REPORT BY THE DOMESTIC VIOLENCE COMMITTEE

RECOMMENDATIONS FOR NEW YORK CITY VIRTUAL FAMILY COURT PROCEEDINGS, WITH PARTICULAR FOCUS ON MATTERS INVOLVING LITIGANTS WHO ARE SURVIVORS OF ABUSE

I. INTRODUCTION

During the past year, New York City's courts have faced numerous, unprecedented challenges in responding to the ongoing COVID-19 pandemic. The New York City Bar Association's Domestic Violence Committee is concerned with the pandemic's impact on litigation and on litigants, especially those who are survivors of abuse and those who are representing themselves.

Our committee members practice at a variety of non-profit organizations and private firms across the five boroughs. We represent women, men, teens, and children who have been abused or have witnessed abuse and are seeking safety and assistance from the City's Family Courts. We appreciate the efforts that the judiciary has made to enable access to justice and to pivot to an exclusively electronic platform. However, the transition to all-virtual proceedings, particularly trials, has created new challenges. Our recommendations hope to address the recurring issues we have encountered and to raise additional points for the court system to consider subsequent to the release of its "Virtual Bench Trial Protocols and Procedures."

While the virtual format and the Court's efforts to speed up proceedings have challenged lawyers and litigants alike, domestic violence survivors have been particularly impacted. Many of the clients we serve are low income and do not have access to laptops, cell phones with minutes, or reliable WiFi. Also, the trauma they have endured makes situations like excessive pressure to settle a matter or having to testify in a narrative format particularly difficult. In one case, during a first appearance a judge repeatedly said that the parties had to settle an order of protection matter or immediately start a trial. The client did not want to agree to the offer (made for the first time moments before), but was incredibly stressed and expressed fear of upsetting the judge. Their lawyer had to reassure them that they would not be in trouble for exercising their right to reject an offer, and had to strenuously argue for a later trial date. The client was rattled by the experience; they eventually stopped replying to their lawyer and failed to continue with their case. This is just

one example of how the pressure on the court system to resolve cases and address the significant backlog had an unintended negative impact on a litigant.

Furthermore, the lack of uniform virtual trial procedures within and between boroughs has made it exceedingly difficult to properly prepare our clients and to handle novel issues involving introduction of evidence, virtual testimony, and other matters in an efficient and consistent way. Victims and survivors of trauma are better prepared when they have advance time to prepare, and when procedures and expectations are clear.

We appreciate that the "Virtual Bench Trial Protocols and Procedures" aim to offer consistent guidelines, but worry about if and how they will be applied in practice without a requirement to do so, and whether accommodations will be made based on the practicalities of particular types of cases and court participants. We respectfully offer the following recommendations in the hope of striking a balance between judicial discretion, due process, and best practices for serving survivors of violence and other litigants.

II. RECOMMENDATIONS

Virtual Bench Trial Decorum

(1) While we appreciate the need for Microsoft Teams participants to use professional backgrounds, we disagree with the recommendation that litigants must use their actual backgrounds. Survivors of violence will be at heightened risk if they are prevented from using a virtual background and/or blurring their actual background. Their abusive partners could use information gleaned from the background to determine their whereabouts. This risk is especially pronounced for those residing in a confidential shelter.

(2) Domestic violence survivors should be given the choice about whether to appear by video for non-trial appearances. Seeing an abusive party in court can be traumatic; having to stare at them on a screen for the duration of an appearance can be intimidating in a way not present during in person appearances. This accommodation should also be made for litigants who cannot use video due to poor internet connection or other technological reason.

(3) The Court should avoid displaying the phone numbers of litigants or witnesses during Teams sessions. Oftentimes survivors of violence change their phone numbers upon leaving the abusive relationship. Displaying a confidential phone number puts survivors at risk of harm and forces them to change their number again. To help minimize risk, litigants filing for orders of protection should be instructed to use *67 if they call in and to type their name if they log in via Teams.

(4) Attorneys and litigants should be dissuaded from using the chat function to communicate in Teams. As of this writing, the text is visible to everyone in the Teams meeting and thus confidentiality cannot be ensured. Attorneys have also reported receiving chat communication for cases they are not party to days after they have appeared in that particular virtual part. Additionally, the content of the chats provides for a peculiar

evidentiary issue, as it is unclear as to whether those statements, if relevant for the proceeding, can be used as evidence in court.

(5) Jurists should develop clear and consistent guidelines for whether/when to mute and/or eject participants from a Teams session. In a number of cases litigants accused of domestic abuse have talked over judges and attorneys, have tried to directly speak to survivors, or have otherwise acted in a threatening or disruptive manner. Such behavior, which would result in at least a warning or a finding of contempt, would not be tolerated in person and it should not be tolerated in virtual parts.

(6) Any and all guidelines regarding court decorum, procedure, and/or rules should be available to litigants in languages other than English. Many clients coming to Family Court do not speak or read English as a first language and may not understand what is expected of them.

Safeguarding the Virtual Bench Trial

(1) While we understand the Court's recommendation that participants be "strongly encouraged" to not use public WiFi, this may not be feasible for low-income clients. Many neighborhoods in New York City have unreliable WiFi, and many people are unable to pay their utility bills, resulting in service disruption. Litigants may also need to leave their home to participate in court proceedings for safety, privacy, or another reason; public WiFi may be their only option. We encourage the Court to allow people with limited access to technology, including non-public WiFi, to participate in proceedings from the courthouse. For survivors of violence, the Manhattan Family Justice Center may also be a resource, and pro se parties should be able to use the new centers that the Center for Court Innovation will be opening in the coming months.

(2) When litigants or witnesses provide contact information to the Court to reach them in the event of technical difficulties, the Court should not distribute that information. A survivor's contact information should be provided to the Court outside the purview of the abusive party. In one instance, the Court inadvertently disclosed the e-mail and telephone number of a domestic violence survivor on a summons that was sent to her ex-partner. As a result, she had to change her number.

Maintaining Public Access

(1) Interns and newly admitted lawyers working with attorneys of record should be allowed to observe appearances. The all-virtual platform has disrupted practitioners' ability to have trainees to sit in the back of courtrooms, which is an invaluable learning experience. Interns and newly admitted lawyers should be required to identify themselves on the record.

Pre-Trial Considerations

(1) In addition to a pre-trial conference, at least one appearance with the Court, the attorneys, and the litigants should be conducted prior to the commencement of a trial. Before COVID-19 most cases had multiple appearances during which the jurist could assess credibility, ascertain facts and issues, and build trust with the litigants. Having additional appearances and opportunities to conference cases may result in fewer violation or modification cases in the future and can ensure that critical decisions impacting individuals and families are given due consideration. This is especially important given that in New York City, Supreme Court jurists, who are less familiar with family law issues, are now hearing cases initiated in Family Court.

(2) Instructions about how to appear with up-to-date Teams links and call-in information should be provided to all counsel and litigants at least 24 hours in advance of scheduled proceedings. This information, as well as any instructional materials or videos the court has for pro se litigants, should be available in languages other than English.

(3) The Court should have consistent procedures for contacting litigants and parties who fail to appear. Litigants and counsel have reported instances of not receiving links to dial into parts or having unforeseen technical issues.

Virtual Pre-Trial Conference

(1) All virtual pre-trial conferences should be on the record (in New York City, FTR).

(2) The pre-trial conference should be scheduled with the jurist who will conduct the trial.

(3) In addition to ascertaining whether a litigant or witness will need an interpreter during the trial, the Court should create practices to confirm that the person requiring interpretation understands everything that is occurring during the proceedings. On several occasions we have been told by the individual that they did not understand the interpreter, could not hear them/had the interpretation cut out, or did not think everything that was being said was being interpreted.

(4) A pre-trial conference should occur no less than four weeks prior to the commencement of the trial.

Exhibits

(1) In New York City, attorneys and litigants have access to the Electronic Document Delivery System. The Court should specify whether and when exhibits should be uploaded to that system.

(2) If exhibits must be submitted to the Court Reporter, the Court should inform attorneys or pro se litigants of the process by which, and how, to do so.

(3) What is considered "something other than a document" should be clearly and consistently defined. For example, an audio or video recording is not a document but it is also not a physical object. There is currently no consistently available mechanism by which to provide such evidence to the court and/or display that evidence at trial.

(4) The mechanism for making appointments with the Court to view evidence should be clearly defined.

(5) The Court (a jurist, clerk, court attorney, etc.) should be present for the entirety of any and all evidence inspection to ensure the item is not tampered with or inadvertently altered.

(6) The process for submitting items to the court, such as a physical object, should be clearly defined, i.e. to whom and where should such evidence be directed. There are currently no guidelines available.

Witness Testimony

(1) A number of jurists have been encouraging, or even requiring, litigants to testify in a narrative format. We disagree with this method of testimony for parties in general, particularly for those who are survivors of trauma and abuse. It severely limits the efficacy of counsel, undermines the very bases upon which our adversarial system is premised, and can be an incredibly difficult format of testimony for survivors of domestic violence and other trauma. Trauma impacts the brain's ability to recall details and talk about events in a linear fashion. Forcing domestic violence victims to testify in narrative form puts them at an incredible disadvantage. Litigants generally cannot be expected to testify in narrative fashion and still establish the legal elements necessary to make their case. It is unreasonable and violative of due process to put the onus on the litigant to proffer such testimony without the aid of their attorney.

(2) When a litigant provides witness contact information to the Court, the Court should make an inquiry as to whether that information can be safely disclosed to the other litigant. For example, if a survivor of domestic violence wishes to call their mother as a witness but their ex-partner has previously threatened her, the Court should consider prohibiting the ex-partner's counsel from disclosing the mother's contact information to them. In the case of pro se litigants, witnesses can be asked to create a new e-mail address or use an app like Google Voice for the purposes of litigation.

(3) We understand the Court's recommendation that "there shall be no other computer monitor, screen, TV screen, cell phone or the like in the room wherein the witness is testifying." However, it fails to take several considerations into account. First, some people live in a studio apartment, rent a room in an apartment, or live in another type of small space. It may thus be impossible for them to be in a room absent any of the aforementioned devices. Second, for parties with children or other individuals under their care it is unreasonable to prevent them access to a phone in case of emergency. A possible solution would be for the Court to instruct that they put the phone on vibrate and place it outside of their reach and view.

(4) The use of affidavits in lieu of in-person testimony should be limited to collateral witnesses, and only upon consent of all parties. Litigants and their attorneys may utilize a Notice to Admit to admit undisputed facts. If a witness testifies via affidavit, the affidavit should contain:

(i) That they swear or affirm to tell the truth;
(ii) That they swear or affirm no one has told them what to say; and
(iii) A list of questions, if any, their attorney asked them.

The Court should provide counsel and pro se parties with guidance and/or samples about what can and cannot be included in an affidavit, including page limitations and subject matter limitations. The Court should establish procedures for objections to such affidavits (i.e. hearsay objections) and mechanisms for resolving them (i.e. redaction) prior to the trial.

Ample time for cross-examination via audio and video should be permitted.

(5) Prior to the pandemic, litigants with children had the benefit of in-court childcare services. Many childcare operations are not fully running because of COVID-19. Additionally, many people have lost jobs or otherwise suffered a loss of income which may make childcare difficult to come by. The Court should consider these factors when prohibiting others from being in the room or "so near the witness as to be seen and/or heard by the witness." Due to the litigant's financial resources and/or dwelling's layout this may be impossible.

(6) It is unreasonable to make counsel calling the witness "responsible for ensuring the witness has a suitable location and access to suitable computer equipment and screen(s) . . ." Many organizations and law offices remain closed or have limited space due to the pandemic. They may or may not have access to extra technology for clients or third party witnesses to use. The Court has said that it is open to those without the necessary equipment or resources to access virtual parts; the Court should bear responsibility for providing the necessary space and technology to litigants and witnesses, just as it would during an in-person appearance.

(7) Although the quality of the appearance may not be ideal, clients without access to a computer or tablet should be able to testify by phone if that is their only option. Many litigants can only access the internet via their smartphones. Requiring access to computers or tablets is unrealistic and fails to take into consideration the financial resources of the people accessing Family Court.

Closing Arguments

(1) Whether written summations will be permitted or required should be addressed during the pre-trial conference, as should the process for submission.

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We respectfully urge the Court to consider the unique circumstances presented by certain proceedings and/or court participants, and to permit or require appropriate accommodations—particularly in the domestic violence context and in Family Court generally, as well as in other contexts in which the practicalities of the situation make such accommodations necessary.

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