557</sup>

“The other thing is oftentimes the defendants would like to *look the witness in the eye* while they’re confronting.”<sup>558</sup>

“You have to *look the judge in the eye* . . . and the judge looks right back at you.”<sup>559</sup>

“[P]art of the courtroom practice involves . . . sort of having *an eye contact* with the person you’re speaking to. . . . I think [Zoom] reduces the sense of that that one on one contact, that *eye contact*.”<sup>560</sup>

“[The defendant] needs to, you know, *look the officer in the eye* type of thing.”<sup>561</sup>

“I think you have to have that person to person, *eyeball to eyeball* contact.”<sup>562</sup>

“For anything over a C felony, yeah, they pretty much, I gotta *look [the defendant] in the eye*.”<sup>563</sup>

“I want to *look the judge in the eyes* to say, ‘Don’t send them to prison.’”<sup>564</sup>

As the above quotes illustrate, some interviewees had trouble explaining exactly what it was about in-person interaction or about face-to-face and eye-to-eye contact that rendered it so important. Some noted that “there’s something about” it,<sup>565</sup> that it “means something”<sup>566</sup> or that virtual interaction is “just not the same as being in the courtroom.”<sup>567</sup> Even when pressed, interviewees struggled to explain further. One prosecutor in North Dakota, for example, fretted about being repetitive when asked to elaborate on his answer.<sup>568</sup> Another worried that “I don’t know if that’s, explains, gives you an answer that you could work with or not.”<sup>569</sup>

Some respondents noted an even more abstract sense of loss in explaining their feelings about virtual interactions. According to one prosecutor in North Dakota, “There is just something lost in the dynamics of that [virtual] exchange.”<sup>570</sup> A Miami judge similarly explained that “there’s something lost when you’re not, when you’re not in person” and that “there’s always gonna be a little bit of a loss.”<sup>571</sup> A Milwaukee judge noted that, when witnesses appear remotely, “you lose something.”<sup>572</sup> A North Dakota judge concurred: “I think there’s a loss of a certain intangible. . . . [T]here is a, there is a loss there, handling things remotely.”<sup>573</sup>

## **CUES, COMMUNICATION, AND CONNECTION**

Some respondents, instead of (or in addition to) describing an intangible loss, emphasized a more concrete loss of visual cues, nonverbal signals, or body language. According to respondents, these cues are critical for interpersonal interaction in the courtroom and for clear communication between actors. In this way, too, the loss associated with virtual communications equated to the loss of a kind of human connection.

Respondents cited a number of cues that are helpful for interactions with defendants, witnesses, and attorneys and explained that those cues are less available virtually.<sup>574</sup> A Milwaukee defense attorney commented that “changes in [a witness’s] physical, in their facial expression, their tone of voice, uh, composure” are “missing.”<sup>575</sup> A Milwaukee prosecutor explained that “you just lose all of those nonverbal cues” and “mannerisms.”<sup>576</sup> One North Dakota prosecutor explained that “you can read so much from facial expressions or lack thereof and eyebrow bats,” and “sighs,” “eye rolls,” “flinches and the grimaces” are “all important things that you can’t accomplish virtually, in my opinion.”<sup>577</sup> A second was particularly emphatic:

I mean, when you talk about communication, I mean, they argue what, 70, 80% of communication is done through body language. And there’s no way—and I’ll never believe, I don’t care if it’s 3D video. I never think that you’re going to get that same feel. . . . And that’s what I worry about the most is that, you know, when there’s some guy that’s, you know, twiddling his hands and fidgeting and those types of things that you wouldn’t see on the video because you’re just looking at his face. I mean, he could be lying all day long, and you might not know that if you don’t see those other cues in my opinion.<sup>578</sup>

A North Dakota judge agreed that, while Zoom is “a little bit better” than phone, “[y]ou can’t pick up the full-body cue.”<sup>579</sup> He explained that “we’ve been on this earth, what, five million years, and evolutionary process has geared us towards, you know, interaction between each other, you know, within a certain physical distance that, it allows us to pick up certain cues.”<sup>580</sup> As a result, “we’re geared to interact with each other in a certain way. And that is in person.”<sup>581</sup>

Many interviewees claimed that without these physical cues, interpersonal connection is more difficult, meaning that virtual communication is less effective or impactful. A few respondents explained that the absence of physical cues impaired attorney-client relationship-building and communication.<sup>582</sup> Others noted difficulties connecting with a judge<sup>583</sup> or a jury.<sup>584</sup> Still others explained that courtroom interactions affect defendants more deeply when they are accompanied by in-person, physical cues. One North Dakota judge, for example, thought that “there’s a bigger impact on a person . . . actually sitting in the courtroom.”<sup>585</sup> Another lamented the inability to communicate and connect with litigants on the telephone:

I think the other thing is, is that, like, on a, a minor in possession would be a good example. . . . I like to do those in person because I like to have a firm, a conversation with them to make sure that they understand that there could be some long-term consequences to having a criminal conviction. . . . [During COVID,] I had to kind of give my lecture a little bit on the phone, and I don’t like that. I don’t think that’s as effective.

I felt like I couldn’t communicate with [litigants] . . . you know, sometimes, sometimes our jobs are to deescalate. I mean, sometimes in court, one of the biggest things that I can do is deescalate a situation. Let somebody know, “You know what? I’m here. I’m listening to you. I hear what you say. I see you.” A lot of times that can deescalate things, but on the phone, you know, that just doesn’t—it’s just really hard.<sup>586</sup>

A Miami judge conveyed the same sentiment about lenient sentences:

I think just being in the courtroom and my being able not only just to see their face, but their entire body. . . [L]et's just say the defendant did something very, very lenient, to impress upon the defendant, the importance of not having, not doing anything and getting into trouble in the future. . . . I think, when someone's receiving that type of a sentence, it can be important for them to appear before the judge and just for me to explain to them that they've been given this opportunity and to be very careful and make the most of it. I think that can be better conveyed and received probably in person.<sup>587</sup>

Expressing the same concerns, a North Dakota prosecutor described his decision to hold an important meeting with a juvenile in-person, rather than by telephone:

So I drove all the way over there . . . a meeting that lasted 30 minutes. And now I've heard that it's gone well. But we had a very candid, I had a very candid conversation with the juvenile. I said, "Listen, you don't want this to go this way. It's not good." And I'm glad that I took the time to drive over there and speak to the juvenile in person. . . . I think if I would have sent her, juvenile, an email and they would have read that or picked up the telephone and they didn't meet me or know me or otherwise, I don't feel like that would have the same message.<sup>588</sup>

For these respondents, then, in-person connection was important to convey important information to respondents: that they were seen, heard, and should act in a certain way. Remote communication was not considered as effective as its in-person equivalent.

With the lack of physical cues and in-person communication, the criminal justice process can feel less real. One North Dakota prosecutor noted that "technology can only take it so far. . . . I'm used to being able to glare at the defendant. In these [virtual] situations, it's kind of like you're one dimension removed. And so it does not feel as real to me."<sup>589</sup> Another North Dakota prosecutor explained: "Somehow, it loses some of that dynamic if the defendant is three hours away and being piped in on Zoom. . . . [T]here's just an element of the realization or the realness missing if it's all just, it's like sitting at home watching your TV."<sup>590</sup> A Miami defense attorney spoke in almost identical terms when describing a particular client's case: "[E]verything was done via video. It's almost like, it almost feels like it's not real life. It's like everything is happening on TV."<sup>591</sup> A North Dakota defense attorney similarly described a "separation," like "the difference between watching a concert" or "watching a sporting [event], even, in-person versus on TV."<sup>592</sup> And a Milwaukee defense attorney compared in-person and Zoom court to live and filmed versions of the musical *Hamilton*.<sup>593</sup> He noted that, while you may get to see more facial expressions on the film, "it's a whole different feel when you're live in person."<sup>594</sup>

## EMPATHY AND HUMANITY

Finally, some interviewees described the missing “something” as an emotional connection and intuitive recognition of others as humans—ideas intimately tied with those of nonverbal communication and interpersonal connection described above. Indeed, according to some respondents, all of these factors feed into a dehumanization of defendants, especially during sentencing, and a lower degree of trust in the criminal justice system.

Emotion, and especially sympathy or empathy, was key for this group of respondents. One North Dakota prosecutor noted the role of emotions in victims’ communications: “But somehow their emotion, their, capturing that in person, either by a judge or a jury sitting there, that just has a whole different impact than them videotaping it and playing it that way or appearing via Zoom into the courtroom.”<sup>595</sup> A second concurred with respect to communicating emotions more generally, noting, “on just telephone alone, I think you lose a lot of the emotion . . . of what’s going on.”<sup>596</sup> A prosecutor in Miami agreed, explaining: “It is very hard to convey warmth over a computer screen.”<sup>597</sup> And a North Dakota judge elaborated:

I don’t think [Zoom is] even close to what you can do when people are in person. You deal with people, and I think you’ve got to show compassion. There’s gotta be sympathy. There’s gotta be empathy both for the criminal and for the victims. And when all of that stuff is done by Zoom, and electronically, I think there’s a lot lost.<sup>598</sup>

Emotional connections, together with the nonverbal communication concerns discussed earlier, were important for seeing defendants as humans, especially in the context of criminal punishment. One Miami defense attorney wrapped a number of such concepts—the importance of face and flesh, the need to recognize humanity, and the defendant’s liberty interest—together:

I think there’s something about being in the flesh, in front of a person, especially when they’re making a judgment regarding someone’s liberty or regarding the law and its applicability to that human being as a human being. I think there’s something about being there and being about to look them in the face.<sup>599</sup>

In North Dakota, where individual judges had discretion about whether to conduct sentencing hearings virtually or in person, many judges refused to conduct serious sentencings virtually. One judge noted, “I’m not sentencing somebody to significant jail time without being able to see them.”<sup>600</sup> Another described it as partially an issue of importance:

The other thing about Zoom is there's a big push to do Zoom and there's this great quote from this federal judge out of Minnesota that I love, that there's no such thing as a small case. And, I feel like if I'm going to send someone to prison taking away their freedom or taking away their kids or doing something, you know, that affect[s] them, because that's what, I mean, that's the, the awesome power judge has. I feel like I owe it, especially to someone who is going to get sentenced to jail, that I owe it to look them in the face in person. And if I'm on Zoom, I have this, this feeling like your case is not as important to me.<sup>601</sup>

But when pressed to explain his emphasis on looking someone in the face, the judge emphasized particular human traits: "I believe every human being has dignity, inherent dignity, no matter who they are. I try to treat everyone as the same, ... because they're human beings."<sup>602</sup>

And across jurisdictions, six interviewees expressed the concern that virtual forums—again, marked by a lack of human connection—would dehumanize defendants and lead to overly harsh punishments.<sup>603</sup> Defense attorneys were especially concerned with this possibility. In the words of one Milwaukee defense attorney:

I think that there is, you know, this, this system already feels like a conveyor belt at times. . . . And so to me, what doing virtual hearings just further dehumanizes this process, and in a system whose principal tenet is dehumanization and othering of people who are charged with crimes. And that's the same for people who are victims of crimes. . . . You know, there's a, there's a sort of a saying or a tenet that is taught to attorneys that start here that if you can get your client out of custody prior to any sentencing hearing, you gotta do it because it's much easier for a judge to look at somebody who's already in orange and shackled the floor and say, 'I'm gonna give you a little bit more of a time-out,' right, than someone who walks in with their family or even alone, but, in their own clothes, and saying 'I'm going to remove you from all of that,' right. I think that sort of parallels with the way in which technology, at least to me, feels like it's just sort of greasing the wheels of injustice, you know?<sup>604</sup>

Nor was this attorney alone. A Miami defense attorney explained: "I think it's easier for [judges] to say 'No' on video."<sup>605</sup> A North Dakota defense attorney, while noting that the judges hadn't been "particularly overbearing," nonetheless remarked: "I do wonder if part of the weight of the argument is lost without having the client personally present there. Right? It's a lot harder to send in somebody and be hard on somebody if they're sitting right in front of you, right?"<sup>606</sup> One Milwaukee defense attorney had "read that bails are higher."<sup>607</sup> And a second worried:

I think that there's a, I don't know, there's something in our brains that makes it less likely to feel emotion or compassion or empathy when we are using, when we're disconnected or we're remotely. I think it's more difficult for a judge to be able to see, or sense, what's going on with someone if they are, you know, appearing remotely. So there's some definitely some disadvantages to that. I think it's easier for a judge to say, "I want to send you to prison."<sup>608</sup>

And while defense attorneys expressed this concern more than others, they were not alone. One North Dakota prosecutor, for example, explained: "I think you have to have that person-to-person, eyeball-to-eyeball contact. . . . I think it would be so much easier to throw the book at someone. Just like it's easier to . . . have harsher rhetoric on social media."<sup>609</sup>

Finally, a few comments suggest that the dehumanization of criminal justice could have repercussions beyond individual defendants. Two interviewees lamented the connection between human interaction—in-person, in the courtroom—and trust in government. One North Dakota prosecutor repeatedly emphasized the importance of in-person court for the status of the judiciary as an equal form of government: "Don't take the government away from the people," he cautioned, because "you're gonna have, in my opinion, more distrust of the government."<sup>610</sup> A judge in Milwaukee concurred: "I believe defendants should be in the courtroom unless we find that they don't want to be or something ministerial. I think having a defendant in the courtroom, no matter what kind of case it is, engenders more trust in the justice system."<sup>611</sup> She later shared an anecdote illustrating the importance of emotional and personal connection for building trust in the criminal justice system:

[One defendant] wrote me a letter before [his sentencing hearing] and said, "Judge, I really want to talk to you privately." About some of the things that went on during his trial . . . . I didn't address his letter, I said, "I got your letter," but I didn't say anything about the substance of it. And we finished and I sentenced him. And before he left the courtroom, I asked his lawyer to come up and I talked to his lawyer and I said, "Would you please tell him that I read his letter and that I just can't talk to him privately? It's just not allowed." So the lawyer was able to go over, quietly tell his client that, and when they took the defendant out of the courtroom, you know, he walks past the bench, and he acknowledged that, and he thanked me for that and thanked me for reading this letter. So those kinds of interactions that I think are extremely important to build confidence in our criminal justice system cannot, they just can't happen electronically. We're a personal business."<sup>612</sup>

## CHAPTER 9: REMOTE WITNESSES

Fully remote court necessarily involves remote witnesses. Instead of coming to the courtroom in the flesh, witnesses appear via video or phone, which, in many respondents' opinions, altered the dynamics of their testimony. Issues related to witnesses were raised by all types of actors in all three jurisdictions: 46 interviews included the subject of witnesses.

The following table illustrates the number of interviews in each jurisdiction discussing the topic:

	<b>Miami (n = 12)</b>	<b>Milwaukee (n = 21)</b>	<b>North Dakota (n = 22)</b>
Interviews Noting Witness Issues	10 (83%)	17 (74%)	19 (79%)

And the following table illustrates the number of interviews in which witness issues were raised by actor:<sup>613</sup>

	<b>Defense Attorneys (n = 20)</b>	<b>Judges (n = 15)</b>	<b>Prosecutors (n = 14)</b>
Interviews Noting Witness Issues	18 (90%)	14 (93%)	12 (86%)

These witness issues centered on the ability to test a witness's credibility and ensure that the witness was telling the truth based on their own unaided recollection. Some witnesses expressed different concerns depending on the type of witness. In addition, several interviewees shared silver linings of remote witness testimony, namely, the ability to include more witnesses.

### EVALUATING CREDIBILITY, ENSURING TRUTHFULNESS

Respondents' comments about remote witness testimony centered on truth-telling: They thought that remote proceedings either carried insufficient safeguards to ensure that witnesses would testify honestly or influenced their abilities to detect a witness's credibility. The issues within this theme primarily fell into three categories: (1) the inability to read body language or respond to nonverbal cues; (2) the inability to know if a witness was being coached; and (3) the lack of testimonial formality and interpersonal pressure to be truthful. The following table displays the number of interviews in which each concern occurred:

	<b>Nonverbal Cues and Effects on Assessing Credibility</b>	<b>Inability to Know if Witness Is Being Coached</b>	<b>Lack of Formality and Interpersonal Pressure</b>

Interviews Noting Specific Issue	14	8	4
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## BODY LANGUAGE AND NONVERBAL CUES

“It cannot be understated how important it is to be able to see your witness in person.”<sup>614</sup> In the opinion of this defense attorney and many other interviewees, in-person witness testimony is critically important for assessing credibility. As respondents explained, body language and nonverbal cues can be lost in remote proceedings, making credibility assessments harder.<sup>615</sup> While respondents were not unanimous on this point—some found credibility assessments equally good or easier when witnesses were remote—the majority of respondents who discussed the issue did so with concern.

A wide range of interviewees—across all jurisdictions and actor types—emphasized the importance of witnesses’ body language and nonverbal cues. They stressed the need to know whether witnesses are making eye contact,<sup>616</sup> twitching,<sup>617</sup> tapping their feet,<sup>618</sup> twiddling their thumbs,<sup>619</sup> shaking their knees,<sup>620</sup> or fidgeting<sup>621</sup> to assess credibility. As one judge remarked: “[N]ot only is it the spoken word as to weighing credibility, but it’s body language, it’s eye contact, it’s how a person—do they appear nervous? Do they appear comfortable? There’s a lot of nonverbal communication that a judge looks at in determining weight and credibility of the witness. . . .”<sup>622</sup> A court administrator agreed: “Not all credibility issues are based upon what a person says, it’s also their mannerisms.”<sup>623</sup>

Respondents emphasized that many of these cues may be lost in remote hearings. As one defense attorney summarized: “[W]hen the witness is not personally present, I do not have the ability to read that body language.”<sup>624</sup> Another defense attorney lamented the loss of “real-time reactions and the nuances,” which are “very important to the judges” for “assessing credibility.”<sup>625</sup> Others agreed:

You know, I was doing it by video and the sense, the feel, the rhythm, you know, the ability to sort of gauge how this witness is maybe moving around in their chair, tapping their hand. You know, things you can see in a courtroom that inform how you’re going to behave, the tone of your next question, things like that—don’t have it.<sup>626</sup>

[T]here are these studies that say that, you know, 60 or 70% of our communication is not to be found in the words we chose. All the other things. The phrasing, intonation, the physical way in which we hold ourselves. You can tell when people are leaning in and when they’re not leaning in, all that kind of stuff. . . . Zoom doesn’t take it all away from you. But it takes enough away from you that really important situations maybe it makes a difference.<sup>627</sup>

A judge echoed this sentiment of losing important details on video:

[Y]ou don't see the whole person. You know, if somebody's giving testimony and their hands are shaken, or they're twiddling their thumbs or . . . there's other things we observe in the live proceeding that we may not catch in a Zoom proceeding. So . . . you know, we judge credibility. We judge other things about a person, so on Zoom, you don't get it as well as in-person.<sup>628</sup>

Several respondents specifically connected the lack of nonverbal cues with the need to determine whether a witness is lying.<sup>629</sup> One prosecutor related:

I spend a lot of time looking at body language from a person that's testifying. And if I can't see them, I can't do that. And it's not a science, but if the defense calls a witness and puts him on the stand, they're an alibi witness, and I started asking questions and I can find out what I don't think they're telling the truth about, I can really start drilling down on that. And I can pull out the, the discrepancies in their story. If I can't see them and figure out where they're, they're being deceptive. That makes it tough.<sup>630</sup>

As several respondents noted, the presence or absence of physical cues and indicia of discomfort or deception can affect the way proceedings and cases unfold.<sup>631</sup> One defense attorney recounted an instance where in-person cues changed his examination strategy:

I had a client who had a preliminary hearing the other day. The client was appearing by virtual means, but the detective was present. . . . And when I questioned him about [a gunpowder residue test], he got really tense and uncomfortable and if he hadn't had been there [in person], I wouldn't have known. . . . [T]he cop's argument was that [the defendant] wasn't too intoxicated to give consent to get his hands swabbed for gunpowder residue, but that he was too intoxicated to speak with law enforcement, right? And that's a huge—that doesn't make sense. How can he be okay for this or not? But had he been on the phone, I would have never been the wiser, right?<sup>632</sup>

Other interviewees didn't have precise counterfactuals but nonetheless worried about what they didn't know. When asked about the effects of virtual testimony on assessing credibility, one judge explained that he had no basis for comparison: "I don't know if it makes my job harder or not because I couldn't see what I would have seen if he would have been there live."<sup>633</sup> A prosecutor similarly explained:

I don't have any good examples about that truthfully. I mean, do I think [remote testimony is] as good? No. I mean, but that's the hard part, right? I mean, we don't get a do-over to go ahead and say, "Well, let's redo the motion to do it in person now. Now what you think, judge, versus what you thought before?" That's my concern, too, is that there are no do-overs.<sup>634</sup>

Because of these credibility issues and their possible implications, some respondents preferred to do substantive witness examinations in person. In the words of one defense attorney: "I

wanna be in the same room as the witness. Body language is very important to me in these evidentiary hearings.”<sup>635</sup> Another agreed that “I don’t think you could [determine credibility] over Zoom.”<sup>636</sup> A judge in North Dakota similarly noted, “if I’m taking a hearing where it’s incumbent upon me to weigh credibility of witnesses, I want them live because there’s nonverbal communications that go on by people in the courtroom which judges can use in determining credibility, weighing credibility of testimony.”<sup>637</sup>

However, not all interviewees shared these credibility concerns or the desire for in-person witness examinations. One defense attorney shared that having two police officers testify by phone didn’t affect his ability to confront the witnesses: “I think maybe my cross went a little bit better because I had my computer in front of me. I don’t think there’s any difference.”<sup>638</sup> A prosecutor in Milwaukee concurred:

Talking to the witnesses and victims may be a little harder now, but I don’t think it’s affected my ability to determine [credibility]. Because, remember, when you’re talking about, you know, credibility and things like that, you’re talking about what it sounds like when you talk to them, but you’re also talking about, is the evidence there? And, you know, most of that is coming from the detectives telling me what they have, what the scene investigation is, taking a look at the scene diagram, of matching up with what the witnesses say, that sort of stuff.<sup>639</sup>

A judge in North Dakota agreed: “You know, with regard to the bench trial, and I would just listen, listen to the witnesses and observe whatever documents and make the, make the decision based on the evidence that I received, and so I didn’t find a large difference from an in-person.”<sup>640</sup> And a judge in Miami explained that, while it might be “more difficult” to “pick up on those cues,” remote hearings might be better than in-person proceedings when the witness is facing the jury box, as opposed to the judge: “[Y]ou’re seeing the witness face to face forward and, as I said, you can make the witness’s image larger than everyone else on the screen. So I haven’t had a problem at all conducting these hearings remotely and being able to make credibility determinations.”<sup>641</sup>

## WITNESS COACHING

Several interviewees—mostly judges and defense attorneys—raised a different kind of reliability concern: not being able to tell if a witness is being assisted, either by another person or by a document. A judge elaborated on the potential problem of witness coaching:

[W]hen someone is appearing remotely. I do have to consider the . . . potential outside influences that we talked about before. So, if someone’s here in the

courtroom, I'm going to know that they're not referring to any materials or their phone because they're sitting right here. And everyone is watching them, so that's a difference in the courtroom, that's not even a consideration, whereas outside of the courtroom, even though it hasn't been a problem, it's at least something that judges have to address to try to ensure the sanctity of the proceedings.<sup>642</sup>

A defense attorney concurred, explaining that, in a remote hearing:

You're not seeing if somebody's assisting that person. . . . You [interviewers] have your questions set up. Imagine being a witness, and you have answers of somebody else's. And you have typed up what you're gonna answer. Or worse, somebody is texting you and giving you the answers because they're watching, because these hearings are public hearings.<sup>643</sup>

As with the other credibility issues, the inability to monitor witnesses led some respondents to prefer in-person witnesses: "I wanna be able to cross-examine the witnesses in person. I wanna make sure that there is nobody in the room with them."<sup>644</sup> Others have tried to mitigate the problem. One judge, for example, has taken to asking witnesses who appear by phone or video about the circumstances of their testimony: "I do inquire whether the witness is alone in the room and whether there's any materials that they're referring to . . . and if so, just that when they refer to any other materials that they let us know so that the record's clear as to that."<sup>645</sup> But another interviewee worried that such questions may be insufficient, at least when conducted by examining attorneys:

[U]nless you're asking the person every five minutes, "You're not looking at text?" "You're not looking at the email?" "You don't have this?" "You don't have that?" "You're not getting help?" [If] you're not doing that every five minutes, you don't really know, you know, the reliability of what you're getting.<sup>646</sup>

In fact, two chambers in North Dakota had such severe concerns about witness coercion that they stopped using Zoom for certain proceedings. One chambers "had restraining orders by Zoom, but we've made them start coming in person because via Zoom you don't know if they're being coerced into saying things. . . ."<sup>647</sup> Elsewhere in North Dakota, a judge moved juvenile proceedings in-person after hearing background whispering by various members of the household during a phone proceeding. "I couldn't control who was in the court. You know, I couldn't control who was on the other, other line. And so I started doing juvenile matters . . . in person."<sup>648</sup>

## LACK OF FORMALITY AND INTERPERSONAL PRESSURE

Still other respondents worried that a loss of the formality associated with in-person, in-court testimony might influence how witnesses testify.<sup>649</sup> A defense attorney in Miami shared:

I think there's something to be said about the formality of a courtroom. I think that there is something about being in a courthouse, even if it's not a fancy one, being in a courtroom even if it's not a fancy one, but where you know where you're at, right? And so whether this is good or bad, I'm not prepared to make that judgment. But it is—I do see people testifying in a far more relaxed way, and I don't mean that was a positive or negative connotation, but I just think like they're in their house, right. But also, I mean, I think, I think part of why we have public trials where we have courthouses because we want all the participants, including the witnesses, to recognize the solemn nature of the proceedings that are going on. And you know, I can see that that's not quite there via Zoom.<sup>650</sup>

A Milwaukee defense attorney agreed:

The disadvantage, I think is that you . . . don't have an intimidation factor. . . . [W]hen you have just a screen, it's, you know, it's pretty easy to kind of like pooh pooh it. . . . Because when you're the witness, you're just, you're in whatever environment you have chosen to be in. You're not in a witness chair in a courtroom with a bailiff next to you and a jury. You're in your house, or you're in your office, you're in a comfortable place. You're not threatened at all. You're not intimidated at all, right? And so I think that's a real problem.<sup>651</sup>

Another defense attorney, this one from North Dakota, suggested that the lack of in-person formalities might increase a witness's tendency to lie: "It's a big deal to get sworn in and sit up on the stand, have the microphone in front of you, look at everybody in the courtroom. That's a little different. You know, holding your hand up on camera, and promising the tell the truth, as far as I'm concerned. . . ."<sup>652</sup>

Finally, one Miami defense attorney explained the importance of in-person testimony not in terms of courtroom formalities but by reference to the comparative social difficulty of lying to a screen versus a live person:

I'm seeing the witness on video, but I'm not in person where that person won't lie to my face, and clients believe that. And clients think that. And frankly, I know I've been deposed on cases, and I loved it when I have the person across from me lying to my face, in the number one because I could tell my attorney that's just BS, that's just a lie. But [being in person] forces the person to have to lie to your face. . . . And I think—and I don't know if there's any study that's been done—but I think on video, there's probably more of a tendency not to be as honest. . . . But because they're so impersonal when you're doing a video that I think some people may tend to do things that would not otherwise do.<sup>653</sup>

## WHICH WITNESS?

Concerns about witnesses varied depending on the type of witnesses testifying. A few respondents felt that remote witness evaluations could work with experts or less significant witnesses. One judge in Milwaukee, for example, worried less about professional witnesses such as doctors:

I'm okay with that on Zoom. You're talking about a professional witness. You're talking about someone whose credibility really isn't being challenged. This is a professional with training. They're not a friend of the defendant. They're not on the, you know, being paid by any party or anything like that. This is just their job. These evaluating doctors have been testifying in front of us for years. You kind of know them. Everyone knows them. So I'm okay with that on Zoom.<sup>654</sup>

Similarly, a North Dakota judge differentiated between “the state’s expert witness” where “it’s not really credibility issues for the most part” and more “substantive” witnesses, where nonverbal cues are important for credibility assessments.<sup>655</sup>

By contrast, respondents (and especially defense attorneys) expressed a stronger preference for in-person testimony for key substantive witnesses. As one defense attorney explained: “The idea of having an officer or even a victim testify over Zoom to me is just not something I’m ever going to be willing to do, and it’s something I would always advise my client not to do.”<sup>656</sup> A second defense attorney also expressed greater concern with a police witness:

I will not cross-examine a police officer and, in a motion hearing through a screen. They need to see me. They need to hear me. And vice versa. You know, it’s a lot easier to hide and to duck when there’s an extra medium between you and your bullshit story. So I will not do that unless it’s in person.<sup>657</sup>

Other defense attorneys connected officer testimony with concerns about referencing police reports improperly. As one explained:

I have no idea when police officers were testifying, what the heck they’re looking at. Now, the honest ones will say, “Can I refer to my report?” But if they’re at home and they’re sitting like you are, . . . I don’t know what they have on either side of your screen, that they could be looking at, including notes from an interview with the prosecutor. So yeah, I have, I have grave concerns in some situations.<sup>658</sup>

Another explained that both having a report and not having the report creates problems that don’t exist in person—especially over the phone, when “you can’t even see them”:

[The officer] could be looking at the report. They could *not* be looking at the report. . . . I've had this happened where, you're talking, you're cross-examining them, and you're asking the question about the night of the incident. And when they're like, "I guess I don't recall that." "Okay, well, can you look at your report to refresh your memory?" "Oh, I don't have my, I don't have my report here." How do you not have your report there? "Well, I didn't," you know, "I don't know. I just don't have my report there." Yet you were, you were able to tell the prosecutor in their questioning the exact time down to the minute . . . . You, you memorize that, but you can't tell me what direction you were traveling. "Well, it would be in my report." . . . . And if I were in court, I could just walk the report up to him, hand it to him. . . . But I can't do that.<sup>659</sup>

For these respondents, then, it is especially important that examinations of key substantive witnesses are conducted in person.

## **SILVER LINING: MORE TESTIMONY**

Despite the downsides, remote technology may yield some unexpected witness-related benefits, according to a few respondents. One judge in Miami shared that it's easier to get certain witnesses to testify by phone or video, rather than in person: "[A] lot of treatment providers, they can't leave their place of business and drive into the court and sit there and wait for the hearing. But it was much easier for the treatment providers to be on Zoom and to report how people were doing."<sup>660</sup> A defense attorney in Miami concurred, describing an instance where a remote witness being available made all the difference:

But I will tell you, the technology was helpful with my, with my sentencing case—this guy that was facing 10 years—you know, his dad is a truck driver and drives . . . trucks all around Georgia, and I would have never met him in person, and the judge would have never been able to see him to assess his credibility if now the technology wasn't in play, and I think it made a difference. I think the dad's testimony and her being able to gauge his sincerity and wanting to help his son got the downward departure.<sup>661</sup>

# CHAPTER 10: ATTORNEY-CLIENT COMMUNICATION

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Another consequence of the switch to remote technology—discussed almost exclusively by defense attorneys—is the effect of such technology on communication between defense attorneys and clients. Some of their comments related to remote criminal proceedings, and some pertained to the remote communication and preparation with their clients before those proceedings. Most spoke of ways in which the attorney-client communication is damaged due to poor reliability of and access to technology, reduced or questionable confidentiality, and the inability to control communication and build trust. In short, they felt that to be effective, certain conversations should take place in person.

Still, a few of the defense attorneys recognized the efficiencies of using phone and video technology to communicate with clients in and out of court. One admitted that he prefers to meet with his clients by phone as opposed to in-person, citing his busy schedule.<sup>662</sup> Numerous others discussed the travel time saved by virtue of remote meetings.<sup>663</sup> Such topics, though, are addressed<sup>664</sup> more thoroughly elsewhere in this report,<sup>664</sup> the remainder of this section focuses on other issues.

## RELIABILITY AND ACCESS

Several interviewees raised concerns about defendants' ability to access reliable technology, both for hearings and attorney-client communications. Interviewees of all types and in all jurisdictions worried about out-of-custody defendants' abilities to access phones, internet, computers, and cameras, as well as private spaces in which to use those technologies.<sup>665</sup> A Milwaukee defense attorney was "frustrated" with the "presumption" that "we can meet with all of our clients virtually, and it should just be kind of business as usual;" instead, she explained, "it's really difficult to practice right now because clients, you know, don't have the technology or . . . their numbers change or whatever it is."<sup>666</sup> A Miami defense attorney agreed that "it's been almost harder to get a hold of our clients that are out-of-custody. You know, when phone numbers change, we don't have that sort of check-in date with the court to see them. . . . I would say that it's even been more difficult to communicate."<sup>667</sup> And a North Dakota attorney explained that access problems interfered with his ability to reach his clients:

[U]sually when I try to call them, one of three things happens. The first one is the number is no longer in service. The second one is they have a voicemail, but they haven't set it up. And the third, there is actually four. The third one is their voicemail's full. And the fourth one is, says there's restrictions on the phone and they can't accept calls from your number.<sup>668</sup>

For many attorneys, these worries are exacerbated for in-custody clients.<sup>669</sup> Several defense attorneys cited reliability problems with the jail's technology. One, for example, noted that the department of correction's video platform—Blue Jeans—was “a gigantic mess,” “constantly broken, constantly causing problems.”<sup>670</sup> A Miami attorney explained that “there's always technical problems which are unavoidable, especially in a jail environment.”<sup>671</sup> Another explained that broken video units prevented her from contacting a particular client:

[B]ecause technology is technology, when the video units break at the jail, it becomes more difficult. So I have a client who I was supposed to do a video interview with this morning. That video unit has been out. It's been out for weeks, and I don't have a way of talking to her unless she calls. And she's just not a client who actually calls often. She sort of waits for me to do a video for us to talk.<sup>672</sup>

Defense attorneys also noted that, on several occasions, there were insufficient phone and video lines to talk to clients. A defense attorney in North Dakota explained the phone lines that he uses to communicate with clients are “now being occupied by virtual hearings” or other attorneys.<sup>673</sup> A Milwaukee attorney agreed: “Usually, sometimes, there's a phone that is designated for confidential communications, and every lawyer that has somebody in custody is trying to use that phone.”<sup>674</sup> Another North Dakota attorney explained that he could not place a call into the jail: “[I]t's not like calling the hotel and say, ‘Send me to room 201.’ It doesn't work that way. They can only call me. . . . Well, there's no way to communicate with them that I'm busy. I'm in court. I'm traveling.”<sup>675</sup> Still others explained that phone or video lines had more restrictive hours than pre-COVID in-person visitation.<sup>676</sup>

Other interviewees cited financial access barriers for in-custody clients. One North Dakota attorney explained that he had to fight for free calls with his clients:

[The jail phone company] charge[s] exorbitant per minute charges. I did make some arrangements with them. I raised the constitutional issue more than once on different defendants because I was not allowed to call them. And, I told the court, I said, I don't believe they, the defendant should have to pay to call me or that I should have to pay to call them. They agreed. . . . [N]ow the defendants can call me directly from the jail here . . . and they get 60 minutes.<sup>677</sup>

Finally, a number of interviewees explained that they had trouble communicating with clients for reasons more closely associated with the pandemic than with remote technology—quarantine requirements, lockdowns, and so on<sup>678</sup>—but COVID-specific concerns are not the focus of this report.

## ATTORNEY-CLIENT CONFIDENTIALITY

Interviewees’—and especially defense attorneys’—most common concern with remote attorney-client communications is confidentiality. Concerns about attorney-client privilege were raised in at least seven defense attorney and three prosecutor interviews across the three jurisdictions.<sup>679</sup> Interviewees expressed concerns unique to out-of-custody clients, unique to in-custody clients, and common to both.

### OUT-OF-CUSTODY VERSUS IN-CUSTODY CLIENTS

One defense attorney thought that confidentiality concerns might be worse for out-of-custody clients than in-custody clients:

The confidentiality is better for the clients who are in jail. Because [for] the clients who are out of jail, the attorneys have to talk to the client to make sure there’s nobody around, to make sure they’re in a room where you’re not breaking confidentiality by having somebody else present. The attorney can have that conversation. . . . The other kind of weird thing is we’re having to ask the clients—and not every client has them—to put on headphones. So that way, what we’re telling the client also isn’t heard by other people. So that confidentiality piece is still a problem.<sup>680</sup>

Many other interviewees, though, worried more about their communications with in-custody clients. Several defense attorneys (and, as they explained, their in-custody clients) felt certain that their phone calls to the jail were recorded, erasing any semblance of confidentiality. One Milwaukee defense attorney remarked, “We can’t set up attorney calls anymore, which are non-recorded calls.”<sup>681</sup> A North Dakota attorney explained that the combination of pandemic-induced visitation moratoriums and telephonic communication “destroyed attorney-client confidentiality”:

Every phone call is recorded. So now what you’ve done is you taken, you’ve completely destroyed attorney-client confidentiality because I can’t go see them. So they can only call me, and they call me in, the only system that is available to us to talk on the phone, is a recorded phone call. So attorney-client confidentiality is now null and void. And so you’re talking very generics. You’re talking very vague a lot of times.<sup>682</sup>

Another North Dakota defense attorney disagreed somewhat, explaining that, “technically speaking, they give a separate phone for attorney-client conversations that doesn’t have the ability to be recorded”—but, as he noted, “the clients don’t often trust that.”<sup>683</sup>

Confidentiality concerns for in-custody clients extended beyond the fear of conversations being recorded; they included worries that others might be in the room listening, including other detainees and corrections officers. As one Milwaukee attorney explained:

There's still, understandably, the clients that are reluctant to talk about anything over the phone. Either because they don't trust the fact that it's supposedly not recorded. But also, I have clients that have to have a discussion in the presence of other people that are incarcerated. And there, you know, there's the risk of creating a snitch that heard a whatever.<sup>684</sup>

Because of confidentiality concerns, some defense attorneys prefer in-person visitation with their incarcerated clients—even if they can only communicate with them through glass—to phone or video technology.<sup>685</sup> Moreover, concerns about confidentiality were not limited to defense attorneys; at least one prosecutor wondered how confident defendants feel about being able to have confidential conversations with their attorneys.<sup>686</sup>

### IN-COURT BREAKOUT ROOMS.

A concern affecting both in-custody and out-of-custody defendants is the ability to have confidential attorney-client communications in remote court hearings. To enable those confidential conversations, courts rely on breakout rooms (via Zoom) or private phone lines to enable attorney-client communication. Some defense attorneys have used these options and found that it satisfied their confidentiality concerns, including in situations where the attorney is in person and the client is remote, or vice versa. In their words:

But the nice part about [Zoom] is that we can be placed into a breakout room. For example, so if the client has a confidential question, they need to ask me, they can put us in a breakout room, I can take my laptop and go to the jury room and speak to them privately. Whereas if we're on the phone, that's not a possibility.<sup>687</sup>

The courts have been willing to take a break. I can call the client on a different line. Or the courts have been willing in some instances to clear the courtroom. I ask my client, "Are you the only one in the courtroom?" He says yes and we talk. At the end, the client probably walks to the door, says "I'm done," and everyone comes back in.<sup>688</sup>

Another explained that he knows the breakout room option is available, though he hasn't had to use it:

[T]he judge will tell them if at any time you want to, you feel you need to talk privately with your attorney, you speak up and let us know. And then what they do is clear the virtual room, that I have to let him know when I'm ready to come back, but it hasn't, it hasn't happened yet.<sup>689</sup>

But a few defense attorneys cautioned that these techniques aren't foolproof. Two Miami defense attorneys described incarcerated clients speaking with them while corrections officers were in close proximity.<sup>690</sup> Another attorney admitted he retains concerns about confidentiality when using breakout rooms:

I choose to believe that if I'm put in a breakout room on a Zoom, and the judge and the clerk are the host and have access to it, that they're not gonna breach my privilege, even accidentally. . . . [B]ut I'd be lying if I said it wasn't something that we all have a little bit of concern about.<sup>691</sup>

Finally, one attorney pointed out that the breakout room can't replace "the client just kind of going like this, like waving me over to the box . . . and then I kind of lean in and he whispers something in my ear which actually sometimes is important."<sup>692</sup> As the next section illustrates, concerns about a decrease in informal in-court communications between the attorney and the client were not restricted to breakout rooms.

## **WHISPERED ASIDES, KICKS UNDER THE TABLE**

Defense attorneys also shared how virtual court proceedings reduce their ability to communicate with their clients at crucial times. In the words of one defense attorney, "[t]he bigger concern is to make sure that the client isn't divulging too much on the record in the courtroom."<sup>693</sup> Indeed, other attorneys shared specific instances in which their inability to communicate immediately with their client harmed the client's case. One defense attorney described a sentencing hearing, which took place by phone:

I'm not there to kick him under the table. And he just, he was just like interrupting the judge. He was dropping the n-word. I mean, it was bad. Yeah, and there's no way to stop him from hurting himself. If I'm virtual, I can't even say there's, you know, there's nothing. If they're on the phone, it's just this void. So that was really bad.<sup>694</sup>

Another attorney described a Zoom hearing in a case where the client was charged with possession with intent to deliver drugs:

[A]t one point, [the client] says, in open court, . . . "I got no problem with the possession charge because, you know, I possessed that stuff. I just was not dealing in that stuff." Okay, so had I been sitting right next to him, in court, I could have muted the microphone and whispered quietly in his ear to shut the eff up. And I could have, because everything in court, that's said in court and said on the record can be used against you. Yet, because I didn't have that ability to shut him up, that now becomes part of the record. And now . . . the prosecuting attorney is saying, "Hey, by the way, your client just admitted to possessing drugs. So I do intend on using that against him in court." K. Thanks for the heads up. I knew that, but thanks for the heads up. But not having that ability to reach, you know, reach over and smack him on the nose with a rolled-up newspaper. . . . [T]hat makes it very, very difficult to represent them sometimes.<sup>695</sup>

A prosecutor sympathized with this challenge: “And then the weird part is, the defense attorney is not with their defendant. The defense attorney is in his office somewhere. And the defendant is somewhere else. If you have somebody running off at the mouth, how do you cut them off?”<sup>696</sup>

As one defense attorney noted, the inability to communicate with clients spontaneously can translate to additional work for the attorney:

Before, I was sitting next to them . . . and I could kind of manipulate their responses while sitting right next to them. Now I don’t have that ability, so I kind of have to do it in advance. And before, they’re, really the only time that I was really ever worried about what a client would do or not do is when they, if they had to testify. Well, I would definitely prepare them for that in advance. But now, it seems like I’m having to prepare them for every single hearing.<sup>697</sup>

The information flow goes both ways: It is also difficult for attorneys to gain critical information from their clients. One attorney lamented clients not “being able to whisper into your ear” during proceedings.<sup>698</sup> And, as noted by a defense attorney in the last section, the virtual format eliminates the possibility of “the client . . . like waving me over to the box . . . and then I kind of lean in and he whispers something in my ear which actually sometimes is important.”<sup>699</sup>

## CLIENT TRUST AND ENGAGEMENT

The majority of defense-attorney interviewees felt that fully remote communication made it more difficult to build trust and rapport with their clients. One Miami defense attorney used precisely these terms, noting that “it’s more difficult to develop rapport. . . . It’s not the same relationship with clients.”<sup>700</sup> A Milwaukee attorney agreed that remote communication makes relationship development harder: “I think [telephone communication] has brought a lot of harm . . . or I guess additional obstacles. I don’t know if harm is the right word, but that, you know, as long as we’re remote and you can’t have that human interaction, it’s going to stay a problem.”<sup>701</sup>

Some interviewees noted that they were less able to get to know or build relationships with their clients. A Miami defense attorney described a client she had only ever met on Zoom and noted the adverse effects on the attorney-client relationship: “It hinders the ability to establish good working relationships with the clients. I think that you don’t get the same feel for a person, even though you’re seeing their face. . . . [Y]ou get a vibe from somebody when you’re in the same room with them, and that is completely gone.”<sup>702</sup> One North Dakota defense attorney thought that remote communication made it harder to “understand where the client is coming from.”<sup>703</sup> And a second described a lack of trust in both directions:

It's easy for [a defendant] to, let's say, just not be really forthcoming on the phone as opposed to, again, watching them fidget, shift around, can't look you in the eye, that kind of thing. And I tend to have to take them at face value. I just, to cover my butt, I take extensive notes about conversations and things like this so that I don't get in the situation or somebody denies saying that kind of thing.<sup>704</sup>

Indeed, many defense attorneys felt that remote communication prevented the clients from trusting them. Some noted that credibility and good relationships were harder to build remotely:

The inability to meet with clients sucks. Just sucks. Because, I am, how do I explain this? . . . I don't portray kind of the typical lawyer, the look you, what you would expect a lawyer to look like. . . . So having the ability to go meet with the clients and meet with them and see them face to, face to face, I think added a little, a level of credibility to my representation of them where they would see me as not, you know, a suit-and-tie, numbers-punching lawyer. . . . I think a lot of that helped me communicate with them better. . . . I have had countless clients tell me over the years that . . . they feel more comfortable with me than they have with any of their other court-appointed attorneys. So being able to meet with the client face-to-face was very, very important. And now I can't do that.<sup>705</sup>

I think a lot of our job is, you know, the relationship that we have with our client, right? Obviously, meeting someone in person and talking to them face-to-face and interacting face-to-face is obviously going to be different than interacting over a computer screen. . . . And I think that it all kind of boils down to it, almost a trust issue. I think that it's hard to, I guess, gain the trust of somebody over the phone, more than it is to do it when you're in person.<sup>706</sup>

Another explained that in-person interactions can be especially important for building trust in interracial attorney-client relationships:

[A]s public defenders and especially in my case, as a white public defender who is serving predominantly black clients, in a historically segregated city. . . there's a trust deficit that, that comes to that relationship, right? . . . [Y]ou work for the state, you get paid by the same people that pay the DAs. You're a public pretender. You're just gonna push a plea on me. I mean, all the sort of cliches that come along with this position. And so, you know, I welcome such a deficit and believe it's real and should exist and believe that I'm going to earn a client's trust by showing them what I do, right? Talking to them. . . . [T]hat's harder to do through the telephone. . . . I mean, very detrimental, I think, to attorney-client confidence and . . . it's sort of a two-way street, right? You get, your clients get to know you. But you also get to know them so that when you're . . . in court advocating and you're saying, "Look, I'm here to tell this person's story," you feel like you know it as opposed to just reading a few notes here and there.<sup>707</sup>

Still other defense attorneys felt that in-person communication—either between the attorney and client directly or within the courtroom environment more broadly—helps clients understand the realities of the criminal justice system, which then helps them trust the attorney guiding them through it:

So we have an individual who is in custody who called the office six times last week, and that may not sound like a lot, but he couldn't comprehend why we weren't getting his request done, but not enough time had passed to take any actionable steps towards it. But I feel like if I could have been there in person [I could have] explained to him, hey, this takes 50 days, you need to be patient. . . .<sup>708</sup>

At least before [COVID], [defendants] would come to court, they would see what was going on in person. They would see what was going on with everybody else. . . . [T]hey sit there while they're waiting for their case to get called, so they get to observe what's going on in the courtroom. They get to see the judge's demeanor for that day as to what's going on. . . . And, I think that that made a difference. Because, you know, sometimes you would get, you know, like after court, you would kind of get it. . . . It would give the clients insight like, "Wow, that judge is a really tough judge. You know, maybe I should reconsider the offer that the state made me." Or, "Hey, I saw you beat up that prosecutor in court today. Now, I have more faith in you as my court-appointed lawyer." Like those kind of things, they don't get to see anymore.<sup>709</sup>

In addition to trust issues, some interviewees believed that remote communications make clients feel anxious and disengaged from their cases. One explained, "But yes, there is a great deal of stress and anxiety created for a defendant who can't even be in the courtroom. And can't participate and just has to kind of watch it all unfold."<sup>710</sup> A prosecutor expressed a similar sentiment:

[T]here were a lot of individuals who were in the jail with very little information about their case, very little information outside a phone call from their defense attorney, but no ability to have face-to-face visits. . . . And that had to be a very stressful situation for those defendants, for the defense attorneys, and it was a hindrance to the criminal justice system.<sup>711</sup>

Finally, some defense attorneys concluded that certain conversations are so consequential, they need to take place in person. One attorney explained that "the preferred method for anything of any substance is for the lawyers to go visit the clients . . . in a visiting room."<sup>712</sup> Another agreed:

I certainly think there's something to be said about meeting someone in the flesh versus virtually. So you know, you would have your really difficult conversations about whether your client should go to trial or whether they should take a plea. You would go over all the discovery, you would go into the jail and go over the discovery with them and review everything with them. And those were done in person.<sup>713</sup>

Another respondent connected the concerns about important decisions with the trust concerns discussed in the previous section, explaining that difficult conversations are easier when the parties trust each other:

[Virtual communication] is not the same as walking in a room, shaking their hand, you know, physically just patting them on the back at the end. You know, because I will tell you there are some clients I've experienced, where when you shake their hand as a show of respect, and I do that for every one of my clients. . . . But some of these clients have never had anybody shake their hand, you know, at least as an adult, you know, as in a sense of respect. So it's very hard to build that relationship. And in these types of serious cases where you have to advise a client to, maybe take a state prison, a long state prison sentence, as an alternative to what will be a longer state prison sentence, you need to have built a rapport and a sense of trust. And there are real limits to, in my view, how well you could build that when you're only talking across a screen.<sup>714</sup>

# CHAPTER 11:

## CONSTITUTIONAL ISSUES

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Interviewees in all three jurisdictions worried that virtual court proceedings may jeopardize defendants' constitutional rights. These concerns were mentioned frequently: Just over half of all interviews (30) included some discussion about constitutional concerns. Constitutional concerns were raised somewhat more frequently in Miami, though the kinds of constitutional issues were similar across jurisdictions. Moreover, defense attorneys, judges, and prosecutors raised constitutional concerns with almost equal frequency.<sup>715</sup>

A minority of interviewees discussed constitutional issues in general terms. One Miami defense attorney, for example, remarked that “there are a multitude of constitutional objections” associated with remote jury trials.<sup>716</sup> Most interviewees, however, spoke about specific constitutional concerns. Those concerns most often discussed one of the following four constitutional provisions: the Confrontation Clause, right to counsel, due process, and trial rights.<sup>717</sup>

It should be noted that the concerns raised by respondents and shared here are just that, the concerns of the respondents. This is by no means an analysis of constitutional doctrines, though what is presented here could preview what will eventually be constitutional claims brought on behalf of defendants and needing to be decided by the courts.

### CONFRONTATION CLAUSE

Of all constitutional concerns, Confrontation Clause issues were most frequently discussed. Defense attorneys and judges brought up these issues most frequently: Defense attorneys mentioned the Confrontation Clause in eight interviews (40% of interviews with defense attorneys),<sup>718</sup> and judges did so six times (also 40%).<sup>719</sup> Comparatively, interviews with prosecutors surfaced Confrontation Clause issues four times (29%).<sup>720</sup> A few of these interviewees discussed the COVID-specific issue of whether the Confrontation Clause is satisfied if the witness testifies in person but wears a mask.<sup>721</sup> However, this issue is not inherently tied to remote technology and is therefore beyond the scope of this report.

The remaining interviewees who discussed the Confrontation Clause tended to focus on the importance of *in-person* confrontation. A minority suggested that in-person confrontation

was not, or should not be, important. A North Dakota court employee was “hopeful” that remote proceedings, including those with witnesses, would become “far more normalized.”<sup>722</sup> He acknowledged that some attorneys objected to remote testimony—“at least for some, [confrontation has] got to be in person”—but he also felt that other attorneys took “a bit more of an open approach.”<sup>723</sup>

The majority believed that confrontation had to be in-person—though they differed in the intensity with which they discussed this point. One interviewee simply noted existing legal requirements for in-person confrontation.<sup>724</sup> Others mentioned in-person confrontation in passing. For example, a Miami defender noted, in a broader conversation about COVID and the Constitution: “You can’t constitutionally, in my opinion, do remote criminal jury trials. I think it violates the Confrontation Clause.”<sup>725</sup> One judge explained that he had not done remote criminal trials “because of all the issues about the right to confrontation and looking at the jurors.”<sup>726</sup> And another judge raised the point that pressuring *defendants* to attend trials remotely might raise confrontation issues, even if the witnesses attended in person.<sup>727</sup>

Other interviewees, though, elaborated on the reasons they believed that confrontation had to take place in-person—and some of their reasons map directly onto the issues discussed in Chapter 8: Dehumanization. One prosecutor, for example, noted the importance of in-person eye contact: “The other thing is oftentimes the defendants would like to look the witness in the eye while they’re confronting.”<sup>728</sup> Another spoke about the abstract meaning of the confrontation right, implicitly referencing the idea that remote hearings cause some important intangible feature to be lost:

What is the Constitution? The ability to confront your accusers. And so, are they getting the ability—you know, again, I’m looking at it from my viewpoint. What’s easier for me?—But are they getting, are those defendants having an opportunity to, to confront their accusers? And is that what we meant by all that, by the accusers being piped in and all that? I don’t know. I don’t think so.<sup>729</sup>

Other interviewees connected in-person confrontation with the witness issues discussed in Chapter 9: Remote Witnesses, namely, lying and coaching. One defense attorney felt that in-person confrontation was critical for her ability to ensure that the witness—and only the witness—provided the testimony:

I think that there are too many Sixth Amendment issues to adequately have [remote trials]. Okay, I think that you completely compromise the right of confrontation, and you limit the true job that a defense attorney can do. Look, admittedly, I sit in calendars and text message on my computer with another defense attorney or the prosecutor who’s in the same Zoom with me. . . . And what if I was a witness who had the same capability? You know, who’s gonna be, who’s sitting in the room with me? You don’t know whether anybody is sitting in the room with me right now. I have a virtual screen and, and somebody could be sitting behind my computer, and you would never know.<sup>730</sup>

And a North Dakota defense attorney noted that in-person confrontation was important to ferret out liars:

[Y]ou get into the right to confront, and I, like I said, I just in general think that is extremely important. Because I met some accomplished liars both as a prosecutor and as doing defense. And sometimes, the way they're found out is just watching them. And then, you know, you get that tip and so you start looking at things a little differently. And with a little luck, you expose it or at least realize that, you know, it isn't quite the way they're saying. And that's, I think, probably the most important [right] COVID is probably interfering with.<sup>731</sup>

These interviewees effectively elevated the concerns mentioned in the witness section to a constitutional magnitude, framing the inability to guard against these problems during virtual proceedings as a loss of the confrontation right.

Relatedly, two defense attorneys felt that they were less able to provide their clients with constitutionally sufficient opportunity to confront witnesses against them when those witnesses were remote. One interviewee, quoted above, explained that her inability to guard against witness coaching “compromise[s] the right of confrontation” and “limit[s] the true job that a defense attorney can do.”<sup>732</sup> A second explained that they were limiting remote court to “non-dispositive legal argument because we don't want to run afoul of any sort of Confrontation Clause. We don't want to do a disservice to our clients and be ineffective because we're not getting direct access to a witness. . . .”<sup>733</sup>

For some interviewees, these issues got to the core of the originalist constitutional argument. In the words of one North Dakota judge:

And the reason for that is the Framers of our Constitution designed it that way. The right to confront is very important because, you know, the old star chamber days of English common law, where we have affidavits, and nobody got to confront witnesses. And there's something about a witness taking this stand and having the subject of their accusations sitting right there and seeing them face to face. So I think it's very important for the criminal defendant to have that right to face-to-face confrontation under the Confrontation Clause so I would not be in favor of remote trials and Zoom trials.<sup>734</sup>

A defense attorney echoed these ideas:

And I would argue the right to confront the accuser. . . . [A]nd maybe my, my idealistic side of me coming out, but there, I'm a defense attorney, so I kind of have to stick with my roots. But the right to confront the accuser is so ironclad critical to our, our system for a reason. It's set that way because it's really easy for your neighbor to get pissed off at you and call the police and say, you know, you threw something through my window, K? And that changes when that person has to get on the stand, swear an oath, to tell the truth and nothing but the truth, and then look the judge and the defendant and a group of 12 people in the eye and recount this. There, there have been so many cases where what

the allegation was versus what has testified to at trial are so drastically different that I think a remote trial would just be a travesty. And I would fight it. I would fight it tooth and nail. I would argue against it. I'd threaten an appeal. I would do everything I could to stop it from happening. . . . I think they really got, they cannot lose focus of the, the core fundamentals of why the system is, was, and is set up the way it is. You know, there's a reason why we have the right to confront the accusers.<sup>735</sup>

## **RIGHT TO EFFECTIVE COUNSEL**

Four respondents were also concerned about the right to effective assistance of counsel issues. In general, these respondents thought that there was something lost in the attorney-client relationship because defense attorneys were not physically present next to their clients; this concern—also discussed in Chapter 10: Attorney-Client Communication—felt so fundamental that respondents questioned whether defense attorneys could provide effective assistance without it.<sup>736</sup> A Milwaukee defense attorney explained his perception of the right to counsel and the challenges that remote court presented:

Defense lawyers stand in the unique position where we really need to be within, you know, eight inches of our client's space during a hearing. And there's just no other way to do this. Where you can, because as it's happening, on the fly, that's part of what, how I envisioned the Sixth Amendment right to counsel. It's not just the warm body there and the person that knows how to talk, but somebody who is there with you that you can talk to, like, as it's happening. Right now, that's not really possible.<sup>737</sup>

A Miami defense attorney went one step further, explicitly mentioning ineffective assistance of counsel claims stemming from virtual court:

And frankly, what we're most—I wouldn't say scared about—but apprehensive about, is the fact that, ineffective assistance of counsel claims are sure to come down the pike if we have to do this. Because I cannot like, whether it's a client writing me a note on a pad of paper or tapping me on the arm and whispering something, that will not happen. And so the only thing that we could do is have a client who is sitting there . . . just kind of wave at us and say, "Judge, I need to go into a breakout room" or "Judge, I need them to call me" or "Judge, I need to do this" . . . . It's going to affect my ability as defense counsel to effectively represent my client because they've got information or they see things. . . . [T]hey might know the facts of what's going on.<sup>738</sup>

He later added: "I won't go forward with certain hardcore motions like the real serious ones because I don't want to do that without my client sitting right there. That's an ineffective assistance of counsel motion just waiting to happen."<sup>739</sup>

In at least one jurisdiction—Miami—these respondents are touching on an unresolved legal issue. As one judge explained:

[The appellate court] deferred considering the right to counsel issues because they're taking a wait and see approach as to whether the breakout room and the other options . . . whether that is sufficient. So that's still an open question in our jurisdiction as to what exactly needs to be done to make sure that the right to counsel . . . is respected.<sup>740</sup>

## **NOTICE AND DUE PROCESS**

Many respondents' due process concerns related more to the COVID pandemic than the use of remote technically itself.<sup>741</sup> Nor were all comments negative: One judge affirmatively noted that remote witnesses are “just as legitimate as having people appear in court” and “not a violation of due process.”<sup>742</sup> Still, four respondents noted potential due process concerns related to the switch to virtual proceedings.

In North Dakota, two attorneys—one defense attorney and one prosecutor—mentioned the possibility of insufficient notice of criminal proceedings. As the defense attorney explained:

I do have clients that you have gotten bench warrants for non-appearance at hearings, and I can't confirm or deny, but I think part of it may be they don't have minutes available, or they didn't know that it was supposed to be by Zoom or by home. And so I think there's potentially a notice of criminal proceedings issue as well. No client has flagged that, but just in my experience, I think that could be happening.<sup>743</sup>

The prosecutor agreed, worrying that defendants “get a Zoom notice to come to a hearing, and they have no idea what it means, or they have no ability to participate that way. And maybe they don't advocate for themselves enough to say that. And there might be warrants issued. . . .”<sup>744</sup>

Relatedly, two defense attorneys cited access-to-technology problems (as discussed in Chapter 7: Access to Technology) as constitutional due process concerns. According to these attorneys, some defendants have such limited access to technology that virtual proceedings deprive them of due process of law:

[Access is] a big concern for a lot of the public defender's clients who are indigent—that's a major issue. The, you know, the world changed, but the, you know, poverty gap did not. If anything, it grew larger. And so these people who are barely making ends meet and who are declared indigent by the court may not have access to high-speed internet, and that could adversely affect them, which could be a due process issue if we're all going to stay in this remote world.

And there are some real concerns about access to the proceedings because a lot, a lot, of my clients have very transient lifestyles . . . where they may use a community phone or a landline at somebody's house, and an entire family uses that phone. And there are a lot of people who don't have minutes, or their plan is expired or they haven't been able to pay it. . . . But when they are expected to be on these conference calls [for court], and they could spend up to an hour and a half to two hours waiting for the case to be called, they're burning through the minutes that they did have. And . . . there's not really Wi-Fi spots available, especially in indigenous communities. And with our courthouses being closed, that creates a major problem. In my mind, a huge due process problem.

Finally, one North Dakota judge explained his “love” of due process, which he tied to both the physical space of the courtroom and the in-person emotional connections inherent in in-person proceedings:

My job is harder because I'm old and I, you know, I love due process. I love the courtroom. I love people being present. I think it's kind of a, regardless of you know, what we do, you know, people could say, “Well, you can conduct business by Zoom.” Yes, you can, you can conduct business by Zoom. Is it the best way of conducting business? I don't think it's even close to what you can do when people are in person. You deal with people, and I think you've got to show compassion. There's gotta be sympathy. There's gotta be empathy both for the criminal and for the victims. And when all of that stuff is done by Zoom, and electronically, I think there's a lot lost.<sup>745</sup>

## TRIAL RIGHTS

Finally, in nine interviews, participants spoke about trial rights<sup>746</sup>: the right to a fair trial, the right to a public trial, the right to a jury trial, and, for some respondents, the right to an in-person trial.<sup>747</sup> Additionally, speedy trial concerns arose in 20 interviews<sup>748</sup>—over a third of all interviews conducted in this study—but those concerns related to the COVID pandemic rather than the use of remote technology per se. As such, those perspectives are beyond the scope of this report.

A few respondents made only vague allusions to trial rights. For example, one court employee questioned whether a remote trial “would ever be legal.”<sup>749</sup> And numerous others discussed the possibility remote trials in conversations about their preferences post-COVID, but these comments appear elsewhere in the report.<sup>750</sup>

Four interviewees spoke specifically about the right to a public trial, but only two focused on publicity as a protection for the defendant. A North Dakota defense attorney characterized a public trial as one of “the defendant's right,” which he connected to “the core fundamentals” of constitutional protections for the accused.<sup>751</sup> A Miami defense attorney similarly connected public access with the seriousness of the proceedings:

I think there's something to be said about the formality of a courtroom. I think that there is something about being in a courthouse, even if it's not a fancy one, being in a courtroom even if it's not a fancy one, but where you know where you're at, right? . . . I mean, I think, I think part of why we have public trials where we have courthouses because we want all the participants, including the witnesses, to recognize the solemn nature of the proceedings that are going on. And you know, I can see that that's not quite there via Zoom.<sup>752</sup>

The other interviewees who discussed public trials focused on the *public's* right of access rather than the *defendant's* right to have his proceedings out in the open. A North Dakota court employee, for example, discussed the “right to public trials,” which he “worked through . . . with both the ability for some people to come in, to be physically present . . . and we use the system as well—Zoom, or Global Meet—to provide access.” A North Dakota judge spoke similarly, remarking that “we had to make sure that there's public access as a constitutional right, and, and so we just made sure that the number of the call-in number was available, the Clerk's Office had and it was posted and provided.”<sup>753</sup> Many additional interviewees spoke about public access rights more generally,<sup>754</sup> but they did not necessarily focus on trials or frame their comments in constitutional terms.

A few respondents spoke in terms of the right to a *jury* trial. One judge apparently saw no constitutional defects with remote bench trials but dismissed the possibility of remote jury trials: He thought “we could” conduct remote bench trials in a small set of cases but explained, “There aren't a lot of defendants in felony court that want to give up the right to a jury trial.”<sup>755</sup> One defense attorney—the same one who characterized the confrontation and public trial rights as “core fundamentals”—included jury trials in the same category, noting: “There is a reason why it's a jury trial.”<sup>756</sup>

One interviewee spoke explicitly of the constitutional right to a fair trial. She connected this right to a quirk of hybrid hearings, unequal in-person attendance:

The defendant has a right to fair trial. Well, the state does too. The judiciary: it's supposed to be fair. Fair for all. Fair for the victim. Fair for the defendant. Fair for the State. The judiciary is supposed to be the moderator to ensure that that fairness happens. What is it that makes it fair? To me, it was not fair that the defense attorney gets to sit in the courtroom by himself with the judge. The defense attorney would have your ear and I wouldn't. That's not right. It has to be fair for everybody.<sup>757</sup>

Finally, many actors spoke in terms of a defendant's right to be physically present in the courtroom during trial. Interviewees discussed both bench and jury trials in this context. A Milwaukee judge, for example, cited the defendant's right to attend in person for jury trials: “[T]here's too many issues, other issues, for a criminal trial to be handled [remotely]. You know, defendant has a right to be present in the courtroom with the jury, and I think there's just so many issues, that would cause just a . . . nightmare to trials, jury trials by Zoom.”<sup>758</sup> And a North Dakota prosecutor described “the right to be in the courtroom,” at first in the context of a bench trial:

For a bench trial, I just believe that people have the right to be in the courtroom and they have the right to talk to the judge, and the judge should be able to see them and hear the sighs and see the eye rolls. All those nonverbal cues that people give off, I think sometimes we lose them with technology.<sup>759</sup>

Later, though, this prosecutor considered “all the different types of trials” and concluded: “I think if there’s decisions made that affect, at the end of the day, you know, people’s lives. I think that everybody should have the right to have them in person if they want to.”<sup>760</sup>

These interviewees, then, placed a high value on the physical courtroom, the interactions that the courtroom enables, and the human connections forged therein<sup>761</sup>—so much so that they used the language of rights. A Miami judge’s comments, connecting the right to a jury trial with in-person dynamics, encapsulates this theme well:

But I think people are very much looking forward to being back in the courtroom. I think part of the legal profession just traditionally has involved, especially for criminal cases, it’s involved that direct contact with all of the players in the system, right. . . . I think a lot of people miss them, that human interaction, and are really looking forward to that returning to a certain degree, and hopefully that will never be lost completely, because I think, even with artificial intelligence and other changes in some aspects of the legal system, at least for the foreseeable future, a big part of our process is human judgment, human observation of a witness, of an attorney, seeing someone here live, definitely the dynamic of a jury trial and having the witnesses here live testifying to the finder of fact, having cross-examination, all of those things that are so important to our criminal justice system and the constitutional right to a jury trial can’t—I don’t know if it can—I think it’s unlikely that it could be done as well remotely.<sup>762</sup>

## CHAPTER 12: ULTIMATE PREFERENCES

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In the previous sections, interviewees detailed a range of issues—from efficiency and practical concerns to constitutional issues and dehumanization—associated with remote court. Given this vast array of (sometimes juxtaposing) concerns, how did interviewees ultimately come down on remote court as a whole? When asked about it specifically, almost every interviewee shared their overall opinions about videoconferencing post-pandemic. Their most common preferences fall within three non-exclusive categories: (1) a strong sentiment that “absolutely no” serious hearings should be virtual (over half of interviewees); (2) a willingness or desire to conduct minor hearings virtually (approximately one-third of interviewees); and (3) an emphasis on flexibility about videoconferencing’s use, especially for hearings that fall in between the two extremes (approximately one-third of interviewees).

Preferences varied by actor type. Defense attorneys most often expressed strong preferences about contested hearings (approximately 80%, compared to about half of judges and prosecutors). Judges were less inclined than defense attorneys and prosecutors to express preferences about minor hearings remaining virtual; approximately a quarter of judges expressed such preferences, compared with about half of defense attorneys and prosecutors. But judges were more inclined than defense attorneys and far more inclined than prosecutors to emphasize the importance of flexibility.<sup>763</sup>

### IN-PERSON PREFERENCES

Over half of all interviewees expressed a preference that certain hearings should only be conducted in person. Interviewees drew a particularly strong line in the sand at trials: At least a third of interviewees thought that trials should never be done virtually, though there were a handful of dissenters. Others drew the line even earlier, opining that, after the pandemic, all contested and evidentiary hearings should occur in person. A smaller group went further still, arguing that all hearings worth having were worth conducting in person. As discussed below, interviewees’ reasoning often centered around the same kinds of constitutional concerns, credibility assessments, and dehumanization issues discussed in other sections.<sup>764</sup>

## TRIALS

**“ABSOLUTELY, POSITIVELY NOT.”** Not surprisingly, the most common type of proceeding that interviewees were unwilling to do remotely was trials.<sup>765</sup> Many expressed that they would “absolutely, positively not”<sup>766</sup> do Zoom trials, that “the Supreme Court would have to force me,”<sup>767</sup> that trials “should not be [done] virtually,”<sup>768</sup> or that they “hope there aren’t any Zoom trials ever.”<sup>769</sup> Others noted that, if the choice were theirs to make, “all trials would be in person.”<sup>770</sup> For some interviewees, the mere thought of remote trial provoked some of the strongest negative reactions in the study. For instance, one North Dakota defense attorney said that remote trials would “just be a travesty”:

INTERVIEWER: [W]ould you do a remote trial? . . .

DEFENSE ATTORNEY: No.

INTERVIEWER: No. Tell me more.

DEFENSE ATTORNEY: I would do the same thing that other defense attorney did. And I would argue the right to confront the accuser. . . . I think a remote trial would just be a travesty. And I would fight it. I would fight it tooth and nail. I would argue against it. I’d threaten an appeal. I would do everything I could to stop it from happening. And so far, they’ve, nobody’s, you know, pressed in our jurisdictions that I’ve seen. But I think it would be a travesty.<sup>771</sup>

A Milwaukee defense attorney had a similarly “harsh” perspective:

[P]ardon my language, but they sure as hell won’t be on any one of my cases. I will, I will not do a jury trial. If they scheduled me to do a jury trial by Zoom, I will not show up. I will get locked up right next to my client, and I will not show up for a Zoom jury trial. It will not happen. And I personally think that anybody, and I know this is going to come across as harsh. . . . Any attorney that [agrees to a Zoom jury trial] should have their license yanked. At the very least, any attorney that does that should be immediately disqualified by the office of the state public defender from taking any cases for them.<sup>772</sup>

Even an interviewee who was willing to do everything else virtually drew the line at trials, which he thought should only be conducted in person.<sup>773</sup>

Most interviewees did not explicitly distinguish between bench trials and jury trials, simply stating that “trials” or “criminal trials” should be in person.<sup>774</sup> Others explicitly ruled out both possibilities.<sup>775</sup> But three interviewees who objected to remote jury trials were willing to consider remote bench trials in narrow circumstances. The Milwaukee defense attorney who thought that attorneys “should have their license[s] yanked” for Zoom jury trials expressed a “very limited” carve-out:

I'm setting aside court trials for a second because I could maybe see a scenario, in a very limited scenario, which Zoom court trial might be appropriate, okay, if this is a highly technical issue and really it's just coming down, nobody's disputing the facts, and it's just an argument-based thing, okay, fine. I'd still be uncomfortable with it, but I could—I wouldn't do it, but I could see people doing it.<sup>776</sup>

Similarly, a Milwaukee judge thought that bench trials might be doable in limited circumstances:

I think the most likely scenarios are in connection with an NGI [Not Guilty by Reason of Insanity] plea. And so, if you've got, you know, if you've got an undisputed opinion by a doctor that the person is NGI, then that's a likely court trial. But again, it's not so much that that would be an issue as long as everyone agrees. . . .<sup>777</sup>

A second judge somewhat hesitatingly expressed that bench trials might be alright:

Yes, assuming I had a good waiver from that person, a good knowing waiver, and I would, I would want to set up and do a couple of mocks, maybe a couple of civil trials to make sure we got it right. . . . So if we're able to get the technology set up and we got a good waiver from that person who's facing that loss of liberty, I would certainly be willing to try it. Assuming we had a couple of good trial runs, yeah, sure.<sup>778</sup>

Two additional respondents disagreed with the majority stance altogether and indicated that they would be ok with virtual trials, including one judge who had, in fact, conducted a remote bench trial.<sup>779</sup> A Milwaukee defense attorney felt that remote trials were alright, "in the right set of circumstances," if everyone agreed:

And I think the aspects of confrontation, confidentiality, and those are the things, they're very important. And it depends on who you ask, but some people would say that's why we can't do Zoom trials. You know, I think if, in the right set of circumstances, I would be willing to do one. If it made sense. And, of course, with the consent of the defendant and everybody involved.<sup>780</sup>

As for the judge, he explained that the decision about "remote jury trials" was "way above my pay grade": "If it's something that the Florida Supreme Court says we can and should do, and . . . our chief judge says the same, I'm here to serve, I really am."<sup>781</sup>

These respondents notwithstanding, the large majority of interviewees felt that trials should be conducted in person. Their ultimate preferences were driven by many of the factors discussed in other chapters: the absence of nonverbal cues,<sup>782</sup> the need for human connection,<sup>783</sup> the inability to assess credibility remotely,<sup>784</sup> and constitutional infirmities of remote proceedings.<sup>785</sup> Others identified the high stakes of trials as part of their justification.

**CUES AND CONNECTIONS.** To explain their preference for in-person trials, many interviewees cited the lack of facial expressions, body language, and human connection from the judge, the jurors, the defendant, or the witnesses.<sup>786</sup> Many of these comments extended to other evidentiary hearings beyond trials and so are discussed in the next section.<sup>787</sup> Several interviewees, though, discussed such cues specifically in relation to jury trials<sup>788</sup> or bench trials.<sup>789</sup> One Milwaukee judge emphasized:

The assessment of credibility. Not just of witnesses, but of venire panel members. A number of lawyers have brought that up, that they don't necessarily feel as comfortable gauging the reactions of the people they're *voir dire*-ing, . . . over Zoom, as they would in person when they can get up close and personal with them.<sup>790</sup>

A defense attorney agreed, connecting the need for facial expressions with the importance of the proceeding (a theme to which we will return shortly):

[T]rials have to be in person. . . . When I'm just picking a jury, there's no way you could do it on Zoom. There's no way. And it's also very difficult, even in the hearings that I do have, judging people's facial expressions. Not having that, I don't know. There's just something about being in person when you're doing something super important. I think that when you're doing something that is really key to the case, I think you really have to be in person.<sup>791</sup>

And the role of physical cues goes beyond *voir dire*. A Milwaukee defense attorney noted that “there’s no platform where you could actually physically see all the jurors,” which makes it hard to understand “what the jurors are thinking.”<sup>792</sup> Similarly, a North Dakota defense attorney explained, “You get a better idea of how to read people when you’re in the room. Okay, as a defense attorney, I prepared this argument. It’s not landing with the jury. So how can I change on the fly?”<sup>793</sup> A North Dakota prosecutor explained that the jury, too, watches physical cues:

Again, we haven't done any jury trials virtually, but that jury sitting there, staring that witness down and whatever they do as jurors and hearing it and seeing the facial expressions, flinches, and the grimaces, those are all important things that you can't accomplish virtually, in my opinion. Maybe, and maybe you don't even capture it in a video type of setting.<sup>794</sup>

Some interviewees explained that their preference for in-person trials related not just to physical cues but also to human connection and the intangible benefits of face-to-face interaction.<sup>795</sup> A Miami judge, for example, couldn't imagine a virtual jury trial because “you really need that one on one.”<sup>796</sup> A prosecutor in North Dakota concurred, explaining that “I don't think that's effective justice for the defense to have Zoom trials” because “[y]ou have to have that person-to-person, eyeball-to-eyeball contact.”<sup>797</sup> And a defense attorney in Miami shared:

I think there's something about being in the flesh, in front of a person, especially when they're making a judgment regarding someone's liberty or regarding the law and its applicability to that human being as a human being. I think there's something about being there and being able to look them in the face.<sup>798</sup>

A Milwaukee defense attorney went so far as to say that “not doing [jury trials] in person is missing the point of a trial.”<sup>799</sup> In explanation, he cited the “physical presence in the courtroom, the confrontation in the courtroom, [and] the human connection between you, the jurors, the judge.”<sup>800</sup> And a Miami judge explained that he thought “it's unlikely that [trials] could be done as well remotely”:

[A] big part of our process is human judgment, human observation of a witness, of an attorney, seeing someone here live, definitely the dynamic of a jury trial and having the witnesses here live testifying to the finder of fact, having cross examination, all of those things that are so important to our criminal justice system and the constitutional right to a jury trial, you know, can't—I don't know if it can—I think it's unlikely that it could be done as well remotely. . . . But I think more than that. I think there are just characteristics of in-person proceedings that probably are best maintained through in-person proceedings.<sup>801</sup>

**CONFRONTATION CLAUSE.** Interviewees also pointed to the Confrontation Clause as another primary reason for their opposition to virtual trials.<sup>802</sup> (This theme is also discussed in Chapter 11: Constitutional Issues,<sup>803</sup> such that more than a few illustrative comments would be repetitive.) One defense attorney reasoned, “I think that there are too many Sixth Amendment issues to adequately have [virtual trials]. Okay, I think that you completely compromise the right of confrontation, and you limit the true job that a defense attorney can do.”<sup>804</sup> Another defense attorney maintained:

[T]he right to confront the accuser is so iron-clack critical to our, our system for a reason. It's set that way because it's really easy for your neighbor to get pissed off at you and call the police and say, you know, you threw something through my window, K? And that changes when that person has to get on the stand, swear an oath to tell the truth and nothing but the truth, and then look the judge and the defendant and a group of 12 people in the eye and recount this. There, there have been so many cases where what the allegation was versus what has testified to at trial are so drastically different that I think a remote trial would just be a travesty.<sup>805</sup>

Prosecutors also relied on the Confrontation Clause to justify their opposition to virtual trials. For example, one prosecutor in North Dakota saw the ability to confront the accuser as incompatible with the witnesses being “piped in”:

[Trials] should not be virtually, I don't believe. Maybe you, maybe you bring in a witness or two, that type of thing. And experts, some doctor with some, some dull dissertation on, I don't know, blood spatters or something. But. . . . What is the Constitution? The ability to confront your accusers. . . . [A]re those

defendants having an opportunity to, to confront their accusers? And is that what we meant by all that, by the accusers being piped in and all that? I don't know. I don't think so. Maybe I'm just old fashioned, but just, it loses some of the, that, that dynamic that I think is important to our system of justice.<sup>806</sup>

**HIGH STAKES.** Finally, several interviewees explained their resistance to remote trials by referencing the profound importance and high stakes of the trial. This theme has already emerged twice in prior quotes. In one, a defense attorney noted that “[t]here’s just something about being in person when you’re doing *something super important*. I think that when you’re doing *something that is really key to the case*, I think you really have to be in person.” (emphasis added)<sup>807</sup> Another defense attorney felt there was “something about being in the flesh, in front of a person, especially when they’re making a judgment regarding *someone’s liberty* or regarding the law and its applicability to that human being as a human being.” (emphasis added)<sup>808</sup>

Nor do these attorneys stand alone. For example, a pair of defense attorneys in Milwaukee (in a joint interview) explained that the “human connection” and small cues might change the outcome of an entire case:

DEFENSE ATTORNEY: No, I just think not doing [trials] in person is missing the point of a trial. The physical presence in the courtroom, the confrontation in the courtroom, the human connection between you, the jurors, the judge. You know, even if that’s a combative, ugly connection—

DEFENSE ATTORNEY: That’s a very good point. And, you know, the essence of all litigation is witness credibility. I mean, it’s, we do it the same way now that we’ve done it for over 300 years. But it all comes down to people watching somebody talk, and if that group of people believes the person or not. . . . I mean, it could be the simplest little thing that’s the difference between a lengthy prison term and freedom. It could be the look on someone’s face when they’re testifying. It really could. That could make all the difference in the world, and we don’t know what that little thing is gonna be. So it’s part of our job to protect [that].<sup>809</sup>

Another defense attorney, this time in Miami, emphasized the consequences of trials: “My view is very simple. I think that criminal trials . . . [or] any adversarial hearing that results in you going to prison, okay, being sentenced, but jury trials in particular: absolutely, positively not!”<sup>810</sup>

Defense attorneys were not the only ones to emphasize the importance of the proceeding. One North Dakota prosecutor, who was “not a fan of remote trials,” cited distractions and nonverbal cues.<sup>811</sup> But she also emphasized the need for in-person proceedings when they would affect people’s lives:

I think if it’s a dispositional trial, I think if it’s a confrontational arena, where the burden’s high, I think those need to be in person. I think if they are, I’m just thinking through all the different types of trials. I think if there’s decisions made that affect, at the end of the day, you know, people’s lives. I think that everybody should have the right to have them in person if they want to.<sup>812</sup>

## SUBSTANTIVE HEARINGS

Many interviewees thought that all “important”<sup>813</sup> hearings, not just trials, ought to take place in person. Not all interviewees agreed on the precise contours of this category, but most converged on the basics. Hearings involving testimony or evidence, for example, seemed to fall within it. A North Dakota judge defined the set of in-person hearings to include “a bench trial or a jury trial” or “an evidentiary hearing on a suppression motion where I need to weigh credibility.”<sup>814</sup> A Milwaukee defense attorney referenced the similarity between such hearings and trials: “I would be very hesitant to do a Zoom trial. I can’t even conjure up circumstances for that. . . . Evidentiary hearings are the same thing, you know.”<sup>815</sup> A North Dakota prosecutor likewise preferred in-person hearings for “the things that really matter,” including trials and “anytime you’re taking testimony from a witness.”<sup>816</sup>

Others emphasized the importance of having “contested” hearings in person, a category that largely, if imperfectly, overlapped with evidentiary hearings. A North Dakota defense attorney objected to using Zoom for “any kind of contested litigation,” which he associated with witnesses and exhibits.<sup>817</sup> A Milwaukee defense attorney similarly thought that “contested hearings, for the most part, are gonna be preferred to be in person.”<sup>818</sup> And a North Dakota prosecutor believed that “[i]f you’re contesting, sometimes it’s because the defendant needs to know the evidence against them. I’d rather have those in person.”<sup>819</sup>

Even interviewees who generally preferred virtual hearings sometimes expressed a qualitative difference between serious, evidentiary hearings and other kinds of court proceedings. A Miami defense attorney thought that almost everything should be remote:

Everything except jury trials, probation violation hearings, and evidentiary motions, evidentiary hearings. If you’re calling a witness to the stand, and it results in the suppression of evidence or a dismissal for one reason or another, I think those should be in person. So everything else I mean, I love this.<sup>820</sup>

Some of the rationale for in-person contested hearings was purely technical. One defense attorney explained that “there are interruptions, disruptions” and that “[i]f you have to confront someone with a document, you really can’t do it effectively.”<sup>821</sup> A prosecutor described his experience in a contested civil hearing to explain his feelings about remote preliminary hearings and the like:

[In the civil hearing], it took longer, because all of a sudden we’re having to read documents and, so we and, it was quite herky-jerky. It was quite interrupted. It wasn’t an effective hearing at all on that particular occasion. So when you’ve got exhibits and those sort of things, I think would be real difficult to use Zoom hearings, in my, you know. But I’m an old, I’m an old dog. So treat me, teach me a new trick. We’ll see.<sup>822</sup>

But other interviewees didn't restrict the problem to "old dogs." One judge, for example, connected technical problems to possible substantive errors in virtual testimony: "Again, there's always that nightmare scenario that the feed breaks up and someone's statement comes out the exact opposite of what they meant."<sup>823</sup>

Beyond technical issues, a substantial number of interviewees preferred to conduct evidentiary hearings in person because of the very same witness issues discussed in Chapter 9: Remote Witnesses. In fact, the similarities are so overwhelming that much discussion of them here would be duplicative. In brief, several interviewees who preferred in-person evidentiary hearings emphasized physical cues.<sup>824</sup> Resultingly, interviewees felt that remote cross-examination was not as effective at detecting dishonesty.<sup>825</sup> Moreover, interviewees found it more difficult to ensure that remote witnesses were not being coached:

[I]f you ask the witness a question, and they don't know the answer, that's a highly relevant piece of information. And if somebody's whispering in their ear and giving them the answers . . . on a Zoom conference call, you can't discern whether that they actually know the answer or somebody is helping them. Which is, I think, the reason why I, contested hearings, for the most part, are gonna be preferred to be in person.<sup>826</sup>

The takeaway point, then, is that the witness issues described earlier in the report were so severe that they caused many interviewees to prefer to conduct all hearings with witnesses in person.

Additionally, some interviewees felt that they could perform their job at an evidentiary or contested hearing more effectively in person. For one judge, "it would be better for [most evidentiary hearings] to be held in-person" in part because of his "ability to control the proceedings a little more."<sup>827</sup> For attorneys, too, their physical presence in the courtroom increased their efficacy. The following comments are illustrative:

One of the things that I tried to tell people is, you know, how the physical presence is so important. Your voice, how you project your voice, looking, being able to have a direct connection, being able to look at the witness directly face to face. It just, there's no substitute for that when you're doing a hearing remotely, especially if you're having to cross-examine a witness.<sup>828</sup>

You know, I just like thinking about handing the witness the exhibit. You know, I like that, I like, I don't know. You could show on screen, obviously, or they could have it in front of them remotely, wherever they're at. But I just like that movement, maybe I like getting up and moving. I stand by the way, just to let you know I stand whenever I cross-examine or examine any witness, partly because I get a sore back . . . but also because I just like the little extra sense of authority maybe. And you don't get that when you're standing in front of a screen.<sup>829</sup>

Then when we go to the other side of the spectrum, we start looking at the trials and the jury trials, contested hearings, that sort of thing. If we could go back to in person, I would like to see that, the sooner the better. It's just, because I do feel that I'm not as persuasive, and I'm, you know, not as effective if I'm not in-person when we're at, you know, hotly contested situations.<sup>830</sup>

Finally, a few interviewees expressed an idea that arose with trials: Some proceedings should be in-person simply by virtue of their importance or their high stakes. In a Miami defense attorney's words: "If you're calling a witness to the stand, and it results in the suppression of evidence or a dismissal for one reason or another, I think those should be in person."<sup>831</sup>

### **(ALMOST) EVERYTHING**

A final category of interviewees thought that it was important to do everything, or almost everything, in the criminal justice system in person. The boundaries between this category of respondents and the one discussed in the next section, who believed that certain minor hearings should be virtual, are blurry. The difference in focus is subtle: The next section focuses on the virtues of remote platforms for minor proceedings, while this section focuses on the importance of in-person interaction, either across the board or for everything but a very small set of hearings.

Two interviewees "would never do anything in the criminal justice system virtually"<sup>832</sup> or "would do everything in person,"<sup>833</sup> and though both qualified their responses somewhat, they expressed a strong preference for "face-to-face" criminal justice. One spoke of the importance of the entire criminal process, of her related worries about her clients, and of the intangible importance of face-to-face confrontation:

If I had a choice, I would never do anything in the criminal justice system virtually. I, you know, when all this kind of first started, I understood the need for it. I still understand the need for it, with COVID and everything like that. But I just don't think our job or anything to do with the criminal justice system where we're taking people's liberties away, and that's the whole point of the criminal justice system, should be done over Zoom. I think that there are, I think we're kidding ourselves if we think that our clients are understanding everything that's going on when we're doing things over Zoom. . . . And I don't think we can expect our clients to agree to serve an amount of jail time when no one else knows what's going on either. So, I just think that the criminal justice system was meant to be in-person, right? It was meant to be where you're face-to-face with your accusers, you're face-to-face with those prosecuting you, you're face-to-face with the judge, and you're face-to-face with the person who is supposed to be helping you. So I personally, if I had a choice and COVID wasn't a thing. I would hope that everything would go back to how it was.<sup>834</sup>

Another defense attorney spoke of the tradition of the court, and though he tolerated remote proceedings for unimportant auxiliary matters and occasionally for speedier resolution, he emphasized the importance of physical interaction:

Given the choice, I would do everything in person. I mean, in the absence of COVID, I would do everything. I would not, I mean, the only thing I might want to consider doing virtually might be some depositions. Certain types, you know, witnesses that are not, you know, not significant, not the key witnesses. . . . But the third officer on the scene who picked up a shell casing a half a block away, I could [depose] him on video. . . . I would, look, I would do the initial stuff, by video if I felt that it was, would speed up the court's consideration maybe of something. But all things being equal, I still think it's better to be physically in court face-to-face with the judge, with the client there, with the prosecutor there. Okay, with whatever witnesses either side may have, to say, you know, maybe he should get out or he shouldn't get out. . . . I don't know if you didn't get the idea, I miss being in court. I don't like this anymore. As convenient as it may be and it's saved me a ton of money. . . . I'm gonna do it in court like I've done my whole life. Like I watched my father do my whole life. You know, this is criminal, criminal court was not meant to be done virtually, period.<sup>835</sup>

Several additional interviewees expressed a desire to “go back to the way it was.”<sup>836</sup> In fact, when asked how he would use remote technology after the pandemic, one judge responded exactly this way: “I would probably go back to the way it was before.”<sup>837</sup> A Milwaukee prosecutor similarly noted that he “would like to go back to in-person” because “more can get accomplished in person. You don't deal with technological issues. You don't deal with people talking over each other, not understanding, or not hearing one another.”<sup>838</sup> Other interviewees who wanted to return to the pre-COVID regime did not oppose all use of technology, noting that some remote hearings occurred before the pandemic. A North Dakota prosecutor, for example, didn't think “our system of just—, justice should ever adopt [remote technology] as a permanent way of doing business”:

Well, I suppose it's about people. It's about bringing somebody in, letting them face their accusers, whatever that is, in person, *in person*. . . . I'm sorry, there's a, there's a dynamic to this process of being in person and, and addressing those issues in the flesh. And I still think that that's a better way of doing business. Maybe after 20 years of doing it virtually, maybe I would differ. . . . So I just, you know, when the pandemic is over with, let's go back. I mean, and again, this is not cutting-edge technology. We've had, oftentimes, we'll have probation officers three hours away that maybe need to testify for 10 minutes. Well, can we do that telephonically? Well, defense bar isn't, isn't opposed to it, and then we can. . . . [T]hat's been an old way of doing business in some instances. But it's not the whole case. It's not the whole, you know, the defendant not being there is, it's just almost like we're, I don't know, making a movie.<sup>839</sup>

A second North Dakota prosecutor would also “go back the way it was before we started this.”<sup>840</sup> He emphasized that everything that was worth having a hearing for was worth having in person:

I guess a good way to respond to that, then, is: Why not do it in person? That’s my, that’s my question then, right? I don’t see why we wouldn’t do every hearing in person. I mean, that’s the way that it’s been done even before the legal system was created in the United States. It was done in person. And I know that some could then argue that that’s just how archaic it is, and you’re being archaic, not trying to move forward with the times type of thing, but I don’t agree with that. I mean, I think that there’s a, if you think about the amount of time and an entire case, all the time spent from its inception until its close, I think very little time is spent in the courtroom based on all the prepping, all the discovery, all the time drafting motions, all those types of things. And all those things are almost all digital right now. I mean, now, in North Dakota, we’re gonna, you know, it’s streamlined the system, you know. As soon as law enforcement’s done with the report and they submit it, it shows up on my computer. Once I review it, I could pick which charges I want. I click the button, and all of a sudden, it’s filed in the court system. So everything else is on high speed. You know, and we’re North Dakota. I can’t imagine that there’s states that are not as technologically advanced as us. If there are, that’s fine. I don’t have any opinion on that. But I think that when it comes to the court proceedings and where the rubber meets the road, I think that those should still be in person because those are the most important. And I don’t think all in all it takes that much time, effort, or energy to do that.<sup>841</sup>

## **KEEP MINOR HEARINGS VIRTUAL**

Whereas most interviewees indicated, they preferred in-person trials or contested hearings, around two dozen prosecutors, defense attorneys, and judges thought that minor hearings could or should continue to use videoconferencing.<sup>842</sup> Indeed, even several of the interviewees who felt that almost everything should be in-person qualified that certain minor hearings should remain virtual. They explained their preferences by reference to the considerations discussed at length in Chapter 6: Efficiencies and Inefficiencies and in Chapter 7: Access to Technology. In sum, according to some respondents, when the hearings were minor or relatively unimportant, the efficiency gains for the system and access benefits for the defendants outweighed the benefits of in-person meetings.

## WHICH HEARINGS?

As with the other categories examined thus far, interviewees disagreed about the precise contours of this category. In fact, certain types of procedures drew contrasting opinions, and those are largely discussed in Section III (“Middle Ground”). But once again, most interviewees agreed on at least the general contours of “minor hearings.” Often, the category included things like master or morning calendar,<sup>843</sup> status or scheduling conferences,<sup>844</sup> charging conferences,<sup>845</sup> initial appearances,<sup>846</sup> and pretrial conferences.<sup>847</sup> They included “brief . . . preliminary matters,”<sup>848</sup> and “ministerial” matters,<sup>849</sup> such as “a calendar call [where] you’re just gonna be announcing that you’re ready for trial, or you’re just gonna be asking for a continuance, or . . . a very quick motion, a motion to compel or a motion for permission to travel.”<sup>850</sup> One defense attorney described them as “administrative” matters:

I think any, let’s call them administrative use, can be dealt with online. So that is motions to compel. Even the same sounding calendars, which, in Dade, the clients come to. But again, it is, “I’m ready” or “I’m not ready.” If I’m not ready, and I need a continuance, this is why. And if I’m missing discovery, you address that. But those are all things that don’t require somebody to physically come in. . . . [L]ike, yeah, emotionally an easy motion calendar that’s not an evidentiary one, just a status calendar, a sounding calendar. All of those things could be done remotely.<sup>851</sup>

Others defined the category by contrasting the minor hearings with serious or contested ones. One defense attorney, for example, contrasted short hearings with “real courtroom stuff”:

Like I said, my reservations come in when you get into what I consider to be real courtroom stuff. A pre-trial conference, the judge, you sit down, and the judge calls the case and asks defense counsel if there’s a resolution. You say no. She turns to the prosecutor and asks if the state’s ready to have the trial. And then we talked logistics, and the hearing’s over in 10 minutes.<sup>852</sup>

Indeed, several interviewees defined the category as the set of hearings for which a hearing isn’t really necessary. In the words of one defense attorney, “I want to retain some of the Zoom stuff for, like, ministerial, you know, status conferences, and this sort of shit. That’s just like, there’s no reason that we have to go to court.”<sup>853</sup> One prosecutor similarly commented:

And some of the more mundane, run-of-the-mill procedural things could be done electronically, no doubt about it. And then you look at those things and go, is a hearing even necessary? Or should we just be filing a document saying, Hey, judge, we see this as our status deadline. We’re going to trial. And maybe that’d be the wiser thing to do, you know, instead of having the necessity for a hearing in the first place.<sup>854</sup>

Several interviewees, therefore, expressly or by implication, defined the category of proceedings that were suitable to virtual court as the unimportant ones. They were “procedural” and “non-substantive.”<sup>855</sup> They were “short”<sup>856</sup> and “brief.”<sup>857</sup> They did not require

defendants to speak or were the subject of an appearance waiver pre-COVID.<sup>858</sup> They were group proceedings that involved “scheduling court dates.”<sup>859</sup> They did not involve contestation, and the outcome was known.<sup>860</sup> They were, in short, “inconsequential.”<sup>861</sup> Of course, interviewees were not unanimous about conducting even these virtually,<sup>862</sup> and on the other hand, some expressed greater enthusiasm for a broader range of virtual hearings.<sup>863</sup> But the majority coalesced around this definition of minor hearings.

## WHY VIRTUAL?

As noted above, interviewees cited two main factors to explain their preference for keeping (or at least, their willingness to keep) minor hearings virtual. First, they cited accessibility improvements, largely for defendants but also for victims. Second, they cited time and cost savings, especially against busy caseloads and strict budgets. (Both of these are substantially duplicative of other sections,<sup>864</sup> so discussion is abbreviated.) Interspersed throughout their comments is a recognition that these factors outweigh the benefits of being in-person because the hearings at issue were seen to be unimportant.

**ACCESSIBILITY FOR DEFENDANTS.** A few respondents homed in on defendants’ struggles to access in-person court and the corresponding ease of virtual proceedings to explain their preferences for the latter. One prosecutor “hope[d]” that virtual initial appearances would continue after COVID because it seems to have resulted in better attendance.<sup>865</sup> A judge who “would do all statuses, all pretrial conferences . . . by Zoom” cited the advantages of videoconferences for work and parenting schedules:

The big one that I’ve seen, the big advantage is individuals who have issues with childcare and who are legitimately working. . . . [T]here are some people who just, the 9 to 5 court schedule or 8:30 to 5 court schedule, it’s just not conducive to that. And so the idea that I can do something at 1:30, and I can schedule my break at that time and step out and still be present for it and not have to take a whole half-day off of work or a whole day off work to come down to the courthouse. . . . Individuals who have multiple kids . . . to be able to kind of step into a side room and deal with your case is, I think, an extreme advantage.<sup>866</sup>

And one defense attorney described his preferences by reference to clients’ travel burdens and also to the “brief” nature of certain proceedings:

[T]he most common criminal appearances are the initial appearance and then the pretrial conference. And, frankly, those are fine and probably better as a, as being Zoom, for a variety of reasons, not the least of which, the client doesn’t have to travel. . . . I have a client in East Grand Forks right now, so that’s 45, 40 minutes away. . . . And so he was on the Zoom call last week, and I was here in my office. And actually, that worked out better. And those brief . . . preliminary matters can be taken care of quite nicely with Zoom.<sup>867</sup>

This last quote, with the reference to brevity, touched on the unimportant nature of the proceedings in which in-person interaction is reduced. Other interviewees also mentioned indicia of unimportance. A Miami defense attorney, for example, explained his preference for reducing the “economic burden” on clients when making “scheduling decisions”:

I think the ones that could be handled are the ones that are status hearings. Unfortunately, pre-COVID—Yeah, I’ll be quoted on this. So judges were addicted to all these in-person status hearings and not realizing that it was a waste of time, particularly for poor people, to have to come to the courthouse, spend money on parking, miss an hour, two, three, four hours of work because our client are indigent. So our clients are not typically the type of folks that even have annual or sick leave. You know they’re people in the service industry or in job that are, you know, making barely above minimum wage. So for our clients pre-COVID, it was entirely on economic burden for them to come to the courtroom. So for me, when I see how we’re doing things now, where the judges have finally figured out through the process of having status hearings, that you don’t really, you know, we can invite our clients, and obviously, they’re entitled to be present on Zoom or on the phone. But they’re not—they shouldn’t be required to do that because the decisions that you’re making are scheduling decisions. And they’re decisions on, “Has the State, the prosecution, provided the discovery?” “Have we taken the deposition on the case?” “Has the prosecutor been in touch with the alleged victim?” So those status hearings, I think that to me, those are ideal to have them done virtually.<sup>868</sup>

Others were more explicit, explaining, for example, that the “inconvenient” disruptions in clients’ lives were not worth it for a “meaningless” hearing:

Miami-Dade, in particular would have all these soundings and status conferences, and they were oftentimes 30-second hearings that were meaningless but would eat up the entire morning. A lot of judges would require your client to be present for their sounding, which, one, is inconvenient, two, if you have a client who has a job, has childcare issues, and has to do multiple sounding hearings over the course of, say, six months, they’re gonna lose their job. Some of the public defender clients simply can’t afford to come to court all the time. You know, they don’t have transportation. It’s, they don’t have childcare at home, they’re working a 9 to 5 hourly wage job that they can’t tell their boss, ‘I got to go to court because I’ve got an open criminal charge.’ That can all be done via Zoom. They are advising the court, “I’m ready for trial.” “I’m not ready for trial.”<sup>869</sup>

And as one defense attorney explained, in-person attendance is “disruptive” and “unnecessary” (and virtual hearings are therefore helpful) in “minor” matters, but not “when it’s important”:

Look, like I said before, it’s, especially now the vast majority, or, well, a significant number of our clients are not in custody, that [virtual conferencing] is less disruptive. Especially for minor scheduling matters. And I just I hope that the trend continues so that people can concentrate. I’m doing the work when it’s important, not just wasting people’s time and dragging people into a courthouse so they can control their lives and impact and disrupt their lives in a way that is totally unnecessary. . . . But so I’m hoping that when we emerge from this pandemic, that we would have the tools to be able to, you know, to cause less disruption and then concentrate on those cases where we really need people to participate in person. . . . As opposed to dragging people into a courthouse for just one case, and they have sit in a courtroom for hours. Just to get a schedule, a court hearing. It’s just not productive. So, so I’m hoping that we take away from this is, yeah, there’s some things we can do to, you know, to facilitate things, and then all the things that are needed that need to be done in person.<sup>870</sup>

**EFFICIENCIES FOR THE SYSTEM.** The last quote’s reference to concentrating on the most “important” work hints at the second major justification for virtual minor hearings: the efficiencies for attorneys and for the justice system as a whole. These efficiencies—substantially the same time- and cost-savings discussed in Chapter 6: Efficiencies and Inefficiencies—contributed to interviewees’ preferences for keeping minor, unimportant hearings virtual.<sup>871</sup> Implicitly, the efficiency benefits for attorneys and for the system seemed to justify proceeding virtually because the benefits of in-person attendance for minor hearings were minimal.

Several interviewees cited reduced attorney travel and wait times—and the ability to put that saved time to better use—as a key justification for keeping minor hearings virtual. The contrast between an hours-long drive and a minutes-long hearing led some respondents to prefer virtual hearings in brief matters.<sup>872</sup> Interviewees also contrasted the delays of in-person court, which involved considerable wasted time,<sup>873</sup> with the ability to multitask while waiting for virtual hearings.<sup>874</sup> Remote appearances were thus “easier” for attorneys and a “more efficient use” of their time.<sup>875</sup> These efficiency gains, according to several respondents, allowed attorneys to be more productive and devote more time to other matters. A Milwaukee defense attorney, for example, explained:

And instead of having everybody, you know, waiting around . . . you could do that on Zoom conference. You can sign up, you can be in several Zoom rooms and you communicate back and forth. . . . [Y]ou can get a bunch of things done instead of trying to run around through four or five courtrooms to try to get it accomplished. . . . [F]or the attorneys, there can be some efficiency for what I would call more perfunctory kinds of things. Setting dates and handling, you know, fairly routine matters.<sup>876</sup>

A judge in Milwaukee concurred:

So while I do think that Zoom will, moving forward, be incredibly helpful for attorneys, I think it'll allow attorneys to be more productive. When you're in court, you're not able to be drafting motions or getting work done. Instead of coming down to the courthouse and spending a half a day here, you know, you can call in and get it. I think it will be very helpful for attorneys.<sup>877</sup>

Nor were efficiencies for attorneys the only ones at issue. A defense attorney noted the judge's busy schedule as part of his justification for virtual pretrial conferences.<sup>878</sup> One judge cited the transportation-related time savings for the state's treatment providers as partial justification for remote competency hearings.<sup>879</sup> Others noted the benefits of not having to transport in-custody defendants for minor hearings. A prosecutor explained that “[m]aybe the shorter appearances over Zoom make it just easier for everybody, especially if you have someone in prison, they don't have to come all the way down from the prison system for a five-minute hearing.”<sup>880</sup> A judge also talked about the savings of not transporting prisoners for “something minor”:

[L]et's say the person gets revoked, and the rest of their sentence is imposed, they're going to go back to a state institution. If I wanted to have that person in court, we had to pay to have a transportation company go get them, bring them down, house them for, like, three or four days in the county jail before, you know, for the total trip. Interrupts their programming is not the best environment to put somebody back in a county jail from a state institution. And, you know, for a 10-minute court appearance. . . . Now, if the defendant agrees, he can go in a videoconferencing room . . . and we can do our work and save the state and the county all that expense for bringing this person on for something minor.<sup>881</sup>

Finally, some interviewees noted the importance of efficiency in keeping the whole of the criminal justice system moving. One judge shared that “we can get so much done. I mean, you know, I had Zoom hearings this morning, Zoom hearings, and you can crank out 20 hearings in an hour, you know, on Zoom.”<sup>882</sup> Another judge noted a willingness to use Zoom so that “indigent defense counsel . . . can keep their cases working through the system,”<sup>883</sup> while a prosecutor cited the need to have “initial appearances, the day-to-day. . . done in a timely fashion.”<sup>884</sup>

Lurking in the background of most of these comments, as was the case with the accessibility arguments, is a sense that efficiency-based arguments win the day only when the hearings carry little or no substantive weight. After all, efficiency-based arguments were vanishingly rare in the comments about trials and evidentiary hearings (and, when they did arise, the context was usually an unimportant witness).<sup>885</sup> By contrast, respondents felt that there was little purpose for minor hearings in the first place.<sup>886</sup> Seemingly, as a result, they emphasized access and efficiencies over dehumanization and connection, and in turn, they expressed greater willingness to proceed remotely.

## MIDDLE GROUND

So far, the majority of interviewees’ overall preferences have converged on two broad points: Trials and important, contested hearings are better in person, and minor, non-substantive hearings can proceed virtually. This section explores two additional points: the more nuanced opinions among interviewees about “in-between” hearings (especially sentencings) post-pandemic and the importance of flexibility in the long-term use of virtual technology. It is to these final points that we now turn.

### “IN BETWEEN” HEARINGS

As noted earlier in this section, the majority of interviewees agreed on the definitions of major, substantive hearings and minor, unimportant ones—but some did not. In fact, there were a few categories of hearings that respondents disagreed about, including master calendar,<sup>887</sup> probation violation hearings,<sup>888</sup> treatment or drug court proceedings,<sup>889</sup> and bail or bond hearings.<sup>890</sup> The two kinds of “in-between” hearings that generated the most discussion and the most nuanced opinions, though, were plea hearings and (especially) sentencing hearings.<sup>891</sup>

**PLEA HEARINGS.** Interviewees disagreed about *whether* pleas should be conducted virtually, about *which* pleas should be conducted virtually, and about *why* certain pleas should or should not proceed virtually. At the far end of the spectrum, one judge explained that virtual plea hearings worked better than she expected and would likely continue post-pandemic:

I had some hesitation about doing pleas via Zoom. I was essentially, when I started, I just didn’t know how I felt about doing something that is so serious in terms of waiving all of these various constitutional rights, doing that via Zoom. I wasn’t comfortable with it. But, you know, started it out, and I went through it, and I was surprised that, you know, how many things really weren’t different. You know, it really felt like we still have that still serious tone. I was able to have that meaningful colloquy with that individual. And so, and I will say again, I think some of these things are going to stand the tide past COVID. I think we will probably continue to do remote plea . . . hearings, even for drunk driving offenses, post-COVID.<sup>892</sup>

Another judge agreed at least in part, noting that he was “a little reticent about doing a guilty plea colloquy when the attorney and client aren’t in physical proximity to each other” but explaining that Zoom pleas had advantages over in-person ones:

[I]n some respects, I almost feel I have more of their attention. Because when we're in a courtroom and I'm sitting up on the perch there, and they're, you know, 30 feet away or so, a lot of times hunching down at the desk. No one's happy to be there. Actually, on Zoom, I feel like I'm almost engaging them better. . . . I think you do actually see them better. I think you see them, you know, if your screen's not freezing up, and you can see some of the concern or if you can kind of see that question in their head, you know, they're kind of like, hmm? You know, in the courtroom, I can't always see that. So, actually, in some respects, it's better.<sup>893</sup>

Other interviewees felt that the appropriateness of a remote plea depended on whether the plea was pursuant to a plea agreement or whether the likely sentence included incarceration. One judge explained that “[i]f it's a plea deal . . . and they don't want to appear, we can do it remotely. . . . But if it's an open sentence, you know, open plea, then we'll do it in person.”<sup>894</sup> A defense attorney concurred, citing the importance of testimony: “[T]he open plea would be, you know, again, one of those situations where I think I would like to be in the courtroom. Mainly because, if it's an open plea, someone's gonna be testifying as to why the prosecution's view is better . . . than my view.”<sup>895</sup> Another defense attorney took a slightly different tack, emphasizing the importance of the sentence as a proxy for the substantiveness of the hearing: “It's mostly like anything that's really of substance should be in person. So, like, most pleas and sentencings, but not all, so, like, if a plea and sentencing, the offer is, like, time served, or the offer is for probation.”<sup>896</sup>

Right at the center, two prosecutors did not come to a definitive position either way on plea hearings. One explained that plea hearings are “more difficult” remotely, due to the separation of the attorney and the client and because “that personal interaction where you can read each other a little bit, you can feed off each other's energy and, and, interpret facial expressions a little bit and respond to a person” is “lost if things are being done virtually.”<sup>897</sup> A second cited some benefits of in-person proceedings but noted that the pre-COVID status quo didn't necessarily deliver them either:

You know the, the guilty plea itself is, it's usually a big decision for the defendant to make. But we get a lot of our guilty pleas in writing the way it is already. And then the court sets them for sentencing down the road. So I, I'm not sure how personal that is for the defendant. Obviously, that decision to change to a plea of guilty is important. And I've got a lot of victims that get therapeutic value from listening to the bad guy say, “I'm guilty. I did it.” . . . And the defendant isn't hauled before the court and has to stand up and say, “Your Honor, I'm guilty. I did it.” So definitely, I think we lose some effect there.<sup>898</sup>

Finally, two judges cited the importance of in-person physical cues in plea hearings for assessing voluntariness. One described an instance where he halted a remote proceeding and required in-person follow-up, explaining:

You can't pick up the full-body cue, but you can, you can at least see what they're, what they look like. So yesterday, just yesterday, I had [a Zoom plea hearing] where they were, they were just saying what, you know, they thought that I wanted to hear. I mean, are you, you know, when they plead guilty, you go through the litany of, has anyone promised anything? You know, are you under any medication? And they were just kind of fidgeting about well, you know, I am sick, and I said, "Okay, I'm not accepting your guilty plea." And that was one individual. So I'm gonna bring them into court, so I can really just assess them.<sup>899</sup>

And a second judge noted that, while he would "feel comfortable continuing to take some pleas remotely," other pleas "would be better taken in person":

I think maybe if there are any issues about whether the defendant—if the defendant truly wants to plead guilty or if there's any if there's any hint that the defendant is sort of on the fence, I think having the defendant here in the courtroom is probably better to impress upon him or her . . . the significance of the proceeding. I think just being in the courtroom and my being able not only just to see their face, but, you know, their entire body to see whatever I might be able to read from that in terms of the way the voluntariness of the plea would be helpful. . . .<sup>900</sup>

**SENTENCING HEARINGS.** As with plea hearings, the topic of sentencing hearings generated significantly mixed opinions about post-COVID preferences. Once again, at the far end of the spectrum, the same Miami judge was surprised by "how many things really weren't different" between video and in-person and predicted that "we will probably continue to do remote plea and sentencing hearings, even for drunk driving offenses, post-COVID."<sup>901</sup> And, as described above, a few interviewees noted that pleas and sentencings with agreed-upon sentences, or sentences of probation, could proceed remotely.<sup>902</sup> A few interviewees also drew a logistical line between sentencings that result in incarceration and those that do not: Unlike sentences of probation, sentences of incarceration require the defendant to be physically taken into custody, so the defendant must be present.<sup>903</sup>

The majority of interviewees, though, preferred in-person hearings for most sentencings post-pandemic and gave substantive reasons for that preference. And those reasons often involved the same concerns about human communication and connection discussed in Chapter 8: Dehumanization. Some interviewees focused on the severity of the offense, noting that severe sentences merited in-person interaction. One Milwaukee defense attorney spoke about this at length, emphasizing the need for in-person interactions when liberty was at stake:

There's some sentencings that are taking place via Zoom. And they're usually in cases where there is an agreement between the prosecutor and the defense attorney, and it's usually where the recommendation is not a recommendation that results in someone going to prison or jail. Those ones are successful. Because they can be done remotely. Now in cases where there is the risk of incarceration, it's different. Personally, I would not have a Zoom hearing if the risk of incarceration is there because I just think that we, even though we try to treat people the same way, right. And I would try to treat people the same way, I think that there's, I don't know, there's something in our brains that makes it less likely to feel emotion or compassion or empathy when we are using, when we're disconnected. Or we're remotely. I think it's more difficult for a judge to be able to see, or sense, what's going on with someone if they are, you know, appearing remotely. So there's some, definitely some disadvantages to that. I think it's easier for a judge to say I want to send you to prison. And not only that, there's also the other issue, too, that's missing from the equation is that and it's the public. . . . [T]he judge is not looking at, is not in the courtroom where the, where the defendant's family or the victim's family, for that matter, are watching the proceedings and the judge can see in the audience and measure or take the temperature of what's going on in there. So then there's some, you know, of course, I have cases where I don't want any—I don't want an audience, you know what I mean? But other cases in which I want the judge to see the audience, I want the judge to see the mom and the family and the sisters and the brothers. It's more, you know, you have a much better impact than if they weren't there. And even though they can appear via Zoom, it's just not the same thing. It's just not, it can't replace the physical participation of people.<sup>904</sup>

Similarly, a North Dakota judge connected the importance of being in-person for serious sentencings with the idea of human dignity:

JUDGE: The other thing about Zoom is there's a big push to do Zoom and I, there's this great quote from this federal judge out of Minnesota that I love, that there's no such thing as a small case. And, I feel like if I'm going to send someone to prison, taking away their freedom . . . or doing something, you know, that affects them, because that's what, I mean, that's the, the awesome power judge has. I feel like I owe it, especially to someone who is going to get sentenced to jail, that I owe it to look them in the face in person. And if I'm on Zoom, I have this, this feeling like your case is not as important to me because, I don't need to travel— because one of the reasons why we would use Zoom is to not have to travel because we travel a lot of distances. To me that, that, that implicit message of your case is not as important to me.

INTERVIEWER: I see. You said now just, you know, you feel you owe it to them to look them in the face. What is it about looking someone in the face?

JUDGE: I just think that there's something I, you know, I just, I'm, I could be a unique person. I believe every human being has dignity, inherent dignity, no matter who they are. I try to treat everyone as the same, because they're human beings.<sup>905</sup>

Conversely, a few respondents emphasized the importance of in-person sentencings for lenient sentences, where they wanted to communicate the opportunity for change. One judge, for example, preferred in-person communication and the formality of the courtroom for the greater potential impact on the defendant:

I think just being in the courtroom . . . would be helpful . . . maybe to impress upon the defendant—let’s just say the defendant did something very, very lenient, to impress upon the defendant, the importance, you know, of not having, you know, not doing anything and getting into trouble in the future. . . . I think, you know, when someone’s receiving that type of a sentence, I think it can be important for them to appear before the judge and just for me, to you know, explain to them that they’ve been given this opportunity and you know to be very careful and make the most of it. I think that can be better conveyed and received probably in person.<sup>906</sup>

Two prosecutors concurred:<sup>907</sup>

[I]f there’s a sentencing, they need to be in person. They need to hear and see and understand what happened and why it happened. And this is your opportunity to make better choices. This is your opportunity to show that we’re not gonna see you back here.<sup>908</sup>

[B]acking up to a . . . situation I had before. When you’ve got somebody that is kind of in the middle, if I’m, you know, there are some situations where I like to stress, if, you know, if you, if you stick with your probation and you make these improvements, you’re really helping yourself. I try to do those persuasions also sometimes, and I think that that’s better in person also.<sup>909</sup>

A third group of respondents felt that in-person sentencing was important when the judge needed to determine certain characteristics of the defendant. One judge, for example, preferred in-person sentencings when he needed to determine remorse:

If there’s a time where I need to determine whether they’re not truly remorseful for their crime, then I’m probably gonna want them in my courtroom because seeing body language, hearing the tone of their sentences, and how they react to my questioning is important. Because if I see somebody who is before the court for a criminal case and then they’re truly remorseful, then I’m gonna cut him a little bit more slack on the rehabilitation side. However, if I catch the idea based upon their courtroom behavior, how they respond to the victim, if the victim testifies, how they respond to dialogue with me, and it appears that there really giving me the one-fingered wave, then I’m going to go a little bit more toward the specific deterrence and retribution, paying the price for society. So if there’s some issues that come up where the court is gonna have a lot of discretion on sentencing and I need to really weigh where they’re at in their recovery, then I would prefer to have them live.<sup>910</sup>

One prosecutor felt that the need for character assessments universally justified in-person sentencings because the judge had to make those assessments under the sentencing guidelines:

[O]ne of those factors [in the sentencing guidelines is] that [judges] are to consider, you know, what was the harm? Did they intend to do it? Did they abuse a position of power? But the other thing, too, that they take into consideration that the law says, is that they need, they can take into consideration the character, the reputation, you know, all those types of things. . . . I mean, there's a lot to be said, I mean, don't they say that you can determine if you like somebody within the first, like four seconds or something about meeting somebody? You get that feel with, for somebody. And that's not to say that it's subjective as far as what a judge is to do. They're to be objective, but they have to take in those things as far as, what's the character of the person? Are they, are they a, you know, there's some people I've met that have, you know, murderers and rapists and type stuff, make the hair on the back of your neck stand up. You know, they need to know if it's that type of person versus, you know, like 90% of the people I run into that just made a mistake. And they're good, honest, hardworking people, right? I mean, that's, you know, bad people shouldn't be, you know, on the streets, in my opinion, and good people shouldn't be put through the wringer if they just made a mistake.<sup>911</sup>

One judge's explanation for her preferences on in-person versus remote sentencings wrapped many of these themes together. In her answer, quoted at length, she emphasized the importance of eye contact and human connection, the formality of the courtroom, the characteristics of the defendant, and the need for in-person interaction in harsh and light sentences:

JUDGE: . . . . [F]or anything over a C felony, yeah, they pretty much, I gotta look them in the eye. A lot of times those are open pleas. . . . So it's up to me to determine what the sentence is gonna be. And I don't like to sentence somebody, I'm not sentencing somebody to significant jail time without being able to see them.

INTERVIEWER: Why? What is it about that?

JUDGE: Well, I think because part of making the judgment, when I have to make the judgment of, how much time does this person need to spend in jail. There are sentencing factors that are set out in the North Dakota Code that we're supposed to consider, but a lot of it, it's all discretionary. . . . And I, I just, I take that very seriously. I mean, I think going to prison absolutely changes your life. It just does. You can't, you can't wake up in prison and not, I don't know. And I just, I think it's a very, I take it very seriously. So I don't wanna, I'm weighing that, you know, what it costs to the defendant against, you know, the needs of society and whether or not this person is dangerous . . . and how they act and how they behave does matter very much. If it's somebody who has enough sense to be respectful, you know, that matters to me because it tells me that they're much more likely to be successful on probation. But if they are a person who does not, who absolutely does not have respect for authority or the court or whatever. Well, you know, and some of that stuff, you just can't

gauge. . . . And I also think it has to deal with respect for the court system that the person, you know, I respect them enough that I'm gonna be there in person. And that also means they have to respect what the court's doing, be there in person. And you know what, judging isn't all, it isn't just about punishment. It's, you know, sometimes it's mercy. Sometimes it's mercy. And if that's, if I'm, if I'm exercising mercy, I want, I want to do it in person, because sometimes mercy can motivate people to do better. Sometimes it doesn't. [Laughs.] And those people show back up in front of me again. And I'm like, Okay, well, mercy didn't work. They're not getting mercy this time.<sup>912</sup>

## THE ROLE OF FLEXIBILITY

The above sections dealt, in large part, with respondents' ideas about hard-and-fast rules and appropriate line-drawing: Which hearings should always be held in person? Which hearings should default to virtual? What line best separates the sentencings that should be done in person from those that can proceed virtually? But another theme emerged in several interviews—the need to have flexibility and case-by-case determinations about the use of virtual technology. Some of the interviewees who emphasized this flexibility did admittedly also emphasize hard lines; for example, several of the interviewees who wanted flexibility with minor hearings believed that trials should never be virtual. Nonetheless, many interviewees shared a sense that, at least within certain parameters, virtual technology serves the justice system best when it can be deployed in accordance with particularized needs.

In the realm of attorney-client communication, for example, a Milwaukee defense attorney emphasized the benefits of videoconferencing as an additional communication option. In deciding whether to communicate via videoconferencing, he explained that “[y]ou have to see the circumstances of each person individually.”<sup>913</sup> He continued:

But the positive aspect is that we have flexibility that we didn't have before and the opportunity to be able to put many things, you know, in place to facilitate communication with clients. So no one is going without communicating with the client, it's just, so, we have more options now.<sup>914</sup>

When it came to court proceedings, a couple of interviewees emphasized the importance of flexible procedures based on client preferences. A Miami defense attorney thought that “a lot of it needs to be up to the client and the attorney. I don't think that being forced into any sort of virtual hearing just because they might be doable is a good idea.”<sup>915</sup> Conversely, a judge in Milwaukee explained that “I would probably be fine doing pleas and sentencings via Zoom,” but “if you wanted an in-person date, I'd give you one.”<sup>916</sup>

More interviewees noted the importance of flexibility in response to actual and potential access difficulties that defendants faced. One North Dakota judge, for example, explained that she was no longer “a stickler” about in-person appearances, “especially with persons who are far away.”<sup>917</sup> A Milwaukee prosecutor noted that virtual hearings alleviate the need to pay “\$16 to park and going through security,” which might “add some flexibility into a defendant’s and a victim’s day.”<sup>918</sup> And a North Dakota court administrator noted the importance of flexibility to work around litigants’ schedules:

I don’t think it’s ever going to replace in-person hearings. I think that’s pretty institutionalized, that we’re gonna have that. But you often hear people say, “I want my day in court.” And I think, what this is going to allow them, is more flexibility on what that looks like. You know, a lot of people who work every day don’t have that extra time to come down to the courthouse if they have a civil matter or something that may be in dispute. I just really, I think that this’ll just be a new way that people can look at the court system.<sup>919</sup>

Others specifically noted the ways in which flexibility with virtual hearings could mitigate a wide variety of access concerns.<sup>920</sup> One Milwaukee judge noted the importance of “proceed[ing] with caution and mak[ing] sure we’re not limiting people’s ability to have access to justice” and discussed Zoom computers in public libraries as an option to provide flexibility.<sup>921</sup> A Miami defense attorney speculated that “maybe we can have two days of the week where they’re just Zoom calendars,” which would “cut down on traffic” and “on parking.”<sup>922</sup> And a Milwaukee defense attorney hoped for hybrid protocols in minor hearings—in person for attorneys, but flexible for defendants:

I think generally what I would love to see is that, like, we could be in person, but clients could just call in for pretrials or call in for scheduling. Because if I was in person, I could still have those conversations with the DA without having my client have to take off work. . . . [S]o I think definitely in the future, I would like to see the judges at least having the option to just call in. I think that that makes it a lot easier for clients.<sup>923</sup>

For attorney attendance, too, a few respondents noted the benefits of flexibility between in-person and virtual hearings. A Milwaukee defense attorney explained that “with scheduling and stuff, having some discretion about what needs to actually be in person would be helpful.”<sup>924</sup> A Milwaukee judge similarly noted that a “hybrid model” might be helpful and thought that “most judges and most attorneys would favor having that as an option in at least some proceedings.”<sup>925</sup> One North Dakota judge explained that she will no longer “be pushing so much that the attorney from Fargo has to drive up here for a Monday morning initial appearance.”<sup>926</sup> A second North Dakota judge, who wanted to “try to avoid Zoom as much as possible,” nonetheless expressed openness to Zoom to benefit “indigent defense counsel.”<sup>927</sup>

Finally, several respondents noted that videoconferencing could be a useful tool in urgent or extreme situations. Three interviewees cited blizzards or extreme winter weather as examples of times when Zoom could be deployed flexibly.<sup>928</sup> One prosecutor, for example, explained that “the Zoom meetings can be good and effective for occasional things” and elaborated:

Well, maybe for an emergency meeting where, or something where you need to get together and, in North Dakota, you, you might have a blizzard. . . . Maybe, maybe in, New Orleans, you have a hurricane. Maybe that’s, sometimes you just can’t get together, and things are gonna get canceled. . . . It’s not the same as being there person-to-person and dealing with it. But if you had [Zoom], it’s better than nothing. It’s better than not having the hearings.<sup>929</sup>

Others noted the benefit of virtual conferencing for time-sensitive matters, when it “would speed up the court’s consideration”<sup>930</sup> or “when there’s a specific time frame.”<sup>931</sup> And the same North Dakota prosecutor who spoke of blizzards and hurricanes noted the role of Zoom in time-sensitive proceedings as well:

Whenever possible, we have an in-person hearing. If there are extreme circumstances. . . . So, so getting people who are remotely located to deal with an issue, whether it’s a bond hearing, so that the person doesn’t have to sit in jail for two extra days, they can actually get in front of a, you know, in front of a judge for bond appearances. Yeah, that’s fine. . . . [T]here’s a place for it. Just don’t try to make it the norm. It’s not the interstate. It’s a side road. I don’t wanna take gravel roads when I drive . . . 155 miles to Bismarck. I wanna take the blacktop, and I want to get on the interstate. . . . [A]nd that’s how I look at—I want the main roads and the main sort of travel, the main interaction to be live and in person. But sometimes you take a side road. If there’s, if there’s road construction, you take a side road, and you can, you take the gravel road for five or 10 miles. So we’ll . . . take the side road. We’ll take the Zoom once in a while when we need to.<sup>932</sup>

# CHAPTER 13: SPECIFIC THEMES FOR MIAMI-DADE COUNTY

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Respondents in Miami raised several issues that were specific to that jurisdiction. They include issues related to interpreter services, concerns related to corrections officers, and matters related to depositions.

## INTERPRETER ISSUES

Interpreter services were mentioned by more respondents in Miami (5) than any other jurisdiction. Indeed, interpreter services were only mentioned once in Milwaukee and were never alluded to in North Dakota. This difference is perhaps unsurprising given how much more diverse Miami is than Milwaukee and North Dakota, rendering translation services far more important there. With “a large population that’s speaking Spanish and Creole,”<sup>933</sup> figuring out interpretation in a remote world was a top priority early on for interviewees in Miami.

At the beginning of the pandemic, interpreters would simply Zoom into meetings and translate in real-time: “You’d say something, and they would translate, and then you’d wait ... so it wasn’t simultaneous interpreting.”<sup>934</sup> At some point over the summer, however, Zoom created a simultaneous interpreter function. As one judge described it:

On the bottom of your screen, there’s a little interpreter, and you set that up in your profile. So all the judges in their virtual courtroom were trained or taught, given instructions on how to set up their virtual courtroom with the interpreter function in there . . . . We worked it out with the interpreters on their end too. So basically, you click on the interpreter function, and then you basically put the name of the interpreter that is your interpreter for that day, and then it allows you to choose the language, and then it allows you to choose a language you want to hear. So it’s great. I mean, it’s not ... as good as being in person, but it’s almost as good as being in person, like there’s not ... a big big delay. And we in Miami have a lot of people that don’t speak English, so it’s really made a huge difference.”<sup>935</sup>

Opinions on the efficacy of this simultaneous interpretation function, though, were mixed:

	<b>Positive (n = 5)</b>	<b>Neutral (n = 5)</b>	<b>Negative (n = 5)</b>
Interviews Noting Interpreter Services	2 (40%)	1 (20%)	2 (40%)

As the table above illustrates, one interviewee mentioned interpreter services without expressly indicating how well she believed they worked.<sup>936</sup> Most, however, expressed a view one way or the other.

Interviewees with a negative opinion were concerned that the function was too difficult to use. One judge found it “really challenging to get . . . us educated on how to use the interpreter simultaneously,” and explained that “most people just couldn’t get that down, so we couldn’t do simultaneous interpretation.”<sup>937</sup> Another judge concurred: “[S]ometimes litigants can’t figure out how to use the simultaneous interpretation features.”<sup>938</sup>

But other judges seemed more positive, explaining that “the interpreter function works really well on Zoom.”<sup>939</sup> One even expressed a preference for remote hearings over in-person ones when it comes to translation services: “I think virtually, it might even be better because the interpreter virtually comes in, will leave, will come back, whereas the in-person interpreters, they wouldn’t necessarily come back unless they knew that . . . we needed them, so that’s, that’s a different (*sic*).”<sup>940</sup>

## **CORRECTIONS OFFICERS**

In Miami, interviewees expressed concerns about the close proximity of corrections officers to defendants as they participated in virtual hearings. In total, four respondents—or one-third of all interviewees—mentioned such a concern. And all four who noted an issue were defense attorneys, comprising two-thirds of all defense attorneys interviewed.

Three defense attorneys mentioned these concerns in passing. While describing a colleague’s client, one attorney remarked, “He’s only appeared on his screen with a mask covering his face with a corrections officer behind him.”<sup>941</sup> Another, while discussing the challenges of communicating with clients in virtual hearings, remarked: “The only thing that we could do is have a client who is sitting there, which, by the way, there’s a corrections officer like within feet of them, just kind of wave at us and say, ‘Judge, I need to go into a breakout room.’”<sup>942</sup> A third noted that “with the clients who are in custody, they’re in front of a screen at the jail with a corrections officer just off-screen behind them.”<sup>943</sup>

One attorney highlighted that the presence of corrections officers might affect attorney-client confidentiality:

If your client is in custody, there might be a corrections officer over their shoulder. . . . So sometimes, you, you know, you have to be careful with privileged to that. Now that's not to say, you know, we've got plenty of great corrections officers who understand that this is as private as we can get and will, you know, make themselves scarce, will go over in a corner, will put their fingers in their ears. But at the same time, as an attorney, you have to be worried about the privilege because you can't claim it if you have a reason to think it doesn't exist. And if you see someone in the background, I think that's clearly indicative of there not being privilege. But you know, you have to deal with what we've got, and this is the best we've got. So it's really important that we have whatever privileged conversations we need to have with our clients in those video interviews [before hearings] so that we can just answer whatever small questions they might have [during the hearing]. Or if a plea slightly changes, we can ask for a breakout room, and we can have that conversation with them on, and it's not necessarily about something that's particularly privileged. So it is something that we have to be aware of when it comes to breakout rooms and in court proceedings.<sup>944</sup>

## DEPOSITIONS

Miami is the only jurisdiction of the three in which attorneys can conduct depositions as part of discovery. This practice posed another logistical challenge for the jurisdiction, as interviewees initially struggled to formulate a feasible process for conducting depositions. Prosecutors and defense attorneys had to collaborate to create a mutually agreeable process,<sup>945</sup> and different law enforcement agencies whose officers might be deposed had varying deposition preferences and processes.<sup>946</sup> As one defense attorney explained,

[E]ach agency had a different issue with which platform you chose to use. So there were security issues with Zoom because their servers are in China. And so Florida Department of Law Enforcement was telling certain agencies not to do it. Then you have, I think the state attorney's office started using LifeSize. So LifeSize, for the most part works. Then you have, so far as delaying the process of taking depositions, you have some agencies, like a couple weeks ago, we were told one agency only has one room with one dedicated computer for the cops to come in to do their depositions, and so a lot of cops were doing it on their phone and from their car, you know, for the most part, depending on the case, that's okay.<sup>947</sup>

Subsequently, as a judge explained, "depositions . . . didn't start until May [2020] and . . . weren't even full force over remote until probably maybe by the end of the summer . . . [A]nd even . . . some of the police departments (we have like 37 different agencies) some of them hadn't caught up yet."<sup>948</sup>

Initial struggles aside, the interviewees' comments about depositions revealed two smaller themes. First, two interviewees expressed a preference for video depositions over phone depositions in the remote world. One attorney's preference stemmed in part from a desire to use screen sharing:

Sometimes you want to show the witness something that you're [going to] ask them about. And again, you can run into these sort of technical issues during that, too ... I think the best method is—the best way people been doing—is just using the Zoom platform [and screen sharing].<sup>949</sup>

The preference for video depositions also stemmed from a mistrust in phone calls. Indeed, one attorney's distrust was so strong that he indicated he would not conduct a deposition over the phone.<sup>950</sup> As he explained, “you have some people who can phone in, but they don't have the video capability ... and honestly, if it was a [deposition], I wouldn't take their [deposition]. I don't know who I'm talking to.”<sup>951</sup>

Second, two interviewees seemed to agree that a video deposition, like an in-person deposition, “makes it a little bit easier to resolve cases.”<sup>952</sup> These interviewees seemed to indicate that video depositions can occasionally function as an effective substitute for in-person depositions in helping move cases along. One defense attorney explained:

I did just resolve an attempted murder about a month ago. And I was able to take depositions over Zoom. I was able to do some things, and then once I took a few depositions over Zoom, the prosecutor said, “You know what? This is not an attempted murder. This is more like an aggravated battery that kind of got blown up,” and we resolved it to that.<sup>953</sup>

However, others indicated that these video depositions may not always be perfect substitutes for their in-person counterparts. Two attorneys expressed comfort with doing some depositions over Zoom but were uncomfortable doing all kinds of depositions that way. As one defense attorney explained, “I have several cases with victims. I prefer to take a victim deposition in person. But if it's an officer, I don't have a problem with [taking it over Zoom].”<sup>954</sup> Looking beyond the pandemic, a second defense attorney explained:

The only thing I might want to consider doing virtually [post-pandemic] might be some depositions. [C]ertain types, you know, witnesses that are not, you know, not significant, not the key witnesses . . . an alleged victim, or the lead detective I [want to] look at face-to-face across the table, you know? But the third officer on the scene who picked up a shell casing a half a block away, I could do him on video.<sup>955</sup>

These last two comments suggest that respondent preferences for video versus in-person depositions shift depending on the type of person being deposed.

# CHAPTER 14: SPECIFIC THEME FOR MILWAUKEE COUNTY

A theme that was unique to Milwaukee respondents was the use of livestreaming.

## LIVESTREAMING

Of the three jurisdictions under study, only Milwaukee livestreamed court proceedings. Most judges in Milwaukee livestreamed their proceedings, at least in the beginning of the pandemic. Some judges stopped livestreaming proceedings over YouTube in summer 2020 when courtrooms started to open back up and the public regained access to the court gallery.<sup>956</sup> But for several months, livestreaming was a common feature of the Milwaukee County courts. During that time, it was used for a wide variety of court proceedings, including plea and sentencing hearings.<sup>957</sup>

Many of the Milwaukee interviewees—including every prosecutor—discussed issues presented by livestreaming court on YouTube. In total, YouTube issues arose in 14 interviews out of 21. The following table illustrates the number of interviews in which the concern arose, by actor type:

	<b>Defense Attorneys (n = 8)</b>	<b>Judges (n = 6)</b>	<b>Prosecutors (n = 6)</b>
Interviews Mentioning Livestreaming	3 (38%)	5 (83%)	6 (100%)

The primary themes that emerged from these discussions were: (1) efficiencies and technical challenges; (2) the proper scope of public access; and (3) participants' privacy and intimidation.

## **EFFICIENCIES AND TECHNICAL CHALLENGES**

A few interviewees discussed the benefits and challenges that YouTube livestreaming had for their jobs, but there was no consensus on this point. At least one attorney found livestreaming efficient, explaining, "I've used it in conjunction with waiting in a waiting room to see what the court's doing, so I kind of try to gauge when my case is gonna be called."<sup>958</sup> But another noted that such efficiencies were lost when judges stopped consistently using YouTube:

On any given day [pre-COVID], I could walk into any single courtroom before and see exactly what was happening and what was going on, or I could shoot someone a text in my office to see if they were in that courtroom and know what was going on. Now, with all of us in waiting rooms or YouTube not being up and running, it's just not, it's just not as efficient, and it's just holding things up because we just don't have the access like we used to have.<sup>959</sup>

One judge, though, spoke about the technological challenges of simultaneously using Zoom video conferencing and livestreaming via YouTube:

[T]hat is the most stressful part of the job. It's like running a DJ booth. I got to make sure Zoom's working, I got to make sure YouTube's working, I got to make sure people's mics are muted at the right time. Or you get that awful feedback and reverb. Lord, some days I come back, and I'm just exhausted. I'm just like, I've spent eight hours in a disco trying to play all the music.<sup>960</sup>

However, the judge noted improvements as he and the staff became more experienced: "I call it the ZoomTube now. That was a little tricky, but they did, they did do a very good job, but there was a lag of about a month and a half to two months before I think really everyone was up and running."<sup>961</sup>

## TOO MUCH PUBLIC ACCESS?

As one prosecutor explained, the courts used YouTube to try to increase public access in the face of a pandemic that closed the courts:

We used YouTube broadcast to make the proceedings public for the first number of months before the courtrooms could be open to the public so that the public had general, in general, could watch, family members could watch, victims could watch, defendants' families could observe the proceedings, and everyone knew what was happening.<sup>962</sup>

But while livestreaming was intended to ensure public access, many interviewees worried that YouTube provided *too much* public access. Interviewees expressed complicated feelings on this point, as many also felt that YouTube was necessary to compensate for closed or restricted courtrooms.<sup>963</sup> Still, they found the large increases in public access troubling. As one judge explained, far more members of the public can access livestreamed footage than in-person court, and that footage can then be distributed even more widely:

You know, it sort of opens it up to the entire world where that world of public access would be a lot smaller and, you know, it can have an awful impact on victims, defendants, families about what's being livestreamed. . . . When you're livestreaming, you can film anything. It could go on Facebook. It could go on YouTube. It could be edited. It could be used against people. So we're trying to come up with a better solution. I haven't found it yet, but we're trying.<sup>964</sup>

Nor is the issue simply that *more* members of the public can access court. Echoing the first judge, a second warned that, once placed online, the recordings are not restricted to one site: “[P]eople have broadcast YouTube hearings on Facebook. I believe there are other ways they could be broadcast.”<sup>965</sup> Another judge noted that the public might hear things on the livestream that would be inaudible in person: “And you know, there are some things you need to be more aware of. If you’re making a kind of a confidential request or remark to your clerk, you got to be careful not to be blasting that out.”<sup>966</sup> Further, recorded proceedings can remain accessible well after the hearings conclude. As yet another judge remarked:

I have had individuals reach out and ask me to take things down, which I do. I actually, by practice at the end of my day, the first thing I do is delete my YouTube channel. Not my channel, but my content from that day, because I don’t leave it up. I don’t think that’s right.<sup>967</sup>

The broader public access provided by livestreamed proceedings, then, raises new privacy and dignitary concerns—discussed further in the next section.

Finally, one interviewee noted that posting hearings on YouTube can allow cruel public comments in a way that does not generally occur in person. He described an instance in which YouTube facilitated “mocking disabled people, like, for kicks.”<sup>968</sup>

## PRIVACY AND INTIMIDATION

Public, livestreamed proceedings raised new concerns about privacy, intimidation, and safety. Most of the discussion about YouTube centered on privacy and intimidation for victims and witnesses, though others voiced concerns about defendants and jurors.

Several interviewees noted that livestreamed YouTube hearings had negative privacy consequences. One prosecutor focused on victims’ concerns: “And so, in the beginning, . . . the courts were utilizing YouTube to make sure it was a public appearance, and that created a lot of privacy concerns for our victims. . . . You could have someone in Finland watching the sexual assault hearing. And so that brought a lot of privacy concerns. . . .”<sup>969</sup> Another shared that “there’s some privacy concerns that would need to be addressed if this is something we continue to do a lot of in the future.”<sup>970</sup> He explained that those concerns arose regarding sensitive information and victims’ willingness to testify:

[Y]ou have to be careful what you say, right? So maybe you’re in between cases, and you’re on YouTube, and the judge asks you something about your kids or things like that, you know? And now this is being broadcast, you know, on the internet. Or you sometimes worry for victims and for defendants. You know, in the past, you could do something where your victim appears in person, and there’s no one there, so they don’t worry as much. But when you tell a victim, “Hey, you’re gonna make a statement, and you’re gonna be on YouTube.” I could see where they may be like, “Look, I don’t, I don’t wanna make a statement.”<sup>971</sup>

Interviewees disagreed, though, about the safety and intimidation consequences of YouTube hearings. One judge noted that victims are able to follow cases without ever coming into contact with the defendant: “In fact, [prosecutors] kind of embrace [livestreaming] because their victims can watch on YouTube. And I think they feel much safer watching it on YouTube than showing it up in a courtroom, sitting in the gallery. So I think that’s been an improvement from their perspective.”<sup>972</sup> On the flip side, other interviewees worried about victim intimidation and safety. One judge explained that “you don’t want YouTube being used to put a bounty on certain people. Things like that. You know, look at so-and-so testifying, you know, in this trial, he’s a rat, or whatever. So, there are a lot of, there are some safety concerns.”<sup>973</sup> A prosecutor echoed this worry:

Or maybe there’s concern for intimidation, like in a DV case, a domestic violence case, there could be concern for intimidation that you have the victim on YouTube and maybe, you know, family members will record it or things of that nature. You know, I’m always worried that something like that could happen because I’ve had family members try to record proceedings when we’ve been in person. And it’s a lot easier, I think, doing it obviously from a distance. And so, you just gotta be careful with what’s being said because it is being broadcast.<sup>974</sup>

Concerns surrounding intimidation weren’t limited to victims or witnesses. As another prosecutor explained, they extended to jury members:

Because we don’t have—because the jury selection is being done in our gallery, the courtroom isn’t technically open for the public while jury selection is taking place, and so that has to be broadcast on YouTube. But it’s the only part of the trial that’s broadcast on YouTube. And if I were a juror, I don’t think I’d want my answers to be broadcast on YouTube, or my, my name, their faces or not. But I think that that would be challenging as a juror to know that what you’re saying is being broadcast in Great Britain and France, and you know, Nairobi. I think that would be intimidating.<sup>975</sup>

Acknowledging these privacy and intimidation concerns, a few respondents shared mitigation strategies. One prosecutor explained that concerns about witness intimidation were “a large reason why judges have avoided broadcasting trials on YouTube, especially because courtrooms are open.”<sup>976</sup> One judge who has done all of his jury selections on YouTube makes sure jurors and witnesses are anonymous:

We don’t have any witnesses names go on YouTube. Typically, I’ll introduce the lawyers, and they will list the names of the witnesses that they expect may be called so that people can identify if these are people they know already. And then after that, we go on YouTube, and the lawyers are instructed, the jurors are only to be referenced by their number. And witnesses are only to be referenced by their initials or, so like even their last initial basically. Mr. S, or Ms. T, things like that. So that’s all that goes out on the internet. And then once jury selection is over with, then we go off of YouTube.<sup>977</sup>

# CHAPTER 15: SPECIFIC THEMES FOR NORTHEAST JUDICIAL DISTRICT OF NORTH DAKOTA

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Respondents in North Dakota raised several issues that were specific to that jurisdiction. They include issues related to phone access, concerns about formality, respect, and justice, and differences between Zoom and phone usage. The reader will note that this jurisdictional specific section is longer than the other two. A perhaps understudied jurisdiction, the Northeast Judicial District of North Dakota, as described in Chapter 4: Qualitative Analysis – Methods and Data, is rural in nature. As such, a number of issues emerged that are perhaps common among other non-urban, non-suburban settings.

## ACCESS TO PHONES

As discussed in Chapter 7: Access to Technology, concerns about access to technology occurred in all three jurisdictions.<sup>978</sup> But North Dakota was unique in one important way: Interviewees from the state placed disproportionate emphasis on access to phones. 14 of 22 interviews (64%) in the Northeast District included discussion about access problems related to phones.<sup>979</sup> In Miami, two out of 12 interviews (17%) included a discussion of this kind of access problem; in Milwaukee, seven out of 21 (33%) did. Part of this emphasis may be due to the unique demographic and geographic features of the (rural and poor) Northeast District. But phone concerns may also be more salient because the Northeast District used conference call court for several months.

In contrast to those 14 interviews, three interviewees—one judge, one prosecutor, and one defense attorney—felt defendants had no problems accessing phones.<sup>980</sup> According to the judge, “the good thing about, about it is, is that in 2020, everybody’s got a phone. Nobody, I mean, you know, everybody’s got a phone. So, in that regard, accessibility, it was good.”<sup>981</sup> The prosecutor explained that, because of the remote nature of the district, residents emphasized technology *more*: “I don’t think there’s any hardship there, because oftentimes, the internet access and the smartphones are the biggest priority with the citizens here.”<sup>982</sup>

The majority of interviewees, though, expressed some concerns—whether slight, substantial, or somewhere in between—about access to phones. One category of concerns involved *actual* access, that is, whether defendants had a smartphone, a cell phone, or *any* phone. Indeed, one court employee described defendants who did not own phones at all: “There are some people that, they don’t even have a phone. . . . [T]hey use somebody else’s phone or, I don’t know.”<sup>983</sup> A prosecutor similarly described a lack of actual access, though not without some skepticism:

Then we’ve seen that with some of our defendants, I think one of them files a letter and said, “Hey, you guys, I understand you’re doing, you know, telephonic court appearances. I don’t have a telephone. What do you want me to do? I see there’s a warrant for me and mailed the letter in.” So, if that’s true or not, I don’t know. . . . But I know there are several people that I try calling that . . . don’t have a phone.<sup>984</sup>

The lack of actual access, as another prosecutor noted, is simultaneously an issue of class and poverty: In “an economically poorer area” like most of the Northeast District, some “people don’t have phones.”<sup>985</sup>

Three additional interviewees discussed actual access to *cell phones* specifically. One judge acknowledged that “it seems like everybody nowadays has a cell phone or computer, but that’s not the case. And so I have a number of times of personally calling on the landline.”<sup>986</sup> Likewise, a court employee described defendants “using their grandma’s dial-up regular phone or the dial-up internet,” which “creates a different area of access that we really need to look at.”<sup>987</sup> Like access to phones generally, access to cell phones is an economic issue; as one prosecutor noted, even if “most of these defendants have cell phones or least access to cellphones,” disproportionately poor demographic groups like Native Americans “don’t have a cell phone,” “don’t have access to a cellphone,” and “cannot call in.”<sup>988</sup>

Six interviewees described a partial access issue, wherein defendants did not have their own phones and had to share or borrow phones from others.<sup>989</sup> In fact, two interviewees who described a general lack of access also mentioned defendants using “somebody else’s” or “grandma’s” phones as a remedial measure.<sup>990</sup> A defense attorney noted that his clients “may use a community phone or a landline at somebody’s house, and an entire family uses that phone.”<sup>991</sup> And a judge described “one case where they were a family standing around a phone and kind of sharing it.”<sup>992</sup>

Finally, three interviewees categorized actual access to cell phones or smartphones as an issue, but only a small one. They believed “most of these defendants have cell phones or least access to cellphones,”<sup>993</sup> or “90% of the time they got a smartphone.”<sup>994</sup> As one acknowledged, “there’s still a few folks that don’t have cell phones” but “not too many anymore.”<sup>995</sup>

A second category of telephone access concerns involved what might be called functional or constructive access: whether defendants have acceptable cell service or can afford to pay for minutes or phone bills. Beginning with the former, respondents described poor cell service associated with the rural nature of the district. As one prosecutor vividly described, “I know

cell phone service out here is spotty. And we've had people at hearings saying, 'Hey,' you know, 'I'm on the roof of my dad's camper on the top of this hill. It's the best I can do. Can't really hear you guys.'<sup>996</sup> Even one respondent who saw the actual access issue as minimal acknowledged the constructive access issue: The judge who stated that "90% of the time [defendants] got a smartphone" had observed "some really bad connections telephonically."<sup>997</sup> Another judge's comments illustrate how poor cell service can overlap with other issues of technological access (e.g., internet, Wi-Fi), with socioeconomic class, and with race:

So the one thing is, cell phone reception is really bad out there. And so was also at times of the internet. And I think that people don't understand, like, you know, when you live in a city, you know, you can get internet fast. When you live out in the rural, I mean, these rural areas, and these, you know, people don't really tend, you know, they don't. I don't know how the cell phone companies work. But I'm sure they have their figuring out like, well, you don't need to put a tower here because it's a waste of money because there's only X amount people here. So that was always my one concern. I've been mentioning that the judges in the district where I'm at is that you know, these Zoom meetings is that, they may work great for Bismarck and Fargo, which, which we call the cities. But they don't necessarily work. I told them, I said, I think it really disfranchises Native Americans because they don't have the technology really to, to get that up. I mean, that's just the extreme poverty. So I really think, you know, in theory, and on paper, it's good to do the Zoom, but with certain populations and certain areas, it disenfranchises certain, certain people.<sup>998</sup>

Defendants' abilities to pay for cell phone plans or minutes comprise the second constructive access issue. Seven interviewees—almost a third of all interviews conducted in the Northeast District—mentioned problems stemming specifically from a lack of minutes.<sup>999</sup> One of those seven, a defense attorney, noted issues with both minutes and cell phone bills: "[T]here are a lot of people who don't have minutes, or their plan is expired, or they haven't been able to pay it."<sup>1000</sup> A second defense attorney focused on phone plans instead of minutes, concluding: "If [defendants] can't pay the bill, they don't have a phone."<sup>1001</sup>

Indeed, as several respondents noted explicitly, access problems created by low minutes and high phone bills stem from poverty. One prosecutor noted that "[l]ots of the people we deal with up here in the criminal sense are from a lower socioeconomic group and don't have a, a phone that works all the time."<sup>1002</sup> A second prosecutor concurred: "In rural areas, while we're rich in history, economically defendants are usually indigent. . . . Do they have Verizon Wireless Unlimited Plan? I'm gonna go with no."<sup>1003</sup> A defense attorney, who is both a contract indigent defender and a private attorney available for hire, explained the socioeconomic divide more explicitly still:

You know, if a client can afford to pay for my services, generally speaking, they're gonna have a car. They're gonna have a job. They're gonna have a cell phone. They're gonna have ways to get a hold of them. If they're court-appointed, a lot of times, they're struggling to make ends meet. And, you know, sometimes that means the cell phone bill doesn't get paid, and you can't reach them.

Considering all of these issues together, at least three respondents emphasized the ways in which a lack of access to a phone impairs access to court overall.<sup>1004</sup> One prosecutor emphasized that the poorest defendants, especially, may not be able to appear in court:

The other thing is, like I said, we live in a (*sic*) economic, economically poorer area. People don't have phones, or if they have phones, they're limited on how much they can use their phone because they're going by minutes. . . . I do worry about that because we don't even, I mean, yeah, we don't have people that have six or seven devices down the hallway. They do not have the internet in their house. They don't have a house. They're in a car. They're in a building empty for the night. They don't have a way to appear if it's electronic only. And I don't know that people advocate for themselves to be able to say that.<sup>1005</sup>

A second prosecutor said that a lack of minutes “potentially” affects defendants’ ability to attend virtual court, noting that “we have a large amount of people that haven’t shown up for court hearings since this started in March [2020], and there’s warrants out for their arrest now.”<sup>1006</sup> A court employee recounted similar experiences:

We've had people call and say they're low on minutes, but we have suggested that they go to a Wi-Fi area if they're not quarantined, and then if they get a Wi-Fi, then it's no charge to their phone and all that. And then, if they truly can't, the judges try to work with them if we know they're low on minutes, and we might have to reschedule as long as they are informing us and not just not showing up.<sup>1007</sup>

In sum, the lack of actual or constructive access to phones concerned nearly two-thirds of interviewees in North Dakota. This potential lack of access to phones is particularly worrisome, as interviewees often described phones as solutions for other technology barriers (i.e., no computer).<sup>1008</sup> These interviews do not, of course, provide empirical data regarding the percentage of defendants who *actually* lack access to a phone. But the narratives from the qualitative interviews nonetheless suggest a basic access problem with potentially important effects on certain defendants’ abilities to come to court.<sup>1009</sup> This problem merits future study, both in North Dakota and elsewhere. But in the interim, policymakers should question the assumption that phone technology is sufficiently basic as to be ubiquitous, at least in rural or poor regions.

## FORMALITY, RESPECT, AND JUSTICE

Unlike those in Miami and like those in Milwaukee, interviewees in the Northeast District of North Dakota emphasized a lack of seriousness in virtual proceedings. The North Dakota interviewees, like those in Milwaukee, described the behavior of defendants and others in the virtual courtroom, highlighting behaviors that they deemed inappropriate for court. But the North Dakota participants went several steps further: They connected defendants' behavior to a lack of seriousness, decorum, and formality; they emphasized the declining respect for the court; and they described a wide range of consequences for sentencing, deterrence, governance, and justice.

### INAPPROPRIATE BEHAVIOR

In 14 of the 22 North Dakota interviews (64%), participants described defendants' and others' inappropriate behavior in virtual court.<sup>1010</sup> By contrast, only three interviews in Miami (25%) and nine interviews in Milwaukee (42%) included such descriptions. Nor were these references limited to certain kinds of actors: Prosecutors, judges, court personnel, and even defense attorneys all described behavior that they considered inappropriate for court.

	<b>Court Personnel (n = 4)</b>	<b>Defense Attorneys (n = 6)</b>	<b>Judges (n = 5)</b>	<b>Prosecutors (n = 7)</b>
Interviews Noting Inappropriate Behavior	3 (75%)	4 (67%)	3 (60%)	4 (57%)

Interviewees noted certain behaviors with particular frequency. Six interviewees described first- or second-hand encounters with defendants who video-called into court from their beds or fell asleep during their hearings.<sup>1011</sup> Five described informal clothing choices,<sup>1012</sup> ranging from “just small things like you can’t wear your cap in the courtroom”<sup>1013</sup> to “pants optional” court.<sup>1014</sup> Four interviewees<sup>1015</sup> described defendants who used “bad language”<sup>1016</sup> or “cuss[ed] at the judge, at the attorneys.”<sup>1017</sup> Another four described instances of or discussed the possibility of defendants using the toilet during their court session.<sup>1018</sup> Two described defendants smoking cigarettes or drinking beer,<sup>1019</sup> and one additional interviewee speculated that “there are some [defendants] who are finding it extremely hilarious to sit [in remote court] and smoke pot or snort a line.”<sup>1020</sup>

Interviewees also condemned multitasking behaviors, which they viewed as a source of noise or inappropriate distractions. Several complained about defendants walking or playing with their dogs,<sup>1021</sup> managing their children,<sup>1022</sup> or making breakfast<sup>1023</sup> during hearings. The most common distraction, though, cited in six interviews, occurred when defendants drove or rode in vehicles during their hearings.<sup>1024</sup> Some interviewees described the detrimental consequences of such noisy multitasking, as when a “judge t[old] the defendant she was going to have to pull the car over because we could not hear her over the road noise.”<sup>1025</sup> And one court employee described both distractions and their consequences for the record in-depth:

We've had one [defendant] that was out walking his dog. His, you know, his dog needed to, you know, needed to have a walk. So he's taking his dog out while we're negotiating juvenile deprivation regarding his child. We have people, you know, they're, they're in their cars, they're in moving cars. They're outside, going for a walk. So you've got wind in the record because they're calling on a cell phone, and there's trucks going by, and there's cars going by, and motorcycles. And I'm supposed to be, I'm responsible for the record. I can't stop this.<sup>1026</sup>

Other respondents lamented a lack of focus due to multitasking: "I mean, when you're in the courtroom, more people, people are more focused on what's going on. As opposed to, I call up on Zoom, I got a whole bunch of other things going on, but I'll take care of this thing in the courtroom, too."<sup>1027</sup> Most interviewees who described defendants' multitasking behaviors as a distraction, though, also noted a lack of seriousness or formality as a mediating factor, as further explained in the next section.

## SERIOUSNESS, FORMALITY, AND RESPECT

Breaking with patterns from other jurisdictions, interviewees in North Dakota did not stop with recollections of negative behavior; they made broader descriptive and normative conclusions about the less serious nature of virtual court. Indeed, while concerns about a lack of seriousness often overlapped with accounts of defendants' inappropriate behavior, seriousness concerns were actually more widespread. According to comments in 16 interviews—a full 73% of the interviews in North Dakota—remote court is less serious, more informal, more casual, more detached, less real, or less respectful than in-person court.<sup>1028</sup> And once again, as the table below illustrates, these responses were not restricted to specific actors:

	<b>Court Personnel (n = 4)</b>	<b>Defense Attorneys (n = 6)</b>	<b>Judges (n = 5)</b>	<b>Prosecutors (n = 7)</b>
Interviews Noting Informality Concerns	3 (75%)	3 (50%)	4 (80%)	6 (86%)

Often, though not always, interviewees mentioned seriousness and formality concerns in the same breath that they described defendants' inappropriate behaviors. One judge's comments provide an illustrative example:

Well, [the defendants] weren't taking it seriously. One person, you know, they had the television on. You could tell they had the television on. They were on the— One, you could hear them using the bathroom, you know. The, the one thing about court for me is, is the decorum and, and the seriousness of what's going on. I've been concerned about that for, before the pandemic. So we had a Zoom meeting. I'll just give you an example. We had a Zoom meeting to, or a Zoom Master Calendar a few days ago. . . . And the girl was laying in her bed. And I just said, "Are you in, are you in your bed, laying down?" And she immediately got up. You know, I mean, I didn't hold it against her or anything,

but I just, I don't know, there's a certain seriousness that needs to take place in the court. And I'm not just, that's my one concern about going to Zoom and doing these telephonic hearings. I just don't know if people will take the seriousness as they, as they need to.<sup>1029</sup>

Other interviewees similarly connected defendants' behavior with a lack of formality. A prosecutor noted that "there are people behaving differently. . . . I do think we lose some formality because of the remote nature."<sup>1030</sup> A second judge described an incident of a defendant logging into Zoom court in from bed and remarked: "We have that problem, too, with regard to there's no sense of formality."<sup>1031</sup> And according to one court staff member: "Things devolve into a Jerry Springer episode very quickly and easily. People think they can just jump in and interrupt counsel because they see the appearances as less formal."<sup>1032</sup>

Relatedly, in four interviews, respondents described remote court proceedings as less "real" than their in-person equivalents. Court employees lamented that "people just don't feel like they're in a court proceeding"<sup>1033</sup> and that "the defendants do not consider it a true court."<sup>1034</sup> Speaking specifically about remote sentencing hearings, one prosecutor explained that "there's just an element of the realization or the realness missing if it's all just, it's like sitting at home watching your TV."<sup>1035</sup> And in the words of a defense attorney: "I think the court loses some of the serious nature of the proceeding. . . . I'm afraid that the younger people, this is just like another, you know, social media thing that it's, you know, not really any big deal."<sup>1036</sup>

Indeed, interviewees often contrasted the seriousness, formality, and decorum of in-person court (which, in their view, incentivizes defendants to pay attention and appreciate the seriousness of their situation) with the informality of remote court (which encourages the opposite). Several prosecutors described in-person formalities as a signal to pay attention. One explained:

You know, it's formal, right? I mean, everything's done, this is done, then this is done, then this is done. It's uniform. I mean, these are how our things are done. And, you know, you don't wear your hat in court, you know? You're not taking pictures in court, it's against the law here in North Dakota. I mean, there's all kinds of different things that, you know, pay attention. The judge is there. He could be making decisions that have a, you know, they impact and, you know, what's gonna happen to, in the criminal case, that person's life, or a family law case, that person's kids or family or otherwise. And so, and I feel like when we're doing all these things telephonically, it kind of takes away from a seriousness of it.<sup>1037</sup>

A second prosecutor noted that, "If, you know, you walk into a courtroom, . . . your heart starts

pounding. You understand what's gonna happen in front of you is going to be important. That it could change the course of your life. And you pay a lot closer attention."<sup>1038</sup> A court employee echoed the same concerns in a comparison of in-person and remote court:

When [defendants] leave their home, get into a car, go to the courthouse and walk into the courtroom, there's a feeling that they have that, Oh, my gosh, I'm in court now. I better, I better sit, sit up straight and behave. Now, some don't. They're still going to slouch in their chairs, and you know, "What? Make me care." There is always gonna be those people. But it isn't so many people. [Remote court] is like a lot of people that are like, "Yeah, whatever. I don't care."<sup>1039</sup>

Relatedly, seven respondents associated informal remote proceedings with decreased respect for the court.<sup>1040</sup> A court employee noted that "[t]he respect for court and for court personnel and for court decorum has changed as much as, you know, like I guess I'd liken it to: It's so much easier on Facebook to bully people because you do, you feel like you're anonymous."<sup>1041</sup> One prosecutor similarly noted a loss of both "the formality of what's happening and the respect for the process":

I think the deficiency is with these remote appearances that we simply just don't have the same respect for the process when we're all on telephone as we do it if we're having to march through the metal detectors and into the courtroom and have to stand up when the judge walks in. And I think we're losing that effect.<sup>1042</sup>

A second prosecutor described a loss of respect for the court because "we don't 'all rise' anymore"; defendants need not "sit down when [the judge] tells you" or "address [the judge] properly."<sup>1043</sup> A defense attorney explained that defendants "have become extremely disrespectful, rude," displaying a "lack of respect towards the bench" and a "lack of decorum."<sup>1044</sup> In a follow-up email after his interview, another defense attorney described an "erosion of respect":

It occurs to me that one ramification of Zoom/remote appearances is the erosion of respect for the courtroom. When I was in law school, the thought of the courthouse implied a certain majesty and decorum. It was in my ideological dreams, the place for justice. Now people can be "in court" while sitting in their car, their living room, and though I haven't seen it yet, their bathroom. I note that there has been a more casual erosion of respect in the courtroom pre-pandemic . . . but that was rare. . . .<sup>1045</sup>

According to North Dakotan interviewees, then, the informality in remote court can distract defendants, make criminal proceedings feel mundane and unimportant, and spur disrespect for the court. Formalities associated with in-person court—traveling to the courthouse, rising with the judge, removing caps, abiding by in-court rules—cause serious, careful, and respectful behavior.<sup>1046</sup> Those formalities and their behavioral consequences are missing from

remote court. Interviewees overwhelmingly described the resultant informality as a negative phenomenon. They believe, normatively, that criminal charges and court proceedings *should* be taken seriously: A “certain seriousness . . . *needs* to take place in the court,”<sup>1047</sup> informality is a “problem,”<sup>1048</sup> and “we’re *losing*” some “effect” because of it.<sup>1049</sup> Indeed, we will see that many interviewees believe that informality and the lack of seriousness create broader problems for the criminal justice system.

## CONSEQUENCES

Some respondents in North Dakota went further still, opining that the consequences of informal, remote court stretched far beyond a given hearing. Six respondents described negative consequences: In their minds, a lack of seriousness influenced sentencing, reduced deterrence, or affected the legitimacy of or trust in courts and other government institutions.<sup>1050</sup> In only one interview did any respondent describe positive consequences that could plausibly stem from informality.<sup>1051</sup>

Before delving in, though, a few caveats merit attention. First, only a subset of the respondents with informality concerns (a bit less than half) went on to describe what they perceived as the negative consequences of that informality. That is to say, there was much less consensus and many more mixed opinions on this topic. One interviewee admitted that he did not know the consequences of more informal court proceedings.<sup>1052</sup> Other interviewees were internally inconsistent, at times denying the effects of remote hearings while at other times describing negative consequences of informality.<sup>1053</sup> True, the majority of those who described outcomes described negative ones—but this finding should not be overstated.

Second, the consequences described in this section reflect interviewees’ opinions only. This study does not contain independent data to validate those opinions. The *actual* impact of informality on sentencing, deterrence, and governance is a fascinating and important topic for future research. But this study concerns only *perceived* consequences of informality. Such perceptions are valuable in themselves, but they should not be conflated with evidence that such consequences actually exist or mistaken for empirical demonstrations of their magnitude.

Third, this section only deals with the perceived consequences of *the informality of remote court*. Other consequences—from a lack of in-person connections, for example, or from the impact of COVID itself—are beyond the scope of this section.

Having dealt with the caveats, we can turn to the perceived broader consequences of informal court hearings. Those consequences generally fall into three categories: effects on sentencing, on deterrence, and on the legitimacy of courts and other government institutions. The remainder of this section examines each in turn.

**SENTENCING.** The effects of informality on sentencing, discussed in three interviews, were

contentious and debated.<sup>1054</sup> One defense attorney believed that the lack of formality affected defendants' behavior, which sometimes led to harsher sentences:

There, but then, there are some situations where I think the complete lack of respect from the defendant has to have affected the judge's opinion or the judge's ruling in certain cases. You know, like a bond is set at an absolutely stupid amount, you know, and it's like, that guy will never bond out on that, on that number. They just won't. I don't care if you have that, a bunch of money. He ain't bonding out because that's just absurd, an absurd number. And having to do with, you know, the complete lack of respect and authority for the court. So, yeah, I think there is. They try, from what I can see, to not let it affect it, but I think it does.<sup>1055</sup>

But at least two respondents disagreed on this point. One judge explicitly disclaimed such effects.<sup>1056</sup> Even the defense attorneys did not all agree that informality led to harsher sentences. When asked about meaningful differences between remote and in-person hearings, another responded: "I don't see that it's changed a lot. I guess that's with my view, but I don't feel like I'm getting any better or worse results from the judge."<sup>1057</sup>

**DETERRENCE.** Three interviewees connected the informal nature of remote proceedings with worries about criminal changes or deterrence. A prosecutor made the clearest case, connecting *both* in-court formalisms and fear *and* a lack of in-person interaction with reduced deterrence:

Well, you know, in the criminal context, that's a lot of what we do is bring people before the court and ask them to take responsibility for their actions. And it's that in-personal, you know, the speech the judge gives you, the look you see in his eyes. You know, that feeling you get being in there that makes a person potentially decided to change and become a law-abiding, contributing member of our society. If all they gotta do is hang up the phone and go right back to doing whatever they were doing, I think we lose that. I think we gain that, or lose that, voluntariness of someone wanting to change just because of their courtroom experience.

You know, when I was a kid, I had friends that did all kinds of naughty things. And I was petrified of having to go sit in front of a judge. And I talked on the phone all the time. I'm not petrified of talking to someone on the phone. What are you gonna do to me? I can say whatever I want to say right now. Worst thing you can do is hang up.

And our criminal defendants, I see that same thing on the phone. Disrespect for the court, the other parties involved, those types of things. And so, yeah, I think it's, we get an, "Eh, so what?" I was in court, you know, one of the defendants we had even said, "Hey, I didn't even have to see the look of disappointment in the judge's eyes this time." Well, what do you suppose that guy is gonna do? Is he gonna go out and change his behavior? Nope. You know, he was back in court two weeks later. Did something else again.<sup>1058</sup>

His comments were echoed in the interview of one other prosecutor: She described a second-hand account of a defendant saying, “Well that’s not so bad. It’s almost like I wasn’t even in trouble,” and concluded, “That impacts deterrence.”<sup>1059</sup> A court employee echoed the same sentiment: “[T]he defendants, they’re just, they’re not worried. They all know they can call in and, and they’re not so worried about their charges anymore. . . . I think having to come to a courthouse means something more to them. They’re more scared of— I mean, they’re off in their house on a phone call. I mean, that’s, that’s not court to them.”<sup>1060</sup> According to these three respondents, then, the formalities of in-person court invoked fear in defendants, causing them to “worr[y] about their charges” and, perhaps, avoiding committing future crimes. By contrast, when defendants need only call in or hang up the phone, deterrence is undermined.<sup>1061</sup>

Interestingly, the court administrators—the most removed respondents from daily practice and by far the most positive about remote court—can be interpreted to say the opposite. In their view, remote proceedings increase defendants’ comfort (arguably, the equivalent of informality and the opposite of formality and seriousness) and thereby increase comprehension. A court employee explained that “there’s so much going on in [the courtroom]” that defendants need “a number of experiences before they’re actually processing what is going on.”<sup>1062</sup> But “remotely, I think they would have a better environment to actually process what’s happening.”<sup>1063</sup> Another agreed that “there’s a natural comfort with technology. . . . You don’t see that comfort in the courtroom.”<sup>1064</sup> Still, she acknowledged considerable unknowns:

We don’t have data on how all of this is going either. So are people getting more out of going to court? We don’t know. I mean, I’ve heard in some hearings, you know, defendants appreciate that they could appear remotely, that it was more convenient for them. But is it going to stop them from coming back to the court system or any of those things? I don’t—If you’re looking at meaningful as the person being successful after court, I don’t think we’ll know.<sup>1065</sup>

**TRUST IN COURTS AND GOVERNMENT.** Finally, two respondents opined that the informality and lack of respect for the court could undermine the judiciary and government writ large. One prosecutor, while noting that defendants don’t take remote court seriously, added that the lack of seriousness “definitely erodes the judicial system.”<sup>1066</sup> A second prosecutor, once again, built both a lack of respect and a lack of personal connection into his argument about government legitimacy:

So lack of respect for the system, the process, lack of one-to-one interaction. . . . [Y]ou know there’s three branches to government. And the judiciary is an equal branch to government. And the more we take away from that, even if it’s person-to-person interaction, the farther we remove people from government, in my opinion. And the farther we remove people from government, the more distrust we have toward government. You know, why don’t we have the legislature, why don’t they meet by Zoom? Why do they have to get together? Just meet by Zoom. It’s not the same, and neither is, neither is, neither is, neither is the judiciary.<sup>1067</sup>

While the potential consequences of informal virtual proceedings for trust in government—like the consequences for sentencing and deterrence—are not as robust as other trends, they provide intriguing food for thought. Discussions of informalities’ consequences occurred predominantly in North Dakota, illustrating a potentially important difference between jurisdictions. As such, they are a rich area for future research on both robustness (whether these differences reach statistical significance with bigger datasets) and causation (i.e., why such differences exist across jurisdictions).

## ZOOM VERSUS PHONE

The Northeast District’s switch, months into the pandemic, from Global Meet (teleconferencing) to Zoom (videoconferencing) for remote court drew considerable comment. What’s more, interviewees discussed their preferences between the two platforms without direct prompting from interviewers: Before conducting interviews in North Dakota, the researchers were unaware of the platform switch, so no question on the interview guide directly addressed it. Nonetheless, in 15 of the 22 interviews in North Dakota, interviewees expressed a preference between Zoom and phone conferences.<sup>1068</sup> Neither Milwaukee nor Miami experienced a similar switch between platforms, making the issue of Zoom versus phone an exclusively North Dakotan one.

In the large majority of those 15 interviews (13 or 87%), respondents expressed a preference for Zoom’s videoconferencing platform over teleconferencing.<sup>1069</sup> The results, broken down by actor, are summarized below:

<b>Interview with:</b>	<b>Zoom Preferable</b>	<b>Phone Preferable</b>
Court Personnel	2	1
Defense Attorneys	2	1
Judges	4	0
Prosecutors	5	0

Those who favored Zoom most often cited its greater similarity to in-person interaction and its capacity for participant control, though a few interviewees mentioned other factors. Those who preferred teleconferencing emphasized convenience and ease of use.

### **PRO-VIDEOCONFERENCING (ZOOM)**

By a clear consensus of North Dakota interviewees, Zoom’s videoconference platform is preferable to the audio-only Global Meet platform. Most often, interviewees preferred Zoom because the video feed provided a better approximation of face-to-face interaction.<sup>1070</sup> Some interviewees “prefer[red] to see people as opposed to just hearing them”<sup>1071</sup> or found it “nice to actually see the faces, and, um, of the people that you’re involved with and the prosecutor

and the judge.”<sup>1072</sup> One prosecutor emphasized that video conveyed more of the feeling of the hearing than telephone:

[In remote proceedings] you know, you don’t have to sit and stare the judge in the eyes when he’s passing sentence on you or something like that. . . The video conferencing, you know, Zoom-type applications helps. So you can at least see the other person. But on just telephone alone, I think you lose a lot of the, emotion maybe is the right word, of what’s going on.<sup>1073</sup>

Still, interviewees described Zoom as better than teleconferencing but inferior to live court. Zoom “provides the level of, you know, it’s some face to face,” though it’s “not perfect”;<sup>1074</sup> it “may lead to a little bit more interaction,” but “it’s not the same as being there person-to-person.”<sup>1075</sup>

Other interviewees explained the importance of face-to-face communication for evaluating visual cues and characteristics of defendants. One judge felt she could “gauge [defendants’ respect] more, you know, in this type of a thing [Zoom]” but “certainly not, cannot gauge that over the telephone.”<sup>1076</sup> One prosecutor emphasized both the ability to evaluate defendants and the value of in-person connection:

Okay, so now the last, I dunno, six weeks, we’re going to Zoom. And so, you know, seeing is believing, and I, that’s a huge change. I love to see the people in person, and I realize I maybe shouldn’t be that way. But you can read so much from facial expressions or lack thereof and eyebrow bats. And it just, this job stinks when you can’t be with the people.<sup>1077</sup>

Rounding out the subject of visual cues, a court employee described an unexpected connection between visual cues and keeping a record:

I really did not realize how much I depend on body language. And, when you have nothing but inflection to meter, you know, what’s, what’s going on with the person who’s speaking, it’s really a different thing. . . . We really are very visual people. Much more than I realized. Because, you know, I’m thinking, I’m wearing headphones. Headphones. It’s all about sound to me. And yet, I am looking, and I am doing much more lip-reading than I ever realized. I am doing much more reading of body language than I ever realized. And when you get on the telephone, you don’t have any of that. With Zoom, you have less of it [than in-person], but you still have some.<sup>1078</sup>

But while Zoom’s face-to-face capacity was the most commonly cited reason for interviewees’ preferences, it was far from the only one. One pair of interviewees cited the degree of control that Zoom hosts have over attendees. Discussing background noises in defendants’ audio feeds, one judge noted that “Zoom isn’t as bad. We have a little bit more control over it. You know, the people that are running it, you know, they can mute people and stuff like that. Where the phone, we didn’t have that.”<sup>1079</sup> And after discussing background noise and over-speaking during telephonic hearings, one prosecutor concluded that “Zoom is better”:

I had two initial appearance days, bond days where I've done Zoom now. Both of those days were much better than the telephonic ones. Now I don't know if it's because there's a different level of control that the court people have over that, or they have some screen they put up that says, "Don't talk when you're in the courtroom" or "until your name is called," but they seem to be a little better.<sup>1080</sup>

Technical features unique to Zoom also made an impression on interviewees. One judge explained "some challenges" to receiving evidence telephonically and thought it "would have been easier with Zoom where you can screenshare."<sup>1081</sup> And one defense attorney cited the ability of Zoom to facilitate confidential attorney-client conversations. In particular, he described the benefits of breakout rooms when he is in court, but the defendant is elsewhere:

[T]he nice part about this option [Zoom] is that we can be placed into a breakout room, for example. So if the client has a confidential question they need to ask me, they can put us in a breakout room. I can take my laptop and go to the jury room and speak to them privately. Whereas if we're on the phone, that's not a possibility.<sup>1082</sup>

Finally, two respondents noted the benefits of Zoom over phone for multitasking—but ironically, they cited opposing benefits. A prosecutor found Zoom helpful for discouraging multitasking: "I can't be working on my keyboarding and working on three other files when I'm talking to you with Zoom at the same time. Whereas if we're just doing audio, you don't know what the heck I'm doing here."<sup>1083</sup> By contrast, a defense attorney found that Zoom was more conducive to helpful multitasking, as when someone he's "been waiting to talk to for a long time, a client or something like that," calls during court.<sup>1084</sup> "Zoom court, I can, I'm on mute, my camera's off. I can take the call. Whereas conference call court, I can't do that."<sup>1085</sup>

## PRO-TELECONFERENCING (GLOBAL MEET)

What remains is the much smaller faction—only two interviewees—who found teleconference court to be superior to Zoom court. These two interviewees shared the opinion that teleconference court is easier or more convenient for themselves or for others. One defense attorney intended to keep using teleconferencing because it was inexpensive and just as easy to use; "I know people prefer Zoom," he acknowledged, "but I'm not really tell (*sic*) why."<sup>1086</sup> And a court employee explained that Zoom was harder to explain to defendants:

Actually, with the Zoom hearings now, the call-in information was easier. Now, with Zoom, that we just started with, they almost, I answer so many calls on that and have to sit and explain it all to [defendants], how they're doing it. But it's explained in their notice of hearing, but they still don't understand.<sup>1087</sup>

Embedded within the court employee's point is the idea that explanatory clarity matters; it was, apparently, difficult to explain Zoom clearly in the notice of hearing, leaving defendants wanting. Interestingly, the role of explanations and trainings played a small role in the pro-Zoom camp, too. A different court employee found the teleconferencing system confusing because "we were just kind of thrown right into the open flames" on short notice.<sup>1088</sup> This employee's positive feelings about Zoom were partially shaped by a more thorough training regime:

However, with Zoom, it was another creature entirely. When we were switching over to Zoom, we had [Assistant Court Administrator] Kelly Hutton come from our administration office in Graf—in Grand Forks. She's an excellent teacher. . . . And really, we got a really good solid training, and when I've had any glitches or anything that happened after that, she's been available, and she's made herself available if I had any questions. So the Zoom has been great.<sup>1089</sup>

Taken together, the experiences of these two court employees suggest that training and explanations matter, regardless of platform.

# CHAPTER 16: CONCLUSION

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The foregoing report has examined a veritable mountain of data. The quantitative section confirms the ubiquity of virtual court, details its use in particular hearings, explores the consequences of remote communications for attorney-client relationships, and uncovers worrying findings about access to justice. The qualitative sections discuss the efficiencies of virtual proceedings; concerns about accessibility and debates about appearance rates; the lack of face-to-face communication, nonverbal cues, and emotional connection over remote platforms; worries about witnesses, attorney-client communication, and constitutional harms; and preferences for remote technology post-pandemic.

This concluding chapter aims to synthesize our findings and provide steps for the future. First, the Analysis and Discussion section below examines how the quantitative and qualitative data of this study align with and build upon past studies. Second, the Promising Practices section distills some of our findings into concrete recommendations for those practicing criminal law. (Chapter 12: Ultimate Preferences provided insight as to several promising practices regarding the use or nonuse of remote technology; the section below concerns potential improvements with remote hearings.) The third and final section in this chapter briefly recaps the limitations of our study and suggests directions for future research.

## ANALYSIS AND DISCUSSION

On the whole, the results of this study align closely with the literature on remote technology, both in the courts and in other contexts. This section examines the quantitative data, the qualitative data, and the relevant literature in a comparative perspective.

This report's qualitative findings on efficiency mirror the conclusions of at least one prior study examining the switch to video court during the pandemic, that of Jenia Turner.<sup>1090</sup> In Turner's study, a large majority of survey respondents—all working in federal and state courts in Texas—believed that online criminal proceedings sometimes, often, or always saved time for prosecutors (84%), defense attorneys (84%), or the court (83%).<sup>1091</sup> It is likewise true that the majority of respondents in our qualitative study believed that virtual proceedings saved time. Our study did not have sufficient granularity to enable us to determine whether perceived benefits for defense attorneys, prosecutors, and the court varied by actor type.<sup>1092</sup> But our results do align with Turner's qualitative finding that reduced travel was a major contributing factor to the time savings.<sup>1093</sup> Further, the emphasis on travel by North Dakota respondents, in particular, reinforces prior research on cost- and time-savings in rural areas.<sup>1094</sup>

Our findings on access to technology also generally mirror findings from prior literature. Our quantitative data revealed defense attorneys' perspectives on these issues: They felt that out-of-custody clients often lacked internet, smartphones, or electronic devices and believed that in-custody clients had even less access.<sup>1095</sup> Turner's related question yielded similar results: 58% of defense attorneys in her sample agreed that "indigent defendants have difficulty accessing the technology necessary to take part in online proceedings" always or often, and an additional 27% agreed that such difficulties existed "sometimes."<sup>1096</sup> Our qualitative data are in accord, with 75% of defense attorneys and about two-thirds of all respondents mentioning access-to-technology problems. As with Turner's study, prosecutors in our sample were less likely than defense attorneys to mention access-to-technology problems.<sup>1097</sup> As Turner noted, this finding is "not too surprising because, among the three groups, defense attorneys are most likely to have directly experienced, or seen their clients experience, the disadvantages of online proceedings."<sup>1098</sup> But unlike Turner's study, judges in our qualitative sample were *more* likely to cite such problems than other actors.<sup>1099</sup> Turner's study obtained statistically significant findings to the contrary, though her sample was restricted to Texas; the qualitative study here cannot reach statistical significance, nor is it generalizable to a broader population. More research is needed to determine the perspectives of judges beyond the contexts of these two studies—and, of course, to determine the actual frequency with which indigent and non-indigent defendants experience access difficulties.

The related concerns raised in this study about access to *quality* technology implicate earlier literature. 78.3% of defense attorneys in our quantitative survey had experienced problems with poor audio quality, while 60.4% had experienced issues of poor video quality. These findings are worrying in light of past studies connecting poor audio quality with greater distrust of and dislike for the speaker.<sup>1100</sup> The pervasiveness of poor video quality may increase the likelihood that Diamond et al.'s findings will transfer to present-day remote court.<sup>1101</sup> Technological difficulties may cause defendants to have difficulties hearing, seeing, and comprehending the proceedings in which their liberty is at stake.<sup>1102</sup>

Our study's findings about the importance of eye contact and nonverbal cues also align with earlier in-court and out-of-court studies. The respondents in our qualitative section repeatedly emphasized that nonverbal cues were reduced or removed in virtual proceedings; past studies agree.<sup>1103</sup> Our respondents emphasized the negative consequences of those lost cues for witness testimony. Similarly, in Turner's study, 51.6% of respondents thought that assessing or challenging witness credibility was always or often more difficult online, and an additional 31.5% thought that it was sometimes more difficult.

Relatedly, our data illustrate a connection between lost cues, missing in-person communication channels, and damaged attorney-client relationships. Beginning with the latter, two-thirds of defense attorneys in our quantitative survey agreed or strongly agreed that the shift to virtual proceedings hurt client communication; of those, 93.7% thought that the shift created difficulties building relationships with clients. This is consistent with Turner's qualitative finding that "the online setting during the pandemic has transformed [defense attorney's]

overall relationship with their clients.<sup>1104</sup> Our qualitative data suggest that the lack of facial and body language cues and the inability to look each other in the eye or communicate face-to-face are partially responsible for those weaker relationships.<sup>1105</sup>

Worryingly, both our study and the literature imply that the use of virtual court proceedings can lead to negative consequences for defendants and for the justice system's legitimacy. Our qualitative interviews and quantitative surveys converge on this point. Defense attorneys responding to the open-ended questions on the survey consistently reported that virtual proceedings dehumanize their clients and lead their clients to distrust the criminal justice system. Proceedings were said to be "devoid of any humanity" or have "a reality TV feel."<sup>1106</sup> Respondents in the qualitative interviews said many of the same things.<sup>1107</sup> Turner's qualitative findings revealed similar themes.<sup>1108</sup> These findings are all consistent with the literature that defendants "may become disengaged" and "perceive the process as less fair," which may cause a decline in the "perceived legitimacy of the proceedings."<sup>1109</sup>

Finally, the consensus in our study that trials or contested hearings should occur in person accords with Turner's study. Turner noted that almost 60% of survey respondents would "like to see online/videoconference proceedings used more frequently in criminal cases after the pandemic is over."<sup>1110</sup> But her respondents did not feel this way about all hearings:

[R]oughly one-third of respondents who would like to see the continued use of video proceedings after the pandemic added important qualifications that video should be used for *some* proceedings but not others. A number of respondents identified initial appearances, bond hearings, status hearings, and certain other uncontested pretrial hearings as suitable for videoconference. Some attorneys went further and thought suppression hearings, plea hearings, or even bench trials would be appropriate to conduct online. But many categorically opposed the idea of conducting virtual jury trials, and some expressed the same view about contested proceedings more broadly.<sup>1111</sup>

This summary of Turner's results aptly describes our results as well, though our respondents tended to disfavor both remote bench trials and remote jury trials.<sup>1112</sup>

It is worth devoting a bit more time to "in-between" hearings, such as pleas and sentencings,<sup>1113</sup> in light of the literature. The perspectives of respondents who advocated for in-person sentencing hearings and who worried that it's easier "to throw the book [at] someone"<sup>1114</sup> during remote sentencing hearings find some support in Diamond et al.'s study. Diamond's team found "a sharp increase in the average amount of bail set in cases subject to [remote technology], but no change in cases that continued to have live hearings."<sup>1115</sup> It follows that sentences might be harsher remotely, too. The concerns of our respondents about remote sentencing hearings should thus be taken seriously, although more research is needed to determine the specific effects of this pandemic-induced shift to remote court on sentences.<sup>1116</sup>

On the other hand, it is a bit surprising and worrying (in light of the Diamond study) that few respondents in our sample advocated explicitly for in-person bail and bond hearings. Perhaps potential increases in bail were mitigated by the pandemic-induced changes in bail/bond schedules designed to keep defendants (and COVID) out of prisons. But regardless of the results of our study, Diamond et al.'s study alone gives jurisdictions reason to be cautious about the use of remote bail or bond hearings.

## **PROMISING PRACTICES**

This section is concerned with promising practices in the use of video- and audio-conferencing in criminal court. Chapter 12: Ultimate Preferences described respondents' preferences for the use of remote technology in court going forward. To the extent that readers are interested in promising practices regarding the use or non-use of video conferencing, that section provides our best answer: Most respondents preferred to do trials and serious hearings in person and preferred a virtual or flexible approach for minor hearings. This section examines a different issue. Once jurisdictions have decided to use remote technology in a given context, how can courts, defendants, and institutional actors minimize negative repercussions? This section offers a handful of suggestions based on our research and the existing literature.

The overriding lesson, even beyond the concrete suggestions listed below, is that practitioners, policymakers, and judges must be cautious and attend carefully to the potential hidden effects of remote court. The words of one Massachusetts Justice come to mind:

[A]s we Zoom into the future of this brave new digital world, judges must be acutely attentive to the subtle and not so subtle distorting effects on perception and other potential problems presented by virtual evidentiary hearings. Although the scholarship of these effects and problems is still developing and requires rigorous testing in court, it raises concerns that require a cautious approach, particularly after the pandemic ends and our courtrooms can return to some semblance of normal. . . .<sup>1117</sup>

## **VIDEOCONFERENCING OR TELECONFERENCING?**

Jurisdictions using remote technology have, during the pandemic, generally gravitated towards video technology. Our conclusions on this point are mixed. Respondents overwhelmingly preferred videoconferencing, which would likely operate well in inconsequential hearings. But if a jurisdiction uses remote technology in hearings where judges make important decisions about defendants,<sup>1118</sup> past research implies that audio-only hearings may lead to less distorted results (as described below).

As a preliminary matter, jurisdictions opting for videoconferencing should ensure that their chosen platform allows people to call in instead of requiring videoconferencing technology. As described in Chapter 7: Access to Technology, respondents had severe concerns regarding defendants' (and in some cases, victims') abilities to access computers, reliable internet, and cameras.<sup>1119</sup> That is not to say that there are no access-to-phone issues,<sup>1120</sup> but adding the option to call in should allow some defendants, who otherwise could not access the courts, to attend their hearings. It follows that judges should not require videoconferencing or penalize defendants where they have clearly made a good faith effort to attend the hearing but are experiencing technological difficulties.<sup>1121</sup>

Audioconferencing technology, of course, creates an additional degree of difficulty in identifying and observing the defendant. Respondents in North Dakota (the only jurisdiction in the study to use audioconferencing with regularity) described their workaround for identification: “[W]e had to elicit at least the year of birth, the last four [of] the Social Security number, identifying information to be sure that Joe Smith, who is pleading guilty, is really Joe Smith.”<sup>1122</sup> Granted, there are some hearings where observing the defendant is more important than others (i.e., where the judge needs to assess voluntariness, the factfinders and opposing counsel need to assess credibility, etc.). But at least for minor hearings, the option to call in can alleviate some access problems.

The broader question of whether videoconferencing or audioconferencing should be the default is a harder question. In North Dakota, respondents preferred Zoom's videoconferencing platform over Global Meet's teleconferencing platform by a huge margin.<sup>1123</sup> Respondents emphasized the need to see each other face-to-face, read body language, and foster more interaction.<sup>1124</sup> Only two respondents in North Dakota found the teleconferencing system preferable. The North Dakota experience, therefore, suggests that videoconferencing might be the better default.

But prior literature actually suggests the opposite, at least for some hearings. Whatever respondents' preferences, Walsh & Walsh's study of immigration court implies that videoconferencing may have negative effects for defendants.<sup>1125</sup> Their study found that asylum grant rates were lower over videoconferencing than in-person, in part because the immigration judges likely conflated the video images (which exhibited fewer cues, lending an appearance of untrustworthiness or emotionlessness) with the asylum applicants themselves.<sup>1126</sup> Despite popular belief, judges (and humans in general) are unable to mentally correct for these effects.<sup>1127</sup> But the same disparities did not exist between audio-hearings and in-person ones,<sup>1128</sup> implying that judges were better able to recognize the limitations of remote technology and correct for them without a video feed. If this study's results are generalizable, audioconferencing may be superior to videoconferencing where judges have to make decisions regarding defendants. But more research is needed to explore the applicability of Walsh & Walsh's research to pandemic-induced remote dispositional hearings.

## PERCEPTION AND PREPARATION

Both the literature and our study emphasize the importance of a quality videoconferencing setup and court-appropriate behavior notwithstanding the virtual format. Advocates should therefore be cognizant of their surroundings. For corrections officials, these findings underscore the need to provide well-lit and carefully designed videoconferencing spaces for in-custody defendants.<sup>1129</sup> And for defense attorneys, our findings underscore the benefits of carefully advising and preparing clients for virtual court.

It is no secret that good videoconferencing setups are important for perception. The literature reveals the importance of lighting, camera angles, and background settings, which may inadvertently “lead a judge to perceive a defendant as less credible or more dangerous.”<sup>1130</sup> For example, a videoconferencing set up with a separate display and camera can create the illusion that the user is avoiding eye contact.<sup>1131</sup> At least some such problems affected respondents in our quantitative study: 49.2% of surveyed defense attorneys reported that camera placement inhibited views of the defendant.<sup>1132</sup> Our qualitative data also adds that backgrounds may be distracting<sup>1133</sup> or create subtle advantages or disadvantages.<sup>1134</sup> Given these potential adverse consequences of a suboptimal videoconferencing setup, all participants in remote criminal court would be wise to create a videoconferencing setup that promotes the appearance of eye contact, is well lit, includes a curated background, and minimizes movement or distractions.

However, it is important to recognize that out-of-custody defendants often have little control over their video backgrounds. Defense attorneys should advise their clients about the expected level of decorum on camera,<sup>1135</sup> but in many situations, the only private space an out-of-custody defendant has access to is his car or the break room at work. To that end, it is imperative that other court actors—especially judges—avoid penalizing defendants for appearing in virtual court in a sub-optimal setting. For in-custody defendants, the burden falls on jail officials or correction officers to ensure the videoconferencing space does not inadvertently prejudice defendants.

## LIMITATIONS AND FURTHER RESEARCH

As described in the first instance in Chapter 3: Quantitative Analysis and Chapter 4: Qualitative Methods and Data, this study is subject to a number of limitations.<sup>1136</sup> Our quantitative data is not nationally representative. Further, findings from qualitative studies cannot be confidently generalized. The cohesion between the three jurisdictions under study, and the agreement between this study’s findings and those of other studies, suggests that parts of the story apply beyond Miami-Dade, Milwaukee County, and the Northeast District of North Dakota. But, as noted below, more research is necessary.

The study also lacks certain kinds of data, which limits the inferences it can support. First and foremost, we neither surveyed nor interviewed criminal defendants directly. Any conclusions drawn about criminal defendants are therefore tentative and based on secondhand knowledge. Second, the qualitative and quantitative data only deal with respondents' perceptions (e.g., of access to technology, of appearances and failures to appear, of the frequency of technological issues, etc.). We did not collect data regarding the accuracy of respondents' perceptions or the frequency with which the events they described objectively occurred. Finally, while the qualitative data can hint at causal links, they cannot show causality with any kind of methodological rigor.

These limitations alone suggest several important avenues for future research. Other researchers may test the generalizability of our qualitative findings by conducting similar or larger qualitative studies in other jurisdictions or by building a quantitative survey from the qualitative results. Future researchers may also wish to conduct a similar quantitative survey with a larger sample (to see, for example, whether certain non-statistically significant results reach significance with more respondents). Or they may wish to use a similar survey to explore the opinions of judges, prosecutors, or other actors, in much the same way that Turner did with her Texas sample. The perspectives of court administrators, court clerks, court reporters, and court recorders may be an especially rich area for future studies; their views are currently understudied.

Researchers may also wish to explore the rural/urban/suburban divide more thoroughly. Throughout this study, a number of findings have varied along geographic lines, including the beliefs of rural and urban prosecutors<sup>1137</sup> and defense attorneys<sup>1138</sup> and the disproportionate emphasis on formality and decorum in rural North Dakota.<sup>1139</sup> Past research has tentatively found such differences, too.<sup>1140</sup> Future studies could use these findings as a starting point to explore the potential differences in greater depth.

Our knowledge on remote criminal court would be substantially improved by studies that directly solicit defendants' perspectives. Both our study and Turner's do not have such data. But a first-hand account of defendants' perspectives would allow the field to eliminate much of its extrapolation and educated guesswork. This data would be especially valuable to the extent that it clarifies the impact of remote court on defendants of different races, genders, socioeconomic classes, disabilities, as well as any variations based on the type of offense or defendant's incarceration status. (Second-hand data, too, could help fill the void on this point; subsequent qualitative or quantitative studies might elicit data about respondents' interactions with defendants of different races, genders, ability, class, and offense and custody types.<sup>1141</sup>)

It is also critically important that future researchers study not just the perceived consequences and outcomes of virtual court, but also the actual outcomes. Researchers should thus look for opportunities to conduct comparative empirical studies like Diamond et al's. The resulting empirical data (on, for example, access barriers, court attendance, or sentences as affected by remote technology) would be hugely beneficial for researchers seeking to understand the differences between actors' perceptions and objective data. More importantly, such data would be invaluable for policymakers as they attempt to develop the best possible policies governing the future use of remote technology.

## ENDNOTES (Click on hyperlinks to visit websites and articles.)

- 1 Miami Interview 6 (Defense Attorney 5).
- 2 ND Interview 15 (Judge 5).
- 3 ND Interview 1 (Court Personnel 1).
- 4 As a result of shutting down some operations, many state court systems faced constitutional and legal challenges.
- 5 *See, e.g.*, History of Cameras in Courts, UNITED STATES COURTS, <https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/history-cameras-courts>.
- 6 Justin Jouvenal, *Justice by Zoom: Frozen Video, a Cat — and Finally a Verdict*, WASH. POST August 12, 2020 [https://www.washingtonpost.com/local/legal-issues/justice-by-zoom-frozen-video-a-cat-and-finally-a-verdict/2020/08/12/3e073c56-dbd3-11ea-8051-d5f887d73381\\_story.html](https://www.washingtonpost.com/local/legal-issues/justice-by-zoom-frozen-video-a-cat-and-finally-a-verdict/2020/08/12/3e073c56-dbd3-11ea-8051-d5f887d73381_story.html)
- 7 COVID Vaccinations in the United States, CENTERS FOR DISEASE CONTROL AND PREVENTION, May 19, 2021, <https://www.cdc.gov/covid-data-tracker/#vaccinations> (reporting, on May 19, 2021, that 37.8% of the United States population was fully vaccinated against COVID).
- 8 *When You've Been Fully Vaccinated*, CTR. FOR DISEASE CONTROL AND PREVENTION, May 16, 2019 <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html>.
- 9 *See, e.g.* Allie Reed & Madison Alder, *Zoom Courts Will Stick Around as Virus Forces Seismic Change*, BLOOMBERG L., July 30, 2020 <https://news.bloomberglaw.com/us-law-week/zoom-courts-will-stick-around-as-virus-forces-seismic-change>; *State Court Judges Embrace Virtual Hearings as part of the 'New Normal'*, NAT'L CTR FOR STATE CTS, <https://www.ncsc.org/newsroom/public-health-emergency/newsletters/videoconferencing>. *See also* Matt Reynolds, *Courts Attempt to Balance Innovation with Access in Remote Proceedings*, ABA J., February 1, 2021, <https://www.abajournal.com/magazine/article/courts-attempt-to-balance-innovation-with-access-in-remote-proceedings>; Laura Gibbons, *Virtual Court Hearings Could Continue Past Pandemic, but Questions of Connectivity, Constitution Arise*, MLIVE, July 14, 2020, <https://www.mlive.com/public-interest/2020/07/virtual-court-hearings-could-continue-past-pandemic-but-questions-of-connectivity-constitution-arise.html>.
- 10 ND Interview 1 (Court Personnel 1).
- 11 Their work is funded under the Justice For All grant, which was issued by BJA as part of the Justice For All Reauthorization Act (JFARA). Through the JFARA, the U.S. Department of Justice provides Training and Technical Assistance (TTA) to state, local, and tribal jurisdictions to strengthen and support the core rights and protections guaranteed by the Sixth Amendment.
- 12 *Uniform Crime Reports*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested>.
- 13 Laura M. Maruschak and Todd D. Minton, Bureau of Justice Statistic Bulletin *Correctional Populations in the United States, 2017-2018* at page 2 (August 2020).
- 14 The Federal Bureau of Investigation (FBI) maintains a database called the “Interstate Identification Index (III),” which contains the records of all persons who are arrested and fingerprinted by a local, state, or federal law enforcement agency, if those records are forwarded to the FBI. As of June 2017, about 73.5 million individuals had records indexed by the III, about 29.5% of the adult population. The FBI considers anyone who has been arrested on a felony or serious misdemeanor charge to have a criminal record, even if the arrest did not lead to a conviction. Lower level misdemeanors are not reported. *See* Privacy Impact Assessment for the Fingerprint Identification Records System (FIRS) Integrated Automated Fingerprint Identification System (IAFIS) Outsourcing for Noncriminal Justice Purposes: Channeling, Federal Bureau of Investigation, <https://www.fbi.gov/services/information-management/foipa/privacy-impactassessments/firs-iafis>; *See also* National Crime Information Center, Federal Bureau of Investigation, <https://fas.org/irp/agency/doj/fbi/is/ncic.htm>.
- 15 MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS*, xxix (2020).
- 16 *Id.* at 8.
- 17 *See* Chapter 2: Literature Review for a discussion of the studied effects of videoconferencing on criminal justice outcomes.
- 18 This section is not intended to be an exhaustive review of previous studies of the use of virtual proceedings for court and/or other related purposes, but rather to share some of the more relevant literature. For a recent primer on the effects of virtual court, including a discussion of specific considerations for marginalized communities, *see* ALICIA BANNON & JANNA ADELSTEIN, BRENNAN CTR., *THE IMPACT OF VIDEO PROCEEDINGS ON FAIRNESS AND ACCESS TO JUSTICE IN COURT* (2020) , <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court>.
- 19 Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J. L. PUB. POL'Y 311, 342 (2016).
- 20 Elizabeth C. Wiggins, *What We Know and What We Need to Know about the Effects of Courtroom Technology*, 12 WM. & MARY BILL RTS. J. 731, 732-33 (2004).
- 21 MIKE L. BRIDENBACK, *STUDY OF STATE TRIAL COURTS USE OF REMOTE TECHNOLOGY 12-13* (2016) <https://napco4courtleaders.org/wp-content/uploads/2016/08/Remote-Technology-Report-April-2016.pdf>.

*Click on hyperlinks to visit websites and articles.*

- 22 SOC. SECURITY ADMIN., HEARINGS HELD IN-PERSON OR VIA VIDEO-CONFERENCING REPORT FY2014, [https://www.ssa.gov/appeals/DataSets/archive/06\\_FY2014/06\\_JulyHearingsHeldInPersonVideoReport.html](https://www.ssa.gov/appeals/DataSets/archive/06_FY2014/06_JulyHearingsHeldInPersonVideoReport.html).
- 23 Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1108 (2004).
- 24 *Id.*
- 25 *Id.* at 1108-09.
- 26 *Id.* at 1109. Other substantial concerns related to virtual proceedings and limiting nature of cameras include the inability of the court to ensure that witnesses or defendants are not being coached or coerced by parties off camera. This is a particular concern for persons appearing in custody who may be supervised by corrections officers or other prison personnel. *See, e.g.*, David Abernathy & Victoria Calhoun, *Witness Coaching by Whisper Leads to Sanctions for Defense Witness and Attorney*, JD SUPRA (Dec. 21, 2020), <https://www.jdsupra.com/legalnews/witness-coaching-by-whisper-leads-to-40825/>.
- 27 *Id.*
- 28 *Id.* at 1111. *See also* Helene Kreysa et al., *Direct Speaker Gaze Promotes Trust in Truth-Ambiguous Statements*, 11 PLoS ONE 1, 9 (2016) (finding that listeners were substantially more likely to believe a statement made with direct gaze as compared to a statement made with an averted gaze); Jari K. Hietanen, *Affective Eye Contact: An Integrative Review*, 9 FRONTIERS PSYCH. 1, 8 (2018) (noting that research “provides considerably strong evidence that eye contact automatically elicits positive effective reactions” and that an individual making eye contact was evaluated more favorably as compared to an individual not making contact in categories such as likeability, competence, attractiveness, intelligence, credibility, and potency).
- 29 Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice?: The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L. REV. 259, 269 (2008). *See also* Miguel Ramlatchan & Ginger S. Watson, *Enhancing Instructor Credibility and Immediacy in the Design of Distance Learning Systems and Virtual Classroom Environments*, 9 J. APPLIED INSTRUCTIONAL DESIGN 1, 6 (2020) (finding that students who viewed an instructor-created video with an eye level camera as more credible than students who viewed video with a camera positioned above eye level).
- 30 Walsh, *supra* note 29, at 269.
- 31 *Id.*
- 32 Poulin, *supra* note 23, at 1110.
- 33 *Id.*
- 34 *Cf. id.* at 1108 (“[V]ideo presentations always either strip some nonverbal cues from the communication or overemphasize them.”).
- 35 *See* Devan Corrigan, *The Myth of Body Language as a Credibility Assessor*, QUEEN’S UNIV. IRC, (Sept. 2020), <https://perma.cc/5PKK-XZFD>.
- 36 *See* Barbara A. Spellman & Elizabeth R. Tenney, *Credible Testimony In and Out of Court*, 17 PSYCHONOMIC BULL. & REV. 168, 169 (2010). Also, body language and non-verbal cues do not only play a role in credibility assessments, but can provide valuable insights on a person’s level of anxiety and the presence of other mental illness or disabilities. Recognizing that someone is nervous, anxious, or has a disability can encourage slowing down the flow of information or provide assurances that can allow a defendant or witness to participate more meaningfully because they are better able to absorb, process and respond to the information they are being given.
- 37 Walsh, *supra* note 29, at 268.
- 38 *Id.*; *see also* Wiggins, *supra* note 20, 731, 738 (arguing that when audio is transmitted through videoconference, a middle bandwidth filter is used causing some information about a speaker’s emotional state—which is carried at high frequencies—to be partly excluded).
- 39 Lynne Wainfan & Paul K. Davis, *Challenges in Virtual Collaboration: Videoconferencing, Audioconferencing, and Computer-Mediated Communications*, RAND NAT’L DEF. RSCH. INST. 32 (2004).
- 40 *See* Vincent Denault, *Furtive Looks, Nervousness, Hesitation: How Nonverbal Communication Influences the Justice System*, THE CONVERSATION (May 1, 2019), <https://theconversation.com/furtive-looks-nervousness-hesitation-how-nonverbal-communication-influences-the-justice-system-114145>.
- 41 Allen Mowery, *See How Lighting Position Affects the Mood and Perception of a Scene*, DIY PHOTOGRAPHY (June, 24, 2015), <https://perma.cc/82FN-W7U9>.
- 42 Rob Hardy, *Stunning Photos Reveal How Lighting Can Vastly Change Our Perception of the Human Face*, NO FILM SCH. (June 22, 2015), <https://perma.cc/S7Y9-N8VF>.
- 43 Jennifer Lee Poland, *Lights, Camera, Emotion!: An Examination on Film Lighting and Its Impact on Audiences’ Emotional Response*, ETD ARCHIVE 68 (2015).
- 44 *See id.* at 13. Some cognitive theorists suggests that these negative associations with shadow and darkness are tied up in evolutionary survival while psychological research notes that viewers generally have life experiences that allow them to “relate tone or mood to perceived light.” *Id.* Filmmakers tap into these experiences with the intention of evoking specific emotions. *Id.*
- 45 *See id.* For a more detailed description of lighting and its use in cinematography to drive narratives, see William Francis Nicholson, *Cinematography and Character Depiction*, 4 GLOB. MEDIA J. 196 (2010).

*Click on hyperlinks to visit websites and articles.*

- 46 *See id.* at 1-2.
- 47 Indeed, many articles advising new Zoom users on camera sets ups emphasized the importance of good lighting. *See, e.g.,* Lauren Ro, *The Best (Most Flattering) Lighting for Video Calls, According to Experts*, THE STRATEGIST (May 27, 2021), <https://nymag.com/strategist/article/best-lighting-for-video-calls-zoom.html>; Jack Wallen, *3 Tips for Lighting a Zoom Meeting on a Budget*, TECH REPUBLIC (Apr. 6, 2020), <https://www.techrepublic.com/article/3-tips-for-lighting-a-zoom-meeting-on-a-budget/>.
- 48 Erin J. Newman & Norbert Schwarz, *Good Sound, Good Research: How Audio Quality Influences Perceptions of the Research and the Researcher*, 40 SCI. COMM'N 246, 248 (2018).
- 49 *Id.* at 248.
- 50 *Id.* at 249.
- 51 *See id.* at 253-254.
- 52 *Id.* at 254.
- 53 *Id.* at 254-55 (citing Norbert Schwarz, *Feelings-as-Information Theory*, in P. Van Lange et al. (eds.), HANDBOOK OF THEORIES OF SOCIAL PSYCHOLOGY 289 (Thousand Oaks, CA: Sage)).
- 54 Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. CRIMINOLOGY 869, 879 (2010). Among other sources for this proposition, Diamond et al. citing United States v. Navarro, 169 F.3d 228, 239 (5th Cir. 1999) (“Sentencing a defendant by video conferencing creates the risk of a disconnect that can occur because the immediacy of a living person is lost. . . . [T]elevision is no substitute for direct personal contact. Video tape is still a picture, not a life.”).
- 55 United States v. Algere, 457 F. Supp. 2d 695, 700 (E.D. La. 2005).
- 56 David F. Ross et al., *The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse*, 18 L. HUM. BEHAV. 553, 556-58, 561-62 (1994).
- 57 *Id.* at 563. It is important to note that these results reached outside of the context of actual court proceedings and that simulated experience maybe different from an actual court hearing. *See id.* at 566.
- 58 John Storck & Lee Sproull, *Through a Glass Darkly: What Do People Learn in Videoconferences?*, 22 HUM COMM. RES. 197, 211 (1995)
- 59 *Id.* at 197.
- 60 Michael J. Mallen et al., *Online Versus Face-to-Face Conversations: An Examination of Relational and Discourse Variables*, 40 PSYCHOTHERAPY: THEORY, RES. PRAC. TRAINING 155, 157 (2003).
- 61 *Id.* at 158.
- 62 Bradley M. Okdie et al., *Getting to Know You: Face-to-Face Versus Online Interactions*, 27 COMPUTS. HUM. BEHAV. 153, 156 (2011).
- 63 Diamond, *supra* note 54, at 883.
- 64 *Id.* at 877.
- 65 *Id.* at 869.
- 66 *Id.*
- 67 *Id.* at 870. Prior to the start of this research, defense attorneys and bar leaders repeatedly expressed grave concerns that CCTP was a “grossly demeaning ‘cattle call.’” *Id.* at 885. A class action lawsuit was filed in 2006 alleging that CCTP violated due process rights and denied bail applicants the effective assistance of counsel. Locke Bowman who filed the lawsuit sought Diamond’s assistance in developing empirical data to support the class’s claims. Preliminary research results were reported in the *Chicago Tribune* and shared with all counsels in the litigation. Shortly after the research results were disclosed, the lawsuit was dismissed as moot when Cook County voluntarily returned to live bail hearings for all of its cases. *Id.* at 870.
- 68 *Id.* at 897.
- 69 *Id.*
- 70 *Id.* at 898.
- 71 *Id.* at 884.
- 72 *Id.* at 898.
- 73 *Id.* at 899.
- 74 *Id.* at 900.
- 75 *Id.*
- 76 Note, *Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1181 (2009).
- 77 *Id.*
- 78 447 U.S. 667, 697 n.3 (1980) (citations omitted).
- 79 Diamond, *supra* note 54, at 879 (quoting United States v. Navarro, 169 F.3d 228, 239 (5th Cir. 1999)).
- 80 LaRose v. Superintendent, 702 A.2d 326, 329 (N.H. 1997) (finding no evidence that the use of videoconferencing would adversely bias a judge’s opinion of the defendant and consequently rejecting a due process argument against its use); *see also* People v. Lindsey, 772 N.E.2d 1268 (2002).

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- 81 *Developments in the Law—Access to Courts*, *supra* note 76, at 1184.
- 82 Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. L. REV. 933, 934 (2015) (“Today, nearly one-third of all detainees attend their immigration hearings by video, rather than in the traditional in-person courtroom setting.”).
- 83 *See id.* *See also, e.g.*, Darcy Reddan, *Immigration Courts’ Video Evolution Stirs Due Process Fears*, LAW360 (Nov. 17, 2019), <https://www.law360.com/articles/1219854/immigration-courts-video-evolution-stirs-due-process-fears>.
- 84 Walsh, *supra* note 29, at 260 (citing David Shichor, *Three Strikes as a Public Policy: The Convergence of the New Penology and the McDonaldisation of Punishment*, 43 CRIME & DELINQ. 470-93 (1997)).
- 85 *Id.* at 271.
- 86 *Id.*
- 87 *Id.* at 271-72.
- 88 *Id.* at 261.
- 89 *Id.* at 269.
- 90 *Id.* at 269; Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 61 (2006).
- 91 Walsh, *supra* note 29, at 269.
- 92 *But see id.* at 269 (explaining the limits that flow from a videoconferencing setup with separate cameras and monitors).
- 93 *See id.* at 270.
- 94 *Id.* at 270 (citing Haas, *supra* note 90, at 67).
- 95 *Id.* The notion that viewers cognitively respond to screen images as though they are real and unconsciously equate media images with real life is underscored by the data collected by Walsh and Walsh (2008), which seems to suggest that teleconferenced hearings (using only audio) did not see the same disparity in grant rates that videoconferenced hearings did. *Id.* at 280.
- 96 Haas, *supra* note 90, at 67.
- 97 *Id.*
- 98 *See generally* Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH L. REV. 198 (2021).
- 99 *Id.* Part II: Remote Criminal Justice Before the Pandemic provides a discussion of relevant federal and state laws and details the advantages and disadvantages of video proceedings. Policymakers looking for a more thorough literature review than the one provided herein should examine this section of Turner’s publication.
- 100 Turner, *supra* note 98, at 212-16.
- 101 *Id.* at 216.
- 102 *Id.* at 216-22.
- 103 *Id.* at 222.
- 104 *Id.* at 235.
- 105 *Id.*
- 106 About 85% of prosecutors, defense attorneys, and judges asserted that online proceedings save *prosecutors* time and resources sometimes, often or always. *Id.* at 239. 89% of prosecutors and 85% of defense attorneys, but only 70% of judges, stated that online proceedings save time and resource savings for the *court*. *Id.* 93% of prosecutors and 87% of judges, but only 74% of defense attorneys, agreed that online proceedings save time and recourse for *defense attorneys*. *Id.* 92% of prosecutors and 82.5% of judges, but only 66% of defense attorneys, believed that online proceedings yielded similar savings for the *defendants*. *Id.*
- 107 *See id.* at 242. For instance, 73.4% of prosecutors and 70.3% of judges asserted that online proceedings help resolve cases more expeditiously sometimes, often, or always, as compared to 59.3% of defense attorneys. *Id.* at 238. 76.2% of prosecutors and 73.4% of judges agreed that virtual proceedings help end pretrial detention of defendants sometimes, often or always, but only 61.7% of defense attorneys said the same. *Id.*
- 108 *Id.* at 246.
- 109 *Id.* at 250.
- 110 *See id.* at 247-48. For instance, 92.6% of defense attorneys said that online proceedings sometimes, often or always make it difficult for the parties to present the case effectively, as compared with 64.3% of judges and 75.1% of prosecutors. *Id.* at 247, 252. And 97% of defense attorneys agreed that the online setting makes it difficult for the parties to assess, and where necessary, challenge witness accounts or credibility, compared with 68.6% of judges and 78.5% of prosecutors. *Id.* at 247, 251.
- 111 *Id.* at 247-48, 252.
- 112 *Id.* at 250.
- 113 *Id.* at 257-58.
- 114 *Id.*
- 115 *Id.* at 259.
- 116 *Id.* at 64.

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- 117 THE SAGE ENCYCLOPEDIA OF COMMUNICATION RESEARCH METHODS (Mike Allen ed., 2017).
- 118 NACDL has several classes of membership. Those provided the survey included members who are institutional public defenders, attorneys in private practice with contracts to provide public defense services, attorneys in private practice who handle court-appointed public defense cases, as well as attorneys in private practice who do not handle court-appointed cases.
- 119 Note that our survey asked respondents to identify the type of jurisdiction in which they primarily practice. As such, it is possible that—for example—attorneys who reported that they primarily practice in rural areas may also represent cases in suburban or rural areas. For the remainder of this report, however, we will refer to attorneys practicing predominantly in urban areas as “urban attorneys” or “attorneys practicing in urban areas;” attorneys practicing predominantly in suburban areas as “suburban attorneys” or “attorneys practicing in suburban areas;” and attorneys practicing predominantly in rural areas as “rural attorneys” or “attorneys practicing in rural areas.”
- 120 The gender composition and racial makeup of our final sample of survey respondents does noticeably differ from those of NACDL’s members as a whole. Just over 68% of NACDL’s members are male, compared to 56.1% in our sample. Moreover, of the 42.8% of NACDL members who reported their race, 35.5% are white, relative to 81.7% of our respondents. Given the large percentage of individuals who did not report their race to NACDL, however, the actual percentage of NACDL members who are white could be much higher—or lower—than 35.5%. For purposes of comparison, it is also important to note that the demographic data NACDL provided us is aggregated across all of NACDL’s membership classes (i.e., the demographic data includes membership classes that did not receive the survey, such as NACDL’s law student and emeritus membership classes).
- 121 NACDL does not provide statistics on their membership class by length of practice, so we are unable to confirm whether this high percentage of experienced attorneys is consistent with the overall demographics of NACDL’s membership.
- 122 Other than the disproportionately high percentage of attorneys from Florida, the geographic makeup of our survey respondents aligns fairly closely with that of the NACDL’s overall membership class.
- 123 *See* Table 10 in Appendix 1 for more details.
- 124 *See* Table 11 in Appendix 1 for more details.
- 125 *See* Table 12 in Appendix 1 for more details.
- 126 *See* Tables 13–14 in Appendix 1 for more details.
- 127 Per standard practice, we consider a result to be statistically significant if the p-value is less than 0.05, but we recognize that the large number of chi-square tests we conducted as part of this quantitative analysis potentially creates a multiple comparisons problem. Nonetheless, many of the p-values we report that satisfy this 0.05 threshold are incredibly small and would withstand a simple Bonferroni correction. Despite this multiple comparisons problem and other imperfections in our survey data and methodology, the p-values reported in this quantitative analysis still provide a useful indicator of how the switch to virtual proceedings has varied across important dimensions (like type of jurisdiction).
- 128 The p-values from chi-square tests comparing rural and urban areas and rural and suburban areas were 0.11 and 0.05, respectively.
- 129 The p-values from chi-square tests comparing rural and urban areas and rural and suburban areas were 0.20 and 0.08, respectively.
- 130 *See* Tables 15–16 in Appendix 1 for more details.
- 131 The p-value from chi-square tests comparing rural and urban areas and rural and suburban areas were 0.31 and 0.01, respectively.
- 132 The p-value from a chi-square test comparing attorneys with 0-5 and 6-10 years of experience was 0.01; the p-value from a chi-square test comparing attorneys with 0-5 and 11-20 years of experience was 0.002; and the p-value from a chi-square test comparing attorneys with 0-5 and 21-plus years of experience was 0.003.
- 133 The p-value from a chi-square test comparing attorneys with 0-5 and 6-10 years of experience was 0.16; the p-value from a chi-square test comparing attorneys with 0-5 and 11-20 years of experience was 0.12; and the p-value from a chi-square test comparing attorneys with 0-5 and 21-plus years of experience was 0.007.
- 134 Note that the responses to these survey questions—as well as the responses to all of the other survey questions—were based on what was occurring at the time the survey was taken. *See* Table 17 in Appendix 1 for more details on the hybrid use of videoconferencing technology in initial appearances, arraignments, and bail-related hearings.
- 135 *See* Table 18 in Appendix 1 for more details.
- 136 *See* Tables 19–33 in Appendix 1 for more details. Included in these tables are tables describing the prevalence of virtual settlement conferences (Table 22), virtual specialty court hearings (Table 31), and virtual juvenile hearings (Table 32), which were omitted from Figure 3 because of space limitations. Table 33 in Appendix 1 describes the use of video-conferencing technology for non-court proceedings.
- 137 The p-value from a chi-square test comparing the proportion of attorneys who always or usually conduct first appearances virtually across the two defendant types was effectively zero ( $5.09 \times 10^{-7}$ ).

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- 138 The p-value from a chi-square test comparing the proportion of attorneys who always or usually conduct bail-related hearings virtually across the two defendant types was also effectively zero ( $1.26 \times 10^{-8}$ ). We can only hypothesize as to what is causing this difference between in-custody and out-of-custody defendants (other than sampling error). It is certainly possible that our results are driven by differences between in-custody and out-of-custody defendants' access to technology. That is, perhaps jails are better equipped with the technology required to conduct these types of virtual proceedings than out-of-custody defendants. As discussed in more detail below, however, this hypothesis proves wanting, because Figure 5—which plots in-custody defendants' access to various forms of technology against out-of-custody defendants' access to the same technology—shows that, overall, out-of-custody defendants appear to have more consistent access to the Internet, a smartphone, a tablet or computer, and quiet and private spaces than in-custody defendants.
- 139 The p-value from a chi-square test comparing the proportion of attorneys who always or usually conduct evidentiary hearings virtually across the two defendant types was 0.49.
- 140 It is important to note that Figure 3 excludes the category “Unsure/NA,” which explains why the sum of the light blue bars (“always/usually”), the orange bars (“sometimes”), and the teal bars (“never”) does not always total 100%. For an unexplained reason—perhaps because COVID has caused most state-level trial operations to grind to a halt—the percentage of attorneys who answered “Unsure/NA” rose sharply for the questions that asked about jury pre-screening, jury *voir dire*, and trials (which included bench trials).
- 141 The p-value from a chi-square test comparing the proportion of attorneys who always or usually conduct change of plea hearings virtually across the two defendant types was 0.02; and the p-value from a chi-square test comparing the proportion of attorneys who always or usually conduct sentencing hearings virtually across the two defendant types was 0.03.
- 142 See Table 34 in Appendix 1 for more details. Due to the way in which the question was phrased, we are unfortunately unable to break out the responses to this question by defendant type (in-custody defendants and out-of-custody defendants).
- 143 See Tables 35–38 in Appendix 1 for more details.
- 144 The p-value from a chi-square test comparing the proportion of attorneys reporting that their out-of-custody defendants had consistent access to a private space between urban and suburban areas was 0.02. The p-values from all of the other comparisons exceeded 0.05.
- 145 The p-value from a chi-square test comparing access to the internet across the two defendant types was effectively zero ( $1.81 \times 10^{-5}$ ).
- 146 The p-value from a chi-square test comparing access to a tablet or computer across the two defendant types was 0.006; and the p-value from a chi-square comparing access to a private space across the two defendant types was effectively zero ( $1.08 \times 10^{-10}$ ).
- 147 The p-value from a chi-square test comparing the proportion of attorneys reporting that their in-custody defendants had consistent access to the internet between urban and rural areas was 0.03. The p-values from all of the other jurisdiction comparisons for internet access exceeded 0.05.
- 148 The p-value from a chi-square test comparing the proportion of attorneys reporting that their in-custody defendants had consistent access to a computer between urban and suburban areas was 0.004; the p-value from a chi-square test comparing the proportion of attorneys reporting that their in-custody defendants had consistent access to a computer between urban and rural areas was 0.03; the p-value from a chi-square test comparing the proportion of attorneys reporting that their in-custody defendants had consistent access to a private space between urban and suburban areas was 0.04; and the p-value from a chi-square test comparing the proportion of attorneys reporting that their in-custody defendants had consistent access to a private space between urban and rural areas was 0.05.
- 149 See Tables 39–40 in Appendix 1 for more details.
- 150 See Tables 41–42 in Appendix 1 for more details. We recognize that our respondents' answers about attorney-client communication likely capture both the effects of the shift to virtual proceedings *and* other effects of the medical and economic crises caused by the COVID pandemic. Despite this shortcoming in our survey data and methodology, we believe our respondents' answers are a rough proxy for how a widespread adaptation of virtual proceedings would impact attorney-client communication in a post-pandemic world, especially because the relevant survey question specifically asked attorneys whether *the shift to audio- and video-conferencing* has hurt attorney-client communication.
- 151 See Table 39 in Appendix 1 for more details. The p-value from a chi-square test comparing suburban and urban areas was 0.79; the p-value from a chi-square test comparing suburban and rural areas was 0.13; and the p-value from a chi-square test comparing urban and rural areas was 0.11.
- 152 See Table 40 in Appendix 1 for more details.
- 153 The p-value from a chi-square test comparing attorneys with 0-5 and 6-10 years of experience was 0.59; the p-value from a chi-square test comparing attorneys with 0-5 and 11-20 years of experience was 0.40; and the p-value from a chi-square test comparing attorneys with 0-5 and 21-plus years of experience was 0.45.
- 154 See Table 42 in Appendix 1 for more details.

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- 155 The p-value from a chi-square test comparing the proportion of attorneys with 0-5 and 6-10 years of experience reporting difficulties sharing discovery was 0.02; and the p-value from a chi-square test comparing the proportion of attorneys with 0-5 and 11-20 years of experience was 0.02. The p-values from all of the other comparisons exceeded 0.05.
- 156 The p-value from a chi-square test comparing the proportion of attorneys with 0-5 and 6-10 years of experience reporting difficulties maintaining contact with their clients was 0.04. The p-values from all of the other comparisons exceeded 0.05.
- 157 See Table 41 in Appendix 1 for more details.
- 158 The p-value from a chi-square test comparing the proportion of attorneys who reported difficulties maintaining confidentiality across the three main jurisdiction types was 0.27. The p-values from two-sample proportion tests comparing suburban and urban areas and suburban and rural areas are 0.18 and 0.10, respectively.
- 159 The p-values from chi-square tests comparing urban and suburban areas and urban and rural areas are 0.11 and 0.30, respectively.
- 160 See Tables 43–46 in Appendix 1 for more details.
- 161 See Tables 43–44 in Appendix 1 for more details.
- 162 See Table 43 in Appendix 1 for more details. The p-values from chi-square tests comparing urban and suburban areas and urban and rural areas are 0.001 and 0.27, respectively.
- 163 See Table 45 in Appendix 1 for more details. The p-values from chi-square tests comparing urban and suburban areas and urban and rural areas are 0.70 and 0.58, respectively.
- 164 We believe the combination of “rarely” and “sometimes” is the best proxy for whether an attorney has encountered difficulties in attorney-client communication. See Tables 44 and 46 in Appendix 1 for more details. The p-value from a chi-square test comparing the proportion of attorneys with 0-5 and 21-plus years of experience who can only rarely or sometimes reach their clients for general communication purposes is 0.03; and the p-value from a chi-square test comparing the proportion of attorneys with 0-5 and 21-plus years of experience who can only rarely or sometimes reach their clients for confidential communication purposes is also 0.03. The p-values from all of the other comparisons exceeded 0.05.

Again, we can only hypothesize what is driving the difference between the newest and most experienced attorneys (other than sampling error). Perhaps this difference is caused by the fact that attorneys with less experience are generally more likely to represent defendants with less serious charges and will thus experience more turnover in their caseload. That is, perhaps newer attorneys are generally more likely to have defendants who they represented *only* during the pandemic, as compared to more experienced attorneys. If this is the case, this could potentially explain older attorneys’ generally better ability to maintain better attorney-client contact during the pandemic, because there was an established attorney-client relationship before the pandemic hit. This theory is consistent with our data, in the sense that 25.9% of attorneys with 0-5 of experience primarily handled misdemeanor cases, compared to just 6.11% of attorneys with 21-plus years of experience.

- 165 See Tables 47–48 in Appendix 1 for more details.
- 166 The p-values from chi-square tests comparing urban and suburban areas and urban and rural areas are 0.31 and 0.16, respectively.
- 167 The p-value from a chi-square test comparing attorneys with 0-5 and 6-10 years of experience was 0.49; the p-value from a chi-square test comparing attorneys with 0-5 and 11-20 years of experience was 0.22; and the p-value from a chi-square test comparing attorneys with 0-5 and 21-plus years of experience was 0.56.
- 168 For example, one respondent wrote that virtual proceedings are “sterile, rushed, confusing, frustrating, and devoid of any humanity.” Other respondents explained that the shift to virtual proceedings “takes the humanity from the system and inserts a reality TV feel” and that “it’s much easier to hold someone in jail or sentence them when you don’t have to look them in the face.” Similar comments were made by many respondents in this free-response section of the survey.
- 169 One defense attorney explained that the shift to virtual proceedings means that “[w]e cannot get personal contact with prosecutors to get them to make decisions,” and another said that it “[d]egrades my ability to confer with the prosecutors and court staff before proceedings along with my ability to effectively communicate with the Judge.” These are but two of many similar comments made in this free-response portion of our survey.
- 170 Actual interviewing was completed by mid-December 2020; only transcription occurred during the remaining time.
- 171 See, e.g., ROBERT S. WEISS, *LEARNING FROM STRANGERS: THE ART AND METHOD OF QUALITATIVE INTERVIEW STUDIES*, 9-11 (1995) (describing the purposes of qualitative research as “developing detailed descriptions,” “integrating multiple perspectives,” “describing processes,” developing holistic interpretation,” “learning how events are interpreted,” “bridging intersubjectivities,” and “identifying variables and framing hypotheses for quantitative work.”).
- 172 For more information on the merits of mixed-methods research, see, for example, Allan Steckler et al., *Toward Integrating Qualitative and Quantitative Methods: An Introduction*, HEALTH EDUC. Q. (Spring 1992) (mixed-methods in health education); Omar Gelo et al., *Quantitative and Qualitative Research: Beyond the Debate*, 46 INTEGRATIVE PSYCH. AND BEHAV. SCI. 266 (2008) (psychology). Other studies have used a mixed-methods approach to developing a fuller understanding of crime policy and the legal system. See, for instance, JENNIFER CARLSON, *POLICING THE SECOND AMENDMENT: GUNS, LAW ENFORCEMENT AND THE POLITICS OF RACE*, (2020).

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- 173 Weiss, *supra* note 171, at 10-11 (“The descriptions of process and system that are likely to emerge from a qualitative interview study can inform quantitative interviewers about what matters in their intended topic.”).
- 174 The team also considered whether any initial contacts were available for initial outreach to facilitate access to the jurisdiction. However, given the size and connectedness of both the research institution (Stanford Law School) and NACDL (the study sponsor with whom the research team worked most directly), this consideration was not particularly restrictive.
- 175 At the time of jurisdiction selection, North Dakota had not yet experienced the dramatic upsurge in COVID cases that caused it to lead the nation in new cases for a time. *See, e.g.*, James MacPherson, *Coronavirus Surge is Filling North Dakota’s Hospitals*, AP NEWS (October 30, 2020), [HTTPS://APNEWS.COM/ARTICLE/VIRUS-OUTBREAK-HEALTH-NORTH-DAKOTA-6B69D7C8A9AB2A984F5A0951ECBF5EC9](https://apnews.com/article/virus-outbreak-health-north-dakota-6b69d7c8a9ab2a984f5a0951ecbf5ec9).
- 176 Most of the counties the team considered had only one prosecutor, and none had more than two. The same was true of judges: The largest county the team considered only had two. Likewise, defense attorneys were scarce even in the final jurisdiction selected.
- 177 *See* Chapter 13: Miami-Dade County, Chapter 14: Milwaukee County, and Chapter 15: Northeast Judicial District of North Dakota.
- 178 The interview guides are available in Appendix 3. The research team gratefully acknowledges Professor Matthew Clair of the Stanford University Sociology Department (Law Professor by Courtesy) for his assistance in drafting and refining the interview guides and in advising student-researchers about best practices for qualitative interviewing.
- 179 In one case, a participant contacted the research team by phone and proceeded with the interview immediately. The interviewer explained consent over the phone, obtained oral consent, and later mailed a hard copy of the IRB-approved consent form.
- 180 Under pandemic-modified IRB guidance, researchers were not required to obtain signed consent forms from respondents and could instead rely on oral consent.
- 181 No interviewees denied note-taking consent.
- 182 We asked demographic questions last to reduce the chance of order effects, wherein demographic questions at the outset prime respondents to answer subsequent questions in ways that they may not have otherwise done. *See* ROBERT M. LAWLESS ET AL., *EMPIRICAL METHODS IN LAW* 70-71 (2d ed. 2016) (discussing order and context effects). For examples, *see* Claude M. Steele & Joshua Aronson, *Contending with a Stereotype: African-American Intellectual Test Performance and Stereotype Threat*, 69 J. PERSONALITY SOC. PSYCH. 797 (1995); Steven J. Spencer et al., *Stereotype Threat and Women’s Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCH. 4 (1999).
- 183 One of the 55 interviews was only partially completed; it was to be completed in two sessions, but the research team was unable to contact the respondent for the second session. The research team also excluded two additional interviews from the 55 used in the report. In one Miami interview, the audio file became irreparably corrupted before the transcription occurred but after the interview; contemporaneous notes were too sparse to substitute for a transcript. A second interview, this time from Milwaukee, was intentionally excluded after the researchers became aware of the individual’s arrest and suspension from their official duties relating to accusations of illegal activity.
- 184 This shorthand is used only for stylistic ease, not to imply that the respondents represent all of North Dakota.
- 185 This decision was a practical one: A formatting bug with the transcripts rendered coding multiple actors in one interview prohibitively difficult and time consuming.
- 186 Milwaukee Interview 1 (Court Personnel 1) (total substitution of notes for transcript); ND Interview 4 (Court Personnel 4) (partial substitution). These two interviews do not include an additional glitch in Miami, which caused the total loss of an audio file with no robust notes to serve as a substitute. *See* note 15, *supra*.
- 187 Miami Interviews 1 (Court Administrator 1), 12 (Prosecutor 1); ND Interviews 8 (Defense Attorney 4), 21 (Prosecutor 6).
- 188 *See* Guest et al., *How Many Interviews Are Enough? An Experiment with Data Saturation and Variability*, 18 FIELD METHODS 59, 74 (2006) (noting that theoretical saturation occurred after twelve interviews for relatively homogenous populations).
- 189 *Id.* at 78
- 190 That is, the findings of this study do not focus on “court personnel in North Dakota” or “judges in Miami,” though at times tentatively notes unusual and marked variations between subgroups. One variation that arises a few times in the report involves the differences between prosecutors in Milwaukee and those in North Dakota. *See, e.g.*, Chapter 7: Access to Technology, footnote 9 and Chapter 8: Dehumanization, footnote 5 and accompanying text, *infra*. These trends could reflect something fundamentally different about these groups of prosecutors, or they may be spurious results of small samples or other methodological defects. The former cannot be eliminated with this number of interviews. The latter is also possible. Interviewer effects could have caused differences between the two groups: One member of the research team interviewed all of the North Dakota prosecutors and a separate team member interviewed all of the Milwaukee prosecutors. One of those interviewers might have asked more or different follow-up questions or biased the respondents in some way. On the first point, though, many of the prosecutors expressed the relevant views for Chapter 7: Access to Technology and Chapter 8: Dehumanization without additional prompting. And while the possibility of bias cannot be eliminated, there is no particular reason to believe that the two members of the interview team were biased in different ways, such that those biases elicited different responses. Inter-coder reliability issues could be another methodological error causing the perceived differences between the prosecutor groups, but that possibility is somewhat limited by inter-coder reliability exercises. *See* note , *infra*, and accompanying text.

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- 191 The small numbers were driven in large part by time constraints of the initial group of student-researchers, many of whom needed to finish their involvement with the research project after one academic quarter.
- 192 See Guest et al., *supra* note 188.
- 193 See, e.g., ND Interview 3 (Court Personnel 3).
- 194 These numbers include only the interviews that were included in the final study.
- 195 These numbers include only the interviews that were included in the final study.
- 196 See Milwaukee Interviews 8 (Defense Attorney 7), 9 (Defense Attorney 8).
- 197 Closed coding refers to identifying data using a pre-establishing coding scheme.
- 198 One team member (who had conducted some of the Miami interviews) coded all of the Miami transcripts and a subset of the North Dakota transcripts. A second team member (who had conducted interviews in North Dakota) coded the remaining North Dakota transcripts. The remaining two team members, including one who had conducted interviews in Milwaukee, coded the Milwaukee transcripts.
- 199 Admittedly, this intercoder reliability procedure was not the most robust. See, e.g., Kathryn M. Young, *Legal Ruralism and California Parole Hearings: Space, Place, and the Carceral Landscape*, 85 RURAL SOCIO. 938, 943 (2020) (intercoder reliability occurred after seven interviews) and John L. Campbell, et al., *Coding In-Depth Semistructured Interviews: Problems of Unitization and Intercoder Reliability and Agreement*, 42 SOCIO. METHODS & RSCH. 3, 294–320 (2013). However, time constraints restricted the amount of intercoder reliability testing possible in this study. As a result, intercoder reliability errors are a potential source of error for findings. However, those errors are likely to result in under-inclusivity rather than over-inclusivity, as the researchers would have dealt with over-inclusive coding in their subsequent analysis of reported themes. Potential intercoder reliability problems, then, are likely to result in an underestimation of the prevalence of themes, not an overestimation.
- 200 The final codebook is available in Appendix 4.
- 201 Most of the major themes were cross-jurisdictional and cross-actor. However, jurisdiction-specific themes are presented in Chapters 13: Miami-Dade County, Chapter 14: Milwaukee County, and Chapter 15: Northeast Judicial District of North Dakota.
- 202 The research team gratefully acknowledges Professor Kathryn Young of the University of Massachusetts, Amherst Department of Sociology for her guidance in post-coding qualitative analysis.
- 203 Where tables are included in the findings sections, their purpose is not to show statistically significant results. They instead appear to summarize, more roughly, frequency, similarity, and difference. Through the tables or numbers indicating overall frequency of a given response, we hope to assure readers that we have isolated meaningful trends, not cherry-picked responses.
- 204 Miami Interview 8 (Judge 1).
- 205 *Quick Facts, Miami-Dade County, Florida* U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/miamidadecountyflorida/POP060210> (last visited July 23, 2021)
- 206 Miami Interview 10 (Judge 3).
- 207 Miami Interview 7 (Defense Attorney 6).
- 208 Miami Interview 11 (Judge 4).
- 209 *Id.*
- 210 *Climate Miami – Florida*, U.S. CLIMATE DATA, [www.usclimatedata.com/climate/miami/florida/united-states/usfl0316](http://www.usclimatedata.com/climate/miami/florida/united-states/usfl0316) (last visited July 23, 2021).
- 211 Miami Interview 1 (Court Personnel 1).
- 212 Miami Interview 11 (Judge 4).
- 213 See, e.g., Miami Interview 2 (Defense Attorney 1) (“So ... Miami-Dade is large, both in population and in, just geographically.”).
- 214 Miami Interview 3 (Defense Attorney 2).
- 215 Miami Interview 9 (Judge 2).
- 216 Miami Interview 10 (Judge 3).
- 217 Miami Interview 11 (Judge 4).
- 218 *Trial Courts – Circuit*, FLORIDA COURTS, <https://www.flcourts.org/Florida-Courts/Trial-Courts-Circuit> (last visited July 23, 2021).
- 219 *Id.*
- 220 Miami Interview 8 (Judge 1).
- 221 Miami Interview 2 (Defense Attorney 1).
- 222 *About the Court – Criminal*, ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, <http://www.jud11.flcourts.org/About-the-Court/Court-Divisions/Criminal> (last visited July 23, 2021)
- 223 *Id.*
- 224 See Miami Interview 3 (Defense Attorney 2)
- 225 *Id.*
- 226 See Miami Interview 4 (Defense Attorney 3).
- 227 Miami Interview 6 (Defense Attorney 5).

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- 228 *State Attorney*, NORTH MIAMI FLORIDA, <https://www.northmiamifl.gov/636/State-Attorney> (last visited July 23, 2021).
- 229 *The Honorable Katherine Fernandez Rundle*, THE OFFICE OF STATE ATTORNEY KATHERINE FERNANDEZ RUNDLE, <https://miamisao.com/about/> (last visited July 23, 2021)
- 230 Miami Interview 4 (Defense Attorney 3).
- 231 Miami Interview 7 (Defense Attorney 6).
- 232 *See* 1-20-02 - Closure of courthouse - COVID-19 - March 17th-27th 2020.
- 233 *See, e.g., No. AOSC20-13 - In Re: COVID-19 Emergency Procedures in the Florida State Courts, No. AOSC20-17 - In re: COVID-19 Emergency Measures in the Florida State Courts.*
- 234 *See* 1-20-04 - Closure of courthouse proceedings - COVID-19.
- 235 *See* 1-20-05 - Emergency Procedures Establishing Remote Platform to Hear Court Proceedings in the Eleventh Judicial Circuit.
- 236 Miami Interview 7 (Defense Attorney 6).
- 237 *Id.*
- 238 *See, e.g.,* Miami Interview 3 (Defense Attorney 2).
- 239 *See* Miami Interview 12 (Prosecutor 1).
- 240 *Id.*
- 241 Miami Interview 6 (Defense Attorney 5).
- 242 *Id.*
- 243 *Id.*
- 244 Miami Interview 12 (Prosecutor 1).
- 245 *About Us*, MILWAUKEE COUNTY, WISCONSIN, <https://county.milwaukee.gov/EN/About-Us>, (last visited July 23, 2021).
- 246 *QuickFacts, Milwaukee County, Wisconsin*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/milwaukeecountywisconsin> (last visited July 23, 2021).
- 247 *About Us, supra* note 245.
- 248 Milwaukee Interview 7 (Defense Attorney 6).
- 249 *QuickFacts, supra* note 246.
- 250 *See, e.g.,* Milwaukee Interviews 2 (Defense Attorney 1), 3 (Defense Attorney 2) (“Milwaukee is for, I don’t know, five years running or something now, the most segregated city in the United States, we beat Detroit.”), 6 (Defense Attorney 5).
- 251 Milwaukee Interview 2 (Defense Attorney 1). *See also* Milwaukee Interview 6 (Defense Attorney 5) (“[A researcher named Marc Levine] just put out a pretty comprehensive paper, research study that’s called, like The State of Black Milwaukee. And it’s absolutely fucking horrible. Pardon my French. It is, you know, I threw out some statistics in a sentencing the other day. Oh, the incarceration rate for poor black youth, is something like 17.4%. Compared to 1.4% for white children of similar socioeconomic means. It is, white high school dropouts have a higher, have a lower unemployment rate than black high school graduates in Milwaukee.”).
- 252 Ashley Luthern & Andrew Mollica, *How We Measure Segregation and What The Numbers Actually Tell Us*, MILWAUKEE J. SENTINEL (Jan 7, 2020), <https://www.jsonline.com/story/news/special-reports/milwaukee-violence/2019/07/10/milwaukee-segregation-how-we-measure-and-define/1523075001/> (“[T]he city of Milwaukee is very segregated and it is certainly among the most segregated. But it’s actually the Milwaukee metropolitan region — which includes Milwaukee County suburbs and surrounding counties — that typically tops the rankings of most segregated areas. The city itself falls in the top 10.”); William H. Frey, *Black-White Segregation Edges Downward Since 2000, Census Shows*, BROOKINGS INST. (Dec. 17, 2018) <https://www.brookings.edu/blog/the-avenue/2018/12/17/black-white-segregation-edges-downward-since-2000-census-shows/> (listing Milwaukee as the most segregated metropolitan area between 2013-2017, with a segregation index of 79.8).
- 253 Milwaukee Interview 3 (Defense Attorney 2).
- 254 Milwaukee Interview 6 (Defense Attorney 5).
- 255 Milwaukee Interview 3 (Defense Attorney 2).
- 256 *Administrative Offices of the Supreme Court & Director of State Courts*, WISCONSIN COURT SYSTEM, <https://www.wicourts.gov/courts/offices/map.htm> (last visited July 23, 2021).
- 257 *See List of Court Officials*, MILWAUKEE COUNTY COURTS, <https://county.milwaukee.gov/EN/Courts/Chief-Judge/List-of-Court-Officials> (last visited July 23, 2021) (listing judges).
- 258 *Chief Judge Mary E. Triggiano*, MILWAUKEE COUNTY COURTS, <https://county.milwaukee.gov/EN/Courts/Chief-Judge> (last visited July 23, 2021).
- 259 Milwaukee Interview 1 (Court Personnel 1).
- 260 Milwaukee Interview 17 (Prosecutor 2).
- 261 Milwaukee Interview 18 (Prosecutor 3).
- 262 Milwaukee Interview 18 (Prosecutor 3). *See also* Milwaukee Interview 17 (Prosecutor 2).

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- 263 MILWAUKEE COMMUNITY JUSTICE COUNCIL, <https://www.milwaukee.gov/EN/MCJC> (last visited July 23, 2021).
- 264 Milwaukee Interview 12 (Judge 3).
- 265 *Id.*
- 266 *See In re The Matter of Remote Hearings During the Covid-19 Pandemic*, Wis. Sup. Ct. (Mar. 22, 2020) <https://www.wicourts.gov/news/docs/remotehearingsamended.pdf>.
- 267 *See In re The Matter of Jury Trials During the Covid-19 Pandemic*, Wis. Sup. Ct. (Mar. 22, 2020) <https://www.wicourts.gov/news/docs/jurytrials1.pdf>.
- 268 *See Chief Judge Directive 20-06 Regarding Emergency Temporary Measures*, Wis. (Mar. 22, 2020) <https://county.milwaukee.gov/files/county/courts/Chief-Judge/Directives/20-06CHIEFJUDGEDIRECTIVE-COURTSCOVIDOPERATIONALPLAN3-23-2020.pdf>.
- 269 Milwaukee Interview 21 (Prosecutor 6), Milwaukee Interview 14 (Judge 5).
- 270 WI Stat Section 971.04.
- 271 Milwaukee Interview 8 (Defense Attorney 7), 21 (Prosecutor 6).
- 272 *See Chief Judge Mary E. Triggiano, 1<sup>st</sup> Judicial District of Wisconsin COVID\_19 Courts Operating Policies, Procedures and Plan for Resuming Jury Trial, CJ-20-18 Effective July 20, 2020*, <https://county.milwaukee.gov/files/county/courts/Chief-Judge/Directives/Directive20-18Attachment-PlanforResumingJuryTrials.pdf> and Chief Judge Directive 20-18 (amended) Approving Phase II Resumption of Jury Trials, September 25, 2020 at: [https://www.wicourts.gov/news/docs/milwaukeereopen\\_jury.pdf](https://www.wicourts.gov/news/docs/milwaukeereopen_jury.pdf). See also Milwaukee Interview 21 (Prosecutor 6).
- 273 Mary E. Triggiano, *1<sup>st</sup> Judicial District of Wisconsin COVID-19 Courts Operating Policies, Procedures and Plan for Resuming In-Person Hearings CJ-20-16* (June 2, 2020), <https://county.milwaukee.gov/files/county/courts/Chief-Judge/Directives/RecoveryPlan.pdf>.
- 274 *Wisconsin Courts Turn to Livestreaming to Keep Courts Open, Accessible*, WISCONSIN COURT SYSTEM NEWS & MEDIA INFORMATION (Apr. 10, 2020), <https://www.wicourts.gov/news/view.jsp?id=1224>.
- 275 Milwaukee Interview 20 (Prosecutor 5).
- 276 Milwaukee Interview 17 (Prosecutor 2).
- 277 Milwaukee Interview 16 (Prosecutor 1).
- 278 Milwaukee Interview 20 (Prosecutor 5).
- 279 Milwaukee Interview 1 (Court Personnel 1).
- 280 Milwaukee Interview 1 (Court Personnel 1). One interviewee believed that a handful of private law firms donated a few dozen laptops as well. Milwaukee Interview 10 (Judge 1).
- 281 Milwaukee Interview 1 (Court Personnel 1), Milwaukee Interview 8 (Defense Attorney 7).
- 282 *See ND Interviews 5 (Defense Attorney 1) (“My district is about 12,000 square miles of land mass. If you were to look at North Dakota on the United States map, I have the entire northeast corner.”); 6 (Defense Attorney 2) (If “you were to take a look at the map, [you’d] be surprised how big this district is.”); 13 (Judge 3) (“And if you look at the state of North Dakota, we are the Northeast quarter of the state about, that’s about the size of our district.”).*
- 283 *QuickFacts Devils Lake City, North Dakota; Ramsey County, North Dakota; North Dakota*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/devilslakecitynorthdakota,ramseycountynorthdakota,ND/PST04521> (last visited July 23, 2021)
- 284 ND Interview 10 (Defense Attorney 6).
- 285 ND Interview 12 (Judge 2).
- 286 ND Interview 10 (Defense Attorney 6).
- 287 ND Interview 15 (Judge 5). The judge also described a home he visited on a reservation: “[T]he house was like, there was like, it was basically dirt floor. This is, this is 2009 United States and a dirt floor.”
- 288 ND Interview 19 (Prosecutor 4).
- 289 Municipal courts have jurisdiction over certain violations of city ordinances, but defendants with jury trial rights can petition to transfer to the district (state) courts. *See Municipal Courts*, STATE OF NORTH DAKOTA COURTS, <https://www.ndcourts.gov/other-courts/municipal-courts> (last visited July 23, 2021). Because municipal courts play a smaller role, their judges and staff were excluded from this study.
- 290 ND Interview 15 (Judge 5).
- 291 *See ND Interview 13 (Judge 3).*
- 292 *Attorney Services*, NORTH DAKOTA COMMISSION ON LEGAL COUNSEL FOR INDIGENTS, <https://www.indigents.nd.gov/attorney-services> (last visited July 23, 2021).
- 293 *Administrative Rule 52 - Contemporaneous Transmission By Reliable Electronic Means*, STATE OF NORTH DAKOTA COURTS (Mar. 1, 2021), <https://www.ndcourts.gov/legal-resources/rules/ndsuptadminr/52>. Courts were separately enabled to accept guilty pleas on the papers for any charges categorized as misdemeanors or lower.
- 294 *See, e.g., ND Interviews 6 (Defense Attorney 2) (“The only time I ever saw it used in state court was mental health cases where the IVN site was at that state hospital.”); 16 (“Usually we only used technology, before COVID, we only used it if somebody was in the Department of Corrections and wanted to appear electronically to handle another matter that they had here if they consented to it, then we would have that. . . . So if we had somebody at the state hospital committed for mental health treatment, they could consent to appear through that interactive video network, but very seldom was it used before COVID.”).*

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- 295 ND Interview 1 (Court Personnel 1).  
 296 *Id.*  
 297 The North Dakota Supreme Court issued an order encouraging (but not mandating) the use of electronic means and cancelling all jury trials at the outset of the pandemic. N.D. SUPREME COURT ORDER 25 (March 17, 2020). The latter provision expired on July 31, 2020. *Id.* (Am. June 9, 2020). Jury trials remained permitted in the Northeast District until November 20, when the presiding judge issued an order cancelling jury trials until January 10, 2021. N.D. Northeast Judicial District, Order Suspending Jury Trials (Nov. 20, 2020).  
 298 *See, e.g.*, ND Interview 12 (Judge 2) (describing a jury trial in “up in Pembina County”).  
 299 *See, e.g.*, ND Interview 9 (Defense Attorney 5) (“I can have [out-of-custody clients] come to my office. I can meet with them. There’s, with COVID, right, there, there’s this—North Dakota has been a little bit, lax is not the right word, so not the right word. But the governor and the, you know, the officials have kind of left business operations to the business owners. So being able to have somebody in our office and, you know, having a six feet rule or having a mask rule like that, is kind of up to us.”).  
 300 Miami Interview 3 (Defense Attorney 2).  
 301 Miami Interview 9 (Judge 2). *See also* ND Interview 13 (Judge 3) (noting that Zoom could be a “beautiful tool” in drug court).  
 302 ND Interview 12 (Judge 2).  
 303 Milwaukee Interview 18 (Prosecutor 3).  
 304 Miami Interview 1 (Court Personnel 1).  
 305 Miami Interview 1 (Court Personnel 1).  
 306 Miami Interview 12 (Prosecutor 1).  
 307 Milwaukee Interview 20 (Prosecutor 5).  
 308 *Id.*  
 309 Milwaukee Interview 21 (Prosecutor 6) (noting that “one of the things that we’ve done during the pandemic that I think has turned out to be beneficial to us, is we—all of our files are now review—we scan in police reports, we create electronic file. And so, prosecutors can now review cases remotely and work on cases remotely and discoveries kept in an electronic file and sent to the defense electronically.”).  
 310 Miami Interview 10 (Judge 3).  
 311 ND Interview 9 (Defense Attorney 5) (explaining that it would be difficult to have a defense attorney on hand all day to take new clients at in-person initial appearances but that it might be possible to do so over Zoom).  
 312 Milwaukee Interview 5 (Defense Attorney 4).  
 313 *Id.* (“And the problem is, from a financial standpoint. . . . If I’m sitting in court waiting for a case to be called, I’m billing the county. . . . Yeah, okay, it’s \$70 an hour. . . . If I have three statuses and I’m in my office and I could do my status is by Zoom, my three statuses from 8:30 to 8:45 and then say 9:30 to 9:50, then 10:15 to 10:20. That’s a grand total, maybe an hour billed tops, if even that. As opposed to, I would have had three hours, probably, billed waiting because I would have been bumped back in line yet on stuff. Three hours. So that’s a difference right there between 70 bucks and 210 bucks. So, 140 every morning, 140 every afternoon. That’s \$280 times five. That’s what, \$1400 per week times 50 weeks? That’s \$50,000-60,000 that I’m saving. That one attorney is saving just by doing it that way. Imagine. Now, multiply that by the number of attorneys who appear in a court on a daily basis. And that’s a significant amount of the budget that can be saved just by doing something as simple a staggering court times.”).  
 314 *See* Milwaukee Interview 19 (Prosecutor 4).  
 315 Milwaukee Interview 18 (Prosecutor 3).  
 316 Miami Interview 1 (Court Personnel 1).  
 317 Miami Interview 11 (Judge 4).  
 318 ND Interview 3 (Court Personnel 3). *But cf.* ND Interview 22 (Prosecutor 7) (implying that Zoom was cheaper in in-person hearings and would “stay put” because “court systems are governed by budgets and by convenience.”)  
 319 Milwaukee Interview 10 (Judge 1).  
 320 In fact, so many interviewees discussed travel and transit that those responses have been divided into two categories. Subsection B deals with travel for actors internal to the justice system, mostly attorneys, judges, and transportation officials charged with moving in-custody defendants. The next subsection deals with transportation and other costs for defendants and victims interacting with the justice system.  
 321 ND Interview 17 (Prosecutor 2).  
 322 ND Interview 9 (Defense Attorney 5).  
 323 Miami Interview 4 (Defense Attorney 3).  
 324 Miami Interview 6 (Defense Attorney 5) (discussing pre-COVID videoconferencing at the jail). *See also* Miami Interview 3 (Defense Attorney 2) (“Why do I need to waste all of that time driving?”).  
 325 Miami Interview 1 (Court Personnel 1).  
 326 Milwaukee Interview 2 (Defense Attorney 1).  
 327 Milwaukee Interview 6 (Defense Attorney 5).

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- 328 ND Interview 1 (Court Personnel 1).
- 329 ND Interview 5 (Defense Attorney 1).
- 330 ND Interview 12 (Judge 2).
- 331 ND Interview 4 (Court Personnel 4). *See also* ND Interviews 2 (Court Personnel 2) (“I believe [defense attorneys are] liking [virtual court] for the most part because they are indigent defense attorneys and, or even retained attorneys, if they’re retained because they’re usually from the bigger cities, then they don’t have to spend time on the road. So they do like that.”), 6 (Defense Attorney 2) (“There’s a lot of travel involving going to court. . . . I’d go to town for a five minute hearing, uh, punch out, uh, 20 minutes down, 20 minutes back. That’s a lost hour of wages. And then there’s the other courtroom an hour away. An hour and 15 minutes away. 45 minutes away this time.”), 10 (Defense Attorney 6) (“So off the top of my head, the general area that I would have to travel would be up to the Canadian border, like I said, that’s within an hour. And then I have had cases down in Fargo, which is about an hour and 45 minutes. So from that perspective, yes, I would be very happy to, to be able to do those, especially those pre-trial conferences and arraignments by Zoom.”), 13 (Judge 3) (“So around here, you got an indigent defense attorney. Your, you know, you’ve got two or three indigent defense attorneys that have to travel all over the place. It’s not like they come to a courthouse and do work, but they have travel or they have to appear by Zoom. And then they’ve got to meet with clients who don’t have driver’s licenses, who don’t have, you know, don’t have a means of being trans—being transported. You know, it’s, transportation is a big issue around here.”).
- 332 ND Interview 21 (Prosecutor 6).
- 333 *See* ND Interviews 18 (Prosecutor 3), 19 (Prosecutor 4).
- 334 *See* ND Interview 18 (Prosecutor 3).
- 335 ND Interview 8 (Defense Attorney 4).
- 336 ND Interview 18 (Prosecutor 3).
- 337 ND Interview 5 (Defense Attorney 1).
- 338 Milwaukee Interview 9 (Defense Attorney 8).
- 339 Miami Interview 3 (Defense Attorney 2).
- 340 ND Interview 5 (Defense Attorney 1).
- 341 Milwaukee Interview 9 (Defense Attorney 8).
- 342 Milwaukee Interview 10 (Judge 1).
- 343 Miami Interview 5 (Defense Attorney 4).
- 344 Miami Interview 4 (Defense Attorney 3) (explaining that parking is “expensive, like it’s five bucks an hour” and that a “parking space is anywhere from 100 - 120 bucks a month.”).
- 345 ND Interview 12 (Judge 2). *See also* ND Interview 14 (Judge 4) (“[W]hen we have a preliminary hearing and a lawyer’s a two hour drive away and they’re just gonna waive the preliminary hearing anyway, then let’s save the client two hours of driving time that they have to pay their attorney and allow them to appear by reliable [electronic] means.”).
- 346 Miami Interview 11 (Judge 4). *See also* Miami Interview 8 (Judge 1) (explaining that he “would have absolutely no problem accommodating” a defense attorney “for something that could be done very quickly” so that he could “attend to other work”); ND Interview 1 (Court Personnel 1) (explaining that the lack of travel time allows defense attorneys to provide “a better service”).
- 347 *Id.* (“[I]f there’s a conflict and the public defender’s office is not representing the defendant, we appoint private counsel, who’s paid by the taxpayers and typically they’re typically does bill by the hour. . . . But, but, so there would be a cost savings to the taxpayers by allowing continued remote proceedings.”). Beyond travel consequences for lawyers and judges (discussed previously) and in-custody defendants (discussing next), a few respondents noting other institutional witnesses—state-employed doctors and police officers—who saved travel time and money. *See, e.g.*, Milwaukee Interviews 10 (Judge 1) (“[Zoom] is a great tool for [competency doctors] to not have to travel three hours, round trip. Yeah, so I think that makes their work a lot more efficient, a lot more efficient.”), 17 (Prosecutor 2) (explaining that talking to officers by Zoom was likely “easier than coming into the DA’s office”).
- 348 Milwaukee Interviews 13 (Judge 4), 15 (Judge 6), 17 (Prosecutor 2); ND Interviews 1 (Court Personnel 1), 3 (Court Personnel 3), 4 (Court Personnel 4), 13 (Judge 3).
- 349 ND Interview 3 (Court Personnel 3).
- 350 ND Interview 4 (Court Personnel 4).
- 351 ND Interview 1 (Court Personnel 1).
- 352 ND Interview 1 (Court Personnel 1).
- 353 Milwaukee Interview 17 (Prosecutor 2).
- 354 ND Interview 13 (Judge 3).
- 355 Milwaukee Interview 15 (Judge 6). *See also* Milwaukee Interview 13 (Judge 4) (“I don’t like to disrupt their treatment by having them brought down and doing those proceedings in-person.”).
- 356 Miami Interview 11 (Judge 4).

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- 357 *See generally* Chapter 8: Dehumanization.
- 358 Miami Interview 6 (Defense Attorney 5).
- 359 Milwaukee Interview 10 (Judge 1). *See also, e.g.*, Milwaukee Interview 8 (Defense Attorney 7) (describing “transportation problems” and noting that, “in the middle of winter, it’s very difficult to get down to the courthouse”).
- 360 Miami Interview 10 (Judge 3). *See also id.* (describing people who “are poor” and “have difficulty accessing” court).
- 361 ND Interview 1 (Court Personnel 1).
- 362 *See, e.g.*, ND Interviews 9 (Defense Attorney 5) (noting that paying clients are generally going to have access to a car but that indigent clients do not have the same resources), 12 (Judge 2) (noting that “sometimes, the reasons people are not showing up are because of economics. . . . It’s because they literally don’t have a ride.”).
- 363 ND Interview 15 (Judge 5). *See also* ND Interview 12 (Judge 2) (noting appearance difficulties for the migrant population).
- 364 Milwaukee Interview 7 (Defense Attorney 6). *See also, e.g.*, Milwaukee Interview 5 (Defense Attorney 4) (“Like if you’re working 8 to 4 and you have to be in a 1:30 and they could call your case at 1:45 or they could call your case of 4:45, then saying I have to be off all afternoon, a lot of a lot of people have to choose between their job and their court case. And if they’re not in within this bench warrant and I have no choice but to tell them Sorry, dude, you gotta come into court.”).
- 365 Miami Interview 2 (Defense Attorney 1). *See also, e.g.*, Miami Interview 10 (Judge 3) (noting that people “have to come to court and spend money on parking and wait in line” and that court proceedings might lead to “people losing jobs.”); Milwaukee Interviews 5 (Defense Attorney 4) (“Like, if you’re working 8 to 4 and you have to be in a 1:30 and they could call your case at 1:45 or they could call your case of 4:45, then saying ‘I have to be off all afternoon,’ a lot of, a lot of people have to choose between their job and their court case.”), 13 (Judge 4) (“the 9 to 5 court schedule or 8:30 to 5 court schedule” is “not conducive” to working defendants who would “have to take a whole half-day off of work or a whole day off work to come down to the courthouse.”).
- 366 Miami Interview 2 (Defense Attorney 1).
- 367 Miami Interview 6 (Defense Attorney 5). *See also id.* (explaining “the judges have finally figured out through the process of having status hearings, that you don’t really, you know, we can invite our clients, and obviously they’re entitled to be present on Zoom or on the phone. But they’re not—they shouldn’t be required to do that because the decisions that you’re making are scheduling decisions.”).
- 368 Milwaukee Interview 2 (Defense Attorney 1).
- 369 Milwaukee Interview 5 (Defense Attorney 4).
- 370 Milwaukee Interview 8 (Defense Attorney 7).
- 371 Miami Interview 10 (Judge 3). *See also, e.g.*, ND Interview 12 (Judge 2) (explaining “if utilizing as electronic means gets, takes that added economic pressure off of somebody and they can make an appearance, then that’s a good thing.”).
- 372 Miami Interview 11 (Judge 4).
- 373 Miami Interview 12 (Prosecutor 1).
- 374 ND Interview 10 (Defense Attorney 6).
- 375 Miami Interview 9 (Judge 2). *See also id.* (“I think that in treatment courts, as I said, you could use them to make people’s lives easier, you know, so that they can work and go about their business and not have to drive and take public transportation. I mean, we have parents that are sometimes 23 hours traveling on buses.”).
- 376 Milwaukee Interview 12 (Prosecutor 2).
- 377 ND Interview 9 (Defense Attorney 5).
- 378 ND Interview 7 (Defense Attorney 3).
- 379 Milwaukee Interview 5 (Defense Attorney 4).
- 380 Miami Interview 2 (Defense Attorney 1). *See also id.* (“I found some advantages to it, being able to access my file right in front of me, um, is kind of a luxury.”)
- 381 *Id.*
- 382 ND Interview 20 (Prosecutor 5).
- 383 Miami Interview 2 (Defense Attorney 2)
- 384 Milwaukee Interview 19 (Prosecutor 4).
- 385 Milwaukee Interview 17 (Prosecutor 2).
- 386 For more on this subject, see Chapter 10: Attorney-Client Communication.
- 387 ND Interview 22 (Prosecutor 7). *See also* ND Interview 8 (Defense Attorney 4) (explaining that the process of communicating with his client: “You can do so by saying, ‘Judge, if the court will indulge me,’ lay the groundwork, kind of explain where you’re at, what needs clarification. Or tell the court, ‘Judge, we need to take a break here so I can talk with my client privately.’ . . . I can call the client on a different line. Or the courts have been willing in some instances to clear the courtroom. I ask my client, Are you the only one in the courtroom? He says yes and we talk. At the end, the client probably walks to the door, says ‘I’m done,’ and everyone comes back in.”).

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- 388 ND Interview 7 (Defense Attorney 3).
- 389 Miami Interview 3 (Defense Attorney 2).
- 390 Milwaukee Interview 5 (Defense Attorney 4)
- 391 Milwaukee Interview 13 (Judge 4).
- 392 Milwaukee Interview 14 (Judge 5).
- 393 Milwaukee Interview 17 (Prosecutor 2).
- 394 Miami Interview 8 (Judge 1).
- 395 Miami Interview 4 (Defense Attorney 3).
- 396 ND Interview 18 (Prosecutor 3).
- 397 Milwaukee Interview 19 (Prosecutor 4).
- 398 Milwaukee Interview 13 (Judge 4).
- 399 ND Interview 9 (Defense Attorney 5).
- 400 Miami Interview 3 (Defense Attorney 2). *See also supra* note 44 and accompanying text.
- 401 Some drawbacks are only briefly mentioned in this section and are discussed more fully elsewhere in the report.
- 402 This last theme arose frequently and is discussed at length in Chapter 7: Access to Technology, Chapter 8: Dehumanization, and Chapter 10: Attorney-Client Communication.
- 403 ND Interview 13 (Judge 3).
- 404 Milwaukee Interview 16 (Prosecutor 1).
- 405 Milwaukee Interview 3 (Defense Attorney 2). For a more detailed description of attorneys preparing clients for virtual court, see Chapter 10: Attorney-Client Communication.
- 406 This trend may not be restricted to North Dakota, however. The research team spoke with more court personnel in North Dakota—and especially more on-the-ground court personnel who handled the day-to-day duties of virtual court—than in other jurisdictions. Therefore, the lack of similar statements from court personnel in other districts might simply reflect the comparative lack of such interviewees.
- 407 ND Interview 3 (Court Personnel 3).
- 408 *Id.*
- 409 *Id.* (“We cry. [Laughs.] And I’m not kidding. We have. We have cried because it’s, it’s some days it’s, it’s a shit show. Sorry.”)
- 410 ND Interview 2 (Court Personnel 2).
- 411 ND Interview 4 (Court Personnel 4).
- 412 *See* Chapter 8: Dehumanization.
- 413 *See id.* In North Dakota, these ideas were also connected with the less serious and more informal nature of virtual proceedings. *See* Chapter 15: Northeast Judicial District of North Dakota.
- 414 *See* Chapter 10: Attorney-Client Communication.
- 415 *See* Miami Interviews 4 (Defense Attorney 3), 11 (Judge 4), 12 (Prosecutor 1); Milwaukee Interviews 3 (Defense Attorney 2), 4 (Defense Attorney 3), 8 (Defense Attorney 7), 13 (Judge 4), 16 (Prosecutor 1), 17 (Prosecutor 2), 19 (Prosecutor 4) 20 (Prosecutor 5); ND Interviews 5 (Defense Attorney 1), 9 (Defense Attorney 5).
- 416 Milwaukee Interview 16 (Prosecutor 1). *See also* Miami Interview 4 (Defense Attorney 3) (“A brand new prosecutor is suspicious of every defense attorney that gets within five feet of them. But you could start gauging somebody’s sincerity in person, and it becomes harder to do it remotely.”).
- 417 ND Interview 9 (Defense Attorney 5). *See also, e.g.,* Milwaukee Interview 17 (Prosecutor 2) (“You know, a lot of negotiations with defense attorneys happens on those in person dates because, you know, it’s easier obviously to communicate with someone that way.”).
- 418 Milwaukee Interview 19 (Prosecutor 4).
- 419 *See, e.g.,* Milwaukee Interview 17 (Prosecutor 2) (“[I]t’s much more difficult than doing it in person.”), 20 (Prosecutor 5) (“I think it is probably much more difficult to do meaningful plea negotiations.”).
- 420 Milwaukee Interview 13 (Judge 4). *See also* Miami Interview 3 (Defense Attorney 2) (“[N]ormally, if it had taken two months, when it should have taken three weeks, I’d be in the building. I’d go into the courtroom, I’d tap him on the shoulder and pull them into the hallway when they’re not and say, ‘Look, we got a resolve this’ but we can’t do that now because we’re on Zoom.”).
- 421 *See* Milwaukee Interviews 3 (Defense Attorney 2) (“I have become the wordsmith. Seriously, you should see some of these emails, they’re goddamn novels. . . . [I]nstead of having that casual kind of interaction, I have to send [DAs] emails. And I’ve had DAs take months to respond.”), 4 (Defense Attorney 3) (“[I]t’s easier for them to deny us something that we’re asking for via email than it was face to face.”), 8 (Defense Attorney 7) (“So people are trying to communicate by email, and, and I think that email is notoriously bad for complicated discussions with human beings. It’s just too easy right to not understand what is being said to you.”), 16 (Prosecutor 1) (“[T]one is lost a lot of times over email and so maybe you interpret it one way, where if you’d been sitting in person and talking to each other, it would have been handled a different way.”), 19 (Prosecutor 4), 20 (Prosecutor 5) (“It has transformed from an in-person conversation, to much more email. However, email is not as organic as an in-person conversation.”).

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- 422 Milwaukee Interview 4 (Defense Attorney 3). *See also* ND Interview 5 (Defense Attorney 1) (“I find that I get more success when I am in the room with [prosecutors], working face to face saying, ‘hey, here’s the situation, here’s this client’s background, would you be willing to consider this. . . .’”); cf. Miami Interview 4 (Defense Attorney 3) (noting that she is “just another face on a screen” to a new prosecutor with “all the power over my client”); Milwaukee Interview 3 (Defense Attorney 2) (“I have re-sent the same DA the same begging email. Pretty, pretty please. He’s such a nice kid. No record, no record. Please consider blah, blah, blah. . . . [A]nd then re-re-sent it to get a one line response. Oh, thanks for that. ‘This is my offer. Uh, no, I can’t do anything else.’”).
- 423 Miami Interview 7 (Defense Attorney 6) (“I do think that there is something to be said to be able to go into chambers and have coffee with the judge and have coffee with the judicial assistant, with the bailiff and get to know them. And you know, what their life is like, Who is their significant other? Do they have kids? Do they have pets? And all of that really helps build and foster relationships that help us in the long run, right? Because if I relationship with the judicial assistant, then when I email her at 8 in the morning, and say “I am so sorry but is there any way to get a clerk to bring down this file like the person just showed up?” Whatever. It’s a thing we can do for the benefit of our clients. And right now, I have two judges who I have yet to meet in person. I have yet to meet any of their court staff in person.”).
- 424 Milwaukee Interview 2 (Defense Attorney 1).
- 425 ND Interview 21 (Prosecutor 6).
- 426 Miami Interview 7 (Defense Attorney 6).
- 427 Once again, many of these same themes arise in other sections, where they are discussed extensively. *See* Chapter 7: Access to Technology, Chapter 8: Dehumanization, and Chapter 10: Attorney-Client Communication.
- 428 Milwaukee Interview 4 (Defense Attorney 3). *See also id.* (“I think we’re kidding ourselves if we think that our clients are understanding everything that’s going on, what we’re doing things over Zoom.”)
- 429 ND Interview 19 (Prosecutor 4). For more on defendants’ comprehension of Zoom criminal proceedings (or lack thereof), see Chapter 7: Access to Technology.
- 430 ND Interview 20 (Prosecutor 5).
- 431 Miami Interview 5 (Defense Attorney 4).
- 432 Relatedly, a number of respondents expressed constitutional concerns with in-person hearings. *See* Chapter 11: Constitutional Issues.
- 433 Milwaukee Interview 8 (Defense Attorney 7).
- 434 ND Interview 5 (Defense Attorney 1).
- 435 ND Interview 15 (Defense Attorney 5).
- 436 ND Interview 18 (Prosecutor 3).
- 437 These comments focus on access to technology for out-of-custody defendants. The provision of technology to in-custody defendants by prisons and jails is a separate issue and is not within the scope of this section. Interviewee comments addressing access to technology for incarcerated defendants appeared to vary with idiosyncratic features of local penal institutions (unlike out-of-custody access concerns, which were connected to broader socioeconomic and generational issues).
- 438 Milwaukee Interview 2 (Defense Attorney 1). *See also, e.g.*, Milwaukee Interview 14 (Judge 5) (noting that “a lot of the out-of-custody, those individuals appeared by Zoom” and that individuals without smartphones or data plans “could call in as well.”); ND Interviews 6 (Defense Attorney 2) (denying access issues with Zoom because “they do allow you to still call in”), 8 (Defense Attorney 4) (denying access issues and noting that “the few that don’t show up were not going to call in anyway.”). Interestingly, the majority of interviewees who made remarks in this category were defense attorneys. But those defense attorneys tended to acknowledge that, though they viewed access to technology as a minimal problem overall, some small segment of defendants did experience issues.
- 439 ND Interview 22 (Prosecutor 7).
- 440 Miami Interview 7 (Defense Attorney 6). *See also* Miami Interview 5 (Defense Attorney 4) (“The fact is that everybody now has a cell phone that you can get on to Zoom with.”).
- 441 Miami Interview 2 (Defense Attorney 3).
- 442 Some court administrators also expressed concerns about access to technology. *See* ND Interviews 1 (Court Personnel 1), 2 (Court Personnel 2), 4 (Court Personnel 4). But the team conducted many fewer interviews with court employees than other actors (six, as compared to 14 to 20), and those interviews were concentrated in North Dakota (where four such interviews took place, as compared to one in each of the other jurisdictions). Thus, the access-to-technology concerns expressed by court administrators provide relatively little data for overall trends. *See also* Chapter 4: Qualitative Analysis – Methods and Data (discussing the small-numbers problem with court personnel).
- 443 Miami Interviews 8 (Judge 1), 9 (Judge 2), 10 (Judge 3), 11 (Judge 4); Milwaukee Interviews 10 (Judge 1), 11 (Judge 2), 12 (Judge 3), 13 (Judge 4), 14 (Judge 5); ND Interviews 11 (Judge 1), 12 (Judge 2), 14 (Judge 4), 15 (Judge 5).
- 444 Miami Interviews 2 (Defense Attorney 1), 3 (Defense Attorney 2), 4 (Defense Attorney 3), 6 (Defense Attorney 5), 7 (Defense Attorney 6); Milwaukee Interviews 2 (Defense Attorney 1), 3 (Defense Attorney 2), 5 (Defense Attorney 4), 6 (Defense Attorney 5), 8 (Defense Attorney 7); ND Interviews 5 (Defense Attorney 1), 7 (Defense Attorney 3) 8 (Defense Attorney 4), 9 (Defense Attorney 5), 10 (Defense Attorney 6).

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- 445 Milwaukee Interview 16 (Prosecutor 1); ND Interviews 16 (Prosecutor 1), 17 (Prosecutor 2), 19 (Prosecutor 4), 20 (Prosecutor 5), 21 (Prosecutor 6). Note that the access-to-technology issues raised by prosecutors were disproportionately concentrated in North Dakota. This result is unsurprising with respect to Miami; as explained in Chapter 4: Qualitative Analysis – Methods and Data, the Miami research team was only able to interview one prosecutor. It is the apparent gulf between prosecutors in Milwaukee (17% reporting access-to-technology issues) and those in North Dakota (71%) that is surprising. *See* Chapter 4: Qualitative Analysis – Methods and Data for potential explanations.
- 446 This would be an obvious potential explanation with respect to the differences between defense attorneys and prosecutors, as the former communicate more closely with defendants and therefore would see access difficulties more directly. It is less clear how this explanation maps onto judges.
- 447 The responses in this catch-all category focused on defendants' inability to access either some form of camera (though without necessarily connecting that lack of access to a lack of a computer or phone) or to access, download, or use the appropriate app. *See, e.g.*, Miami Interview 10 (Judge 3) ("I think sometimes we have defendants appear . . . and then sometimes they don't—they don't have the ability to get on video."); Milwaukee Interview 3 (Defense Attorney 2) ("[T]hat's been a problem for a lot of my clients, not knowing how to use, how to download an app), Milwaukee Interview 13 (Judge 4) ("So oftentimes people are sharing phones with family. . . . So they'll call my clerk and say something like, well, I don't have permission to download this app on this phone. . . . [Or] I have a flip phone, I can't, you know, download this app on my phone."); ND Interview 19 (Prosecutor 4) ("Well, with Zoom, obviously, that implies, I mean, that you got a camera and your face is, your shiny, bright, shining smiling face is there on camera in the courtroom. . . . Sometimes [defendants would] like to Zoom in, and maybe they don't know how to do it. I don't, I haven't heard that excuse yet, or they just don't have the resources available, a camera, to Zoom in.").
- 448 Some interviewees expressed more than one kind of concern, even in the span of a single comment; thus, the numbers in the table do not sum up to the number of respondents per jurisdiction with access-to-technology concerns.
- 449 This finding is analyzed more thoroughly in the North Dakota section of this report. *See generally* Chapter 15: Northeast Judicial District of North Dakota.
- 450 *But see, e.g.*, Milwaukee Interview 8 (Defense Attorney 7) ("[N]eedless to say, a lot of clients don't have phones, and that is one of the challenges.").
- 451 Milwaukee Interview 12 (Judge 3).
- 452 Milwaukee Interview 14 (Judge 5). *See also id.* ("What I'm learning too, is for many of us, just having a phone, but some people, that's a big deal, especially that's on all the time.")
- 453 Miami Interview 6 (Defense Attorney 5).
- 454 ND Interview 11 (Judge 1). *See also* Miami Interview 9 (Judge 2) (describing people who "didn't have computers"); Milwaukee Interview 12 (Judge 3) ("[T]here are groups of people who don't have . . . computers.").
- 455 Milwaukee Interview 2 (Defense Attorney 1).
- 456 ND Interview 21 (Prosecutor 6).
- 457 Miami Interview 6 (Defense Attorney 5).
- 458 Miami Interview 4 (Defense Attorney 3) (noting "not everybody has a computer where they could see somebody's face"); Milwaukee Interview 13 (Judge 4) (describing a defendant with "a laptop [that] doesn't have a camera on it" asking "What should I do?").
- 459 ND Interview 12 (Judge 2).
- 460 ND Interview 1 (Court Personnel 1). *See also* ND Interview 11 (Judge 1) ("I think there was a least a substantial enough figure I know with our, with the schools and every, I mean, everything went remote. And so I know that schools had to provide a number of computers.").
- 461 While not explicitly discussed by most respondents, these Wi-Fi problems might be exacerbated by the pandemic. A complete lack of access to Wi-Fi might, for example, be partially alleviated if public libraries and other public Wi-Fi spaces were open for business, or if defendants could visit other households with Wi-Fi. These potential solutions, of course, beg the questions of whether the public spaces and other individuals have sufficiently high-quality Wi-Fi, whether defendants can physically access these spaces (e.g., by public transport), and whether these spaces are private and quiet enough for sensitive court hearings.
- 462 Milwaukee Interview 13 (Judge 4).
- 463 ND Interview 5 (Defense Attorney 1).
- 464 Milwaukee Interview 16 (Prosecutor 1) ("[S]ometimes our victims or witnesses don't have the means to . . . have Wi-Fi. . . . So if they're home, and they don't have internet in their house, then we can't do any video conferencing with them."); ND Interview 16 (Prosecutor 1) ("People . . . don't have the internet at their house.") ("[T]hey don't have Wi-Fi. They don't have somewhere where they can use free Wi-Fi to access a court hearing.").
- 465 ND Interview 21 (Prosecutor 6).
- 466 Milwaukee Interview 6 (Defense Attorney 5).
- 467 Milwaukee Interview 5 (Defense Attorney 4). *See also, e.g.*, Miami Interview 9 (Judge 2) (describing hearings where "the connection was not stable connection.").

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- 468 Miami Interview 6 (Defense Attorney 5).
- 469 Miami Interview 7 (Defense Attorney 6).
- 470 ND Interview 11 (Judge 1). *See also* ND Interview 14 (Judge 4) (“I think so many people are using Zoom that the bandwidth is starting to get narrowed down. Things aren’t always smoothly going on.”).
- 471 Milwaukee Interview 10 (Judge 1).
- 472 Miami Interview 6 (Defense Attorney 5).
- 473 Milwaukee Interview 6 (Defense Attorney 5). *See also* Milwaukee Interview 8 (Defense Attorney 7) (“We had clients who were sitting in cars” and “one client was sitting in their bathroom because they just couldn’t find a place that was warm enough to be, you know, have this Zoom conference and it was private enough.”).
- 474 ND Interview 8 (Defense Attorney 4).
- 475 Miami Interviews 3 (Defense Attorney 2), 4 (Defense Attorney 3), 7 (Defense Attorney 6); Milwaukee Interviews 3 (Defense Attorney 2), 13 (Judge 4); ND Interviews 7 (Defense Attorney 3), 16 (Prosecutor 1).
- 476 Miami Interviews 2 (Defense Attorney 1), 3 (Defense Attorney 2), 4 (Defense Attorney 3), 6 (Defense Attorney 5), 9 (Judge 2), 10 (Judge 3); Milwaukee Interviews 2 (Defense Attorney 1), 5 (Defense Attorney 4), 6 (Defense Attorney 5), 8 (Defense Attorney 7), 14 (Judge 5), 16 (Prosecutor 1); ND Interviews 5 (Defense Attorney 1), 7 (Defense Attorney 3), 9 (Defense Attorney 5), 11 (Judge 1), 13 (Judge 3), 16 (Prosecutor 1), 17 (Prosecutor 2), 19 (Prosecutor 4), 21 (Prosecutor 6).
- 477 The different perceptions among different groups implicate the same questions discussed at the beginning of this section: Why are the groups’ perceptions different, and whose is most accurate?
- 478 Once again, this is driven by the responses of North Dakota prosecutors. *See* note 9, *supra*.
- 479 *See, e.g.*, ND Interview 7 (Defense Attorney 3) (“I think most of the younger, uh, defendants are fine when it comes to technology. Most are, at times, better than I am at it.”).
- 480 Milwaukee Interview 13 (Judge 4).
- 481 ND Interview 16 (Prosecutor 1).
- 482 Miami Interview 7 (Defense Attorney 6).
- 483 Milwaukee Interview 3 (Defense Attorney 2).
- 484 Miami Interview 3 (Defense Attorney 2). *See also* ND Interview 7 (Defense Attorney 3) (“I think most of the younger, uh, defendants are fine when it comes to technology. Most are, at times, better than I am at it. But, it’s, it’s probably more of a financial thing. A lot of these people are literally living by stealing or peddling meth.”).
- 485 Miami Interview 4 (Defense Attorney 3).
- 486 Milwaukee Interview 14 (Judge 5) (“But a lot of times, with public defenders, they, a lot of those individuals just don’t have the resources.”); ND Interview 11 (Judge 1) (“There’s a number of families or individuals that don’t have the resources, don’t have computers, don’t have unlimited minutes (*sic*) pay for their minutes.”). *See also* ND Interview 19 (Prosecutor 4) (“But we’re doing Zoom now, so but then you still have defendants who aren’t going to be able to have resources to Zoom in, that type of thing. Maybe they can do it on their phone.”).
- 487 Miami Interviews 9 (Judge 2) (“You know, a lot of people that just can’t afford internet access or didn’t have computers or were on their phone but couldn’t get Zoom to work on their phone.”), 10 (Judge 3) (“[H]ere’s the thing, too, like, not everybody can afford, or not everybody has the technology.”); Milwaukee Interview 16 (Prosecutor 1) (“[S]ometimes our victims or witnesses don’t have the means to have a smartphone or have Wi-Fi. The technology issue that is the problem for people because they just don’t, it’s not a priority, it’s not their budget, it’s nothing that— it’s just things they can’t afford.”).
- 488 Milwaukee Interview 2 (Defense Attorney 1).
- 489 Milwaukee Interview 5 (Defense Attorney 4).
- 490 Milwaukee Interview 6 (Defense Attorney 5).
- 491 Miami Interview 6 (Defense Attorney 5). *See also* Miami Interview 4 (Defense Attorney 4) (“We represent a lot of homeless people. You don’t have a house, much less have access to technology.”).
- 492 ND Interview 16 (Prosecutor 1).
- 493 ND Interview 15 (Judge 5).
- 494 Milwaukee Interview 8 (Defense Attorney 7) (discussing economic barriers to accessing video links and using lots of phone minutes for court).
- 495 *See* Miami Interview 2 (Defense Attorney 1); ND Interview 8 (Defense Attorney 4). *See also* Chapter 11: Constitutional Issues.
- 496 ND Interview 8 (Defense Attorney 4).
- 497 Milwaukee Interview 12 (Judge 3).
- 498 ND Interview 1 (Court Personnel 1).
- 499 Miami Interview 1 (Court Personnel 1).
- 500 ND Interview 12 (Judge 2).

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- 501 Milwaukee Interview 10 (Judge 1) (discussing both criminal and civil cases). *See also* ND Interview 12 (Judge 2) (“[Pre-COVID], the reasons people are not showing up are because of economics. And it’s not just, uh, it’s not just because they’re thumbing their nose at the court. It’s because they literally don’t have a ride. . . . So that if utilizing as electronic means gets, takes that added economic pressure off of somebody and they can make an appearance, then that’s a good thing.”).
- 502 Milwaukee Interview 21 (Prosecutor 6).
- 503 ND Interview 9 (Defense Attorney 5).
- 504 One respondent perceived decreased attendance but associated this decrease with COVID-specific factors—in particular, reduced arrests and “watered down” pretrial release conditions—rather than intrinsic aspects of remote proceedings. *See* ND Interview 20 (Prosecutor 5). This respondent is not included in the count for this category.
- 505 Milwaukee Interview 13 (Judge 4).
- 506 ND Interview 5 (Defense Attorney 1). *See also* Miami Interview 4 (Defense Attorney 3) (noting that “you have a lot of civilians that are homeless people . . . who maybe would show up if we were in person, but have no way of showing up, you know, virtually or remotely.”).
- 507 ND Interview 16 (Prosecutor 1).
- 508 ND Interview 17 (Prosecutor 2). *See also id.* (“And so whether it’s the, again, don’t have the ability, or simply are choosing not to, I can’t differentiate between the two. I know cell phone service out here is spotty. And we’ve had people at hearings saying, ‘Hey, you know, I’m on the roof of my dad’s camper on the top of this hill. It’s the best I can do. Can’t really hear you guys.’”).
- 509 Milwaukee Interview 5 (Defense Attorney 4). *But see id.* (explaining strong resistance from other judges against the issuance of such warrants); Milwaukee Interview 8 (Defense Attorney 7) (“The judges have been okay with this. They haven’t been issuing warrants immediately with somebody, you know, they’re willing to accept that maybe there’s a bona fide reason why the person couldn’t get on the call.”).
- 510 ND Interview 15 (Judge 5). *See also id.* (“The other thing is that I’m also sensitive to the fact that the technology for computer is not the best out in rural North Dakota. And some of these people are not, you know, trained as far as knowing how to use computers. So, just like there’s a, I’m concerned about the access to justice.”); *Cf.* Miami Interview 4 (Defense Attorney 3) (noting that “you have a lot of civilians that are homeless people . . . who maybe would show up if we were in person, but have no way of showing up, you know, virtually or remotely.”).
- 511 Miami Interview 8 (Judge 1) (noting that, in instances when “we do need to take sworn testimony,” which “does require zoom video capabilities” the court is “not going to prejudice anybody in any way whatsoever because they don’t have the means to appear by video. We’ll just give them those options and work with them to make sure that if we need video capabilities, we’ll reset the case and let them know how that they can appear in the future.”); ND Interview 4 (Court Personnel 4) (discussing delayed appearances when defendants are low on minutes and noting that “we do suggest, you know, well, can use someone else’s phone? Can you get to a Wi-Fi area? If not, okay, thanks for contacting us.”).
- 512 ND Interview 2 (Court Personnel 2). The same interviewee also noted the differences between observed and official attendance statistics: “And the, we, there was something from the Supreme Court or whatever that was really praising how it was working, that they had 100% of people calling in, and that was not true. It might have been true for one area or something. But when you have 40 to 50 people calling in, no, that was not true.”
- 513 Milwaukee Interview 8 (Defense Attorney 7). At one point, this respondent recalled defendants “cutting off because they didn’t have any idea how long it was going to take. And, you know, they didn’t have the, you know, literally the bandwidth, right, to, you know, to stay involved.” At another point, he explained that the lack of transportation and childcare issues associated with “zoom appearances” got “some people into court and kept their cases moving along that maybe in the past we would have lost some of those people.”
- 514 ND Interview 22 (Prosecutor 7).
- 515 ND Interview 1 (Court Personnel 1).
- 516 Milwaukee Interview 13 (Judge 4).
- 517 *See, e.g.,* Milwaukee Interviews 11 (Judge 2) (“[I]f [the defendants] start showing any confusion, then I ask him to make sure they understand or we go over it again.”), 14 (Judge 5) (“[Y]ou can kind of see when the defendant is just, either they don’t understand or they have more questions or they are not comfortable. You know, you can kind of see that something is just wrong. So at that point, I will kind of veer from my, from the script and make sure that they understand what’s going on or if they need additional questions, they need additional time.”).
- 518 *See* Milwaukee Interview 4 (Defense Attorney 3) (“You know, when clients were in person, it was easy to show them, look, this is everyone who’s in the courthouse. There are about 30 different clients who are waiting for their cases to be called. . . . And they understand more when they have to wait. On Zoom, they just see a blank screen and they don’t know why they’re waiting.”).
- 519 *See* Miami Interview 4 (Defense Attorney 3) (“[A]fter court, you would kind of get it, it would give the clients insight like, ‘Wow, that judge is a really tough judge’ . . . like those kind of things they don’t get to see anymore.”).
- 520 ND Interview 19 (Prosecutor 4).
- 521 ND Interview 5 (Defense Attorney 1).

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- 522 Milwaukee Interview 4 (Defense Attorney 3).
- 523 For the purposes of this section, virtual communications encompass everything from negotiations between parties to attorney-client conversations to full-blown court hearings.
- 524 The difficulty was caused in part because of the intangible nature of the concepts under discussion and in part because they overlapped substantially with witness credibility, attorney-client communication, and (in North Dakota) seriousness and formality codes.
- 525 The following analysis denotes instances in which one jurisdiction dominates a given sub-theme.
- 526 It also arose, though more subtly, in two interviews with court personnel. *See* ND Interviews 1 (Court Personnel 1), 4 (Court Personnel 4). Court personnel are excluded from the table for the reasons mentioned in Chapter 7: Access to Technology. *See* note XX, *supra*.
- 527 *See* note XX, Chapter 7: Access to Technology, *supra*.
- 528 *See* Chapter 4: Qualitative Analysis – Methods and Data.
- 529 Miami Interview 9 (Judge 2); Milwaukee Interview 2 (Defense Attorney 1).
- 530 *See, e.g.*, Miami Interview 10 (Judge 3); ND Interview 12 (Judge 2).
- 531 Miami Interview 9 (Judge 2). *See also id.* (“It was really an eye opener to be able to go into people’s homes and see them with their children. Um, it really, really humanized them, you know, because you see them sitting on a couch in their homes, their children are sitting around them, you know? You see the apartment. I thought it was tremendously useful for the entire team to see that.”). Another judge, in Milwaukee, noted that defendants were more talkative virtually, though he did not explicitly connect that to humanization. *See* Milwaukee Interview 10 (Judge 1) (“I think the defendants are actually a little chattier on Zoom. You know, you give them a chance to allocate. A lot of times in court, . . . a number of people just say no, I don’t have anything to say. I think on Zoom the percentage of people that actually have something to say, and when they do say it say more, has actually, has gone up under Zoom.”).
- 532 Milwaukee Interview 2 (Defense Attorney 1). For fuller context, the attorney continues: “But this was a practice that was widespread in Milwaukee. . . . You know, like bringing people into, and then paraded in hallways, in front of their families, and in the public, it’s just so incredibly dehumanizing. And it’s just not, and barbaric too. . . . It’s just, it’s just inhuman. And it’s in my opinion, it’s not right, and it violates everything that I grew up. About the respect and the dignity of human beings. . . . So I, that is, to the one thing that has changed, obviously, because they have no choice. But it’s the dehumanizing aspect of how people were treated Milwaukee County, before COVID-19, is just unconscionable.”
- 533 Miami Interview 10 (Judge 3).
- 534 ND Interview 12 (Judge 2).
- 535 At another point in the interview, Milwaukee Interview 2 (Defense Attorney 1) noted, “I think it’s more difficult for a judge to be able to see, or sense, what’s going on with someone if they are, you know, appearing remotely.” Similarly, Miami Interview 9 (Judge 2) noted that interaction with “new defendants” was “more challenging” because “I didn’t have a feel for them to begin with.” Miami Interview 10 (Judge 3) talked about “bodies and humans and interaction.” And ND Interview 12 (Judge 2) sometimes described a preference for being able to look litigants in the eye in person.
- 536 *See, e.g.*, Miami Interview 10 (Judge 3) (“I do also look forward to bodies and humans and interaction.”).
- 537 *See, e.g.*, ND Interview 19 (Prosecutor 4) (“I’m sorry, there’s a, there’s a dynamic to this [trial] process of being in person and, and addressing [accusations] in the flesh”).
- 538 However, the majority of respondents using such language were from North Dakota.
- 539 ND Interview 20 (Prosecutor 5) (discussing hearings over Zoom).
- 540 ND Interview 19 (Prosecutor 4). *See also id.* (“Well, I suppose it’s about people. It’s about bringing somebody in, letting them face their accusers, whatever that is, in person.”).
- 541 ND Interview 17 (Prosecutor 2) (discussing parts of in-person sentencing that are not the same virtually).
- 542 ND Interview 19 (Prosecutor 4) (discussing reasons for his frustration with virtual court). *See also* ND Interview 13 (Judge 3) (noting the personal aspect of the judge’s job: “You deal with people.”).
- 543 Milwaukee Interview 15 (Judge 6) (discussing courtroom interactions).
- 544 ND Interview 12 (Judge 2) (discussing sentencing).
- 545 ND Interview 20 (Prosecutor 5) (explaining the differences between Zoom and in-person hearings).
- 546 ND Interview 11 (Judge 1) (comparing in-person and remote hearings).
- 547 ND Interview 12 (Judge 2) (explaining why she wants to control when hearings are virtual or in-person).
- 548 Milwaukee Interview 17 (Prosecutor 2) (discussing informal plea bargaining before a hearing). *See also id.* (“You do lose that face-to-face contact doing it this way.”) (discussing breakout-room plea bargaining).
- 549 Miami Interview 12 (Prosecutor 1) (discussing his comfort with technology).
- 550 Milwaukee Interview 19 (Prosecutor 4) (discussing technological issues in virtual court).
- 551 ND Interview 14 (Judge 4) (discussing the importance of in-person trials).
- 552 Milwaukee Interview 4 (Defense Attorney 3) (discussing in-person court). *See also id.* (“And we got better plea deals, doing things face to face. I think now, um, everything’s, you know, really being done over email, and it’s easier for them to deny us something that we’re asking for via email than it was face to face.”)

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- 553 ND Interview 19 (Prosecutor 4) (explaining that defense attorneys' jobs have gotten more difficult during COVID).
- 554 ND Interview 9 (Defense Attorney 5) (describing his ability to build rapport with the client in person).
- 555 ND Interview 15 (Judge 5) (noting that Zoom cases carry the "implicit message" of being less important).
- 556 Miami Interview 7 (Defense Attorney 6) (explaining her preference for in-person hearings).
- 557 ND Interview 17 (Prosecutor 2) (discussing the feelings of victims at in-person pleas).
- 558 ND Interview 16 (Prosecutor 1) (explaining why a virtual trial would be difficult).
- 559 ND Interview 21 (Prosecutor 6) (discussing in-person pleas and sentencings).
- 560 Miami Interview 11 (Judge 4) (discussing the differences between in-person and virtual hearings).
- 561 ND Interview 18 (Prosecutor 3) (explaining why even "3D video" would be insufficient).
- 562 ND Interview 20 (Prosecutor 5) (explaining why Zoom trials would not be "effective justice for the defense").
- 563 ND Interview 12 (Judge 2) (discussing in-person sentencing practices). *See also id.* ("I think it's better for them, kids, young kids [juvenile defendants], to look me in the eye.").
- 564 Milwaukee Interview 6 (Defense Attorney 5) (discussing a motion for in-person sentencing). *See also* Miami Interview 3 (Defense Attorney 2) ("I personally have not agreed on a massive motion to dismiss that I've been working on for about a year now. I won't agree to doing it over Zoom, I won't. I told my client, I wanna be in there, I want the judge to *see him*." (emphasis added); ND Interview 4 (Court Personnel 4) (Judges had preliminary hearings in person because "they needed to *see the people*." (emphasis added).
- 565 Miami Interview 7 (Defense Attorney 6); ND Interview 14 (Judge 4). *See also* ND Interview 10 (Defense Attorney 6) ("I just think there is a, an element of being in the same room with someone. . . . [T]here's just something, and I've said this to a lot of young people.").
- 566 ND Interview 17 (Prosecutor 2).
- 567 ND Interview 20 (Prosecutor 5). *Cf.* Milwaukee Interview 15 (Judge 6) (noting that it's "nice to be in the same room with your lawyer." (emphasis added).
- 568 ND Interview 20 (Prosecutor 5) ("I don't know if I'll be repetitive or not.").
- 569 ND Interview 19 (Prosecutor 4).
- 570 ND Interview 19 (Prosecutor 4).
- 571 Miami Interview 10 (Judge 3).
- 572 Milwaukee Interview 15 (Judge 6).
- 573 ND Interview 11 (Judge 1). *See also id.* ("Trials as much as possible should be in person because there's just a, there's a tangible to that and an effect to that.").
- 574 The relationship between physical cues and witness examinations is discussed more fully in Chapter 9: Remote Witnesses.
- 575 Milwaukee Interview 2 (Defense Attorney 1).
- 576 Milwaukee Interview 16 (Prosecutor 1).
- 577 ND Interview 19 (Prosecutor 4). *See also* ND Interview 16 (Prosecutor 1) (describing "body language cues").
- 578 ND Interview 18 (Prosecutor 3).
- 579 ND Interview 15 (Judge 5).
- 580 *Id.*
- 581 *Id.* *See also* Milwaukee Interview 2 (Defense Attorney 1) ("I think that there's, ah, I don't know, there's something in our brains that makes it less likely to feel emotion or compassion or empathy when we are using, when we're disconnected or we're remotely.").
- 582 *See, e.g.,* Miami Interview 4 (Defense Attorney 3) ("It hinders the ability to establish a good working relationship with the clients. I think that you don't get the same feel for a person. . . . [I]t's like you get a vibe from somebody when you're in the same room with them, and that is completely gone."); Milwaukee Interview 20 (Prosecutor 5) ("A sentencing hear—a plea hearing is more difficult for a defense attorney if he or she is not in the same room with his or her client. . . . There are things that, you know, there's just that personal interaction where you can read each other a little bit, you can feed off each other's energy and, and, um, interpret facial expressions a little bit and respond to a person. That's lost if things are being done virtually so, it's a lot more difficult."); ND Interview 9 (Defense Attorney 3) ("...[S]o having the ability to go meet with the clients and them with them and see them face to, face to face. . . . I think a lot of that helped me communicate with them better."). The changes in attorney-client communications over virtual platforms are discussed much more fully in Chapter 10: Attorney-Client Communication.
- 583 Miami Interview 11 (Judge 4) ("[W]hen an attorney is here arguing based on the judge's facial expressions that or, or, you know, movement of the head or—often there are cues—there are nonverbal cues that a judge provides to the attorney and perhaps that the attorney might provide to the judges . . . you know, a nonverbal movement of the head from the attorney can affect something the judge is doing. So on Zoom, you do have that, but it's more difficult I think to pick up on those cues.").
- 584 ND Interview 5 (Defense Attorney 1) ("You get a better idea of how to read people and you're in the room. Okay. As a defense attorney, I prepared this argument. It's not landing with the jury. So how can I change on the fly?").

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- 585 ND Interview 14 (Judge 4).  
 586 ND Interview 15 (Judge 5).  
 587 Miami Interview 11 (Judge 4).  
 588 ND Interview 18 (Prosecutor 3).  
 589 ND Interview 22 (Prosecutor 7).  
 590 ND Interview 19 (Prosecutor 4). *See also id.* (“It’s not the whole, you know, the defendant not being there is, it’s just almost like we’re, um, I don’t know, making a movie [laughs].”)  
 591 Miami Interview 4 (Defense Attorney 3).  
 592 ND Interview 10 (Defense Attorney 6).  
 593 Milwaukee Interview 9 (Defense Attorney 8).  
 594 *Id.* *See also* Milwaukee Interview 19 (Prosecutor 4) (“I mean, you’re not, you’re not face to face with the person to sort of gauge their, their, I don’t know, their behavior. It’s the same as its’s sort of the same concept as texting somebody versus talking to him on the phone.”); ND Interviews 14 (Judge 4) (“And it’s one thing to see a witness testifying and hear the witness testify live, as opposed to reading the transcript. It just does not translate the same. You know, things that are said look one thing on paper when you read a transcript—the tone, the intonation of the words, the emotion behind the words are very important for judges or juries to render issues on credibility. So I think it’s very important to be live.”), 17 (Prosecutor 2) (comparing finding deception by a witness at a virtual hearing to “reading a transcript in trying to find it then.”).  
 595 ND Interview 19 (Prosecutor 4).  
 596 ND Interview 17 (Prosecutor 2).  
 597 Miami Interview 12 (Prosecutor 1).  
 598 ND Interview 13 (Judge 3).  
 599 Miami Interview 7 (Defense Attorney 6).  
 600 ND Interview 12 (Judge 2).  
 601 ND Interview 15 (Judge 5).  
 602 *Id.*  
 603 Miami Interview 5 (Defense Attorney 4); Milwaukee Interviews 2 (Defense Attorney 1), 3 (Defense Attorney 2), 6 (Defense Attorney 5); ND Interviews 5 (Defense Attorney 1), 20 (Prosecutor 5).  
 604 Milwaukee Interview 6 (Defense Attorney 5).  
 605 Miami Interview 5 (Defense Attorney 4).  
 606 ND Interview 5 (Defense Attorney 1). *See also id.* (“I just think that the human factor has such a important significance that maybe we don’t realize.”)  
 607 Milwaukee Attorney 3 (Defense Attorney 2).  
 608 Milwaukee Interview 2 (Defense Attorney 1).  
 609 ND Interview 20 (Prosecutor 5).  
 610 ND Interview 20 (Prosecutor 5).  
 611 Milwaukee Interview 15 (Judge 6).  
 612 Milwaukee Interview 15 (Judge 6).  
 613 Two court employees also mentioned such concerns, but as in other sections, they are excluded from the chart due to the difficulty deducing anything about them as a group with such a small sample. *See* Chapter 4: Qualitative Analysis – Methods and Data.  
 614 ND Interview 5 (Defense Attorney 1).  
 615 For descriptions of body language and nonverbal cues of defendants in the context of the overall “feel” or humanization of remote proceedings, see Chapter 8: Dehumanization.  
 616 ND Interview 14 (Judge 4).  
 617 ND Interview 13 (Judge 3).  
 618 ND Interview 13 (Judge 3).  
 619 ND Interview 13 (Judge 3).  
 620 ND Interview 13 (Judge 3).  
 621 ND Interview 7 (Defense Attorney 3).  
 622 ND Interview 14 (Judge 4).  
 623 ND Interview 4 (Court Personnel 4).  
 624 ND Interview 5 (Defense Attorney 1).  
 625 Miami Interview 2 (Defense Attorney 1).  
 626 Miami Interview 5 (Defense Attorney 4).  
 627 Milwaukee Interview 8 (Defense Attorney 7). *See also, e.g.*, ND Interview 18 (Prosecutor 3) (“I mean, they argue what, 70, 80% of communication is done through body language.”).  
 628 ND Interview 13 (Judge 3). *See also* ND Interview 15 (Judge 5) (explaining, with respect to assessing defendants’ credibility, that “you can’t pick up the whole body.”).

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- 629 But not all respondents agreed. *See* ND Interview 11 (Judge 1) (“I don’t recall a number of hearings that I have a number of witnesses on either side that I really had to evaluate for, you know, who’s telling the truth or who is more believable. . . . I didn’t notice a time where I was really wondering that: Is this person really telling, you know?”).
- 630 ND Interview 17 (Prosecutor 2).
- 631 *See, e.g.*, Milwaukee Interview 8 (Defense Attorney 7) (“Zoom . . . takes enough away from you that [in] really important situations maybe it makes a difference.”).
- 632 ND Interview 5 (Defense Attorney 1).
- 633 ND Interview 13 (Judge 3).
- 634 ND Interview 18 (Prosecutor 3).
- 635 Milwaukee Interview 5 (Defense Attorney 4).
- 636 Milwaukee Interview 4 (Defense Attorney 3).
- 637 ND Interview 14 (Judge 4).
- 638 ND Interview 8 (Defense Attorney 4).
- 639 Milwaukee Interview 13 (Prosecutor 3).
- 640 ND Interview 11 (Judge 1). *Cf.* Miami Interview 9 (Judge 2): “You know, I honestly didn’t find—I mean, look, it’s preferable to be able to have a witness in court in front of you, obviously. Um, but I didn’t find it that much different. Um, now for a bench trial, I could see the witnesses very clearly. Um, I could ask them questions. I could gauge their facial expressions. . . .”
- 641 Miami Interview 11 (Judge 4). *See also id.* (“So on Zoom, you do have that, but it’s more difficult I think to pick up on those cues. Number one, because on the screen, you might have 25 boxes and so even if I’m trying to focus . . . most of the time, I don’t use the function where the speaker appears larger than everyone else. Sometimes I do, particularly if it’s, if it’s a witness testifying. And I’m trying to pick up—you know, I’m just trying to see the person more closely in part for credibility determinations to see facial expressions and other things.”)
- 642 Miami Interview 11 (Judge 4). *But cf.* ND Interview 12 (Judge 2) (“The other thing is, is that, um, one of the hearings that I had where they were on the phone, uh, under cross examination, the attorney for the witness was sitting right there next to him, and there was no way for any of us to see whether or not the attorney was helping his client to say—Okay, now that’s a pretty serious thing for me to say, because we know that that wouldn’t be an ethical thing to happen. Alright. And I’m not suggesting that anybody did anything unethical. Um, but I felt it was more like the attorney, when the witness was looking for a piece of paper, you know, the attorney said, ‘Oh, I have it in my file here.’ Do you know what I mean? And that type of stuff would not, that can happen on the phone, but it cannot happen this way [Zoom] because you’d be able, I’d be able to see, I’d be able to see that.”)
- 643 Miami Interview 6 (Defense Attorney 5).
- 644 Miami Interview 3 (Defense Attorney 2). *See also* Miami Interview 4 (Defense Attorney 3): “I may be texting with lawyer who is doing me the favor of covering the other case if that case gets called up and I’m not there, so you don’t know who I’m talking to. And what if I was a witness who had the same capability? You know who’s gonna be, who’s sitting in the room with me. You don’t know whether anybody is sitting in the room with me right now, I have a virtual screen and . . . somebody could be sitting behind my computer and you would never know. So I don’t like them at all.”
- 645 Miami Interview 11 (Judge 4).
- 646 Miami Interview 6 (Defense Attorney 5).
- 647 ND Interview 4 (Court Personnel 4).
- 648 ND Interview 15 (Judge 5).
- 649 Lack of formality of virtual proceedings in general—and in particular, as it affects defendants’ behavior, as opposed to witnesses—is also discussed as a North Dakota-specific theme in Chapter 15: Northeast Judicial District of North Dakota.
- 650 Miami Interview 7 (Defense Attorney 6).
- 651 Milwaukee Interview 9 (Defense Attorney 8). This attorney also connected these in-person formalities to the “idea of a confrontation” as “an in person confrontation.”
- 652 ND Interview 7 (Defense Attorney 3).
- 653 Miami Interview 6 (Defense Attorney 5).
- 654 Milwaukee Interview 10 (Judge 1).
- 655 ND Interview 13 (Judge 3).
- 656 Milwaukee Interview 4 (Defense Attorney 3).
- 657 Milwaukee Interview 6 (Defense Attorney 5).
- 658 Miami Interview 5 (Defense Attorney 4).
- 659 ND Interview 5 (Defense Attorney 5).
- 660 Miami Interview 9 (Judge 2).
- 661 Miami Interview 4 (Defense Attorney 3).
- 662 ND Interview 6 (Defense Attorney 2).

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- 663 *See, e.g.*, ND Interview 5 (Defense Attorney 1). *See also* Miami Interview 3 (Defense Attorney 2) (describing the jail's pre-COVID video conferencing capabilities as a "godsend" that allowed him to avoid "twiddling [his] thumbs for hours" in the waiting room at the jail).
- 664 *See* Chapter 6: Efficiencies for a full discussion of the efficiencies and inefficiencies that affect all actor types (including defense attorneys) as a result of remote technology.
- 665 *See* Chapter 7: Access to Technology for a fuller examination of these issues.
- 666 Milwaukee Interview 7 (Defense Attorney 6).
- 667 Miami Interview 7 (Defense Attorney 6).
- 668 ND Interview 7 (Defense Attorney 3). *See also, e.g.*, Milwaukee Interview 8 (Defense Attorney 7) ("But needless to say, a lot of clients don't have phones, and that is one of the challenges.").
- 669 *See, e.g.*, Miami Interview 2 (Defense Attorney 1) ("The bigger challenge is clients who are in custody."). Often, jails discontinued in-person visitation during COVID, exacerbating such problems further. *See, e.g.*, Miami Interview 2 (Defense Attorney 1) (noting that jails "suspended visitation"); Milwaukee Interview 5 (Defense Attorney 4) ("If my clients are in [the Department of Corrections], I can't see them face to face unless we're in court," and if they are in the Milwaukee Secure Detention Facility, "attorneys cannot go up to see the people face to face anymore."); ND Interview 5 (Defense Attorney 4) (explaining that the Devil's Lake jail was locked down). In other locations, visitation was open and available, albeit with COVID-related restrictions. *See, e.g.*, Milwaukee Interview 5 (Defense Attorney 6) ("But some people in the jail I'll go see, but they, it's all noncontact. So you're in like a booth with glass between you, and then there's like the speaker phones on each side."); ND Interview 9 (Defense Attorney 5) ("So they have to do like some special little meeting area" with "the old phones on the wall where they would talk through the, the phone on the wall and you're looking at each other through glass. . . . [B]ut then I can't show them the papers that I'm looking, or . . . I'm trying to show them the video through this glass while holding, holding a phone up to the speaker on the computer.") But in some instances, defense attorneys felt uncomfortable visiting the jail during the pandemic, even if it was open. *See, e.g.*, Miami Interview 2 (Defense Attorney 1) ("They just recently reopened [visitation] at the federal detention center. But frankly, I don't know many lawyers who are comfortable actually going into the jails and the detention center."); Milwaukee Interview 3 (Defense Attorney 2) ("[In-person visitation] normally wouldn't be an impediment to me. But I'm not gonna risk my life, you know, to go into that crazy jail unless it's super damn important, and I have a hazmat suit.").
- 670 Milwaukee Interview 5 (Defense Attorney 4).
- 671 Miami Interview 5 (Defense Attorney 4).
- 672 Miami Interview 7 (Defense Attorney 6).
- 673 ND Interview 5 (Defense Attorney 1). *See also id.* ("When I'm tying up a jail phone line for half an hour, you know, they're not able to conduct a court, other attorneys aren't able to call in. And so there's some real challenges there.").
- 674 Milwaukee Interview 9 (Defense Attorney 8).
- 675 ND Interview 9 (Defense Attorney 5).
- 676 *See, e.g.*, Milwaukee Interviews 3 (Defense Attorney 2) ("I can only talk to him for 30 minutes, whereas if we were in person, I would sit there for as long as it took depending on you know, that interplay."), 4 (Defense Attorney 3) ("So at the House of Corrections, we can now only talk to clients via phone from five o'clock until seven o'clock at night.").
- 677 ND Interview 7 (Defense Attorney 3). Still, elsewhere in North Dakota, the financial burden for phone calls falls on defense attorneys. *See* ND Interview 9 (Defense Attorney 5) ("[Defendants] can only call me collect, so I have to pay for their phone calls.").
- 678 *See, e.g.*, Milwaukee Attorney 6 (Defense Attorney 5) ("[T]here's massive institutional spread right now. . . . You have these visits, you have these phone calls scheduled, and then they get canceled because client's in a quarantine pod . . . or they've tested positive.").

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- 679 Miami Interviews 2 (Defense Attorney 1) (“but I’d be lying if I said [breach of attorney-client privilege in breakout room] wasn’t something that we all have a little bit of concern about.”), 6 (Defense Attorney 5) (“The other kind of weird thing is we’re having to ask the clients—and not every client has them—to put on headphones. So that way, what we’re telling the client also isn’t heard by other people. So that confidentiality piece is still a problem.”), 7 (Defense Attorney 6) (“But if your client is in custody, there might be a corrections officer over their shoulder. . . So sometimes, you, you know, you have to be careful with privileged to that. . . But at the same time as an attorney, you have to be worried about the privilege because you can’t claim it if you have a reason to think it doesn’t exist. And if you see someone in the background, I think that’s clearly indicative of there not being privilege.”); Milwaukee Interviews 9 (Defense Attorney 8) (“It is challenging just to even talk to [in-custody clients]. Usually, sometimes, there’s a phone that is designated for confidential communications, and every lawyer that has somebody in custody is trying to use that phone. And our jails love to record phone calls if it’s not on a specific phone, and they record all the communications that go in and out. So we have to find the time to coordinate it that way.”), 21 (Prosecutor 6) (discussing attorney-client confidentiality challenges created by judges being unfamiliar with using Zoom breakout rooms); North Dakota Interviews 6 (Defense Attorney 2) (“technically speaking, they give a separate phone for attorney client conversations that doesn’t have the ability to be recorded. But the [in-custody] clients don’t often trust that.”), 7 (Defense Attorney 3 (“This is part of the issue I raised. And [Department of Corrections] monitor these calls. And supposedly, on their word, they’re respecting attorney client privilege, and I don’t believe it.”), 9 (Defense Attorney 5) (“So [in-custody clients] can only call me, and they call me in, the only system that is available to us to talk on the phone, is a recorded phone call. So attorney client confidentiality is now null and void.”), 16 (Prosecutor 1) (“The other thing is, I think it maybe it’s harder for a defendant, and this is just speculating. But maybe it’s harder for a defendant who wants to have a conversation with his attorney. And they request that and everybody leaves the courtroom. But I wonder how confident a defendant feels about that type of a visit with his or her attorney.”).
- 680 Miami Interview 6 (Defense Attorney 5). Moreover, as explained in Chapter 7: Access to Technology, out-of-custody defendants sometimes lack a private place for their participation in virtual court hearings.
- 681 Milwaukee Interview 9 (Defense Attorney 8).
- 682 ND Interview 9 (Defense Attorney 5).
- 683 ND Interview 6 (Defense Attorney 2). Media accounts of instances in which supposedly confidential attorney-client calls were in fact recorded include: NYC (<https://www.nydailynews.com/new-york/ny-rikers-jail-phone-records-lawyers-inmates-20210320-rdfb2lmuevgsdg5npad4egoqai-story.html>); ME (<https://bangordailynews.com/2020/07/11/news/recording-of-837-attorney-client-phone-calls-in-4-county-jails-borders-on-the-ridiculous/>); CA (<https://www.abajournal.com/news/article/inmate-released-after-motion-alleges-jail-recorded-his-attorney-calls>) and KS (federal) (<https://www.kcur.org/news/2019-08-26/leavenworth-inmates-reach-1-45-million-settlement-over-taped-attorney-client-phone-calls>).
- 684 Milwaukee Interview 9 (Defense Attorney 8).
- 685 See Milwaukee Interview 8 (Defense Attorney 7).
- 686 See ND Interview 16 (Prosecutor 1) (“Well, just, you know, are they worrying about things being recorded? Are they worrying about whether or not somebody’s out of the camera view that they cannot see? . . . And if the doors and walls aren’t that good and the speaker volume’s turned up, it’s not such a confidential communication.”).
- 687 ND Interview 5 (Defense Attorney 1).
- 688 ND Interview 8 (Defense Attorney 4).
- 689 ND Interview 6 (Defense Attorney 2).
- 690 See Miami Interview 5 (Defense Attorney 4), 7 (Defense Attorney 6). See also Chapter 13: Miami-Dade County.
- 691 Miami Interview 2 (Defense Attorney 1).
- 692 Miami Interview 5 (Defense Attorney 4).
- 693 ND Interview 8 (Defense Attorney 4).
- 694 Milwaukee Interview 3 (Defense Attorney 3).
- 695 ND Interview 9 (Defense Attorney 5).
- 696 ND Interview 21 (Prosecutor 6).
- 697 ND Interview 9 (Defense Attorney 5).
- 698 ND Interview 5 (Defense Attorney 1).
- 699 Miami Interview 5 (Defense Attorney 4).
- 700 Miami Interview 4 (Defense Attorney 3).
- 701 Milwaukee Interview 6 (Defense Attorney 5).
- 702 Miami Interview 4 (Defense Attorney 3).
- 703 ND Interview 5 (Defense Attorney 1).
- 704 ND Interview 7 (Defense Attorney 3).
- 705 ND Interview 9 (Defense Attorney 5). See also *id.* (finding it difficult to disprove “the image . . . that public defenders have [that] they just really don’t care about their clients” with only telephonic communication).
- 706 Milwaukee Interview 4 (Defense Attorney 3).
- 707 Milwaukee Interview 6 (Defense Attorney 5).
- 708 ND Interview 5 (Defense Attorney 1).

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- 709 Miami Interview 4 (Defense Attorney 3).  
 710 Milwaukee Interview 9 (Defense Attorney 8).  
 711 Milwaukee Interview 21 (Prosecutor 6).  
 712 Milwaukee Interview 8 (Defense Attorney 7).  
 713 Miami Interview 7 (Defense Attorney 6).  
 714 Miami Interview 5 (Defense Attorney 4).  
 715 Additionally, two interviews with court employees surfaced constitutional concerns. *See* Miami Interview 1 (Court Personnel 1); ND Interview 1 (Court Personnel 1).  
 716 Miami Interview 5 (Defense Attorney 4).  
 717 As discussed throughout the following subsections, some of these concerns related to COVID and not to virtual court. Those concerns are not discussed in depth, since the goal of this report is to examine the implications and consequences of remote criminal court.  
 718 *See* Miami Interviews 2 (Defense Attorney 1), 3 (Defense Attorney 2), 4 (Defense Attorney 3), 6 (Defense Attorney 5), 7 (Defense Attorney 6); ND Interviews 5 (Defense Attorney 1), 7 (Defense Attorney 3), 9 (Defense Attorney 5).  
 719 Miami Interview 11 (Judge 4); Milwaukee Interview 12 (Judge 3); ND Interviews 13 (Judge 3), 14 (Judge 4).  
 720 Milwaukee Interview 18 (Prosecutor 3); ND Interviews 16 (Prosecutor 1), 18 (Prosecutor 3), 19 (Prosecutor 4).  
 721 *See* Miami Interview 7 (Defense Attorney 6) (“We’ve had trials in which the state has asked to have their officers, maybe an undercover cop or someone of that nature, testify in a mask. And obviously, we have jumped up and down at that because that does not satisfy the constitutional rights of confrontation.”). *But see* Miami Interview 2 (Defense Attorney 2) (“You can’t constitutionally, in my opinion, do remote criminal jury trials. . . . I don’t know if I would go so far as to say the issue of masks violate [the Confrontation Clause] as well.”).  
 722 ND Interview 1 (Court Personnel 1).  
 723 *Id.* *Cf.* Milwaukee Interview 18 (Prosecutor 3) (describing a case in which he tried to have a witness testify remotely but the defense refused to waive confrontation).  
 724 ND Interview 14 (Judge 4) (“I think the right to confront witnesses that would testify against you has been defined by our Supreme Court as face to face.”).  
 725 Miami Interview 2 (Defense Attorney 1). *See also* ND Interview 5 (Defense Attorney 1) (“I think there are some major concerns with confrontation issues.”).  
 726 Milwaukee Interview 12 (Judge 3).  
 727 ND Interview 13 (Judge 3).  
 728 ND Interview 16 (Prosecutor 1).  
 729 ND Interview 19 (Prosecutor 4).  
 730 Miami Interview 4 (Defense Attorney 3). *See also* Miami Interview 6 (Defense Attorney 5) (“Everything else, particularly if it involves a witness, uh, to me those [remote hearings] are quite problematic, not just from a confrontation, the right to confrontation, perspective, but just the technical aspect of the delay that you’re not seeing the person. . . . Imagine being a witness and you have answers of somebody else’s. And you have typed up what you’re gonna answer or worse, somebody is texting you and giving you the answers because they’re watching because these hearings are public hearings. So all of a sudden you could be a witness who is getting help from somebody from the outside.”).  
 731 ND Interview 7 (Defense Attorney 3).  
 732 Miami Interview 4 (Defense Attorney 3).  
 733 Miami Interview 2 (Defense Attorney 1). In this quote, the respondent may be connecting the Confrontation Clause and the right to effective counsel (discussed later), but it is unclear whether she meant “ineffective” in the generic sense or in the constitutional sense.  
 734 ND Interview 14 (Judge 4).  
 735 ND Interview 9 (Defense Attorney 5).  
 736 However, one defense attorney noted potential constitutional issues relating to access to counsel, though this concern related more to COVID-induced moratoriums on in-person visitation than to the use of remote technology. *See* ND Interview 7 (Defense Attorney 3).  
 737 Milwaukee Interview 9 (Defense Attorney 8).  
 738 Miami Interview 3 (Defense Attorney 2).  
 739 *Id.*  
 740 Miami Interview 11 (Judge 4).  
 741 *See, e.g.*, Miami Interviews 2 (Defense Attorney 1) (“I’m weighing the need to adapt against my client’s constitutional rights, but also their need to have a trial. It’s a due process violation to have them just lingering with no day in court. So, the fact that COVID is gonna be here for a while, we need to start making some adaptations to protect that due process right.”), 11 (Judge 4) (discussing the appellate court’s due process balancing for remote court proceedings).

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- 742 Miami Interview 9 (Judge 2). According to the transcript, this judge did not comment on the Confrontation Clause issues presented by remote witnesses, but the call also cut out right at this moment. Any additional comments the judge may have been making on this topic were regrettably lost.
- 743 ND Interview 5 (Defense Attorney 1).
- 744 ND Interview 16 (Prosecutor 1).
- 745 ND Interview 13 (Judge 3).
- 746 *See* Miami Interviews 1 (Court Personnel 1), 7 (Defense Attorney 6), 11 (Judge 4); Milwaukee Interviews 11 (Judge 2), 14 (Judge 5); ND Interviews 9 (Defense Attorney 5), 11 (Judge 1), 16 (Prosecutor 1), 21 (Prosecutor 6).
- 747 Of course, the rights to confront the accuser and receive the assistance of counsel are intimately connected to trial rights, and in some instances, interviewees perspectives on these topics melded together. However, where possible these issues are discussed separately. For example, ND Interview 9 (Defense Attorney 5) believed that a remote trial would be a “travesty,” but made that comment while discussing the importance of confrontation. Therefore, that comment is discussed in the section on the Confrontation Clause.
- 748 *See* Miami Interviews 2 (Defense Attorney 1), 4 (Defense Attorney 3), 5 (Defense Attorney 4), 7 (Defense Attorney 6), 10 (Judge 3), 11 (Judge 4), 12 (Prosecutor 1); Milwaukee Interviews 2 (Defense Attorney 1), 4 (Defense Attorney 3), 5 (Defense Attorney 4), 10 (Judge 1), 12 (Judge 3), 17 (Prosecutor 2), 18 (Prosecutor 3), 19 (Prosecutor 4), 20 (Prosecutor 5), 21 (Prosecutor 6); ND Interviews 9 (Defense Attorney 5), 16 (Prosecutor 1), 21 (Prosecutor 7).
- 749 Miami Interview 1 (Court Personnel 1).
- 750 *See* Chapter 12: Ultimate Preferences.
- 751 ND Interview 9 (Defense Attorney 5).
- 752 Miami Interview 7 (Defense Attorney 6).
- 753 ND Interview 11 (Judge 1).
- 754 These kinds of comments were especially common in Milwaukee, which livestreamed court on YouTube to protect public access. *See* Chapter 14: Milwaukee County.
- 755 Milwaukee Interview 11 (Judge 2). *See also* Milwaukee Interview 14 (Judge 5) (“I think at some point we could probably maybe do a court trial [remotely]. Now our civil division, . . . they’re looking at a [remote] civil trials. . . I think there’s too many issues, other issues for a criminal trial to be handled that way.”).
- 756 ND Interview 9 (Defense Attorney 5).
- 757 ND Interview 21 (Prosecutor 6). Note that this interview was not recorded, so this is paraphrased, rather than a direct quote.
- 758 Milwaukee Interview 14 (Judge 5). *See also* ND Interview 13 (Judge 3) (explaining the defendant’s right to attend trial in person as a Confrontation Clause issue).
- 759 ND Interview 16 (Prosecutor 1).
- 760 *Id.*
- 761 For more variations on this theme, see Chapter 8: Dehumanization.
- 762 Miami Interview 11 (Judge 4).
- 763 Additionally, five interviewees with court employees surfaced preferences. *See* Miami Interview 1 (Court Personnel 1); Milwaukee Interview 1 (Court Personnel 1); North Dakota Interviews 1 (Court Personnel 1), 3 (Court Personnel 3), 4 (Court Personnel 4).
- 764 *See* Chapter 11: Constitutional Issues, Chapter 9: Remote Witnesses, and Chapter 8: Dehumanization.
- 765 At least 18 respondents explicitly stated that they would be unwilling to do either remote jury trials or remote trials in general. *See* Miami Interviews 1 (Court Personnel 1), 2 (Defense Attorney 1), 3 (Defense Attorney 2), 9 (Judge 2), 11 (Judge 4); Milwaukee Interviews 2 (Defense Attorney 1), 3 (Defense Attorney 2), 5 (Defense Attorney 4), 10 (Judge 1), 14 (Judge 5); North Dakota Interviews 6 (Defense Attorney 2), 9 (Defense Attorney 5), 10 (Defense Attorney 6), 14 (Judge 4), 15 (Judge 5), 16 (Prosecutor 1), 19 (Prosecutor 4), 20 (Prosecutor 5), 21 (Prosecutor 6). These responses include interviewees who indicated *their own preference* to handle trials in person; they do not necessarily include interviewees who stated that, as a practical or a legal matter, that trials must be in person. *See, e.g.*, ND Interview 1 (Court Personnel 1) (“You know, there are certain pieces that must be in person like a jury trial.”).
- 766 Miami Interview 5 (Defense Attorney 4).
- 767 ND Interview 15 (Judge 5).
- 768 ND Interview 19 (Prosecutor 4).
- 769 ND Interview 20 (Prosecutor 5). *See also id.* (“I think that would be, in my opinion, a disaster to try to have a trial by Zoom.”).
- 770 ND Interview 21 (Prosecutor 6).
- 771 ND Interview 9 (Defense Attorney 5).
- 772 Milwaukee Interview 5 (Defense Attorney 4).
- 773 ND Interview 6 (Defense Attorney 2).

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- 774 *See, e.g.*, Milwaukee Interview 9 (Defense Attorney 8) (discussing “Zoom trial”); ND Interview 6 (Defense Attorney 2) (“criminal trials”), 9 (Defense Attorney 5) (“remote trial”). Others only mentioned jury trials and did not mention bench trials one way or the other. *See, e.g.*, Miami Interview 2 (Defense Attorney 1).
- 775 *See, e.g.*, Milwaukee Interview 2 (Defense Attorney 1) (And I would not have a trial. . . . Not even a bench trial.”); ND Interview 10 (Defense Attorney 6) (explaining that he would not want remote “jury or bench” trials), 16 (Prosecutor 1) (“I’m not a fan of remote trials. I certainly would not be a fan of a remote jury trial.”); *Cf.* Milwaukee Interview 7 (Defense Attorney 6) (“[L]ike, similarly a lot of the judges are trying to like, just do a court trial, which I also like, for the most part, I would never do.”).
- 776 Milwaukee Interview 5 (Defense Attorney 4).
- 777 Milwaukee Interview 11 (Judge 2). *See also* Milwaukee Interview 14 (Judge 5) (“I think at some point we could probably maybe do a court trial.”).
- 778 Milwaukee Interview 12 (Judge 3).
- 779 *See* Miami Interview 8 (Judge 1).
- 780 Milwaukee Interview 9 (Defense Attorney 8). *Cf.* Milwaukee Interview 12 (Judge 3) (contemplating using a partially virtual “Utah” model in a low-stakes criminal case if the practice goes well in civil trials).
- 781 Miami Interview 8 (Judge 1). *Cf.* Miami Interview 2 (Defense Attorney 1) (expressing willingness to do *voir dire* remotely but no other parts of trial and speculating that she was in the minority); Milwaukee Interview 7 (Defense Attorney 6) (discussing the possibility of doing “first call” trials—that is, trials to check and see whether the witnesses are actually available, or whether the case will get dismissed—virtually).
- 782 *See* Chapter 8: Dehumanization, Chapter 9: Remote Witnesses.
- 783 *See* Chapter 8: Dehumanization.
- 784 *See* Chapter 9: Remote Witnesses.
- 785 *See* Chapter 11: Constitutional Issues.
- 786 For a fuller discussion of non-verbal expression in general, see Chapter 8: Dehumanization. For a fuller discussion of non-verbal communication as it relates to witnesses in particular, see Chapter 9: Remote Witnesses.
- 787 *See also* Chapter 9: Remote Witnesses.
- 788 *See, e.g.*, Milwaukee Interview 9 (Defense Attorney 8); North Dakota Interview 10 (Defense Attorney 6).
- 789 *See* Milwaukee Interview 2 (Defense Attorney 1) (noting the importance of watching the judge, evaluating his engagement, and changing his strategy accordingly); ND Interview 15 (Judge 5) (reasoning that humans are sensitive to physical cues and “geared to interact with each other . . . in person.”).
- 790 Milwaukee Interview 10 (Judge 1).
- 791 Milwaukee Interview 3 (Defense Attorney 2). *But cf.* Miami Interview 1 (Court Personnel 1) (“Maybe jury selection would be easy to do over Zoom.”), 2 (Defense Attorney 1) (“My feeling, and where I’m a little different, is I do think that doing part—not all—but part of the *voir dire* on Zoom Platform would make sense.”).
- 792 Milwaukee Interview 7 (Defense Attorney 6).
- 793 ND Interview 5 (Defense Attorney 1).
- 794 ND Interview 19 (Prosecutor 4).
- 795 *See also* Chapter 8: Dehumanization.
- 796 Miami Interview 9 (Judge 2).
- 797 ND Interview 20 (Prosecutor 5).
- 798 Miami Interview 7 (Defense Attorney 6).
- 799 Milwaukee Interview 9 (Defense Attorney 8).
- 800 *Id.*
- 801 Miami Interview 11 (Judge 4).
- 802 *See, e.g.*, Miami Interviews 2 (Defense Attorney 1) (“You can’t constitutionally, in my opinion, do remote criminal jury trials. I think it violates the confrontation clause.”) 5 (Defense Attorney 4) (“[B]ut jury trials in particular: Absolutely, Positively not! Okay, I think there are a multitude of constitutional objections”); Milwaukee Interview 20 (Prosecutor 5) (“Jury trials have to be in person. There is a right of confrontation which has been interpreted as in person. So, our defendant will have to be in the same room as the witnesses, at least until and unless our courts change their interpretation.”); North Dakota Interviews 5 (Defense Attorney 1) (“I think there are some major concerns with confrontation issues.”), 16 (Prosecutor 1) (“I think if it’s a dispositional trial, I think if it’s a confrontational arena, where the burden’s high, I think those need to be in person.”).
- 803 *See* Chapter 11: Constitutional Issues.
- 804 Miami Interview 4 (Defense Attorney 3).
- 805 ND Interview 9 (Defense Attorney 5).
- 806 ND Interview 19 (Prosecutor 4).
- 807 Milwaukee Interview 3 (Defense Attorney 2) (emphasis added).
- 808 Miami Interview 7 (Defense Attorney 6) (emphasis added). *Cf.* Milwaukee Interview 12 (Judge 3) (contemplating the feasibility of a hybrid model in “an out-of-custody criminal case” as long as “life and liberty is not at stake.”).

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- 809 Milwaukee Interview 9 (Defense Attorney 8).
- 810 Miami Interview 5 (Defense Attorney 4).
- 811 ND Interview 16 (Prosecutor 1).
- 812 ND Interview 16 (Prosecutor 1).
- 813 *See, e.g.*, North Dakota Interview 10 (Defense Attorney 6).
- 814 ND Interview 14 (Judge 4). *See also* Miami Interview 4 (Defense Attorney 3) (“It’s anything that has that requires evidentiary, that has evidentiary . . . . To me, that has to be done in person.”), 11 (Judge 4) (“I would say most evidentiary hearings like a motion to suppress, some of these other motions that I mentioned, like for pre-trial detention, essentially, things that are sort of like mini trials—I just think overall, it would be better for those to be held in person. . . .”); Milwaukee Interview 13 (Judge 4) (noting she would “probably keep my evidentiary hearings and my motion hearings in-person” after COVID), 14 (Judge 5) (“[W]e try to do just about every hearing [remotely] except those motion hearings, any evidentiary hearing . . . I think all parties thought it would be best to do those in person, and of course trials.”); ND Interview 21 (Prosecutor 6) (explaining that, when you have a witness, in person is best).
- 815 Milwaukee Interviews 9 (Defense Attorney 8).
- 816 ND Interview 17 (Prosecutor 2).
- 817 ND Interview 10 (Defense Attorney 6).
- 818 Milwaukee Interview 8 (Defense Attorney 7). *See also, e.g.*, Milwaukee Interview 10 (Judge 1) (“I think trials and contested, more-involved factual-based motion airings, I think that will probably go back to the old way.”).
- 819 ND Interview 21 (Prosecutor 6). *See also, e.g.*, ND Interview 21 (Prosecutor 7) (“Then when we go to the other side of the spectrum, we start looking at the trials and the jury trials, contested hearings, that sort of thing. If we could go back to in person, I would like to see that, the sooner the better.”).
- 820 Miami Interview 3 (Defense Attorney 2).
- 821 Milwaukee Interview 2 (Defense Attorney 1).
- 822 ND Interview 20 (Prosecutor 5).
- 823 Milwaukee Interview 10 (Judge 1).
- 824 *See, e.g.*, Milwaukee Interview 5 (Defense Attorney 4) (“If its an evidentiary hearing, I want it done in person. I want to see the witness. I wanna be in the same room as the witness. Body language is very important to me in these evidentiary hearings.”).
- 825 *See, e.g.*, Miami Interview 3 (Defense Attorney 2) (There’s no substitute for that when you’re doing a hearing remotely, especially if you’re having to cross examine a witness. Because you have to be able to pay attention to changes in their physical, in their facial expression. Their tone of voice, uh, composure. You know, there’s so many different things that that you are missing if you’re not physically in front of the, And there are lies, you know the okay. I know that some people have tried to water this down, But the right to confront the witness again, in my opinion, it’s impossible to have unless the confrontation happens in person. Live. Instantaneously.”); Milwaukee Interview 6 (Defense Attorney 5) (“I will not cross examine a police officer and in a motion hearing through a screen. They need to see me. They need to hear me. Um, and vice versa. You know, it’s a lot easier to hide and to duck when there’s an extra medium between you and your bullshit story.”); North Dakota 14 (Judge 4) (“But when it comes to proof beyond a reasonable doubt if it was a bench trial or a jury trial or if it’s an evidentiary hearing on a suppression motion where I need to weigh credibility, I want those to be live.”).
- 826 Milwaukee Interview 7 (Defense Attorney 8). *See also, e.g.*, Miami Interview 6 (Defense Attorney 5) (“You’re not seeing if somebody’s assisting that person.”).
- 827 Miami Interview 11 (Judge 4).
- 828 Milwaukee Interview 2 (Defense Attorney 1).
- 829 ND Interview 10 (Defense Attorney 6).
- 830 ND Interview 22 (Prosecutor 7).
- 831 Miami Interview 3 (Defense Attorney 2).
- 832 Milwaukee Attorney 4 (Defense Attorney 3).
- 833 Miami Interview 5 (Defense Attorney 4).
- 834 Milwaukee Attorney 4 (Defense Attorney 3).
- 835 Miami Interview 5 (Defense Attorney 4).
- 836 *See, e.g.*, ND Interview 15 (Judge 5). Interestingly, almost all respondents who framed their concerns in this way were from North Dakota.
- 837 *Id.*
- 838 Milwaukee Interview 19 (Prosecutor 4).
- 839 ND Interview 19 (Prosecutor 4).
- 840 ND Interview 18 (Prosecutor 3).
- 841 *Id.*
- 842 The preferences were sometimes partial, ambivalent, or tentative. *See, e.g.*, ND Interview 10 (Defense Attorney 6) (“I probably would be agreeable to the initial appearances not being in person.”).

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- 843 *See, e.g.*, Miami Interviews 6 (Defense Attorney 5), 7 (Defense Attorney 6) (“So I think that morning calendar is something that could be done remotely.”); ND Interviews 5 (Defense Attorney 1), 13 (Judge 3). *See also* Miami Interview 4 (Defense Attorney 3) (status calendar, sounding calendar).
- 844 *See, e.g.*, Miami Interviews 2 (Defense Attorney 1), 6 (Defense Attorney 5) (“So those status hearings, I think that to me, those are ideal to have them done virtually.”); Milwaukee Interview 9 (Defense Attorney 8) 10 (Judge 1), 13 (Judge 4), 16 (Prosecutor 1), 19 (Prosecutor 4) (suitable “particularly for inconsequential status hearings”); ND Interviews 7 (Defense Attorney 3), 10 (Defense Attorney 6).
- 845 *See, e.g.*, Milwaukee Interview 17 (Prosecutor 2).
- 846 *See, e.g.*, Milwaukee Interview 17 (Prosecutor 2).
- 847 *See, e.g.*, ND Interview 10 (Defense Attorney 6).
- 848 ND Interview 10 (Defense Attorney 6).
- 849 Milwaukee Interview 9 (Defense Attorney 8).
- 850 Miami Interview 8 (Judge 1).
- 851 Miami Interview 4 (Defense Attorney 3).
- 852 ND Interview 7 (Defense Attorney 3). *See also id.* (“As long as they aren’t full-blown, you know, adversarial with witnesses’ testimony type things.”).
- 853 Milwaukee Interview 9 (Defense Attorney 8).
- 854 ND Interview 17 (Prosecutor 2).
- 855 Milwaukee Interview 13 (Judge 4). *See also, e.g.*, ND Interview 17 (Prosecutor 2).
- 856 Milwaukee Interview 16 (Prosecutor 1).
- 857 ND Interview 10 (Defense Attorney 6).
- 858 ND Interview 21 (Prosecutor 6).
- 859 ND Interview 5 (Defense Attorney 1).
- 860 ND Interview 10 (Defense Attorney 6).
- 861 Milwaukee Interview 19 (Prosecutor 4).
- 862 *See, e.g.*, Milwaukee Interview 4 (Defense Attorney 3) (noting the importance of the entire criminal process and concluding it should be in person); ND Interview 3 (Court Personnel 3) (explaining that a particular judge “is gonna want these people back in her courtroom, dressed appropriately, using appropriate language, using appropriate court decorum as soon as possible,” including for master calendar).
- 863 *See, e.g.*, Miami Interview 3 (Defense Attorney 2) (explaining “I want this to stay for everything other than trials, probation violation hearings, and serious, like, motions . . .” and later affirming “Everything except jury trials, probation violation hearings, and evidentiary motions, evidentiary hearings. . . . So everything else I mean, I love this.”); ND Interview 6 (Defense Attorney 2) (“I like [virtual court]. I don’t know if I’m the exception to the rule, but I’m enjoying it, I hope we stay with it. Not that I don’t want COVID to go away, but I hope we embrace this stuff a little better.”).
- 864 *See* Chapter 6: Efficiencies and Inefficiencies and Chapter 7: Access to Technology.
- 865 Milwaukee Interview 21 (Defense Attorney 6). For a more thorough discussion of whether videoconferencing may have increased or decreased attendance, see Chapter 7: Access to Technology.
- 866 Milwaukee Interview 13 (Judge 4). This judge also “would probably not require the individuals charged to be present for those proceedings” at all.
- 867 ND Interview 10 (Defense Attorney 6).
- 868 Miami Interview 6 (Defense Attorney 5).
- 869 Miami Interview 2 (Defense Attorney 1).
- 870 Milwaukee Interview 2 (Defense Attorney 1).
- 871 Once again, much of the themes here are duplicative of those in that section, so the discussion here will be abbreviated.
- 872 *See, e.g.*, Miami Interviews 3 (Defense Attorney 2) (“Why do I need to waste all of that time driving and then sitting there, and waiting to be called, for something that I know is gonna happen anyway? I mean, it’s just, it makes no sense. . . .”) 8 (Judge 1) (“However, if it was left up to the judge’s discretion, I could tell you that I would be extremely open to maintaining and continuing virtual appearances for a lot of hearings. For instance, on my calendar today, I said we had something like a 40 page or so calendar. Many of those cases were addressed in five minutes or less. . . . When I was a practicing attorney, I was, immediately before this position . . . there were many times that I would have something on a five-minute motion calendar, but . . . all of a sudden, you’ve been out of the office and are billing for a couple hours on something that really essentially took five minutes. . . . It’s the same thing in Circuit Criminal where I am now.”); Milwaukee Interviews 9 (Defense Attorney 8) (“Well, we don’t have to drive, you know, four or five hours round trip to go to a 10 minute hearing anymore.”), 16 (Prosecutor 1) (explaining that virtual hearings are helpful so that defense attorneys don’t have to travel for a “five-minute hearing”). *Cf.* Chapter 6: Efficiencies and Inefficiencies at PAGE.

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- 873 *See, e.g.*, ND Interview 10 (Defense Attorney 6) (“And it’s just a, when it’s in the courtroom, all I’m doing is sitting in the courtroom reading my phone and waiting for my turn. And to some extent, I guess I did that here at my office as well. But it just seemed to go quicker with Zoom than it did with in person.” “You spend a lot of your time when you do go into courtrooms, especially on those days for pre-trial conferences and arrangements, you spend a lot of wasted time there. I mean, a lot. I bet you, you know, of 30 years of doing this, I’ve, I’ve easily wasted a year or two just sitting, you know. And this, and I started when you didn’t have a cell phone. So it was bringing the crossword puzzles and stuff like that.”).
- 874 *But see* Chapter 6: Efficiencies and Inefficiencies at PAGE (discussing the loss of helpful informal communication between defense attorneys and prosecutors that occurred pre-pandemic during informal hearings).
- 875 Milwaukee Interview 17 (Prosecutor 2) (“I think from our standpoint doing the appearances, that we can do by Zoom, I think is beneficial. I think it’s just easier to be able to do the appearances for us, scheduling or an initial appearance, things like that through Zoom. It just makes more sense. I think it’s a more efficient use of time.”).
- 876 Milwaukee Interview 8 (Defense Attorney 7).
- 877 Milwaukee Interview 13 (Judge 4).
- 878 ND Interview 10 (Defense Attorney 6) (noting that the “pre-trial conference is usually a very busy day for the judge”). *See also, e.g.*, Miami Interview 8 (Judge 1) (referencing a 40-page calendar call).
- 879 Milwaukee Interview 10 (Judge 1) (“Now, a lot of the scheduling conferences or some of the, uh, more like those competency hearings I was talking about, I think there’s a great chance that Zoom is here to stay. And especially when mental issues are in the case, you know a lot of the treatment providers. For example, we send someone to Mendota to be treated to competency. Those doctors, obviously, are in Madison. Well, this is a great tool for them to not have to travel three hours, round trip. Yeah, so I think that makes their work a lot more efficient, a lot more efficient. So I think there’s a number of things that Zoom’s here to stay, and that’s good.”).
- 880 Milwaukee Interview 16 (Prosecutor 1).
- 881 Milwaukee Interview 15 (Judge 6). Additionally, two interviewees justified their preference for remote hearings in part by reference to the safety benefits of not transporting defendants. *See* Milwaukee Interviews 16 (Prosecutor 1) (“Appearing via virtually makes a lot of sense, you know, it keeps everyone safe.”), 17 (Prosecutor 2) (“I think even from a safety standpoint, it just makes sense, you’re not transporting people doing things like that. I think that’s been something that’s been really good.”).
- 882 Milwaukee Interview 14 (Judge 5). *Cf.* Miami Interview 8 (Judge 1) (referencing a 40 page calendar call).
- 883 ND Interview 13 (Judge 3).
- 884 ND Interview 22 (Prosecutor 7).
- 885 *Cf, e.g.*, ND Interview 19 (Prosecutor 4) (contemplating remote testimony for “some doctor with some, some dull dissertation”).
- 886 *See* Section II. Part A.
- 887 The majority of interviewees believed calendar could proceed remotely, but at least one disagreed. *See* note 155, *supra*.
- 888 *Compare* Miami Interview 3 (Defense Attorney 2) (expressing preference for in-person revocation hearings) *with* Milwaukee Interview 15 (Judge 6) (expressing preference for remote hearings).
- 889 *Compare* Miami Interview 9 (Judge 2) (expressing preference for in-person) *with* ND Interview 13 (Judge 3) (explaining that review hearings are “where I think Zoom might be a beautiful tool.”).
- 890 *Compare* ND Interview 20 (Prosecutor 5) (“I don’t even like it for bond hearings.”) *with* ND Interview 21 (Prosecutor 6) (noting that bonds could be done remotely and have been for years in larger cities). *See also* ND Interview 10 (Defense Attorney 6) (“I haven’t had a bond hearing or bail hearing yet, and so I’m not sure what I’d feel about that. I think I want the guy there, the client with me, in court, is my general inclination. Nonetheless, I wouldn’t want to have to drive all the way to Grand Forks to have a five-minute, bond is set at, you know, \$20,000 goodbye type hearing.”).
- 891 That said, while those who mentioned these hearings did not reach consensus, there were a number of interviewees who did not state their ultimate preferences for sentencings and pleas either way. The implication is that respondents felt that their views on pleas and sentencings did not merit as much exposition as their views about either trials or very minor hearings.
- 892 Milwaukee Interview 13 (Judge 4).
- 893 Milwaukee Interview 10 (Judge 1).
- 894 ND Interview 15 (Judge 5).
- 895 Milwaukee Interview 7 (Defense Attorney 6).
- 896 Milwaukee Interview 6 (Defense Attorney 5).
- 897 Milwaukee Interview 20 (Prosecutor 6).
- 898 ND Interview 17 (Prosecutor 2).
- 899 ND Interview 15 (Judge 5).
- 900 Miami Interview 11 (Judge 4).
- 901 Milwaukee Interview 13 (Judge 4).

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- 902 See Milwaukee Interviews 6 (Defense Attorney 5), 7 (Defense Attorney 6); ND Interview 15 (Judge 5). See also, e.g., Milwaukee Interview 2 (Defense Attorney 1) (“There’s some sentencings that are taking place, place, via Zoom. And they’re usually in cases where there is an agreement between the prosecutor and the defense attorney, and it’s usually where the recommendation is not a recommendation that results in someone going to prison or jail. Those ones are successful.”).
- 903 See, e.g., Milwaukee Interviews 11 (Judge 2) (“I guess the only other way I would do it would be if I hear enough of the case to know that I’m very likely to go with a probation recommendation. Because obviously, if it’s, you know, if I am not sure or if I think it’s a likely prison case, then I wouldn’t do that virtually because I have no way to take the person into custody. And it’s not like federal court. We don’t, you know, arrange a day for you to turn yourself in and you know, we’ll see you in a year or two or whatever they do.”), 15 (Judge 6) (“If they’re going on probation, that’s the only time they’re doing it. . . . Then they’ll do that via video. Everything else, like if someone’s going into custody and they’re out now, that’s got to be done in person, because when we have a deputy bailiff in the courtroom, we’ll take them into custody and they’ll start their sentence that way.”). See also, e.g., Milwaukee Interviews 6 (Defense Attorney 5), 10 (Judge 1).
- 904 Milwaukee Interview 2 (Defense Attorney 1). See also Milwaukee Interview 20 (Prosecutor 5) (explaining that that “it’s certainly problematic for a judge to sentence an out of custody defendant who is sitting in his living room to five years in prison”). Cf. ND Interview 22 (Prosecutor 7) (“Well, I do think that sentencing is also best in person. . . . I like to be able to look, you know, my opponent in the eye. . . . If I’m recommending a harsh sentence . . . I want that to be clear and, you know, stress that I’m serious about this.”).
- 905 ND Interview 15 (Judge 5).
- 906 Miami Interview 11 (Judge 4). See also ND Interview 12 (Judge 2) (“I think the other thing is, is that, like, on a, a minor in possession would be a good example. Usually minors in possession, you know, these are like 18- and 19-year-old kids that got caught at a bonfire, right. So they get brought in and they’re scared to death. They’ve never been in court before. They’ve never, all right. So I like to do those in person because I like to have a firm, a conversation with them to make sure that they understand that there could be some long term consequences to having a criminal conviction. And we’re not, we’re not doing that here, but you better not come in front of me again because I won’t be able to give you a deferred sentence. I’m gonna have to, you know, give you a sentence. Things, things on that line.”).
- 907 But both of these prosecutors thought that all or almost all sentencings should be in person, not just the ones involving leniency.
- 908 ND Interview 21 (Prosecutor 6).
- 909 ND Interview 22 (Prosecutor 7).
- 910 ND Interview 14 (Judge 4).
- 911 ND Interview 18 (Prosecutor 3).
- 912 ND Interview 12 (Judge 2).
- 913 Milwaukee Interview 2 (Defense Attorney 1) (explaining that “[t]here’s some people who can, who can, have a conversation or a video conference without distractions. Others, more difficult because they live in a house with a lot of people.”).
- 914 *Id.* See also *id.* (“I think the videoconferencing aspect of this is an asset. It’s going to improve communication that we didn’t have before, the options we didn’t have available to us before.”).
- 915 Miami Interview 7 (Defense Attorney 6). See also *id.* (illustrating the need to be open to client preferences with an example of a stand-your-ground hearing, conducted virtually at the client’s insistence, that lead to a dismissal).
- 916 Milwaukee Interview 13 (Judge 4).
- 917 ND Interview 12 (Judge 2). She later described defendants who were migrant workers as an example of the need for a flexible approach. See *id.* (“And the other thing is, is that we have a migrant population, not, not as much as we used to, but we certainly do have people that come here for the fall and then go to, return to Texas for the winter. . . . And so a lot of times, if they’re in Texas, if I could get him to appear by Zoom, that’s much better than having an arrest warrant out for them for failure to appear. Now, if it’s a big felony, no. . . . But, you know, for the little stuff. Yeah, I am much more open to it now than I was a year ago. And so I think that’s, I think that’s good.”).
- 918 Milwaukee Interview 16 (Prosecutor 1).
- 919 ND Interview 1 (Court Personnel 1).
- 920 For more background on these access concerns, see Chapter 6: Efficiencies and Inefficiencies and Chapter 7: Access to Technology.
- 921 Milwaukee Interview 12 (Judge 13).
- 922 Miami Interview 4 (Defense Attorney 3).
- 923 Milwaukee Interview 7 (Defense Attorney 6).
- 924 *Id.*
- 925 Miami Interview 11 (Judge 5).
- 926 ND Interview 12 (Judge 2).

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- 927 ND Interview 13 (Judge 3). A couple of interviewees also noted the benefits of flexibility for more personal reasons. *See* Milwaukee Interview 19 (Prosecutor 4) (explained that Zoom enabled him to take a brief hearing during a vacation day but thought Zoom “should be used sparingly”); ND Interview 22 (Prosecutor 7) (explaining that he could “bridge the gap” during vacations or holidays by using Zoom).
- 928 *See* Milwaukee Interview 8 (Defense Attorney 7) (“I think there will be some ways in which zoom conferencing will have proven itself to be an advantage over the old way. And where I believe, the two sources of advantage are, one, to the clients, where in the middle of winter it’s very difficult to get down to the courthouse. They could be on the Zoom conference.”); ND Interviews 3 (Court Personnel 3) (“One is, it is a tremendous asset in very rural North Dakota, where we have weather issues like everybody else in the United States. But if it blizzards in January and we have a jury trial scheduled, even just a day of pre-trials scheduled, we have to move those and reschedule them and redo them and whatever. If we’re doing it by Zoom, there’s very little effect.”), 20 (Prosecutor 5).
- 929 ND Interview 20 (Prosecutor 5).
- 930 Miami Interview 5 (Defense Attorney 4).
- 931 ND Interview 11 (Judge 1).
- 932 ND Interview 20 (Prosecutor 5).
- 933 Miami Interview 8 (Judge 1).
- 934 Miami Interview 10 (Judge 3).
- 935 Miami Interview 10 (Judge 3).
- 936 Miami Interview 1 (Court Personnel 1) (“We had to incorporate interpreters for the interpreter to interpret simultaneously through zoom. They had a training on that and there’s also instructions on that.”).
- 937 Miami Interview 9 (Judge 2).
- 938 Miami Interview 8 (Judge 1).
- 939 Miami Interview 10 (Judge 3).
- 940 Miami Interview 11 (Judge 4).
- 941 Miami Interview 2 (Defense Attorney 1).
- 942 Miami Interview 3 (Defense Attorney 2).
- 943 Miami Interview 5 (Defense Attorney 4).
- 944 Miami Interview 7 (Defense Attorney 6).
- 945 Miami Interview 12 (Prosecutor 1).
- 946 Miami Interview 4 (Defense Attorney 3).
- 947 *Id.*
- 948 Miami Interview 10 (Judge 3).
- 949 Miami Interview 7 (Defense Attorney 6).
- 950 Miami Interview 4 (Defense Attorney 3).
- 951 *Id.*
- 952 Miami Interview 10 (Judge 3) (“I think now the depositions were fully underway. That makes it a little bit easier to resolve cases.”).
- 953 Miami Interview 3 (Defense Attorney 2).
- 954 Miami Interview 2 (Defense Attorney 1).
- 955 Miami Interview 5 (Defense Attorney 4).
- 956 *See, e.g.*, Milwaukee Interview 11 (Judge 2) (“I basically have quit going on YouTube. Because number one, we are open to the public.”).
- 957 *See* Milwaukee Interview 14 (Judge 5).
- 958 Milwaukee Interview 17 (Prosecutor 2).
- 959 Milwaukee Interview 4 (Defense Attorney 3).
- 960 Milwaukee Interview 10 (Judge 1). *See also* Milwaukee Interview 18 (Prosecutor 3).
- 961 Milwaukee Interview 10 (Judge 1).
- 962 Milwaukee Interview 21 (Prosecutor 6).
- 963 *See, e.g.*, Milwaukee Interviews 10 (Judge 1) (explaining that Zoom “still really wasn’t a public court hearing that criminal proceedings are required to have”), 17 (Prosecutor 2) (noting that “it’s interesting because, you know, the courtrooms need to be open to the public” but “it causes a couple of concerns”).
- 964 Milwaukee Interview 12 (Judge 3).
- 965 Milwaukee Interview 11 (Judge 2).
- 966 Milwaukee Interview 10 (Judge 1). *See also id.* (“Some defense attorneys would like to discuss some things off the record. And so they asked that the YouTube be shut down, which is fine. I, I’ll oblige that because that’s, I think, that the equivalent of, ‘hey judge, can we talk back in chambers?’ You know, because sometimes there’s very sensitive information that can’t be blabbed out in the open. Now it’s supposed to be a public proceeding, so I can make, I can always come back and make some sort of kind of cryptic record about it, I guess, just to protect the sensitive information.”)

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- 967 Milwaukee Interview 13 (Judge 4).
- 968 *See* Milwaukee Interview 6 (Defense Attorney 5).
- 969 Milwaukee Interview 16 (Prosecutor 1). *See also* Milwaukee Interview 10 (Judge 1) (“Sometimes when people are updating, you know, especially an alleged victim, updating an address or a phone number, well, you don’t want that blasted over YouTube.”).
- 970 Milwaukee Interview 17 (Prosecutor 2).
- 971 *Id.*
- 972 Milwaukee Interview 10 (Judge 1).
- 973 Milwaukee Interview 11 (Judge 2). *See also id.* (explaining that “the State was very unhappy about any idea of going on YouTube. They have a lot of issues with regard to victim harassment, victim intimidation. And so, once these things are out on the Internet, you really don’t have any control over it.”).
- 974 Milwaukee Interview 17 (Prosecutor 2). *See also* Milwaukee Interview 19 (Prosecutor 4) (“The only thing that the YouTube stuff, that I’ve seen it matter for, is when there’s discussions about people watching and potential witness intimidation.”).
- 975 Milwaukee Interview 20 (Prosecutor 5).
- 976 Milwaukee Interview 19 (Prosecutor 4).
- 977 Milwaukee Interview 11 (Judge 2).
- 978 As with that section, this section also considers accessibility concerns only for out-of-custody defendants (and for victims). In-custody access is a different issue that is not discussed here. *See* Chapter 7: Access to Technology, page Y note Z.
- 979 ND Interviews 1 (Court Personnel 1), 2 (Court Personnel 2), 4 (Court Personnel 4), 5 (Defense Attorney 1), 7 (Defense Attorney 3), 9 (Defense Attorney 5), 11 (Judge 1), 14 (Judge 4), 15 (Judge 5), 16 (Prosecutor 1), 17 (Prosecutor 2), 19 (Prosecutor 4), 20 (Prosecutor 5), 21 (Prosecutor 6).
- 980 ND Interviews 6 (Defense Attorney 2) (responding that access issues like a lack of minutes haven’t been a concern but noting that confidential calls with clients in custody have been a concern), 12 (Judge 2), 22 (Prosecutor 7).
- 981 ND Interview 12 (Judge 2).
- 982 ND Interview 22 (Prosecutor 7).
- 983 ND Interview 3 (Court Personnel 3).
- 984 ND Interview 17 (Prosecutor 2).
- 985 ND Interview 16 (Prosecutor 1).
- 986 ND Interview 11 (Judge 1).
- 987 ND Interview 1 (Court Personnel 1). *See also* ND Interview 7 (Defense Attorney 3) (tentatively noting, regarding smartphone access, “I don’t know if [defendants] don’t have, you know, smartphones. I’m betting not.”).
- 988 ND Interview 19 (Prosecutor 4).
- 989 ND Interviews 1 (Court Personnel 1), 3 (Court Personnel 3), 5 (Defense Attorney 1), 7 (Defense Attorney 3), 11 (Judge 1), 17 (Prosecutor 2).
- 990 ND Interviews 1 (Court Personnel 1), 3 (Court Personnel 3).
- 991 ND Interview 5 (Defense Attorney 1).
- 992 ND Interview 11 (Judge 1). *See also* ND Interviews 7 (Defense Attorney 3) (describing “people that borrow other people’s cell phones to use them”), 17 (Prosecutor 2) (describing an instance where a defendant told probation to “call my cousin and leave a message with him”).
- 993 ND Interview 19 (Prosecutor 4).
- 994 ND Interview 14 (Judge 4).
- 995 ND Interview 20 (Prosecutor 5).
- 996 ND Interview 17 (Prosecutor 2).
- 997 ND Interview 14 (Judge 4).
- 998 ND Interview 15 (Judge 5).
- 999 ND Interview 4 (Court Personnel 4), 5 (Defense Attorney 1), ND Interview 7 (Defense Attorney 3), 11 (Judge 1) (“There’s a number of families or individuals that . . . don’t have unlimited minutes (*sic*) pay for their minutes.”), 16 (Prosecutor 1), 17 (Prosecutor 2) (“I know there are several people that I try calling that don’t have minutes on their phone.”), 21 (Prosecutor 6) (describing defendants who buy minutes and have TracPhones).
- 1000 ND Interview 5 (Defense Attorney 1). That attorney also discussed the consequences of this lack of access: “So we are finding that we’re having a difficult time getting a hold of the clients to begin with. But when they are expected to be on these conference calls, and they could spend up to an hour and a half to two hours waiting for the case to be called, they’re burning through the minutes that they did have.”
- 1001 ND Interview 7 (Defense Attorney 3).
- 1002 ND Interview 17 (Prosecutor 2). This fuller quote, which discusses “Straight Talk phone[s] that [defendants] can probably only use when there’s free Wi-Fi somewhere,” illustrates again the intersectionality between access problems regarding phones and access problems regarding other technology.

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- 1003 ND Interview 21 (Prosecutor 6).
- 1004 ND Interviews 4 (Court Personnel 4), 16 (Prosecutor 1), 17 (Prosecutor 2).
- 1005 ND Interview 16 (Prosecutor 1).
- 1006 ND Interview 17 (Prosecutor 2).
- 1007 ND Interview 4 (Court Personnel 4).
- 1008 *See, e.g.*, ND Interviews 6 (Defense Attorney 2) (lack of Zoom technology not a barrier “because they do allow you to still call in”); 12 (Judge 2) (noting that, while “not everybody has a computer,” “everybody’s got a phone.”)
- 1009 To emphasize, interviewees’ statements about the access-to-phone problem *suggest* potential access-to-court issues for *certain categories of defendants*: those who in fact experience a lack of access to telephones. Interviewees disagreed about whether remote court increased or decreased defendant attendance on the whole, and in all likelihood, its effects are complicated and multidirectional. *See* Chapter 7: Access to Technology.
- 1010 ND Interviews 2 (Court Personnel 2), 3 (Court Personnel 3), 4 (Court Personnel 4), 7 (Defense Attorney 3), 8 (Defense Attorney 4), 9 (Defense Attorney 5), 10 (Defense Attorney 6), 12 (Judge 2), 13 (Judge 3), 15 (Judge 5), 17 (Prosecutor 2), 19 (Prosecutor 4), 20 (Prosecutor 5), 22 (Prosecutor 7).
- 1011 ND Interviews 2 (Court Personnel 2), 3 (Court Personnel 3), 4 (Court Personnel 4), 9 (Defense Attorney 5), 13 (Judge 3), 20 (Prosecutor 5).
- 1012 ND Interviews 3 (Court Personnel 3), 9 (Defense Attorney 5), 10 (Defense Attorney 6), 20 (Prosecutor 5), 22 (Prosecutor 7).
- 1013 ND Interview 10 (Defense Attorney 6).
- 1014 ND Interview 22 (Prosecutor 7).
- 1015 ND Interviews 2 (Court Personnel 2), 3 (Court Personnel 3), 9 (Defense Attorney 5), 17 (Prosecutor 2).
- 1016 ND Interview 2 (Court Personnel 2).
- 1017 ND Interview 9 (Defense Attorney 5).
- 1018 ND Interviews 10 (Defense Attorney 6), 12 (Judge 2), 15 (Judge 5), 19 (Prosecutor 4).
- 1019 ND Interviews 2 (Court Personnel 2), 3 (Court Personnel 3).
- 1020 ND Interview 7 (Defense Attorney 3).
- 1021 ND Interviews 3 (Court Personnel 3), 12 (Judge 2).
- 1022 ND Interviews 13 (Judge 3), 19 (Prosecutor 4).
- 1023 ND Interviews 8 (Defense Attorney 4), 20 (Prosecutor 5).
- 1024 ND Interviews 3 (Court Personnel 3), 7 (Defense Attorney 3), 9 (Defense Attorney 5), 10 (Defense Attorney 6), 13 (Judge 3), 22 (Prosecutor 7).
- 1025 ND Interview 22 (Prosecutor 7).
- 1026 ND Interview 3 (Court Personnel 3).
- 1027 ND Interview 12 (Judge 3).
- 1028 ND Interviews 2 (Court Personnel 2), 3 (Court Personnel 3), 4 (Court Personnel 4), 7 (Defense Attorney 3), 9 (Defense Attorney 5), 10 (Defense Attorney 6), 12 (Judge 2), 13 (Judge 3), 14 (Judge 4), 15 (Judge 5), 17 (Prosecutor 2), 18 (Prosecutor 3), 19 (Prosecutor 4), 20 (Prosecutor 5), 21 (Prosecutor 6), 22 (Prosecutor 7).
- 1029 ND Interview 15 (Judge 5).
- 1030 ND Interview 22 (Prosecutor 7).
- 1031 ND Interview 13 (Judge 3).
- 1032 ND Interview 4 (Court Personnel 4). *See also* ND Interview 14 (Judge 4) (“[U]nfortunately, too many people think this isn’t court, it’s a Jerry Springer episode. And it’s not as easy to keep control of the courtroom and keep proper decorum when it’s done remotely.”).
- 1033 ND Interview 3 (Court Personnel 3).
- 1034 ND Interview 2 (Court Personnel 2).
- 1035 ND Interview 19 (Prosecutor 4).
- 1036 ND Interview 7 (Defense Attorney 3).
- 1037 ND Interview 18 (Prosecutor 3).
- 1038 ND Interview 17 (Prosecutor 2). *See also* ND Interview 26 (Prosecutor 6) (noting that defendants failed to appreciate the seriousness of the offense in informal remote proceedings).
- 1039 ND Interview 3 (Court Personnel 3).
- 1040 ND Interviews 3 (Court Personnel 3), 7 (Defense Attorney 3), 9 (Defense Attorney 5), 10 (Defense Attorney 6), 17 (Prosecutor 2), 20 (Prosecutor 5), 21 (Prosecutor 6).
- 1041 ND Interview 3 (Court Personnel 3). *See also* ND Interview 9 (Defense Attorney 5) (“So, yeah, there’s been, you know, lack of respect towards the bench. But then also lack of decorum, I guess, in the courtroom, because of all the, you know, other things that people are doing, clothing options, you know, that they’ll be wearing or not wearing in some cases.”).
- 1042 ND Interview 17 (Prosecutor 2).

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- 1043 ND Interview 21 (Prosecutor 6).
- 1044 ND Interview 9 (Defense Attorney 5).
- 1045 ND Interview 10 (Defense Attorney 6).
- 1046 Some interviewees saw respectful and serious behavior as the result of both courtroom formalities and in-person, eye-to-eye contact. *See, e.g.*, ND Interviews 17 (Prosecutor 2) (discussing both the informality of a phone call as compared to court and “the look you see in [the judge’s eyes]”), 20 (Prosecutor 5) (describing “some gal lying in bed” together with a “lack of respect for the system, the process,” and a “lack of one-to-one interaction”), 21 (Prosecutor 6) (connecting seriousness to both formalities and “look[ing] the judge in the eye”). While respondents in every jurisdiction described a dehumanization or problematic loss of in-person contact, *see* Chapter 8: Dehumanization, *supra*, they generally did not describe the behavioral and formality consequences that the North Dakotan interviewees emphasized.
- 1047 ND Interview 15 (Judge 5) (emphasis added).
- 1048 ND Interview 13 (Judge 3).
- 1049 ND Interview 17 (Prosecutor 2) (emphasis added).
- 1050 ND Interviews 2 (Court Personnel 2), 9 (Defense Attorney 5), 17 (Prosecutor 2), 20 (Prosecutor 5), 21 (Prosecutor 6), 22 (Prosecutor 7).
- 1051 ND Interview 1 (Court Personnel 1).
- 1052 ND Interview 18 (Prosecutor 3).
- 1053 *See, e.g.*, ND Interview 17 (Prosecutor 2).
- 1054 ND Interviews 6 (Defense Attorney 2), 9 (Defense Attorney 5), 15 (Judge 5).
- 1055 ND Interview 9 (Defense Attorney 5).
- 1056 ND Interview 15 (Judge 5) (describing informal behavior but noting “I didn’t hold it against her or anything”).
- 1057 ND Interview 6 (Defense Attorney 2). Interestingly, a third defense attorney noted an entirely different potential effect on sentencing vis-à-vis plea deals, which he interpreted as defendants’ reactions to informality. *See* ND Interview 7 (Defense Attorney 3) (finding it “harder sometimes to deal with defendants and for them to accept the reality of the situation they’re in,” and noting that defendants “want to fight more” even if they “have silly defense.”).
- 1058 ND Interview 17 (Prosecutor 2).
- 1059 ND Interview 21 (Prosecutor 6).
- 1060 ND Interview 2 (Court Personnel 2).
- 1061 Remarks of a fourth respondent might fall into this category as well—but he was less explicit about deterrence, referring instead to “goals.” *See* ND Interview 22 (Prosecutor 7) (“I think the loss of formality may sometimes take some of the—What’s the word I’m looking for? You know, there are goals we’re trying to achieve. And I think that, you know, the authority of the judge is very important to achieving those goals.”).
- 1062 ND Interview 1 (Court Personnel 1).
- 1063 *Id.*
- 1064 *Id.*
- 1065 *Id.*
- 1066 ND Interview 21 (Prosecutor 6). *See also* ND Interviews 10 (Defense Attorney 6) (noting, on a seemingly smaller scale, “the erosion of respect for the courtroom”), 22 (Prosecutor 7) (noting, also on a seemingly smaller scale, that the “the authority of the judge” and the “goals we’re trying to achieve” are negatively impacted.).
- 1067 ND Interview 20 (Prosecutor 5).
- 1068 ND Interviews 2 (Court Personnel 2), 3 (Court Personnel 3), 4 (Court Personnel 4), 5 (Defense Attorney 1), 6 (Defense Attorney 2), 9 (Defense Attorney 5), 11 (Judge 1), 12 (Judge 2), 13 (Judge 3), 14 (Judge 4), 16 (Prosecutor 1), 17 (Prosecutor 2), 19 (Prosecutor 4), 20 (Prosecutor 5), 22 (Prosecutor 7).
- 1069 ND Interviews 3 (Court Personnel 3) 4 (Court Personnel 4) (“Now we’ve just transferred into Zoom this month, and Zoom is even better than telephone.”), 5 (Defense Attorney 1), 9 (Defense Attorney 5), 11 (Judge 1), 12 (Judge 2), 13 (Judge 3), 14 (Judge 4), 16 (Prosecutor 1), 17 (Prosecutor 2), 19 (Prosecutor 4), 20 (Prosecutor 5), 22 (Prosecutor 7). But one of these interviewees, Judge 11, had limited experience with Zoom and expressed a somewhat more equivocal position.
- 1070 This theme existed in eight of the pro-Zoom interviews. ND Interviews 3 (Court Personnel 3), 5 (Defense Attorney 1), 9 (Defense Attorney 5), 12 (Judge 2), 14 (Judge 4), 17 (Prosecutor 2), 19 (Prosecutor 4), 20 (Prosecutor 5).
- 1071 ND Interview 14 (Judge 4). Interestingly, though, he found IVN preferable to Zoom, for the same sorts of visual-cue-related reasons discussed by other respondents. *See infra* n.118-20 and accompanying text. Specifically, the Judge explained: “If I had a choice between Zoom and IVN, I would prefer the IVN because it’s one camera in the courtroom and it’s a full, ah, full view of a person sitting in the witness stand or, you know, we turn it out to our counsel table, whereas Zoom, you just see the person chest up.” ND Interview 14 (Judge 4). No other interviewees compared Zoom and IVN, but the Judge’s remarks would suggest that comparisons *among* video platforms (and not just comparisons between audio and video) should be considered.
- 1072 ND Interview 9 (Defense Attorney 5).

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- 1073 ND Interview 17 (Prosecutor 2).
- 1074 ND Interview 5 (Defense Attorney 1).
- 1075 ND Interview 20 (Prosecutor 5). *See also* ND Interview 11 (Judge 1) (noting that “you lose something in the translation as far as you know, person appearing telephonically *or even by computer* like this as compared being faced with face”) (emphasis added).
- 1076 ND Interview 12 (Judge 2).
- 1077 ND Interview 19 (Prosecutor 4).
- 1078 ND Interview 3 (Court Personnel 3).
- 1079 ND Interview 13 (Judge 3).
- 1080 ND Interview 16 (Prosecutor 1).
- 1081 ND Interview 11 (Judge 1). But the Judge did not have seem to have firsthand experience using the screensharing feature to receive evidence.
- 1082 ND Interview 5 (Defense Attorney 1). For more on the effects of virtual communication on confidentiality (across all jurisdictions), *see* Chapter 10: Attorney-Client Communication.
- 1083 ND Interview 20 (Prosecutor 5).
- 1084 ND Interview 9 (Defense Attorney 5).
- 1085 *Id.*
- 1086 ND Interview 6 (Defense Attorney 2).
- 1087 ND Interview 2 (Court Personnel 2).
- 1088 ND Interview 3 (Court Personnel 3).
- 1089 *Id.*
- 1090 *See* Chapter 2: Literature Review for an overview of this study.
- 1091 Jenia I. Turner, *Remote Criminal Justice*, 53 TEXAS TECH L. REV. 197-198, 238 (2021).
- 1092 *See id.* at 42-43.
- 1093 *See id.* at 44.
- 1094 *See id.* at 17 (citing Robin Davis et al., *Research on Videoconferencing at Post-Arrest Release Hearings: Phase I Final Report*, ICF INT’L 5 (May 29, 2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248902.pdf>).
- 1095 *See* Chapter 3: Quantitative Analysis (50.7% of attorneys reported that out-of-custody defendants have access to the internet all or most of the time, 67.3% of attorneys reported that out-of-custody defendants have access to smartphones all or most of the time, and 35.3% of attorneys reported that out-of-custody defendants have access to a tablet or computer all or most of the time ).
- 1096 *Id.* at 53.
- 1097 *See id.* (finding that 18% of prosecutors thought that indigent defendants lacked technology access often or always, and 44.9% of prosecutors thought they lacked access rarely or never).
- 1098 *Id.* at 57.
- 1099 *See id.* at 53 (finding that 17.8% of judges thought that indigent defendants lacked technology access often or always, and 54.0% of judges thought they lacked access rarely or never).
- 1100 *See* Erin J. Newman & Norbert Schwarz, *Good Sound, Good Research: How Audio Quality Influences Perceptions of the Research and the Researcher*, 40 SCI. COMM’N 246, 253-54 (2018).
- 1101 *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. CRIMINAL L. CRIMINOLOGY 869, 898 (2010).
- 1102 *Cf.* Turner, *supra* note 2, at 21-22 (discussing past scholarship).
- 1103 *See* Chapter 2: Literature Review.
- 1104 Turner, *supra* note 2, at 57.
- 1105 *See* Chapter 10: Attorney-Client Communication.
- 1106 *See* Chapter 3: Quantitative Analysis.
- 1107 *See* Chapter 8: Dehumanization.
- 1108 *See* Turner, *supra* note 2, at 69 (quoting respondents who worried that “[a]ccused persons in the criminal justice system already face dehumanization[;] remote hearings, especially on anything other than the most routine matters, such as arraignment, significantly heighten those concerns,” and that “defendants will feel cheated by the justice system if contested hearings continue to happen virtually”).
- 1109 *Id.* at 22 (discussing the potential negative consequences of remote court proceedings that emerged from earlier literature).
- 1110 *Id.* at 63.
- 1111 *Id.* at 67 (emphasis in original).

*Click on hyperlinks to visit websites and articles.*

- 1112 Note that our study did not find the same discrepancy in post-pandemic preferences that Turner observed. *See id.* at 63 (finding that 70.3% of prosecutors, 59.8% of judges, and 47.6% of defense attorneys wanted to use videoconferencing more frequently after the pandemic and noting that the difference between prosecutors and defense attorneys was statistically significant). However, our study was not well-designed to detect this degree of nuance, and it would have been impossible to do so at any statistically significant level (as our large survey included only defense counsel).
- 1113 *See* Chapter 12: Ultimate Preferences.
- 1114 ND Interview 20 (Prosecutor 5). *See also* Chapter 8: Dehumanization. Additionally, open-ended responses in the quantitative survey included similar themes. One respondent, for example, thought that “it’s much easier to hold someone in jail or sentence them when you don’t have to look them in the face.” *See* Chapter 3: Quantitative Analysis.
- 1115 Diamond et al., *supra* note 11, at 870.
- 1116 Such a study would, of course, be complicated by changed standards for incarceration intended to keep COVID out of jails.
- 1117 *Vazquez Diaz v. Commonwealth*, No. SJC-13009 (Mass. May 5, 2021) (Kafker, J., concurring).
- 1118 *See* Chapter 12: Ultimate Preferences for respondents’ preferences on whether courts should use remote technology at all for things like trials, pleas, and sentencing.
- 1119 *See also* Chapter 3: Quantitative Analysis page ZZ (finding that 78% of defense attorneys surveyed believed that remote court compromised access to technology).
- 1120 *See* Chapter 15: Northeast Judicial District of North Dakota, Part I - Access to Phones.
- 1121 *See* Milwaukee Interview 5 (Defense Attorney 4) (describing a judge refusing to accept an audio appearance and the occasional issuance of “bench warrants for clients who couldn’t connect”).
- 1122 ND Interview 16 (Prosecutor 1).
- 1123 *See* Chapter 15: Northeast Judicial District of North Dakota, Part III - Zoom Versus Phone.
- 1124 *See id.*
- 1125 *See* Chapter 2: Literature Review for an overview of this study.
- 1126 Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice?: The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L. REV. 259, 261, 269-70 (2008).
- 1127 *Id.* at 270 (citing Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 67 (2006)).
- 1128 *See id.* at 280.
- 1129 *See also* Turner, *supra* note 2, at 73 (“Following social science on videoconferencing and with the help of technical staff, court administrators should also develop protocols on camera angles, lighting, and image size that reduce video’s biasing effects.”).
- 1130 *Id.* at 22.
- 1131 *See* Diamond et al., *supra* note 11, at 898.
- 1132 Further, attorneys with five or fewer years of practice were much more likely to report such problems than the average attorney. To the extent that years of practice is a proxy for age, these findings raise the (admittedly speculative) possibility that younger attorneys are simply noticing such problems more readily, perhaps due to a greater experience on and exposure to videoconferencing. There is at least an outside theoretical chance, then, that these issues are under-reported.
- 1133 *See, e.g.*, ND Interview 12 (Judge 2).
- 1134 *See, e.g.*, ND Interview 21 (Prosecutor 6) (explaining that she uses a virtual background because her office has a flag behind her, and she would not get that privilege in court).
- 1135 The expected level of decorum may, of course, vary from jurisdiction to jurisdiction. *See, e.g.*, Chapter 15: Northeast Judicial District of North Dakota, Part II - Formality, Respect, Justice (explaining that in North Dakota in particular, defendants’ other behaviors, including calling into court in bed, informal clothing choices, and using foul language, tended to come off as a sign of disrespect). But defense attorneys will hopefully be well-positioned to know the expectations in a given jurisdiction and of a particular judge, and should thus advise their clients accordingly. We recognize, however, that this advice creates more work for already-overburdened defense attorneys, and that such pre-hearing preparation may not be feasible in all cases.
- 1136 Not all of those limitations are repeated here. *See* the referenced sections for more detail.
- 1137 *See, e.g.*, Chapter 7: Access to Technology n.X (currently 9) and accompanying text; Chapter 8: Dehumanization n.X (currently 5) and accompanying text.
- 1138 *See* Chapter 3” Quantitative Analysis (reporting rural/urban/suburban differences in communication and access, many of which failed to reach statistical significance in our sample).
- 1139 *See* Chapter 15: Northeast Judicial District of North Dakota, Part II - Formality, Respect, Justice.
- 1140 *See, e.g.*, Turner, *supra* note 2, at 44 (discussing potentially higher cost savings in rural areas and potential reductions in traffic in urban ones).
- 1141 Our study did not ask such questions. While occasional respondents commented on, for example, the effects of remote communication on interracial trust (*see* Milwaukee Interview 6 (Defense Attorney 5)) or the outburst of a defendant suffering from mental illness on Zoom (*see* ND Interview 3 (Court Personnel 3)), we lack sufficient data to report any findings along these lines.

# APPENDIX 1: TABLES 1 THROUGH 46

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**Table 1. Type of Attorney**

	<b>% of Attorneys (n)</b>
Institutional Public Defender	47.28% (113)
Private Practice with K	8.79% (21)
Private Practice with Appointments	27.20% (65)
Private Practice without Appointments	16.74% (40)

**Table 2. Public Defense Caseload**

	<b>% of Attorneys (n)</b>
Capital	4.64% (11)
Other Felony	63.71% (151)
Misdemeanor	8.86% (21)
Appeals	1.69% (4)
Juvenile	10.97% (26)

**Table 3. Type of Jurisdiction**

	<b>% of Attorneys (n)</b>
Urban	42.92% (103)
Suburban	13.75% (33)
Rural	15.00% (36)
Native American Reservation	0 (0)
Mixed urban/suburban	15.83% (38)
Mixed suburban/rural	9.17% (22)

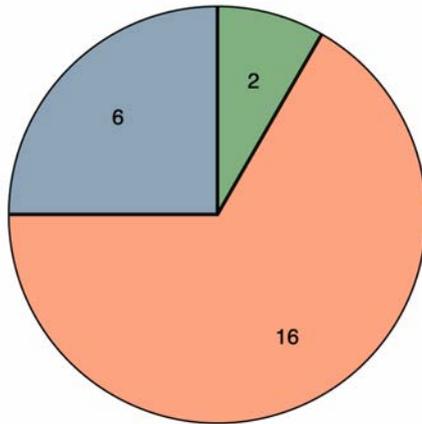
**Table 4. Census Region and Census Sub-Region**

<b>Region</b>	<b>% of Attorneys (n)</b>
<b>Midwest</b>	20.00% (48)
West North Central	10.00% (24)
East North Central	10.00% (24)
<b>South</b>	40.00% (96)
South Atlantic	28.75% (69)
West South Central	8.33% (20)
East South Central	2.92% (7)
<b>Northeast</b>	15.00% (36)
New England	5.00% (12)
Middle Atlantic	10.00% (24)
<b>West</b>	25.00% (60)
Mountain	7.92% (19)
Pacific	17.08% (47)

\*Number of respondents in parentheses

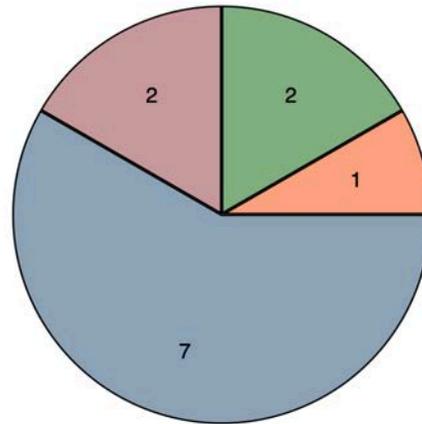
### Further Breakdown of Northeast Region

**Middle Atlantic Census Division**  
24 Respondents (10% of Total)



■ NJ ■ NY ■ PA

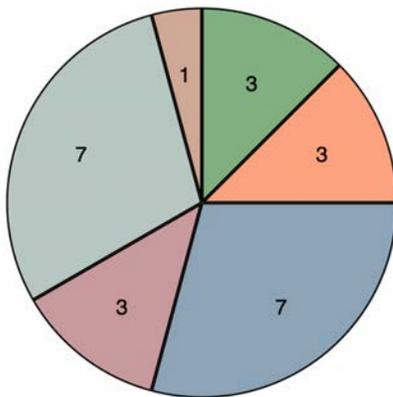
**New England Census Division**  
12 Respondents (10% of Total)



■ CT ■ ME ■ MA ■ NH

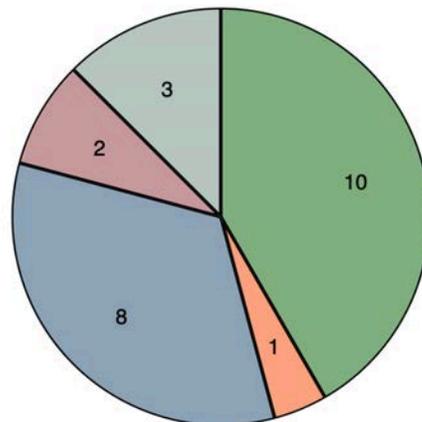
### Further Breakdown of Midwest Region

**West North Central Census Division**  
24 Respondents (10% of Total)



■ IA ■ KS ■ MN  
■ MO ■ NE ■ ND

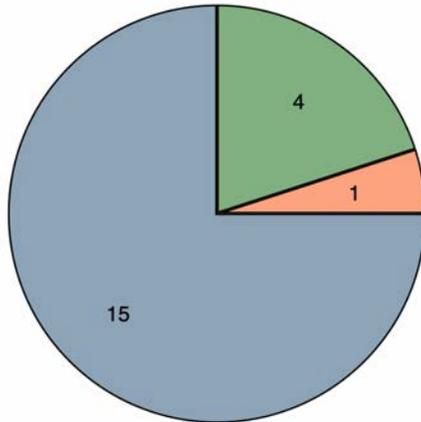
**East North Central Census Division**  
24 Respondents (10% of Total)



■ IL ■ IN ■ MI ■ OH ■ WI

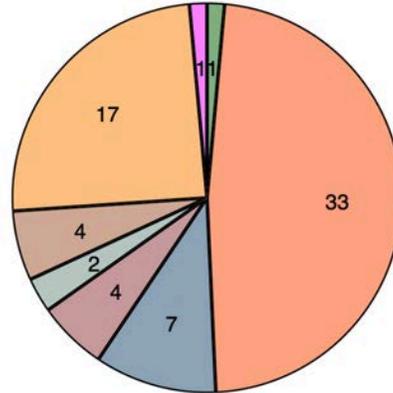
### Further Breakdown of South Region

**West South Central Census Division**  
20 Respondents (8% of Total)



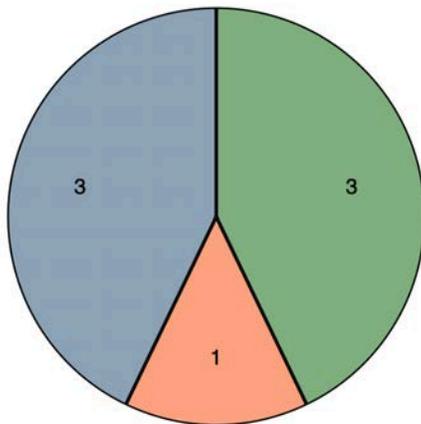
AR LA TX

**South Atlantic Census Division**  
69 Respondents (29% of Total)



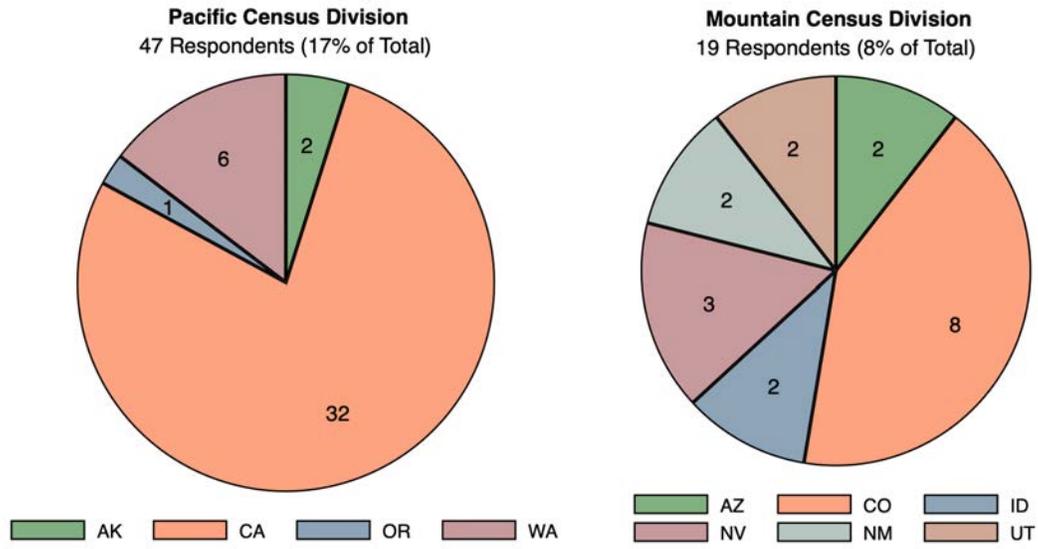
DC FL GA MD  
NC SC VA WV

**East South Central Census Division**  
7 Respondents (3% of Total)



AL MS TN

### Further Breakdown of West Region



**Table 5. Length of Practice**

	<b>% of Attorneys (n)</b>
Less than 2 Years	2.92% (7)
2-5 Years	8.33% (20)
6-10 Years	15.83% (38)
11-20 Years	17.50% (42)
21+ Years	55.42% (133)

\*Number of respondents in parentheses

**Table 6. Length of Practice by Type of Jurisdiction**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
Less than 2 Years % (n)	2.92% (7)	4.85% (5)	0% (0)	0% (0)
2-5 Years % (n)	8.33% (20)	15.53% (16)	0% (0)	6.06% (2)
6-10 Years % (n)	15.83% (38)	16.50% (17)	16.67% (6)	21.21% (7)
11-20 Years % (n)	17.50% (42)	18.45% (19)	11.11% (4)	15.15% (5)
21+ Years % (n)	55.42% (133)	44.66% (46)	72.22% (26)	57.58% (19)

**Table 7. Type of Jurisdiction by Length of Practice**

	<b>All</b>	<b>0-5 Years</b>	<b>6-10 Years</b>	<b>11-20 Years</b>	<b>21+ Years</b>
Urban % (n)	42.92% (103)	91.30% (21)	56.67% (17)	67.86% (19)	50.55% (46)
Rural % (n)	15.00% (36)	0% (0)	20.00% (6)	14.29% (4)	28.57% (26)
Suburban % (n)	13.75% (33)	8.70% (2)	23.33% (7)	17.86% (5)	20.88% (19)

**Table 8. Gender**

	<b>% of Attorneys (n)</b>
Male	56.12% (133)
Female	43.46% (103)
Other	0.42% (1)

**Table 9. Race/Ethnicity**

	<b>% of Attorneys (n)</b>
Asian	2.13% (5)
Black	6.81% (16)
Latinx	2.55% (6)
Native American	0.43% (1)
Other	6.38% (15)
White	81.70% (192)

## **OVERALL TRENDS IN THE USE OF VIDEO-CONFERENCING TECHNOLOGY**

**Table 10. Have You Used Video-Conferencing? (By Type of Jurisdiction)**

	<b>% of Attorneys (n)</b>
All	95.83% (230)
Urban	96.12% (99)
Rural	88.89% (32)
Suburban	96.97% (32)

**Table 11. Livestreamed Virtual Proceedings**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
No % (n)	40.42% (97)	42.72% (44)	47.22% (17)	39.39% (13)
Sometimes % (n)	32.50% (78)	33.01% (34)	27.28% (10)	27.27% (9)
Yes % (n)	27.08% (65)	24.27% (25)	25.00% (9)	33.33% (11)

\*Number of respondents in parentheses

**Table 12. Technology Platforms Used for Audio-/Video-Conferencing  
(by Type of Jurisdiction)**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
Skype % (n)	12.50% (30)	14.56% (15)	2.78% (1)	15.15% (5)
Bluejeans % (n)	3.75% (9)	3.88% (4)	2.78% (1)	3.03% (1)
Zoom % (n)	74.58% (179)	69.90% (72)	80.56% (29)	75.76% (25)
Webex % (n)	32.08% (77)	20.39% (21)	36.11% (13)	39.39% (13)
Microsoft Teams % (n)	18.75% (45)	14.56% (15)	16.67% (6)	21.21% (7)
Other % (n)	21.67% (52)	16.50% (17)	27.78% (10)	18.18% (6)

\*Column totals may exceed 100% because attorneys were asked to select each technology platform that they have used.

**Examples of Other Technology Platforms Used:**

- GoToMeeting
- Justice Bridge
- LifeSize
- Polycom (appears to be for communicating with clients in prison)
- Scopia
- "Securus for video visits with inmates."
- CourtCall

**Table 13. Video-Conferencing Technology Features Used in Virtual Proceedings (by Type of Jurisdiction)**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
Breakout Rooms % (n)	51.25% (133)	50.49% (52)	41.67% (13)	45.45% (15)
Share Screen % (n)	63.75% (153)	65.05% (67)	50.00% (18)	72.73% (24)
Recording % (n)	30.42% (73)	33.01% (34)	30.56% (11)	27.27% (9)
Private Chat % (n)	43.75% (105)	42.72% (44)	30.56% (11)	51.52% (17)
Password Protection % (n)	28.33% (68)	27.18% (28)	16.67% (6)	24.24% (8)
Other % (n)	5.00% (12)	2.91% (3)	11.11% (4)	12.12% (4)

\*Column totals may exceed 100% because attorneys were asked to select each technology feature that they have used

**Table 14. Video-Conferencing Technology Features Used in Virtual Proceedings (by Length of Practice)**

	<b>All</b>	<b>0-5 Years</b>	<b>6-10 Years</b>	<b>11-20 Years</b>	<b>21+ Years</b>
Breakout Rooms % (n)	51.25% (133)	51.85% (14)	47.37% (18)	66.67% (28)	47.37% (63)
Share Screen % (n)	63.75% (153)	66.67% (18)	52.63% (20)	61.90% (26)	66.92% (89)
Recording % (n)	30.42% (73)	25.93% (7)	21.05% (8)	42.86% (18)	20.08% (40)
Private Chat % (n)	43.75% (105)	29.63% (8)	42.11% (16)	57.14% (24)	42.86% (57)
Password Protection % (n)	28.33% (68)	25.93% (7)	26.32% (10)	33.33% (14)	27.82% (37)
Other % (n)	5.00% (12)	3.70% (1)	13.16% (5)	2.38% (1)	3.76% (5)

\*Column totals may exceed 100% because attorneys were asked to select each technology feature that they have used

#### Examples of Other Technology Features Used:

- Waiting room
- Public chat

**Table 15. How Have Features of Video-Conferencing Created Challenges?  
(by Type of Jurisdiction)**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
Camera Placement Inhibiting Full View % (n)	49.17% (118)	53.40% (55)	50.00% (18)	36.36% (12)
Poor audio quality % (n)	78.33% (188)	81.55% (84)	88.89% (32)	63.64% (21)
Poor video quality % (n)	60.42% (145)	64.08% (66)	66.67% (24)	54.55% (18)
Other % (n)	31.67% (66)	30.10% (31)	19.44% (7)	39.39% (13)

\*Column totals may exceed 100% because attorneys were asked to select each challenge that they have experienced

\*\*Restricted to attorneys who agreed or strongly agreed that the shift to virtual proceedings has hurt attorney-client communication

**Table 16. How Have Features of Video-Conferencing Created Challenges?  
(by Length of Practice)**

	<b>All</b>	<b>0-5 Years</b>	<b>6-10 Years</b>	<b>11-20 Years</b>	<b>21+ Years</b>
Camera Placement Inhibiting Full View % (n)	49.17% (118)	77.78% (21)	47.37% (18)	40.48% (17)	46.62% (62)
Poor audio quality % (n)	78.33% (188)	81.48% (22)	89.47% (34)	80.95% (34)	73.68% (98)
Poor video quality % (n)	60.42% (145)	81.48% (22)	65.79% (25)	64.29% (27)	53.38% (71)
Other % (n)	31.67% (66)	37.04% (10)	34.21% (13)	40.48% (17)	27.07% (36)

\*Column totals may exceed 100% because attorneys were asked to select each challenge that they have experienced

\*\*Restricted to attorneys who agreed or strongly agreed that the shift to virtual proceedings has hurt attorney-client communication

**Examples of Other Ways Technology Features Have Created Challenges:**

- Background noise
- “Even breakout rooms are too public.”
- “Inability to share discovery”
- “Everything takes longer”
- “It is impersonal.”
- “Unable to stand beside client and communicate simultaneously as court is conducted.”
- “Dropped, witnesses disrespectful, off camera stuff, reading reports.”
- “If two people talk at the same time, you can’t hear either; unable to answer client’s questions or explain proceedings unless they are out of custody; no organized docket or line to take up cases - can sit waiting for hours.”
- Translation issues
- “I never know if the privacy is real.”
- “Clients not understanding the difference between a private conference and a recorded court proceeding in terms of confidentiality.”
- “Despite assurances otherwise, these are often recorded.”
- “Generally, fact of separation from client.”
- “Everyone takes a screen less seriously than a personal appearance.”
- “Lack of privacy, distractions, hard to hear, limits what I can discuss and/or review with clients.”
- “Unreliability of the system generally.”
- “In the courtroom, the camera is only on the judge. Often, all the other stakeholders are in the courtroom and the kiddo is appearing remotely. From the kiddo’s perspective, the only person on camera is the judge. The other players are merely muffled voices. It is very difficult to hear or understand what the people that off screen are saying. Also, the court staff have a lot of difficulty with the equipment.”

## HYBRID USE OF VIDEO-CONFERENCING TECHNOLOGY

**Table 17. Who Usually Appears Virtually at Initial Criminal Proceedings**

**Defendant, Defense Attorney, Prosecutor & Judge All Usually Appear Virtually for Initial Proceedings**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
% of Attorneys (n)	66.67% (160)	72.82% (75)	66.67% (24)	54.55% (18)

\*Initial criminal proceedings defined as initial appearances, arraignments, and bail-related hearings

**Defendant, Defense Attorney, & Prosecutor All Usually Appear Virtually for Initial Proceedings (Only Judge Usually Appears In-Person)**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
% of Attorneys (n)	5.00% (12)	0.97% (1)	5.56% (2)	12.12% (4)

\*Initial criminal proceedings defined as initial appearances, arraignments, and bail-related hearings

**Only Defendant and Defense Attorney Usually Appear Virtually for Initial Proceedings (Prosecutor and Judge Usually Appear In-Person)**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
% of Attorneys (n)	2.92% (7)	1.94% (2)	5.56% (2)	0 (0)

\*Initial criminal proceedings defined as initial appearances, arraignments, and bail-related hearings

**Only Defendant Usually Appears Virtually for Initial Proceedings (Defense Attorney, Prosecutor, and Judge Usually Appear In-Person)**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
% of Attorneys (n)	9.17% (22)	7.77% (8)	2.78% (1)	18.18% (6)

\*Initial criminal proceedings defined as initial appearances, arraignments, and bail-related hearings

**Table 18. Who Usually Appears Virtually at Subsequent Criminal Proceedings****Defendant, Defense Attorney, Prosecutor & Judge All Usually Appear Virtually for Subsequent Proceedings**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
% of Attorneys (n)	61.25% (147)	70.87% (73)	58.33% (21)	45.45% (15)

\*Subsequent criminal proceedings defined as all criminal proceedings besides initial appearances, arraignments, and bail-related hearings

**Defendant, Defense Attorney, & Prosecutor All Usually Appear Virtually for Subsequent Proceedings (Only Judge Usually Appears In-Person)**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
% of Attorneys (n)	4.17% (10)	0.97% (1)	5.56% (2)	9.09% (9)

\*Subsequent criminal proceedings defined as all criminal proceedings besides initial appearances, arraignments, and bail-related hearings

**Only Defendant and Defense Attorney Usually Appear Virtually for Subsequent Proceedings (Prosecutor and Judge Usually Appear In-Person)**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
% of Attorneys (n)	2.08% (5)	0.97% (1)	2.78% (1)	0 (0)

\*Subsequent criminal proceedings defined as all criminal proceedings besides initial appearances, arraignments, and bail-related hearings

**Only Defendant Usually Appears Virtually for Subsequent Proceedings (Defense Attorney, Prosecutor, and Judge Usually Appear In-Person)**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
% of Attorneys (n)	7.50% (18)	6.80% (7)	2.78% (1)	18.18% (6)

\*Subsequent criminal proceedings defined as all criminal proceedings besides initial appearances, arraignments, and bail-related hearings

## USE OF VIDEO-CONFERENCING TECHNOLOGY BY TYPE OF PROCEEDING

**Table 19. Use of Video-Conferencing for First Appearances**

	All		Urban		Rural		Suburban	
	In Custody	Out of Custody	In Custody	Out of Custody	In Custody	Out of Custody	In Custody	Out of Custody
Always/Usually % (n)	74.35% (171)	51.74% (119)	72.73% (72)	55.56% (55)	75.00% (24)	56.25% (18)	75.00% (24)	43.75% (14)
Sometimes % (n)	13.91% (32)	23.91% (55)	16.16% (16)	23.23% (23)	15.62% (5)	21.88% (7)	12.50% (4)	18.75% (6)
Never % (n)	6.09% (14)	20.00% (46)	4.04% (4)	16.16% (16)	6.25% (2)	21.88% (7)	6.25% (2)	34.38% (11)

\*Category "NA/Unsure" is excluded from the table

**Table 20. Use of Video-Conferencing for Bail-Related Hearings**

	All		Urban		Rural		Suburban	
	In Custody	Out of Custody	In Custody	Out of Custody	In Custody	Out of Custody	In Custody	Out of Custody
Always/Usually % (n)	72.17% (166)	46.09% (106)	69.70% (69)	47.47% (47)	71.88% (23)	53.12% (17)	75.00% (24)	37.50% (12)
Sometimes % (n)	17.83% (41)	24.35% (56)	20.20% (20)	25.25% (25)	21.88% (7)	15.62% (5)	15.62% (5)	25.00% (8)
Never % (n)	3.48% (15)	14.78% (34)	4.04% (4)	13.13% (13)	3.12% (1)	15.62% (5)	0 (0)	21.88% (7)

\*Category "NA/Unsure" is excluded from the table

**Table 21. Use of Video-Conferencing for Pre-Trial/Status Conferences**

	<b>All</b>		<b>Urban</b>		<b>Rural</b>		<b>Suburban</b>	
	<b>In Custody</b>	<b>Out of Custody</b>						
Always/Usually % (n)	65.65% (151)	50.43% (116)	60.61% (60)	50.51% (50)	59.38% (19)	56.25% (18)	75.00% (24)	43.75% (14)
Sometimes % (n)	20.45% (47)	27.39% (63)	17.17% (17)	22.22% (22)	28.12% (9)	21.25% (10)	18.75% (6)	31.25% (10)
Never % (n)	6.96% (16)	14.78% (34)	11.11% (11)	17.17% (17)	9.38% (3)	9.38% (3)	3.12% (1)	21.88% (7)

\*Category "NA/Unsure" is excluded from the table

**Table 22. Use of Video-Conferencing for Settlement Conferences**

	<b>All</b>		<b>Urban</b>		<b>Rural</b>		<b>Suburban</b>	
	<b>In Custody</b>	<b>Out of Custody</b>						
Always/Usually % (n)	31.74% (73)	27.63% (63)	29.29% (29)	23.71% (23)	40.62% (13)	34.38% (11)	34.38% (11)	31.25% (10)
Sometimes % (n)	13.04% (30)	17.54% (40)	12.12% (12)	16.49% (16)	12.52% (4)	21.88% (7)	9.38% (3)	6.25% (2)
Never % (n)	10.00% (23)	17.11% (39)	10.10% (10)	19.59% (19)	18.75% (6)	12.50% (4)	9.28% (3)	21.88% (7)

\*Category "NA/Unsure" is excluded from the table

**Table 23. Use of Video-Conferencing for Non-Evidentiary Motions**

	<b>All</b>		<b>Urban</b>		<b>Rural</b>		<b>Suburban</b>	
	<b>In Custody</b>	<b>Out of Custody</b>						
Always/Usually % (n)	55.22% (127)	44.54% (102)	56.57% (56)	44.90% (44)	56.25% (18)	50.00% (60)	43.75% (14)	40.62% (13)
Sometimes % (n)	25.65% (59)	27.51% (63)	21.21% (21)	26.53% (26)	28.12% (9)	21.88% (7)	43.75% (14)	31.25% (10)
Never % (n)	5.65% (13)	16.59% (38)	10.10% (10)	17.35% (17)	3.12% (1)	15.62% (5)	3.12% (1)	18.75% (6)

\*Category "NA/Unsure" is excluded from the table

**Table 24. Use of Video-Conferencing for Evidentiary Hearings**

	<b>All</b>		<b>Urban</b>		<b>Rural</b>		<b>Suburban</b>	
	<b>In Custody</b>	<b>Out of Custody</b>						
Always/Usually % (n)	28.07% (64)	25.22% (22)	30.30% (30)	25.25% (25)	21.88% (7)	25.00% (8)	32.26% (10)	31.25% (10)
Sometimes % (n)	31.14% (71)	26.09% (60)	28.28% (28)	24.24% (24)	43.75% (14)	34.38% (11)	25.81% (8)	15.62% (5)
Never % (n)	23.68% (54)	32.17% (74)	21.21% (21)	27.27% (27)	25.00% (8)	31.25% (10)	25.81% (8)	40.62% (13)

\*Category "NA/Unsure" is excluded from the table

**Table 25. Use of Video-Conferencing for Preliminary Hearings**

	<b>All</b>		<b>Urban</b>		<b>Rural</b>		<b>Suburban</b>	
	<b>In Custody</b>	<b>Out of Custody</b>						
Always/Usually % (n)	38.26% (88)	29.69% (68)	43.43% (43)	33.67% (33)	28.12% (9)	25.00% (8)	34.38% (11)	25.00% (8)
Sometimes % (n)	20.00% (46)	17.90% (41)	19.19% (19)	14.29% (14)	25.00% (8)	34.38% (11)	28.12% (9)	9.38% (3)
Never % (n)	20.43% (47)	29.26% (67)	15.15% (15)	26.53% (26)	31.25% (10)	28.12% (9)	15.62% (5)	37.50% (12)

\*Category "NA/Unsure" is excluded from the table

**Table 26. Use of Video-Conferencing for Change of Plea Hearings**

	<b>All</b>		<b>Urban</b>		<b>Rural</b>		<b>Suburban</b>	
	<b>In Custody</b>	<b>Out of Custody</b>						
Always/Usually % (n)	42.17% (97)	31.30% (72)	40.40% (40)	32.32% (32)	37.50% (12)	37.50% (12)	37.50% (12)	21.88% (7)
Sometimes % (n)	22.17% (51)	25.22% (58)	23.23% (23)	23.23% (23)	21.88% (7)	21.88% (7)	9.38% (3)	25.00% (8)
Never % (n)	10.87% (25)	23.04% (53)	8.08% (8)	21.21% (21)	25.00% (8)	25.00% (8)	9.38% (3)	15.62% (5)

\*Category "NA/Unsure" is excluded from the table

**Table 27. Use of Video-Conferencing for Jury Pre-Screenings**

	<b>All</b>		<b>Urban</b>		<b>Rural</b>		<b>Suburban</b>	
	<b>In Custody</b>	<b>Out of Custody</b>						
Always/Usually % (n)	3.49% (8)	0.43% (1)	3.03% (3)	0 (0)	3.23% (1)	0 (0)	6.25% (2)	0 (0)
Sometimes % (n)	3.49% (8)	3.04% (7)	4.04% (4)	5.05% (5)	9.68% (3)	6.25% (2)	0 (0)	0 (0)
Never % (n)	34.93% (80)	41.30% (95)	33.33% (33)	37.37% (37)	38.71% (4)	53.12% (17)	34.38% (11)	46.88% (15)

\*Category "NA/Unsure" is excluded from the table

**Table 28. Use of Video-Conferencing for Jury Voir Dire**

	<b>All</b>		<b>Urban</b>		<b>Rural</b>		<b>Suburban</b>	
	<b>In Custody</b>	<b>Out of Custody</b>						
Always/Usually % (n)	3.06% (7)	1.75% (4)	3.03% (3)	0 (0)	0 (0)	3.12% (1)	3.12% (1)	0 (0)
Sometimes % (n)	2.18% (5)	2.18% (5)	3.03% (3)	3.06% (3)	3.12% (1)	3.12% (1)	0 (0)	0 (0)
Never % (n)	48.03% (4)	50.66% (116)	43.43% (43)	42.86% (42)	59.38% (19)	65.62% (21)	59.38% (19)	68.75% (22)

\*Category "NA/Unsure" is excluded from the table

**Table 29. Use of Video-Conferencing for Trials**

	<b>All</b>		<b>Urban</b>		<b>Rural</b>		<b>Suburban</b>	
	<b>In Custody</b>	<b>Out of Custody</b>						
Always/Usually % (n)	4.78% (11)	3.07% (7)	5.05% (5)	4.12% (4)	3.12% (1)	0 (0)	0 (0)	0 (0)
Sometimes % (n)	6.96% (16)	6.14% (14)	7.07% (7)	6.19% (6)	6.25% (2)	0 (0)	9.38% (3)	6.25% (2)
Never % (n)	56.09% (129)	57.46% (131)	47.47% (47)	49.48% (48)	71.88% (23)	81.25% (26)	65.62% (21)	68.75% (22)

\*Category "NA/Unsure" is excluded from the table

**Table 30. Use of Video-Conferencing for Sentencings**

	<b>All</b>		<b>Urban</b>		<b>Rural</b>		<b>Suburban</b>	
	<b>In Custody</b>	<b>Out of Custody</b>						
Always/Usually % (n)	39.13% (60)	29.69% (68)	38.38% (38)	27.27% (27)	37.50% (12)	37.50% (12)	43.75% (14)	25.00% (8)
Sometimes % (n)	32.17% (74)	29.69% (68)	33.33% (33)	28.28% (28)	31.25% (10)	25.00% (8)	28.12% (9)	25.00% (8)
Never % (n)	15.65% (36)	27.95% (64)	12.12% (12)	22.22% (22)	21.88% (7)	31.25% (10)	18.75% (6)	43.75% (4)

\*Category "NA/Unsure" is excluded from the table

**Table 31. Use of Video-Conferencing for Specialty Court Hearings**

	<b>All</b>		<b>Urban</b>		<b>Rural</b>		<b>Suburban</b>	
	<b>In Custody</b>	<b>Out of Custody</b>						
Always/Usually % (n)	34.35% (79)	26.67% (60)	30.30% (30)	28.12% (27)	25.00% (8)	21.88% (7)	40.62% (13)	21.88% (7)
Sometimes % (n)	12.17% (28)	13.78% (31)	14.14% (14)	10.42% (10)	28.12% (9)	28.12% (9)	9.38% (3)	18.75% (6)
Never % (n)	4.35% (10)	11.56% (26)	4.04% (4)	9.38% (9)	9.38% (3)	12.50% (4)	3.12% (1)	12.50% (4)

\*Category "NA/Unsure" is excluded from the table

**Table 32. Use of Video-Conferencing for Juvenile Hearings**

	<b>All</b>		<b>Urban</b>		<b>Rural</b>		<b>Suburban</b>	
	<b>In Custody</b>	<b>Out of Custody</b>						
Always/Usually % (n)	25.22% (58)	22.67% (51)	25.25% (25)	25.00% (24)	25.00% (8)	31.25% (10)	34.38% (11)	26.67% (8)
Sometimes % (n)	16.09% (37)	15.11% (34)	11.11% (11)	10.42% (10)	21.88% (7)	15.62% (5)	21.88% (7)	13.33% (4)
Never % (n)	5.65% (13)	12.00% (27)	7.07% (7)	11.46% (11)	6.25% (2)	12.50% (4)	0 (0)	13.33% (4)

\*Category "NA/Unsure" is excluded from the table

**Table 33. Use of Video-Conferencing for Non-Court Proceedings**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
Meeting with clients who are in custody % (n)	82.92% (199)	86.41% (89)	66.67% (24)	81.82% (27)
Preparing clients for court proceedings (including review of discovery) % (n)	62.08% (149)	62.14% (64)	47.22% (17)	66.67% (22)
Probation meetings (including parole and supervised release) % (n)	35.38% (86)	36.89% (38)	36.11% (13)	24.24% (8)
Mental and behavioral health evaluations % (n)	45.83% (110)	44.66% (46)	33.33% (12)	51.52% (17)
Communication with expert witnesses % (n)	43.75% (105)	42.72% (44)	44.44% (16)	39.39% (13)
Communication with field investigators % (n)	25.83% (62)	27.18% (28)	19.44% (7)	27.27% (9)
Specialty court meetings % (n)	34.17% (82)	34.95% (36)	22.22% (8)	39.39% (13)
Other % (n)	6.67% (16)	5.83% (6)	11.11% (4)	3.03% (1)

**Examples of “Other” Non-Court Uses for Audio-/Video-Conferencing:**

- Depositions
- Meeting with family members of client
- Juvenile multidisciplinary team meetings
- Phone calls to clients
- Meeting with out-of-custody clients
- “Drug court and mental health court are all done on Zoom”

**Table 34. Proceedings You/Your Office Refuses to Conduct Virtually (By Type of Jurisdiction)**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
First Appearance/Arrestment % (n)	2.08% (5)	2.91% (3)	0% (0)	3.03% (1)
Bail-related Hearing % (n)	2.08% (5)	1.94% (2)	0% (0)	3.03% (1)
Pre-trial/Status conference % (n)	1.67% (4)	1.94% (2)	0% (0)	3.03% (1)
Settlement Conference % (n)	1.67% (4)	2.91% (3)	0% (0)	3.03% (1)
Non-Evidentiary Motion % (n)	2.92% (7)	3.88% (4)	0% (0)	3.03% (1)
Evidentiary Hearing % (n)	21.25% (51)	23.30% (24)	16.67% (6)	21.21% (7)
Preliminary Hearing % (n)	12.50% (30)	10.68% (11)	22.22% (8)	15.15% (5)
Change of Plea Hearing % (n)	7.50% (18)	6.80% (7)	11.11% (4)	9.09% (3)
Jury Pre-Screening % (n)	19.58% (47)	21.36% (22)	22.22% (8)	18.18% (6)
Jury Voir Dire % (n)	24.17% (58)	24.27% (25)	30.56% (11)	27.27% (9)
Trial % (n)	28.33% (68)	30.10% (31)	33.33% (12)	30.30% (10)
Sentencing % (n)	10.83% (26)	14.56% (15)	13.89% (5)	6.606% (2)
Specialty Court % (n)	1.25% (3)	1.94% (2)	0 (0)	3.03% (1)
Juvenile Hearing % (n)	5.00% (12)	4.85% (5)	5.56% (2)	6.06% (2)
Other % (n)	0% (0)	0% (0)	0% (0)	0% (0)

## DEFENDANTS' ACCESS TO TECHNOLOGY AND PRIVATE SPACES

**Table 35. Access to Internet**

	<b>All</b>		<b>Urban</b>		<b>Rural</b>		<b>Suburban</b>	
	<b>In Custody</b>	<b>Out of Custody</b>						
All % (n)	12.68% (27)	8.00% (18)	9.78% (9)	9.18% (9)	25.00% (8)	9.68% (3)	17.24% (5)	9.09% (3)
Most % (n)	17.84% (38)	42.67% (96)	16.30% (15)	37.76% (37)	21.88% (7)	41.94% (13)	27.59% (8)	45.45% (15)
Some % (n)	21.13% (45)	40.44% (91)	18.48% (17)	41.84% (41)	15.62% (5)	35.48% (11)	17.24% (5)	36.36% (12)
Very Few % (n)	12.21% (26)	8.44% (19)	17.39% (16)	11.22% (11)	9.38% (3)	9.68% (3)	3.45% (1)	9.09% (3)
None % (n)	36.15% (77)	0.44% (1)	38.04% (35)	0% (0)	28.12% (9)	3.23% (1)	34.48% (10)	0% (0)

**Table 36. Access to Smartphone**

	<b>All</b>		<b>Urban</b>		<b>Rural</b>		<b>Suburban</b>	
	<b>In Custody</b>	<b>Out of Custody</b>						
All % (n)	0.92% (2)	12.66% (29)	1.09% (1)	13.13% (13)	0% (0)	18.75% (6)	0% (0)	6.06% (2)
Most % (n)	2.30% (5)	54.59% (125)	1.09% (1)	50.51% (50)	6.06% (2)	43.75% (14)	3.33% (1)	66.67% (22)
Some % (n)	2.76% (6)	27.51% (63)	2.17% (2)	28.28% (28)	3.03% (1)	34.38% (11)	3.33% (1)	24.24% (8)
Very Few % (n)	5.07% (11)	4.37% (10)	4.35% (4)	7.07% (7)	9.09% (3)	0% (0)	3.33% (1)	3.03% (1)
None % (n)	88.94% (193)	0.87% (2)	91.30% (84)	1.01% (1)	81.82% (27)	3.12% (1)	90.00% (27)	0% (0)

**Table 37. Access to Tablet/Computer**

	<b>All</b>		<b>Urban</b>		<b>Rural</b>		<b>Suburban</b>	
	<b>In Custody</b>	<b>Out of Custody</b>						
All % (n)	10.55% (23)	8.14% (18)	5.43% (5)	8.25% (8)	20.59% (7)	12.90% (4)	17.86% (5)	9.09% (3)
Most % (n)	10.09% (22)	27.15% (60)	8.70% (8)	23.71% (23)	8.82% (3)	22.58% (7)	21.43% (6)	33.03% (11)
Some % (n)	17.89% (39)	48.87% (108)	11.96% (11)	47.42% (46)	17.65% (6)	48.39% (15)	17.86% (5)	42.42% (14)
Very Few % (n)	19.27% (42)	14.48% (32)	25.00% (23)	18.56% (18)	14.71% (5)	22.58% (7)	17.86% (5)	15.15% (5)
None % (n)	42.20% (92)	1.36% (3)	48.91% (45)	2.06% (2)	28.24% (13)	12.90% (4)	25.00% (7)	0% (0)

**Table 38. Access to Quiet Space**

	<b>All</b>		<b>Urban</b>		<b>Rural</b>		<b>Suburban</b>	
	<b>In Custody</b>	<b>Out of Custody</b>						
All % (n)	10.05% (22)	13.30% (29)	7.45% (7)	10.75% (10)	14.71% (5)	13.79% (4)	12.90% (4)	15.62% (5)
Most % (n)	15.98% (35)	43.12% (94)	10.64% (10)	36.56% (34)	20.59% (7)	37.93% (11)	22.58% (7)	56.25% (18)
Some % (n)	21.00% (46)	35.78% (78)	23.40% (22)	43.01% (40)	14.71% (5)	37.93% (11)	16.13% (5)	21.88% (7)
Very Few % (n)	25.57% (56)	5.50% (12)	29.79% (28)	5.38% (5)	23.53% (8)	6.90% (2)	29.03% (9)	6.25% (2)
None % (n)	27.40% (60)	2.29% (5)	28.72% (27)	4.30% (4)	26.47% (9)	3.45% (1)	19.35% (6)	0% (0)

## ATTORNEY-CLIENT COMMUNICATION

**Table 39. Has Video-Conferencing Hurt Attorney-Client Communication? (by Type of Jurisdiction)**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
Strongly Agree % (n)	33.75% (81)	39.81% (41)	25.00% (9)	42.42% (14)
Agree % (n)	32.50% (78)	29.13% (30)	36.11% (13)	27.27% (9)
Neither Agree nor Disagree % (n)	21.25% (51)	21.36% (22)	27.28% (10)	6.06% (2)
Disagree % (n)	10.83% (26)	8.74% (9)	11.11% (4)	18.18% (6)
Strongly Disagree % (n)	1.67% (4)	0.97% (1)	0% (0)	6.06% (2)

**Table 40. Has Video-Conferencing Hurt Attorney-Client Communication? (by Length of Practice)**

	<b>All</b>	<b>0-5 Years</b>	<b>6-10 Years</b>	<b>11-20 Years</b>	<b>21+ Years</b>
Strongly Agree % (n)	33.75% (81)	40.74% (11)	34.21% (13)	30.95% (13)	33.08% (44)
Agree % (n)	32.50% (78)	37.04% (10)	31.58% (12)	30.95% (13)	32.33% (43)
Neither Agree nor Disagree % (n)	21.25% (51)	18.52% (5)	26.32% (12)	23.81% (10)	19.55% (26)
Disagree % (n)	10.83% (26)	3.70% (1)	5.26% (2)	14.29% (6)	12.78% (17)
Strongly Disagree % (n)	1.67% (4)	0% (0)	2.63% (1)	0% (0)	2.26% (3)

**Table 41. How Has Video-Conferencing Hurt Attorney-Client Communication? (by Type of Jurisdiction)**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
Difficulty maintaining confidentiality % (n)	81.13% (129)	78.87% (56)	72.73% (16)	91.30% (21)
Difficulty building relationships with clients % (n)	93.71% (149)	92.96% (66)	95.45% (21)	95.65% (22)
Difficulty sharing discovery % (n)	83.65% (133)	76.06% (54)	86.36% (19)	91.30% (21)
Difficulty maintaining contact % (n)	67.92% (108)	67.61% (48)	68.18% (15)	69.57% (16)
Other % (n)	14.47% (23)	15.49% (11)	13.64% (3)	13.04% (3)

\*Column totals may exceed 100% because attorneys were asked to select each difficulty that they have experienced

\*\*Restricted to those who agreed/strongly agreed that video-conferencing has hurt client communication

**Table 42. How Has Video-Conferencing Hurt Attorney-Client Communication? (by Length of Practice)**

	<b>All</b>	<b>0-5 Years</b>	<b>6-10 Years</b>	<b>11-20 Years</b>	<b>21+ Years</b>
Difficulty maintaining confidentiality % (n)	81.13% (129)	76.19% (16)	92.00% (23)	88.46% (23)	77.01% (67)
Difficulty building relationships with clients % (n)	93.71% (149)	100% (21)	88.00% (22)	88.46% (23)	95.40% (83)
Difficulty sharing discovery % (n)	83.65% (133)	71.43% (15)	96.00% (24)	96.15% (25)	79.31% (69)
Difficulty maintaining contact % (n)	67.92% (108)	80.95% (17)	52.00% (13)	73.08% (19)	67.82% (59)
Other % (n)	14.47% (23)	14.29% (3)	0.16 (6)	0.07 (3)	0.08 (11)

\*Column totals may exceed 100% because attorneys were asked to select each difficulty that they have experienced

\*\*Restricted to those who agreed/strongly agreed that video-conferencing has hurt client communication

### Examples of Other Ways Attorney-Client Communication Has Been Hurt:

- “Case prep”
- “Never face to face.”
- “They are more likely to say/do something unhelpful in court if I am not able to elbow them . . . gently.”
- “In court, clients blurt out confidential [things] where they used to whisper in my ear.”
- “Impossible to read body/face language.”
- “Difficulty building trust.”
- “Explaining complex sentencing.”
- “Physical remoteness has major impact.”
- “Difficulty establishing contact.”
- “Difficulty in resolving cases involving paperwork.”
- “Difficulty getting a good sense of how they are coping.”
- “Lack of face-to-face meeting.”
- “Difficulty assessing credibility.”
- “Limited time slots available for in-custody clients.”
- “Sound quality during arraignment interviews is poor and the background noise is terribly distracting. The placement of the cameras in the holding areas gives the impression that you are much further from your client than ordinarily. Also sometimes [it’s] difficult to make out client’s face via video pointing through a gated partition.”
- “Obtaining access when in custody.”
- “Getting scheduled. Sometimes, I have to wait up to 3 weeks after requesting time. Nothing is contemporaneous or immediate. Plus, we have to be ready to go when a slot is available, be it 7 in the morning or 7 at night and weekends, which mean LONG days.”
- “No back and forth in plea negotiations with DA. More of a take it or leave it and only 5 minutes to explain it to client . . .”
- “Difficulty reaching clients, Federal and state, in one particular regional jail.”
- “The local jail has issues connecting on their end to the system they have in place. It is difficult to communicate with an in-custody client when the jailer does not have the client and the technology ready at the same time.”
- “Difficulty with interpreters.”

**Table 43. Ability to Reach Clients for General Communication Purposes When Needed (by Type of Jurisdiction)**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
Always % (n)	10.42% (25)	7.77% (8)	11.11% (4)	18.18% (6)
Often % (n)	52.33% (128)	45.63% (47)	52.78% (19)	60.61% (20)
Sometimes % (n)	32.50% (78)	40.78% (42)	30.56% (11)	18.18% (6)
Rarely % (n)	3.75% (9)	5.83% (2)	5.56% (2)	3.03% (1)
Never % (n)	0% (0)	0% (0)	0% (0)	0% (0)

**Table 44. Ability to Reach Clients for General Communication Purposes When Needed (by Length of Practice)**

	<b>All</b>	<b>0-5 Years</b>	<b>6-10 Years</b>	<b>11-20 Years</b>	<b>21+ Years</b>
Always % (n)	10.42% (25)	7.41% (2)	2.63% (1)	11.90% (5)	12.78% (17)
Often % (n)	52.33% (128)	40.74% (11)	57.89% (22)	45.24% (19)	57.14% (76)
Sometimes % (n)	32.50% (78)	40.74% (11)	34.21% (13)	40.48% (17)	27.82% (37)
Rarely % (n)	3.75% (9)	11.11% (3)	5.26% (2)	2.38% (1)	2.26% (3)
Never % (n)	0% (0)	0% (0)	0% (0)	0% (0)	0% (0)

**Table 45. Ability to Reach Clients Confidentially When Needed (by Type of Jurisdiction)**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
Always % (n)	11.25% (27)	6.80% (7)	13.89% (5)	15.15% (5)
Often % (n)	39.58% (95)	37.86% (39)	36.11% (13)	33.33% (11)
Sometimes % (n)	37.08% (89)	43.69% (45)	30.56% (11)	39.39% (13)
Rarely % (n)	12.08% (29)	11.65% (12)	19.44% (7)	12.12% (4)
Never % (n)	0% (0)	0% (0)	0% (0)	0% (0)

**Table 46. Ability to Reach Clients Confidentially When Needed (by Length of Practice)**

	<b>All</b>	<b>0-5 Years</b>	<b>6-10 Years</b>	<b>11-20 Years</b>	<b>21+ Years</b>
Always % (n)	11.25% (27)	3.79% (1)	0% (0)	9.52% (4)	16.54% (22)
Often % (n)	39.58% (95)	37.04% (10)	36.84% (14)	21.43% (9)	46.62% (62)
Sometimes % (n)	37.08% (89)	29.63% (8)	50.00% (19)	59.52% (25)	27.82% (37)
Rarely % (n)	12.08% (29)	29.63% (8)	13.16% (5)	9.52% (4)	9.02% (12)
Never % (n)	0% (0)	0% (0)	0% (0)	0% (0)	0% (0)

## **ACCESS TO JUSTICE**

**Table 47. Has the Shift to Virtual Proceedings Compromised Access to Justice? (by Type of Jurisdiction)**

	<b>All</b>	<b>Urban</b>	<b>Rural</b>	<b>Suburban</b>
Strongly Agree % (n)	40.83% (98)	49.51% (51)	36.11% (13)	39.39% (13)
Agree % (n)	37.08% (89)	35.92% (37)	33.33% (12)	21.21% (7)
Neither Agree nor Disagree % (n)	14.58% (35)	6.80% (7)	22.22% (8)	24.24% (8)
Disagree % (n)	5.83% (14)	5.83% (6)	8.33% (3)	9.09% (3)
Strongly Disagree % (n)	1.67% (4)	1.94% (2)	0% (0)	6.06% (2)

**Table 48. Has the Shift to Virtual Proceedings Compromised Access to Justice? (by Length of Practice)**

	<b>All</b>	<b>0-5 Years</b>	<b>6-10 Years</b>	<b>11-20 Years</b>	<b>21 + Years</b>
Strongly Agree % (n)	40.83% (98)	48.15% (13)	39.47% (15)	33.33% (14)	42.11% (56)
Agree % (n)	37.08% (89)	33.33% (9)	39.47% (15)	42.86% (18)	35.34% (47)
Neither Agree nor Disagree % (n)	14.58% (35)	7.41% (2)	13.16% (5)	9.52% (4)	18.05% (24)
Disagree % (n)	5.83% (14)	11.11% (3)	5.26% (2)	11.90% (5)	3.01% (4)
Strongly Disagree % (n)	1.67% (4)	0% (0)	2.63% (1)	2.38% (1)	1.50% (2)

# APPENDIX 2: QUALTRICS SURVEY INSTRUMENT

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Stanford Law School  
Stanford Criminal  
Justice Center



## **Default Question Block**

# **Stanford Criminal Justice Center and National Association of Criminal Defense Lawyers**

## **Survey on the Use of Audio- and Video-Technology in the Delivery of Criminal Defense Services During the COVID-19 Pandemic**

**Summer 2020**

In the wake of the COVID-19 pandemic, most jurisdictions have moved to using audio- and/or video-based technology in lieu of in-person communication for many phases of criminal proceedings. We are seeking to better understand the ways these technologies are being used and to identify and share best practices and potential challenges these technologies present.

This survey is intended to be completed by **practicing criminal defense lawyers** only.

Thank you for taking time to complete this survey. The survey should take you no more than 15 minutes to do. All responses will be kept confidential.

For purposes of this survey, **audio-conferencing** is where two or more people in different locations use technology like a conference bridge to hold an audio call. Audio conferencing is different from a traditional phone-in in that all participants dial into a central system that connects them instead of directly dialing each other.

**Video conferencing** is live, visual connection between two or more people residing in separate locations for the purpose of communication. At its simplest, video conferencing provides transmission of static images and text between two locations.

For purposes of your responses, if you practice in multiple jurisdictions, please answer the questions as conditions exist presently in the **jurisdiction you practice in most frequently**. If there is wide variation within that jurisdiction, please answer based on the **specific courtroom** in which you practice most frequently.

## Block 1

Have you used **video-conferencing** for any criminal proceedings or communication with clients facing criminal charges?

Remember that video-conferencing is live, visual connection between two or more people residing in separate locations for the purpose of communication. At its simplest, video conferencing provides transmission of static images and text between two locations.

- Yes
- No

Have you used **audio-conferencing** for any criminal proceedings or communication with clients facing criminal

# charges?

Remember that audio-conferencing is where two or more people in different locations use technology like a conference bridge to hold an audio (not video) call. Audio conferencing is different from a traditional phone-in in that all participants dial into a central system that connects them instead of directly dialing each other.

- Yes
- No

## Think about your **in-custody clients**.

For these clients, for which criminal proceedings are courts in your jurisdiction currently using **video-conferencing**?

Select "Unsure/NA" if this criminal proceeding **does not occur** in the jurisdiction/courtroom in which you practice most frequently.

	Always	Usually	Sometimes	Never	Unsure/NA
First appearance / arraignment	<input type="radio"/>				
Bail-related hearing	<input type="radio"/>				
Pre-trial / status conference	<input type="radio"/>				
Settlement conference	<input type="radio"/>				
Non-evidentiary motion	<input type="radio"/>				

	Always	Usually	Sometimes	Never	Unsure/NA
Evidentiary hearing	<input type="radio"/>				
Preliminary hearing	<input type="radio"/>				
Change of plea hearing	<input type="radio"/>				
Jury pre-screening	<input type="radio"/>				
Jury voir dire	<input type="radio"/>				
Trial	<input type="radio"/>				
Sentencing	<input type="radio"/>				
Specialty court hearing (veteran's, mental health, drug, etc.)	<input type="radio"/>				
Juvenile hearing	<input type="radio"/>				
Other <input style="width: 200px; height: 20px;" type="text"/>	<input type="radio"/>				

Think about your **out-of-custody clients**.

For these clients, for which criminal proceedings are courts in your jurisdiction currently using **video-conferencing**?

	Always	Usually	Sometimes	Never	Unsure/NA
First appearance / arraignment	<input type="radio"/>				
Bail-related hearing	<input type="radio"/>				

	Always	Usually	Sometimes	Never	Unsure/NA
Pre-trial / status conference	<input type="radio"/>				
Settlement conference	<input type="radio"/>				
Non-evidentiary motion	<input type="radio"/>				
Evidentiary hearing	<input type="radio"/>				
Preliminary hearing	<input type="radio"/>				
Change of plea hearing	<input type="radio"/>				
Jury pre-screening	<input type="radio"/>				
Jury voir dire	<input type="radio"/>				
Trial	<input type="radio"/>				
Sentencing	<input type="radio"/>				
Specialty court hearing (veteran's, mental health, drug, etc.)	<input type="radio"/>				
Juvenile hearing	<input type="radio"/>				
Other <input type="text"/>	<input type="radio"/>				

Think about your **in-custody clients**.

For these clients, for which criminal proceedings are courts in your jurisdiction currently using **audio-conferencing**?

Select "Unsure/NA" if this criminal proceeding **does not occur** in the jurisdiction/courtroom in which you practice most frequently.

	Always	Usually	Sometimes	Never	Unsure/NA
First appearance / arraignment	<input type="radio"/>				
Bail-related hearing	<input type="radio"/>				
Pre-trial / status conference	<input type="radio"/>				
Settlement conference	<input type="radio"/>				
Non-evidentiary motion	<input type="radio"/>				
Evidentiary hearing	<input type="radio"/>				
Preliminary hearing	<input type="radio"/>				
Change of plea hearing	<input type="radio"/>				
Jury pre-screening	<input type="radio"/>				
Jury voir dire	<input type="radio"/>				
Trial	<input type="radio"/>				
Sentencing	<input type="radio"/>				
Specialty court hearing (veteran's, mental health, drug, etc.)	<input type="radio"/>				
Juvenile hearing	<input type="radio"/>				
Other	<input type="radio"/>				
<input style="width: 200px; height: 20px;" type="text"/>					

## Think about your **out-of-custody clients**.

For these clients, for which criminal proceedings are courts in your jurisdiction currently using **audio-conferencing**?

	Always	Usually	Sometimes	Never	Unsure/NA
First appearance / arraignment	<input type="radio"/>				
Bail-related hearing	<input type="radio"/>				
Pre-trial / status conference	<input type="radio"/>				
Settlement conference	<input type="radio"/>				
Non-evidentiary motion	<input type="radio"/>				
Evidentiary hearing	<input type="radio"/>				
Preliminary hearing	<input type="radio"/>				
Change of plea hearing	<input type="radio"/>				
Jury pre-screening	<input type="radio"/>				
Jury voir dire	<input type="radio"/>				
Trial	<input type="radio"/>				
Sentencing	<input type="radio"/>				
Specialty court hearing (veteran's, mental health, drug, etc.)	<input type="radio"/>				
Juvenile hearing	<input type="radio"/>				

Always

Usually

Sometimes

Never

Unsure/NA

Other

On what level has your jurisdiction created policies for the use of audio- or video-conferencing?

- State-wide
- Jurisdiction-wide
- Court-wide
- Judge-by-judge
- No policy
- Unsure

Has your office or organization instituted a policy restricting the use of video-conferencing in specific court-related proceedings?

- Yes
- No

Which of the following court-related proceedings have you or your office refused to participate in via audio- or video-conferencing? Check all that apply.

- First appearance / arraignment
- Bail-related hearing
- Pre-trial / status conference
- Settlement conference
- Non-evidentiary motion
- Evidentiary hearing
- Preliminary hearing
- Change of plea hearing
- Jury pre-screening
- Jury voir dire
- Trial
- Sentencing
- Specialty court hearing (veteran's, mental health, drug, etc.)
- Juvenile hearing
- Other

Has your jurisdiction conducted a bench or jury **trial** where **any portion** was done by video- or audio-conferencing?

- Yes
- No

Unsure

Who usually appears via audio- or video-conferencing for **initial appearance, arraignments, and bail-related hearings**? (Check all that apply.)

- Client
- Defense attorney
- Prosecutor
- Judge
- Probation / pre-trial officer
- Witnesses
- Community members
- Press/media/public
- Other

Who usually appears via audio- or video-conferencing for **all subsequent criminal proceedings**? (Check all that apply.)

- Client
- Defense attorney
- Prosecutor
- Judge

- Probation / pre-trial officer
- Witnesses
- Community members
- Press/media/public
- Other

Which technologies are being used? (Check all that apply.)

- Skype
- Bluejean
- Zoom
- Webex
- Microsoft Teams
- Other

Which features of audio- or video-conferencing software have you used? (Select all that apply.)

- Breakout rooms
- Share screen
- Recording
- Private chat

Password protection

Other (please describe)

Are video proceedings being livestreamed?

- Yes
- Sometimes
- No

Are the digital links to virtual hearings being made public?

- Yes
- Sometimes
- No

Please estimate the percentage of audio- and/or video-conferencing that **requires** English language translation in your caseload? Please consider all communications relating to a case.

- 0-25%
- 26-50%

- 51-75%
- 76-100%

Of the communications that require translation, estimate the percentage of audio- and/or video-conferencing where English language translation is **taking place**? Please consider all communications relating to a case.

- 0-25%
- 26-50%
- 51-75%
- 76-100%

In what other settings is audio- and/or video-conferencing being used in your jurisdiction outside of the court context? (Check all that apply.)

- Meeting with clients who are in custody
- Preparing clients for court proceedings, including review of discovery
- Probation meetings (including parole and supervised release)
- Mental and behavioral health evaluations
- Communication with expert witnesses
- Communication with field investigators
- Specialty court meetings

Other

For the purposes of attorney-client communication, do your **in-custody** clients have...

	All	Most	Some	Very few	None	Unsure/NA
reliable access to the internet	<input type="radio"/>					
access to a tablet, laptop, or desktop computer	<input type="radio"/>					
access to a smartphone	<input type="radio"/>					
access to a quiet, private setting	<input type="radio"/>					

For the purposes of attorney-client communication, do your **out-of-custody** clients have...

	All	Most	Some	Very few	None	Unsure/NA
reliable access to the internet	<input type="radio"/>					
access to a tablet, laptop, or desktop computer	<input type="radio"/>					

	All	Most	Some	Very few	None	Unsure/NA
access to a smartphone	<input type="radio"/>					
access to a quiet, private setting	<input type="radio"/>					

## Communications with Clients

Since the start of the COVID-19 health crisis, how often are you able to communicate with your clients when you need to reach them?

- Always
- Often
- Sometimes
- Rarely
- Never

Since the start of the COVID-19 health crisis, how often are you able to communicate **confidentially** with your clients when you need to reach them?

- Always
- Often
- Sometimes

- Rarely
- Never

Rate your **agreement** with this statement: The shift to audio- and video-conferencing has **hurt communication** with my clients.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

How has the shift to audio- and video-conferencing hurt communication with your clients? (Select all that apply.)

- Difficulty maintaining confidentiality
- Difficulty building relationships with clients
- Difficulty sharing discovery
- Difficulty maintaining contact
- Other

In what ways have the features of audio- and video-conferencing created challenges? (Select all that apply.)

- Camera placement inhibiting full view
- Poor audio quality
- Poor video quality
- Other

Rate your **agreement** with this statement: The shift to audio- and video-conferencing has **compromised** access to justice in the courtroom.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

How has the shift to audio- and video-conferencing compromised access to justice?

## Open-Ended Questions

What is working **best** regarding the use of audio- or video-conferencing?

What are you most **concerned** about regarding the use of audio- or video-conferencing?

Is there **anything else you would like to share** regarding the use of audio- and video-technology in criminal

proceedings in the jurisdiction in which you primarily practice?

## Demographics

Thank you for answering questions about the jurisdiction in which you primarily practice. The following questions pertain to your specific legal practice and your demographics.

In regards to your court appointed/public defense practice, where do you primarily practice?

- State Court
- Federal Court
- Tribal Court
- Other

In regards to your court appointed/public defense practice, what types of cases do you primarily handle?

- Capital
- Other Felony
- Misdemeanor
- Appeals
- Juvenile
- Other

Which best describes your practice?

- Institutional public defender office
- Private practice with contract to provide public defense services
- Private practice appointed to individual cases by court
- Private practice without court-appointed cases

Which best describes the primary jurisdiction you practice in?

- Urban
- Suburban

- Rural/small town
- Native American reservation
- Mixed urban/suburban
- Mixed suburban/rural
- Other

City/State you primarily practice in:

City

State

How many years have you been in criminal defense practice?

- Less than 2 years
- 2-5 years
- 6-10 years
- 11-20 years
- 21+ years

## Gender

- Male
- Female
- Other

## Race

- White
- Black
- Latinx
- Asian
- Native American
- Other

## Age

- 20-30
- 31-40
- 41-50
- 51-60
- 61-70
- 71+

## Block 3

Date of completion of this survey:

Name of respondent (if you wish to share it):

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# APPENDIX 3: QUALITATIVE SURVEY INSTRUMENTS

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## INDIGENT DEFENSE VIDEO-CONFERENCING POLICY LAB QUESTIONS FOR COURT ADMINISTRATORS

### INTRODUCTION

- My name is \_\_\_\_\_ and I'm part of a policy practicum at Stanford Law School.
- I want to start by telling you a little bit about our research.
  - We are working with the National Association of Criminal Defense Lawyers, the Association of Prosecuting Attorneys, the National Center for State Courts, and RTI International to better understand the use of audio- and video-conferencing in court proceedings, especially in light of COVID-19.
  - We're talking to a diverse collection of stakeholders--prosecutors, defense attorneys, courts--in three jurisdictions to try to understand as much about audio- and video-conferencing as possible.
  - We're specifically focused on the use of audio- and video-conferencing in criminal proceedings, so our questions will be directed at the criminal process.
    - *If you have relevant comparisons between virtual criminal and civil proceedings at the courthouse, please feel free to tell us. But otherwise, we'd ask you to keep your answers focused on criminal proceedings.*
- Before starting the interview portion, I want to talk a bit about informed consent.
  - Have you reviewed the IRB consent form I sent you?
  - Do you have any questions about that form or this study?
  - Do I have your consent as a participant in this interview?
  - Do you have any objection to us recording the interview?
    - *IF OBJECTION: Are you ok with me taking notes during the interview?*

### GENERAL INTRODUCTORY QUESTIONS

- Briefly tell me your daily life as a court administrator.
- Tell me about the jurisdiction in which you serve.
- Broadly, what if any aspects of your job have changed since COVID-19?
  - *How is your jurisdiction using audio- or video-conferencing during COVID-19?*
  - *What sorts of proceedings do you use audio- or video-conferencing for?*
  - *Which is predominantly used, audio- or video-conferencing*
- **Describe the transition from in-person work to remote work.**
  - *Tell me about your role in that transition.*
  - *How did the courthouse/jurisdiction come up with its rules on remote technology? What sorts of things were you thinking about?*
  - *Has the use of video- or audio-conferencing changed since the beginning of the pandemic?*
- How was your jurisdiction using remote technology in criminal proceedings before COVID-19?
  - *IF NO: Not at all? Even for remote witnesses?*

**COURTHOUSE DYNAMICS**

- Tell me (more) about what it's like to run a remote courthouse/district.
- How has the increase in audio- and video-conferencing affected your job responsibilities?
  - *Are you responsible for troubleshooting errors with remote technology? (Who is?)*
  - *Do people ever ask you for help with remote technology? (What do you do?)*
- Tell me about the logistics of remote hearing attendance.
  - *Who sets up the remote conference technology for the hearings?*
  - *How does that set-up work?*
  - *How do you get the information to the judge? The attorneys?*
  - *How has the court's communication with in-custody defendants changed?*
  - *What about out-of-custody defendants?*

**VIRTUAL HEARINGS & PROCEDURES**

- What kinds of virtual hearings has your courthouse/district handled?
  - Are there any criminal proceedings that are never held virtually? Why?
- How, if at all, are virtual versions of these hearings meaningfully different from in-person versions?
  - Have there been any changes in victim appearances?
  - Have there been any changes in public attendance?
- Are there any kinds of hearings (initial appearances, bail hearings, evidentiary hearings, guilty pleas, etc.) that are especially different virtually?
  - What are they?
  - How are they different? (Can you give examples?)
- **IF COURTHOUSE/DISTRICT HAS HELD REMOTE JURY TRIALS: Tell me about remote jury trials.**
  - How do you get prospective jurors to come to virtual court?
  - How does your courthouse conduct voir dire remotely?
  - Have you noticed any changes in who shows up to jury duty?
- **IF NO: Do you know of other courthouses within the district that are conducting remote trials? (Which ones? Who are the court administrators there?)**
- **How likely do you think your courthouse is to use virtual trials in the future?**
  - Why?
  - In which kinds of cases?
- Do you expect anything will change about the normal course of business once COVID-19 is over? (What?)
  - Has your courthouse done anything to implement those changes longer term? (What?)
  - Has your courthouse done anything to research those changes? (What?)

**ENDING QUESTIONS**

- Is there anything else you think I should know?
- How long have you been in your current position?
- What position did you have before this one?
- What is your comfort level with technology?
  - What year were you born?
  - What race or ethnicity do you identify as?
  - What gender do you identify as?
  - Who else do you know in your district--defense attorneys, prosecutors, judges, or court administrators--who I should talk to?
    - *Can you give me their contact information or connect us?*
    - *IF GIVE CONTACT INFO: Can I tell them that you passed along their name, or would you prefer to be anonymous?*
    - *IF APPLICABLE: You mentioned [X OTHER PERSON] who has [tried a case/ done an evidentiary hearing/etc.]. Can you put me in touch with that person?*

## **INDIGENT DEFENSE VIDEO-CONFERENCING POLICY LAB QUESTIONS FOR DEFENSE ATTORNEYS**

### **INTRODUCTION**

- My name is \_\_\_\_\_ and I'm part of a policy practicum at Stanford Law School.
- I want to start by telling you a little bit about our research.
  - We are working with the National Association of Criminal Defense Lawyers, the Association of Prosecuting Attorneys, the National Center for State Courts, and RTI International to better understand the use of audio- and video-conferencing in court proceedings, especially in light of COVID-19.
  - We're talking to a diverse collection of stakeholders--prosecutors, defense attorneys, courts--in three jurisdictions to try to understand as much about audio- and video-conferencing as possible.
  - We're specifically focused on the use of audio- and video-conferencing in criminal proceedings, so our questions will be directed at the criminal process.
- Before starting the interview portion, I want to talk a bit about informed consent.
  - Have you reviewed the IRB consent form I sent you?
  - Do you have any questions about that form or this study?
  - Do I have your consent as a participant in this interview?
  - Do you have any objection to me recording this interview?
    - *IF OBJECTION: Are you ok with me taking notes during the interview?*

### **GENERAL INTRODUCTORY QUESTIONS**

- Briefly tell me your daily life as a defense attorney.
- Tell me about the jurisdiction in which you practice.
- Broadly, what aspects of your job have changed since COVID-19?
  - *How is your jurisdiction using audio- or video-conferencing during COVID-19?*
  - *What sorts of proceedings do you use audio- or video-conferencing for?*
  - *Which is predominantly used, audio- or video-conferencing?*
  - *What are the rules in jurisdiction about video- and audio-conferencing?*
  - *How clear are those rules? How often are they followed?*
  - *How, if at all, have the pace of your cases changed?*
- How was your jurisdiction using remote technology in criminal proceedings before COVID-19?
  - *IF NO: Not at all? Even for remote witnesses?*
- Describe the transition from in-person work to remote work.
  - *Has the use of video- or audio-conferencing changed over the course of the pandemic?*

### **COMMUNICATIONS AND DISCOVERY**

- Tell me about your normal (pre-COVID) ways of communicating with clients.
  - *In custody clients? Out-of-custody clients?*
- Tell me about communicating with your clients virtually.

- *Has your ability to serve your clients changed?*
- *Has the amount of time you spend communicating with them changed?*
- *Has your ability to develop a rapport with your clients changed?*
- *Tell me about discussing discovery virtually.*
- *Does this vary between in-custody and out-of-custody clients?*
- *Do your clients have access to remote technology?*
- *Which clients do well with video-conferencing technology? Which struggle?*
- *Have you noticed any differences in the behavior, engagement, or attitudes of your clients?*
- *Do you have any concerns about privileged communications?*
- **How, if at all, has plea-bargaining changed since COVID?**

### **VIRTUAL HEARINGS & PROCEDURES**

- **I now want to focus on virtual hearings, be they arraignments, evidentiary hearings, trials, sentencing--anything where the defendant would normally be present in person.**
- **What kinds of virtual hearings have you personally handled?**
- **How, if at all, are virtual versions of these hearings meaningfully different from in-person versions?**
  - *Tell me about your opportunities for private discussions with your clients during hearings.*
  - *How, if at all, has your ability to argue your client's case changed?*
  - *How, if at all, has your ability to connect with and be heard by the judge changed? What about your ability to anticipate how the judge is leaning?*
  - *Have there been any changes in victim appearances in your cases?*
  - *Have there been any changes in public attendance?*
- **Are there any kinds of hearings (initial appearances, bail hearings, evidentiary hearings, guilty pleas, etc.) that are especially different virtually?**
  - *What are they?*
  - *How are they different? (Can you give examples?)*
- **IF RESPONDENT HAD EVIDENTIARY HEARING OR TRIAL: Tell me about your [evidentiary hearing/trial].**
  - *What kind of case was it?*
  - *Was it a jury trial?*
    - *How did the process of selecting jurors work?*
    - *Was anything meaningfully different about jurors in remote trials? What? (Paying attention, note-taking, ability to "read" jurors, etc.)*
  - *What did your client think of having a remote trial?*
  - *What changes, if any, did you perceive in witness examinations?*
  - *Were there any technical hiccups, or did things run smoothly?*
  - *Have there been any noticeable changes in judgments in remote trials? (What? Why do you think they exist?)*

- IF NO EVIDENTIARY HEARING OR TRIAL: **Are other people in your office or jurisdiction conducting remote trials or evidentiary hearings? (Who?)**
  - What are your views about remote trials? (Why?)
  - Given the choice, what proceedings would you do virtually, and which would you do in-person? (Why?)

#### **ENDING QUESTIONS**

- **Is there anything else you think I should know?**
- **How long have you been in your current position?**
- **How are you compensated for your services?** (Per case, salary, etc.)
  - *How, if at all, has that changed since COVID?*
  - *How has that affected your work? Your personal stability?*
- What position did you have before this one?
- How well has remote technology worked for you?
- What year were you born?
- What race or ethnicity do you identify as?
- What gender do you identify as?
- Who else do you know in your district--defense attorneys, prosecutors, judges, or court administrators--who I should talk to?
  - *Can you give me their contact information or connect us?*
  - *IF GIVE CONTACT INFO: Can I tell them that you passed along their name, or would you prefer to be anonymous?*
  - *IF APPLICABLE: You mentioned [X OTHER PERSON] who has [tried a case/done an evidentiary hearing/etc.]. Can you put me in touch with that person?*

## INDIGENT DEFENSE VIDEO-CONFERENCING POLICY LAB QUESTIONS FOR JUDGES

### INTRODUCTION

- My name is \_\_\_\_\_ and I'm part of a policy practicum at Stanford Law School.
- I want to start by telling you a little bit about our research.
  - We are working with the National Association of Criminal Defense Lawyers, the Association of Prosecuting Attorneys, the National Center for State Courts, and RTI International to better understand the use of audio- and video-conferencing in court proceedings, especially in light of COVID-19.
  - We're talking to a diverse collection of stakeholders--prosecutors, defense attorneys, courts--in three jurisdictions to try to understand as much about audio- and video-conferencing as possible.
  - We're specifically focused on the use of audio- and video-conferencing in criminal proceedings, so our questions will be directed at the criminal process.
    - *If you have relevant comparisons between virtual criminal and civil proceedings at the courthouse, please feel free to tell us. But otherwise, we'd ask you to keep your answers focused on criminal proceedings.*
- Before starting the interview portion, I want to talk a bit about informed consent.
  - Have you reviewed the IRB consent form I sent you?
  - Do you have any questions about that form or this study?
  - Do I have your consent as a participant in this interview?
  - Do you have any objection to us recording the interview?
    - *IF OBJECTION: Are you ok with me taking notes during the interview?*

### GENERAL INTRODUCTORY QUESTIONS

- Briefly tell me your daily life as a judge
  - *Tell me specifically about your job in criminal cases.*
- Tell me about the jurisdiction in which you sit.
- Broadly, what if any aspects of your job have changed since COVID-19?
  - *How is your jurisdiction using audio- or video-conferencing during COVID-19?*
  - *What sorts of proceedings do you use audio- or video-conferencing for?*
  - *Which is predominantly used, audio- or video-conferencing?*
  - *Who made those rules? (IF THEY DID: What was that process like?)*
  - *Do you have specific rules within your chambers? (What? Why?)*
- How, if at all, have the pace of your cases changed?
- How was your jurisdiction using remote technology in criminal proceedings before COVID-19?
  - *IF NO: Not at all? Even for remote witnesses?*
- Describe the transition from in-person work to remote work.
  - *Has the use of video- or audio-conferencing changed over the course of the pandemic?*

**VIRTUAL HEARINGS & PROCEDURES**

- I now want to focus on virtual hearings, be they arraignments, evidentiary hearings, trials, sentencing--anything where the defendant would normally be present in person.
- **What kinds of virtual hearings have you personally handled?**
- **How, if at all, are virtual versions of these hearings meaningfully different from in-person versions?**
  - *Tell me about evaluating defendants remotely. (Competence? Credibility? Sincerity? Knowing & voluntary?)*
  - *Have any of your bail-versus-release recommendations changed? Your sentencing recommendations?*
  - *Have there been any changes in victim appearances in your cases?*
  - *Have there been any changes in public attendance?*
- Are there any kinds of hearings (initial appearances, bail hearings, evidentiary hearings, guilty pleas, etc.) that are especially different virtually?
  - *What are they?*
  - *How are they different? (Can you give examples?)*
- **IF RESPONDENT PRESIDED OVER EVIDENTIARY HEARING OR TRIAL: Tell me about your [evidentiary hearing/trial].**
  - *What kind of case was it?*
  - *Was it a jury trial?*
    - *How did the process of selecting jurors work?*
    - *Was anything meaningfully different about jurors in remote trials? What? (Paying attention, note-taking, etc.)*
  - *Did the attorneys proceed any differently? In what ways?*
  - *What about the defendant? Any behaviors different from an in-person trial?*
  - *What was it like to evaluate witness credibility remotely?*
  - *Did the court provide any opportunities for defense counsel and the defendant to communicate privately? (How did that work?)*
  - *Were there any technical hiccups, or did things run smoothly?*
  - *IF BENCH TRIAL: How did the process of reaching a verdict in a remote trial comparable to that in an in-person trial?*
- **IF NO EVIDENTIARY HEARING OR TRIAL: Are other judges in your courthouse or district conducting remote trials or evidentiary hearings? (Who?)**
- **What are your views about remote trials? (Why?)**
- **Given the choice, what criminal proceedings would your chambers do virtually, and which would you do in-person? (Why?)**
- **Do you expect anything will change about the normal course of business once COVID-19 is over? (What?)**
  - *Has your courthouse done anything to implement those changes longer term? (What?)*
  - *Has your courthouse done anything to research those changes? (What?)*

**ENDING QUESTIONS**

- Is there anything else you think I should know?
- How long have you been in your current position?
- What position did you have before this one?
- How well has remote technology worked for you?
- What year were you born?
- What race or ethnicity do you identify as?
- What gender do you identify as?
- Who else do you know in your district--defense attorneys, prosecutors, judges, or court administrators--who I should talk to?
  - *Can you give me their contact information or connect us?*
  - *IF GIVE CONTACT INFO: Can I tell them that you passed along their name, or would you prefer to be anonymous?*
  - *IF APPLICABLE: You mentioned [X OTHER PERSON] who has [presided over a trial/evidentiary hearing/etc.]. Can you put me in touch with that person?*

## INDIGENT DEFENSE VIDEO-CONFERENCING POLICY LAB QUESTIONS FOR PROSECUTORS

### INTRODUCTION

- My name is \_\_\_\_\_ and I'm part of a policy practicum at Stanford Law School.
- I want to start by telling you a little bit about our research.
  - We are working with the National Association of Criminal Defense Lawyers, the Association of Prosecuting Attorneys, the National Center for State Courts, and RTI International to better understand the use of audio- and video-conferencing in court proceedings, especially in light of COVID-19.
  - We're talking to a diverse collection of stakeholders--prosecutors, defense attorneys, courts--in three jurisdictions to try to understand as much about audio- and video-conferencing as possible.
  - We're specifically focused on the use of audio- and video-conferencing in criminal proceedings, so our questions will be directed at the criminal process.
- Before starting the interview portion, I want to talk a bit about informed consent.
  - Have you reviewed the IRB consent form I sent you?
  - Do you have any questions about that form or this study?
  - Do I have your consent as a participant in this interview?
  - Do you have any objection to us recording the interview?
    - *If no recording: Are you ok with me taking notes during the interview?*

### GENERAL INTRODUCTORY QUESTIONS

- Tell me your daily life as a prosecutor.
- Tell me about the jurisdiction in which you practice.
- Broadly, what aspects of your job have changed since COVID-19?
  - *How is your jurisdiction using audio- or video-conferencing during COVID-19?*
  - *What sorts of proceedings do you use audio- or video-conferencing for?*
  - *Which is predominantly used, audio- or video-conferencing?*
  - *What are the rules in jurisdiction about video- and audio-conferencing?*
  - *How clear are those rules? How often are they followed?*
  - *How, if at all, have the pace of your cases changed?*
- How was your jurisdiction using remote technology in criminal proceedings before COVID-19?
  - *IF NO: Not at all? Even for remote witnesses?*
- Describe the transition in-person work to remote work
  - *Has the use of video- or audio-conferencing changed over the course of the pandemic?*

**DISCRETION, INVESTIGATIONS, AND COMMUNICATIONS**

- Has the pace of your caseload changed since COVID?
- Has COVID-19 and remote technology changed your approach for investigating potential cases?
- Has it changed your decision-making process about which cases to bring or dismiss?
  - *Do you think any of those changes will persist?*
- *How, if at all, has the exchange of discovery changed?*
  - How, if at all, has plea-bargaining changed since COVID?

**VIRTUAL HEARINGS & PROCEDURES**

- I now want to focus on virtual hearings, be they arraignments, evidentiary hearings, trials, sentencing--anything where you and the defense attorney and the defendant would normally be present in person.
- **What kinds of virtual hearings have you personally handled?**
- **How, if at all, are virtual versions of these hearings meaningfully different from in-person versions?**
  - *How, if at all, has your ability to argue the government's case changed?*
  - *How, if at all, has your ability to connect with and be heard by the judge changed? What about your ability to anticipate how the judge is leaning?*
  - *Have there been any changes in victim appearances in your cases?*
  - *Have there been any changes in public attendance?*
- Are there any kinds of hearings (initial appearances, bail hearings, evidentiary hearings, guilty pleas, etc.) that are especially different virtually?
  - *What are they?*
  - *How are they different? (Can you give examples?)*
- **IF RESPONDENT HAD EVIDENTIARY HEARING OR TRIAL: Tell me about your [evidentiary hearing/trial].**
  - *What kind of case was it?*
  - *Was it a jury trial?*
    - *How did the process of selecting jurors work?*
    - *Was anything meaningfully different about jurors in remote trials? What? (Paying attention, note-taking, ability to "read" jurors, etc.)*
  - *What changes, if any, did you perceive in witness examinations?*
  - *Were there any technical hiccups, or did things run smoothly?*
  - *Have there been any noticeable changes in judgments in remote trials? (What? Why do you think they exist?)*
- **IF NO EVIDENTIARY HEARING OR TRIAL: Are other people in your office or jurisdiction conducting remote trials or evidentiary hearings? (Who?)**
- **What are your views about remote trials, if you have any? (Why?)**
- **Given the choice, what proceedings would you do virtually, and which would you do in-person? (Why?)**

**ENDING QUESTIONS**

- Is there anything else you think I should know?
- How long have you been in your current position?
- What position did you have before this one?
- How well has remote technology worked for you?
- What year were you born?
- What race or ethnicity do you identify as?
- What gender do you identify as?
- Who else do you know in your district--defense attorneys, prosecutors, judges, or court administrators--who I should talk to?
  - *Can you give me their contact information or connect us?*
  - *IF GIVE CONTACT INFO: Can I tell them that you passed along their name, or would you prefer to be anonymous?*
  - *IF APPLICABLE: You mentioned [X OTHER PERSON] who has [tried a case/done an evidentiary hearing/etc.]. Can you put me in touch with that person?*

# APPENDIX 4: NVIVO CODEBOOK

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## CODEBOOK FOR QUALITATIVE DATA ANALYSIS

### TECHNOLOGY ACCESS/QUALITY (FOR DEFENDANT, ATTORNEY, OR JUDGE)

Parent Code	Child Code	Description	Example
<b>Access</b>			
	Access to Computer	Respondent discusses issue(s) related to accessing computers.	<i>"Originally, I left the building when all this started with a laptop I had that I never used. When I started using it, it was no good."</i>
	Access to Phone	Respondent discusses issue(s) related to accessing phones.	<i>"A lot of our clients, their phone numbers change or they don't have access to a phone one day and they do the next."</i>
	Access to Quiet Space	Respondent discusses issue(s) related to finding a quiet space to use virtual technology.	<i>"I can sit in my office and have quiet. Defendants (by which I mean my clients and non-clients) don't necessarily think that far forward."</i>
	Access to Internet Connection/Reliable WiFi	Respondent discusses issue(s) related to accessing quality internet.	<i>"[M]ost of my clients . . . don't necessarily have a stable internet connection."</i>
<b>Breakout Rooms</b>		Respondent discusses the use of Zoom breakout rooms. Code includes both advantages and disadvantages of breakout rooms.	<i>"[I]f the client has a confidential question, they need to ask me, they can put us in a breakout room, I can take my laptop and go to the jury room and speak to them privately. Whereas if we're on the phone, that's not a possibility."</i>
<b>Difficulty Creating Record</b>		Respondent discusses problems with creating a record, including problems with participants speaking over one another.	<i>"So I mean trying to create a record is tough."</i>
<b>Difficulty Seeing &amp; Hearing</b>		Respondent discusses having trouble seeing or hearing during a court proceeding.	<i>"[W]hen we went to access all our Zoom hearings, they, they could hear us, but we could not hear a word anybody was saying."</i>
<b>Pre-COVID Technology</b>			
	Pre-COVID Conference Call Use	Respondent discusses using phone calls before COVID.	<i>[Pre-COVID,] "it was very, very rare for an attorney to appear telephonically unless there was some sort of extenuating circumstances."</i>
	Pre-COVID Video Technology Use	Respondent discusses using video technology before COVID.	<i>"[T]he closed circuit television was being used somewhat before COVID hit."</i>

<b>Parent Code</b>	<b>Child Code</b>	<b>Description</b>	<b>Example</b>
<i>Translation Services</i>		Respondent discusses using video translation services. Code includes both advantages and disadvantages of services.	<i>"[T]he interpreter function works really well on Zoom."</i>
<i>Zoom Waiting Rooms</i>		Respondent discusses the use of Zoom waiting rooms. Code includes both advantages and disadvantages of waiting rooms.	<i>". . . I would say that when I'm in a Zoom waiting room, I have no idea what's going on. I don't know when I'm going to be let into the Zoom room."</i>

### **INFORMALITY**

<b>Parent Code</b>	<b>Child Code</b>	<b>Description</b>	<b>Example</b>
<i>Describing D's Behavior (in bed, in car)</i>		Respondent discusses or describes a defendant's informal behavior during a virtual court proceeding.	<i>"I think I had to tell one person to put a shirt on."</i>
<i>Lack of Seriousness</i>		Respondent indicates virtual proceedings are being taken less seriously.	<i>"[T]aking everybody out of the courtroom and doing it remotely, I think we lose, a, a fair amount of the formality of what's happening and the respect for the process."</i>
<i>No Informality Concern</i>		Respondent does not believe virtual proceedings are more informal.	<i>"There's not a lot of fooling around in my courtroom, so, because I don't allow it. And when I see it start happening, I'm on it. So, so for me, it hasn't been very much different."</i>
<b>Outcome</b>			
	Better Outcome	Respondent suggests the informality of virtual proceedings might lead to better outcomes.	<i>Never referenced</i>
	Don't Know Outcome	Respondent does not know if informality of virtual proceedings has impacted outcomes.	<i>Q: "And what are the consequences of that [informality], do you think?" A: "I don't know."</i>
	Worse Outcome	Respondent suggests the informality of virtual proceedings might lead to worse outcomes.	<i>"[P]eople call in like, Well, I forgot to get up . . . Just have to turn your phone on and lay there in bed, that's all you had to do. So no, we're not lifting your warrant."</i>

<b>Parent Code</b>	<b>Child Code</b>	<b>Description</b>	<b>Example</b>
<i>Probation Violations on Camera</i>		Respondent discusses a probation violation taking place during a virtual proceeding.	<i>"[S]o we've had, probation revocation cases where the defendant is on probation and he can't have any controlled substances. And he can't be drinking, you know. And he can't have any alcohol, right? And he'll be in the Zoom meeting and behind him is his fridge. And on top of the fridge, it's just full of alcohol bottles. You can see it right there."</i>

### **DEHUMANIZATION/LACK OF NON-VERBAL CUES OF DEFENDANT IN PROCEEDINGS**

<b>Parent Code</b>	<b>Child Code</b>	<b>Description</b>	<b>Example</b>
<i>Intangible Benefits of In-Person</i>		Respondent struggles to describe why but articulates that court proceedings are better in person for intangible reasons.	<i>"I think, with hearings, that are sort of more, you know, in depth and just trying to get to know your cases, you know, there's something lost when you're not . . . in person".</i>
<i>Look in the Eye</i>		Respondent mentions it being harder to look someone in the eye (or have face to face contact) during virtual proceedings.	<i>"[T]here's something about a witness taking this stand and having the subject of their accusations sitting right there and seeing them face to face."</i>
<i>Trust &amp; Legitimacy</i>		Respondent mentions needing to have open in-person courts to foster trust in the system.	<i>"[W]hen people are face to face and have to look at each other and deal with each other and interact with each other, um, the more effective government that you have. I think it's important that people participate, and the more, the farther you remove them, electronically or otherwise, the more harsh rhetoric, in my opinion, that comes out. The more distrust that comes out."</i>
<i>Nonverbal Cues</i>		Respondent mentions the importance of seeing gestures, shaking hands, sweat on brow, and other nonverbal cues.	<i>"And when you're talking to someone on the phone, you just, you miss on their mannerisms. It's hard to read how they're accepting what you're telling them, which can drive the conversation. You know, if somebody is, is silently crying, um, you know, maybe then we would pause the conversation if we're in person . . . Over the phone, you just lose all of those nonverbal cues."</i>

<b>Parent Code</b>	<b>Child Code</b>	<b>Description</b>	<b>Example</b>
<b>Humanization/ Positive</b>		Respondent mentions some positive or humanizing element of virtual proceedings.	<i>"[I]n some respects, I almost feel I have more of their attention [on Zoom]. Because when we're in a courtroom and I'm sitting up on the perch there and they're, you know, 30 feet away or so, a lot of times hunching down at the desk. No one's happy to be there. Actually, on Zoom, I feel like I'm almost engaging them better."</i>

### **EFFICIENCIES AND INEFFICIENCIES**

<b>Parent Code</b>	<b>Child Code</b>	<b>Description</b>	<b>Example</b>
<b>Attention Span</b>		Respondent indicates it is easier or harder to pay attention in the virtual world.	<i>"So are they paying attention? Yeah you can lead a horse to water, you can't make them pay attention. Are you losing something there by not having it in person? I don't know."</i>
<b>Costs</b>		Respondent describes an expense or a cost-saving mechanism of the virtual world.	<i>"There have been a lot of IT expenses. A lot of webcams being issued to judges and judges' staff."</i>
<b>Defense Attorney Meetings with Clients</b>		Respondent indicates it is easier or harder (or better or worse) for defense attorneys to meet with their clients in the virtual world.	<i>"In custody it makes it that much easier. Because you know what, I haven't seen this guy in a while. Click, click, click on. And then they pull him. And I mean, I saw one at eight o'clock the other night. He was like, 'Yeah, I just finished dinner. I didn't expect to have a lawyer meeting,' but I was like, 'Listen, man, this is the time that I could get it in with the kid with everything going on.' And he was like, 'Nah, I appreciate it. I would've been bored back there anyway.' So, I think it has increased, I think it's been good."</i>
<b>Distractions</b>		Respondent indicates there are more or less distractions in the virtual world.	<i>"[H]aving that many people on the screen. It's just a little easier to be distracted, whereas in the courtroom, you know, I'm looking out now from the bench."</i>
<b>Faster &amp; Less Time in Court</b>		Respondent indicates they are spending less time in court in the virtual world or that court proceedings are moving faster.	<i>"Well, you know, a number of hearings are just scheduling. ... You know, those scheduling conferences, you might as well just do those on Zoom. It's very efficient."</i>

<b>Parent Code</b>	<b>Child Code</b>	<b>Description</b>	<b>Example</b>
<i>Slower &amp; More Time in Court</i>		Respondent indicates they are spending more time in court in the virtual world or that court proceedings are moving slower.	<i>“. . . Zoom is much longer. Because we just have to go slower. I mean, that's my experience."</i>
<i>Staff Time</i>		Respondent discusses how staff time may be the same or different as a result of the virtual world	<i>"[W]e were busy before, but it seems like it's harder now. We're trying to fit people in where we can . . ."</i>
<i>Training</i>		Respondent indicates that the virtual world requires more or less training.	<i>"So I was in conversation sort of regularly with our IT folks and setting up trainings for my judges so that they could get well versed on Zoom and then also just setting up a system."</i>
<i>Travel Time (attorney, judge, court personnel)</i>		Respondent indicates that the virtual world requires more or less travel time. This code does not include travel time changes for defendants.	<i>"It's much easier. Before you would have to schedule it and I'd have to drive to other courthouse or I'd have to drive to the county IT department which is down south. Even driving to a jail now is just, 'Here's the Zoom link.' It's definitely easier."</i>

### **EFFECTS ON CASE PROCESSING**

<b>Parent Code</b>	<b>Child Code</b>	<b>Description</b>	<b>Example</b>
<i>Backlogs</i>		Respondent discusses how either COVID or the use of virtual technology has impacted case backlogs.	<i>"[T]here was obviously a backlog when jury trials were suspended."</i>
<i>Caseloads</i>		Respondent discusses how either COVID or the use of virtual technology has impacted their caseloads (could be positive or negative).	<i>"The volume of cases that we have here, we're never going to be able to 100% deal with 100% of the time. But it's just COVID has just kind of exasperated, um, all of the issues we had before."</i>
<i>Detention</i>			
	Bail Practices	Respondent discusses how either COVID or the use of virtual technology has impacted their jurisdiction's bail practices.	<i>"[W]hen COVID first started hitting, we went through our jail roster and, and basically gave a lot of PR bonds to cases where they were nonviolent offenses and they were in jail because they hadn't made bond because of issues with not showing up for court before. So if they were low level and nonviolent cases, then we were giving a lot of PR bonds."</i>

<b>Parent Code</b>	<b>Child Code</b>	<b>Description</b>	<b>Example</b>
	Bookings & Capacity	Respondent discusses how either COVID or the use of virtual technology has impacted their jurisdiction's booking process or capacity of correctional facilities.	<i>" . . . I looked at the jail population because we have, in North Dakota, we have county jails and they're small. You know, like I think the Cavalier County Jail maybe can hold eight. Pembina County Jail maybe holds 12 and Granton where I'm chambered, we have the largest jail. Maybe we have 30 or something. But, you know, we were told again from the Supreme Court and kind of trickling down, that we needed to really watch that jail population."</i>
	COVID in Jail	Respondent mentions the (actual or possible) spread of COVID in the jurisdiction's jails.	<i>"We're just at a point now where unsurprisingly, the jail is a hot spot for COVID. You can imagine when you've got a bunch of people essentially living on top of each other with no real good ventilation, that is spread. It has spread like wildfire."</i>
<b>Informal Meetings (hallways of court)</b>		Respondent discusses how either COVID or the use of video technology has led to less informal meetings between court actors.	<i>"[N]ormally you get a whole lot of stuff done like you said by leaning over in court and saying, 'Mike, we've got that, you know, case coming up and I just talked to his parents and this is what we can do as far as the restitution goes, What do you think about this?' That is how you got a lot of stuff done . . . That's not happening now . . . So instead of having that casual kind of interaction. I have to send them emails."</i>
<b>Plea Bargaining &amp; Guilty Plea Practices</b>		Respondent discusses how either COVID or the use of virtual technology has impacted their jurisdiction's plea bargaining and guilty plea practices.	<i>"You know, I think I was more optimistic when things were started. That we would see more cases resolve in ways that were beneficial to the client but I personally just don't think we're getting offers that are that different from where it was before."</i>
<b>Sentencing Practices</b>		Respondent discusses how either COVID or the use of virtual technology has impacted their jurisdiction's sentencing practices.	<i>"[T]he sentencings, and this is a bit of a product of the COVID age, the state has been more willing to be a little creative with their dispositions."</i>

Parent Code	Child Code	Description	Example
<i>Speedy Trial</i>		Respondent discusses how either COVID or the use of virtual technology has impacted the speedy trial right.	<i>"[T]he Florida Supreme Court issued when the pandemic started, and they've updated it since, um, administrative orders. And the administrative order has tolled, the speedy trial rule, and that has lifted a tool that a lot of defense attorneys use to push cases."</i>

## **BACKGROUND OF JURISDICTION**

Parent Code	Child Code	Description	Example
<i>Miami</i>		Respondent gives any kind of description of Miami (could be about the population, the geography, the weather, the transportation system, etc.).	<i>"[M]iami-Dade is large, both in population and in, just geographically . . . It's very diverse."</i>
<i>Milwaukee</i>		Respondent gives any kind of description of Milwaukee (could be about the population, the geography, the weather, the transportation system, etc.).	<i>"Milwaukee is the largest, metropolitan area in Wisconsin. And . . . of course, poverty, unemployment is a problem."</i>
<i>North Dakota</i>		Respondent gives any kind of description of North Dakota (could be about the population, the geography, the weather, the transportation system, etc.).	<i>"[I]t's very rural. It's beautiful . . . I can drive in the morning, my commute, and I can be alone on the road for miles and miles and miles and not see another car. Our farms are big in terms of acreage."</i>

## **ATTORNEY-CLIENT COMMUNICATION**

Parent Code	Child Code	Description	Example
<i>Access to Clients</i>			
	Access to In-Custody Clients Better	Respondent indicates that either COVID or the use of virtual technology has led to better access to in-custody clients.	<i>"[B]eing able to video conference with clients in custody is huge. I mentioned the House of Correction. That's 30 minutes away."</i>
	Access to In-Custody Clients Same	Respondent indicates that either COVID or the use of virtual technology has led to no change in access to in-custody clients.	<i>"[B]ack in 2010 I installed video equipment at all the jails through our budget so that we can have a direct link to clients and we don't have to drive out and waste an hour, an hour and a half, to two hours in traffic. So we did that in 2010 and 2011. So when the COVID pandemic hit, even though the jail shut down for outside visitors and for attorneys to visit their clients, we did not miss a beat because we already had video."</i>

<b>Parent Code</b>	<b>Child Code</b>	<b>Description</b>	<b>Example</b>
	Access to In-Custody Clients Worse	Respondent indicates that either COVID or the use of virtual technology has led to worse access to in-custody clients.	<i>“. . . I don't want to say that I am underserving my clients that are in custody. It is just more difficult to serve them, especially because it's harder to contact them."</i>
	Access to Out-of-Custody Clients Better	Respondent indicates that either COVID or the use of virtual technology has led to better access to out-of-custody clients.	<i>"So for out of custody clients, again like it's to a large extent, I would say that it's been easier for me. They have a phone number. They have a way to reach me."</i>
	Access to Out-of-Custody Clients Same	Respondent indicates that either COVID or the use of virtual technology has led to no change in access to out-of-custody clients.	<i>"[P]eople who are out of custody, things haven't really changed. Things haven't really changed, they call my office, they call my cell, they email me. It is what it is."</i>
	Access to Out-of-Custody Clients Worse	Respondent indicates that either COVID or the use of virtual technology has led to worse access to out-of-custody clients.	<i>"So it's been interesting now with the out-of-custody clients because, you know, I can tell you that my phone rings more now than it did pre-pandemic. Right? Because everyone's calling and calling from different numbers and from Google voice numbers. So it's been almost harder to get a hold of our clients that are out of custody. You know, when phone numbers change, we don't have that sort of check-in date with the court to see them and say, 'Listen, I tried calling. I need to get an updated phone number for you.' So, yeah, I would say that it's even been more difficult to communicate."</i>
<b>Clients Attitudes/ Perceptions</b>		Respondent discusses how they believe clients have been feeling or how clients have been perceiving the system during COVID and/or the shift to virtual technology.	<i>"There's a lot of frustration, especially from clients who are in custody, especially from the clients who are in custody with everything done and waiting to just have literally their day in court."</i>
<b>Communication Methods</b>			
	Communication by Email	Defense attorney discusses communicating with clients by email.	<i>"I use email all the time, so I share discovery by email, it comes from the state by email, gets sent to the client by email."</i>

<b>Parent Code</b>	<b>Child Code</b>	<b>Description</b>	<b>Example</b>
	Communication by Text	Defense attorney discusses communicating with clients by text.	<i>"I text my clients all the time. I've always done that. You know, clients at the jail actually get to be little text machines, they're crazy with them. But I have always responded to them."</i>
	Communication by Phone	Defense attorney discusses communicating with clients by phone call.	<i>"My primary means of communication with my client is via phone."</i>
<b>Confidentiality</b>		Defense attorney indicates confidentiality concerns.	<i>"[T]hey can put you in, like, a breakout room. We call it. And as far as we know no one can listen in. I still try to not use those very often. I just don't necessarily trust them because I just don't, I don't think any of us really understand the Zoom technology as much."</i>
<b>Face-to-Face Communication (preferences, non-preferences, control)</b>		Defense attorney indicates a preference or non-preference for face-to-face contact; defense attorney discusses how face-to-face interactions may limit or help their ability to control a client (nudges, whispers, etc.).	<i>"My primary means of communication with my client is via phone, and that's been difficult for me because I think there's so much value, there's such, that face to face communication is just huge. It's big for building trust, it's big for keeping points, understanding where the client is coming from on. That's difficult now that I don't have the ability to be doing that on a regular basis."</i>
<b>Frequency of Communication</b>			
	Frequency of Communications Decrease	Defense attorney indicates that either COVID or the use of virtual technology has caused them to communicate with clients less frequently.	<i>"[I]t probably was less client conversation during the, you know, shutdown. It's not that clients weren't able to talk to the lawyers or the lawyers weren't talking to them, but there was just, frankly, less to discuss."</i>
	Frequency of Communications Increase	Defense attorney indicates that either COVID or the use of virtual technology has caused them to communicate with clients more frequently.	<i>"I've also started texting clients a lot more with my out-of-custody clients."</i>

<b>Parent Code</b>	<b>Child Code</b>	<b>Description</b>	<b>Example</b>
<i>Preparing Clients (sharing discovery, expectations of court, mock-Zoom)</i>		Defense attorney discusses advantages or disadvantages of preparing clients while using video technology.	<i>“. . . I have spent more time preparing a client for court . . . in the new world than I ever had before. Before, I was sitting next to them . . . and I could kind of manipulate their responses while sitting right next to them. Now I don't have that ability, so I kind of have to do it in advance.”</i>
<b>Trust &amp; Rapport</b>			
	Lower trust/harder to build rapport	Defense attorney indicates they are having a harder time building trust and establishing rapport either during COVID or while using virtual technology.	<i>“Yeah, it's more difficult to develop rapport and, yeah, it is. It's not the same relationship with clients.”</i>
	Higher trust/easier to build rapport	Defense attorney indicates they are having an easier time building trust and establishing rapport either during COVID or while using virtual technology.	<i>Never referenced</i>
	Trust & rapport no change	Defense attorney indicates they have seen no change in their ability to build trust and establish rapport either during COVID or while using virtual technology.	<i>Q: “How has it been communicating with clients virtually like, do you feel like that's impacted your relationships, your ability to develop rapport and all of that?” A: “I would think it would, but so far it has not. I think any client communication, which is very important, is not necessarily about the medium, but what you're relaying to them and how often you're doing it.”</i>

**HEARINGS**

<b>Parent Code</b>	<b>Child Code</b>	<b>Description</b>	<b>Example</b>
<b>Appearances &amp; Failures to Appear</b>			
	Client Getting to Court	Respondent discusses how access for clients to getting to court has changed or stayed the same.	<i>"[P]eople can still go work and call in, which is really helpful. Not all jobs will allow them to do that. But before COVID, I mean, people could wait in court, you know, all afternoon finally get their case called at 4:30 and they're taking off the whole day of work for that, or they're showing up late for work. So that that's one small benefit is that there is more flexibility. And clients are able to do that."</i>
	More Appearances	Respondent indicates they have seen an increase in appearances.	<i>"[M]aybe a little bit of a pro is that you're getting more appearances because the defendants actually willing to appear."</i>
	More FTAs	Respondent indicates they have seen an increase in failure to appear.	<i>"I do have clients that you have gotten bench warrants for non-appearance at hearings, and I can't confirm or deny, but I think part of it may be they don't have minutes available or they didn't know that it was supposed to be by Zoom or by home."</i>
<b>Attendance of Others</b>			
	Family & Public Attendance	Respondent discusses how the attendance of family members and the public has changed or stayed the same.	<i>"The public attendance is nothing like it used to be."</i>
	Victim Attendance	Respondent discusses how the attendance of victims has changed or stayed the same.	<i>"Yeah, they're actually willing to show up if they don't have to drive into the courthouse or the state attorney's office. So we'll see an increase of actual participation from the victims. When you see increase in participation from the victims, you generally see increasing charges as well."</i>
<b>Forum</b>			
	In Person	Respondent discusses a hearing done in person.	<i>"[I]n-person ones are generally limited to two categories. One, are in cases where the client is in custody and we're resolving with a plea and sentencing . . . The other ones that we've been doing in person are ones where there is either a mandatory minimum or a very strong likelihood that the case is gonna be, result in incarceration."</i>

	Never Done Virtually	Respondent discusses a type of hearing they have never done virtually.	<i>"I personally have not agreed on a massive motion to dismiss that I've been working on for about a year now, I won't agree to doing it over Zoom, I won't. I told my client I wanna be in there, I want the judge to see him. I wanna be able to cross examine the witnesses in person. I wanna make sure that there is nobody in the room with them."</i>
	Phone	Respondent discusses a type of hearing conducted over the phone.	<i>"[C]harging conferences, we're mainly using the telephone."</i>
	Video	Respondent discusses a type of hearing conducted by video.	<i>"So virtual hearings—I've done bond modification hearings. I've done hearings to modify stay away orders. I've done hearings—not full out hearings—but motions to compel and putting things before the court of that nature. I have supervised some stand your ground hearings that my attorneys have done, some probation violation hearings that have been done by attorneys in our office."</i>
<b>Juvenile</b>		Respondent discusses any type of juvenile proceeding.	<i>"Juvenile appearances have taken place remotely."</i>
<b>Taking Evidence Virtually</b>		Respondent discusses how courts have been receiving evidence when using phone or video hearings.	<i>"If I need to play a video and I need the video to have audio, I know in court that I could make that happen. Because we have an Elmo that we drag into court, my IT guy is there, we make that happen. When I'm doing it virtually, I have to hope everything is working. You know, it's a lot of that Zoom—'Can you hear it? Can you hear me? You guys, you hear the audio hearing the audio? Do you see it?' And so anything that requires more than just testimony, anything that requires sort of audio and visual in particular, I think it's far more challenging to do on Zoom."</i>
<b>Trials</b>		Respondent discusses how trials have been conducted since the pandemic began or virtual court started.	<i>"[S]o far, the Supreme Court has not allowed—the administrative order basically says no part of the criminal jury trial could be conducted over Zoom or over remote hookup."</i>

	Voir Dire	Respondent discusses how voir dire has been conducted since pandemic began or virtual court started.	<i>"We've done voir dire in galleries of the courtrooms."</i>
<b><i>Unequal Participation (among attorneys)</i></b>		Respondent indicates a situation where one attorney may be appearing virtually while the opposing attorney is appearing in person in the courtroom.	<i>"In a different county, defense has been granted the ability to appear virtually, but she (the prosecutor) must appear all the time."</i>
<b><i>Witnesses</i></b>			
	Assessing Witness Credibility Harder	Respondent indicates that assessing witness credibility is harder either because of COVID (i.e. use of masks, protective shields) or virtual technology.	<i>"[I]f I'm taking a hearing where it's incumbent upon me to weigh credibility of witnesses, I want them live because there's nonverbal communications that go on by people in the courtroom which judges can use in determining credibility, weighing credibility of testimony."</i>
	Assessing Witness Credibility Easier	Respondent indicates that assessing witness credibility is easier either because of COVID (i.e. use of masks, protective shields) or virtual technology.	<i>"[B]ecause of the physical configuration of my courtroom . . . the witness chair is to the left of my bench and the witness sits facing the jury box which is also to my left. So the . . . witness has his or her back to me. . . So I actually have a better vantage point remotely than I would in person."</i>
	Cross-Examination	Respondent discusses cross-examining witnesses.	<i>"I wanna be able to cross examine the witnesses in person. I wanna make sure that there is nobody in the room with them."</i>

**PREFERENCES FOR POST-COVID WORLD**

<b>Parent Code</b>	<b>Child Code</b>	<b>Description</b>	<b>Example</b>
<b>Absolutely NO</b> (trials, jury trials, etc.)		Respondent indicates that in a post-COVID world they would prefer to have absolutely no [certain type of hearing]. This code was used anytime a hard line was drawn.	<i>"[I]n criminal cases, I would not do a remote trial."</i>
<b>Contested Hearings in Person</b>		Respondent indicates that in a post-COVID world they would prefer to have contested, major, evidentiary hearings in person.	<i>"I would say most evidentiary hearings like a motion to suppress, some of these other motions that I mentioned, like for pre-trial detention, essentially, things that are sort of like mini trials—I just think I think overall, it would be better for those to be held in person."</i>
<b>Go Back to the Way It Was</b>		Respondent indicates that in a post-COVID world they would prefer to go back to the way their jurisdiction functioned pre-covid.	<i>"I would go back the way it was before we started this. I, I think it's important to have people there in person."</i>
<b>Keep Minor Hearings Virtual</b>		Respondent indicates that in a post-COVID world they would prefer to have minor, non-evidentiary hearings virtual.	<i>"I think any, let's call them administrative [ones] can be dealt with online. So that is motions to compel. Even the same sounding calendars, which, in Dade the clients come to . . . But those are all things that don't require somebody to physically come in."</i>
<b>More Flexibility in Virtual and In-Person</b>		Respondent indicates that in a post-COVID world they would prefer to have some flexibility in proceeding virtually or in person.	<i>"I think a lot of it needs to be up to the client and the attorney. I don't think that being forced into any sort of virtual hearing just because they might be doable is a good idea."</i>

**MISCELLANEOUS**

<b>Parent Code</b>	<b>Child Code</b>	<b>Description</b>	<b>Example</b>
<b>Accountability/ Probation</b>		Respondent indicates challenges with keeping defendants accountable or changed interactions with probation because of either COVID or the use of virtual technology.	<i>“. . . I did standing orders when I went home, about . . . how we were gonna be handling people that were supposed to be reporting, criminal defendants that were supposed to be reporting in for random alcohol testing, drug testing, things of that nature. Because, you know, it was just such a weird time and everything just kind of stopped and people . . . didn't know if we should be allowing, you know, jailers to be administering breath tests to people or collecting urine samples and things of that nature.”</i>
<b>Collaboration &amp; Inter-Personal</b>			
	Collaborative Policy Development	Respondent discusses policy development as a collaborative process.	<i>“[F]irst thing when . . . COVID came in, the first thing, one of the first things we did is the judges and the prosecutors and even the defense attorney, we got together and we said, Okay, who's in jail right now that really needs to be in jail? And we let a whole bunch of people go because we were concerned about those things.”</i>
	Inter-Office Dynamics	Respondent discusses how COVID or virtual technology has impacted dynamics between offices.	<i>“So to have, you know, to have the prosecutor in the same room as the defense attorney . . . It just can help to establish your professional working relationship to improve upon it, to to build the the ties of trust, you know, that are that are used in negotiating pleas, for example, on something can just be done on the fly here in the courtroom while I'm addressing one case you can have, you know prosecutor and defense attorney back in the corner or walk outside so you know all of all of those things that are traditionally part of the system, I think a lot of people miss them, that human interaction and are really looking forward to that returning to a certain degree, and hopefully that will never be lost completely.”</i>

<b>Parent Code</b>	<b>Child Code</b>	<b>Description</b>	<b>Example</b>
	Intra-Office Dynamics	Respondent discusses how COVID or virtual technology has impacted dynamics within the respondent's office.	<i>" . . . I think that that's something that our office has had a little bit of a hard time dealing with just because we were so good at, you know, making sure that we're arguing motions and litigating things in court. And obviously those have kind of been the first things that have kind of been taken away because of COVID. So I think that those are the biggest changes I think our office has seen and that I've seen personally."</i>
	Supervision	Respondent discusses how COVID or virtual technology has impacted their ability to supervise employees.	<i>"[A] lot has changed in so far as I've had to spend a lot of time being, I think, supportive in a way of the attorneys I supervised that I didn't have to before."</i>
	Voice Not Heard in Policy Development	Respondent indicates that a stakeholder was ignored or excluded while developing policies for the jurisdiction.	<i>" . . . I prefer the pretty reliable electronic means of court appearances. But that's not always the case. I think in the future they're probably gonna go with them or with Zoom. But that's not my call. That's the administration."</i>
<b>Constitutional Issues</b>		Respondent raises a constitutional problem posed by video technology or COVID.	<i>"[W]ith our courthouses being closed, that creates a major problem. In my mind, a huge due process problem."</i>
<b>Corrections Officers</b>		Respondent discusses the proximity of corrections officers to defendants.	<i>"He's only appeared on his screen with a mask covering his face with a corrections officer behind him. If he goes to the probation violation hearing and loses, um, he could get life, and likely will."</i>
<b>Defendant Vulnerability Concerns (as expressed by judge, prosecutor, court administrator)</b>		A judge, prosecutor, or court administrator expresses concern about defendants.	<i>"[I]t is a big difference, not for the defendant and the defense attorney, not to be in the same location."</i>

<b>Parent Code</b>	<b>Child Code</b>	<b>Description</b>	<b>Example</b>
<b>Crime Rates</b>		Respondent discusses crime rates before or during the pandemic.	<i>"Usually, we're somewhere between on average 85 to 110-115 homicides a year. A couple of years ago, we had 145 followed by 141 and that was a bad two years. But this year I think we're already at 170 or something like that. And it's November, and majority of that number has happened since April."</i>
<b>Demographics</b>			
	Native American	Respondent discusses the Native American population.	<i>"There is a spattering of the Native Americans. There's a, there's a reservation, or a Native American nation up, the Turtle Mountain reservation north of my three counties. And they're Chippewa and, and smack in between Ramsey and Benson County which are immediately to my east is the Spirit Lake reservation, which is Lakota."</i>
	Poverty	Respondent discusses the low-income population or dynamics or policies related to the low-income population.	<i>"The, you know, the world changed, but the, you know, poverty gap did not. If anything, it grew larger. And so these people who are barely making ends meet and who are declared indigent by the court, may not have access to high speed internet, and that could adversely affect them,"</i>
<b>Investigations</b>		Respondent discusses how investigations have proceeded in the remote world.	<i>"It has slowed down our ability to conduct investigations but not eliminated it. As a matter of fact, today I already signed off on an undercover investigation. So we are still doing the things we would normally do during COVID."</i>
<b>Transitions</b>			
	Initial Transition Mixed	Respondent indicates the initial transition to remote technology was mixed.	<i>"[W]hat I found interesting is it seems the state court in Miami-Dade has managed the Zoom a little bit better than the federal court, which is different than in-person practice."</i>
	Initial Transition Not Smooth	Respondent indicates the initial transition to remote technology did not go smoothly.	<i>"There was a couple of weeks where, you know, we had to figure out Zoom, and who could do it. We didn't have the technology in a lot of courtrooms, we didn't have laptops."</i>

Parent Code	Child Code	Description	Example
	Initial Transition Smooth	Respondent indicates the initial transition to remote technology went smoothly.	<i>"We have three jail facilities and one of the ways we were able to deal with the pandemic much better than most public defender offices or most defense attorneys, is back in 2010 I installed video equipment at all the jails through our budget so that we can have a direct link to clients and we don't have to drive out and waste an hour, an hour and a half, to two hours in traffic. So we did that in 2010 and 2011. So when the COVID pandemic hit, even though the jail shut down for outside visitors and for attorneys to visit their clients, we did not miss a beat because we already had video."</i>
	Subsequent Transition Mixed	Respondent indicates that subsequent transitions to remote technology were mixed.	<i>"A lot of the courtrooms in Milwaukee, some of them are older. You know, the acoustics aren't very good when you're there in person, let alone trying to do an appearance where people are, you know, speaking into a microphone. There have been some difficulties with it. Some judges in some courtrooms seemed to be better equipped to handle it because I think they dealt with it more often. Whereas in other courtrooms where they haven't done very many of them, it still becomes problematic to get the audio working correctly so that everyone can hear all the parties."</i>
	Subsequent Transition Not Smooth	Respondent indicates that subsequent transitions to remote technology did not go smoothly.	<i>"[T]he transition into Zoom was not something I'm gonna call easy because some people are a little opinionated and inquisitive."</i>
	Subsequent Transition Smooth	Respondent indicates that subsequent transitions to remote technology went smoothly.	<i>"I think that people are getting-- and it really is, you know, just such a change, such a sudden change that it takes time to get used to. I think people are, you know, getting used to: 'Oh, sometimes we're in person, sometimes we're over Zoom, [inaudible] Zoom links, how does Zoom work.' All of those things people are getting much more used to now."</i>