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JUSTICE

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August 16, 2021

Judge Glenn A. Grant, J.A.D.  
Acting Administrative Director of the Courts  
Richard J. Hughes Justice Complex  
25 Market Street  
Trenton, NJ 08625

Via electronic mail

Comments on the Future of Court Operations, Remote and In-Person Proceedings

Dear Judge Grant:

Please accept these comments in response to the Notice to the Bar, Future of Court Operations, Remote and In-Person Proceedings ("Post-Pandemic Operations Order"), dated July 16, 2021, on behalf of Partners for Women & Justice (Partners), Seton Hall Law Center for Social Justice (CSJ), and Volunteers Lawyers for Justice (VLJ).<sup>1</sup> For the reasons discussed below, we respectfully urge the Supreme Court to modify the Post-Pandemic Operations Order and, once the pandemic subsides and courthouses can safely reopen, provide instead, for the resumption of in-person trials for Final Restraining Orders (FRO) and Final Protection Orders ("FPO"), unless the parties consent to a remote trial or for other good cause, such as the victim's fear of the defendant.<sup>2</sup>

The virtual courtroom can duplicate and, indeed, improve upon, the in-court experience for many types of matters. For example, hearing Temporary Restraining Order (TRO) applications, first appearances, and motions and applications in family court through remote means has benefited litigants and their counsel greatly. We support these facets of the Post-Pandemic Operations Order (§ 6(d)) because they facilitate and simplify litigants' access to the courts, save time, reduce failures to appear, and lower litigations costs.<sup>3</sup>

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<sup>1</sup> Partners provides free legal assistance to low-income survivors of domestic violence and sexual assault in family court in Northern New Jersey and engages in advocacy to address systemic problems faced by low-income survivors. CSJ undertakes direct legal services, impact cases, and advocacy work on behalf of low-income clients, including victims of domestic violence and sexual assault. VLJ is a comprehensive legal services organization and provides a full array of free legal services to low-income and vulnerable client populations.

<sup>2</sup> Partners raised a number of the concerns discussed herein in its comments to the report and recommendations of the Committee on Diversity, Inclusion, and Community Engagement, dated March 26, 2021, available at <https://www.njcourts.gov/courts/assets/supreme/reports/2021/comments/sccr003.pdf>.

<sup>3</sup> We strongly support the provision within the Post-Pandemic Operations Order (§ 4) to permit the taking of remote testimony to accommodate the needs of witnesses who have difficulty appearing in court.

FRO and FPO remote trials, in contrast to many of the matters that may be heard either virtually or in-person, approximate, but do not replicate, those held in-person. The Post-Pandemic Operations Order provides that FRO trials will not automatically be heard remotely, effectively leaving the format of these trials as well as FPO trials to the discretion of judges, pursuant to ¶ 2. It is premature to treat the in-court and virtual court proceedings interchangeably, as the Post-Pandemic Operations Order does. Before making permanent changes to the docket, more must be understood about the impact of virtual court proceedings on case outcomes.<sup>4</sup> Partners, CSJ, and VLJ urge the Court to consider the strong preference for in-person confrontation in domestic violence and sexual assault trials as reflected in case law, the rules of evidence, and Court Rules, as well as the following factors:

- The importance of the rights at stake and the need to make factual findings based on decisions regarding credibility. In general, the Post-Pandemic Operations Order designates cases for in-person proceedings based on the importance of the rights at stake in the matter. But there is nothing more consequential to victims than securing their personal safety and that of their children. For defendants, (outside of criminal convictions) a lifetime designation as a “batterer” and mandatory recording in the Domestic Violence Central Registry can have a significant impact on employment, immigration, and other weighty collateral consequences. The granting or denial of a FRO has important implications for child custody and parenting time decisions under the Prevention of Domestic Violence Act, N.J.S.A. § 2C:25-29(b)(11). Thus, the due process rights of both victims and defendants are substantial. With litigant credibility integral to this case type, remote proceedings without consent or other indicia of good cause, may potentially infringe upon litigants’ right to due process in the absence of a public health emergency.
- The increased challenges of presenting evidence in a virtual courtroom for pro se litigants. Victims who are unable to present adequately their story over a remote hearing may lose their case. The ability to upload evidence in an acceptable forms onto the Judiciary Electronic Document Submission (JEDS) system in advance of the hearing and then to screen share and display evidence is challenging for many self-represented litigants. With remote proceedings, victims are less likely to have access to the services of trained domestic violence advocates who can help them understand what to expect on the day of trial. Plaintiffs are not always aware of their burden of proof or that a decision to rely on testimony alone in lieu of getting voice recordings and texts and photographs into evidence may cost them their case. These challenges are even greater for LEP litigants who may have more difficulty understanding the proceedings in virtual court than in the courtroom; with remote simultaneous interpretation, the interpreter’s face is sometimes hidden from view, which can reduce comprehension.<sup>5</sup>

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<sup>4</sup> Comparing the dismissal and success rates for self-represented victims in virtual court with data for in-person trials (including the subset of data for Limited English Proficiency (LEP) litigants) could shed light on the influence of technology.

<sup>5</sup> See, i.e., Alicia Bannon and Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court* (2020), available at <https://www.brennancenter.org/sites/default/files/2020->



- The risk that LEP litigants are discouraged from pursuing their cases. For low-income foreign language speakers, these barriers to remote court are higher, as many of the resources for pro se litigants on the New Jersey Courts website are available only in English, with some in Spanish.<sup>6</sup> This includes much of the information provided about JEDS; the instruction pages on the New Jersey Courts website<sup>7</sup> and the YouTube video explanation<sup>8</sup> are only in English. In addition, timely assistance from local ombudsmen or JEDS technical support is not always available.
- Reduced courtroom control, which may diminish the integrity and order of the proceedings and erode compliance with orders. Ensuring sequestration of witnesses and preventing witnesses from relying on unseen notes or documents in giving testimony is far more challenging in a remote proceeding than in-person. When other household members offer testimony, a judge is unable to discern whether third-party witnesses listened to the prior testimony. More generally, some of the formality and solemnity of the courtroom is lost over remote platforms, and it is premature to assess if the format of proceedings affects compliance with orders.<sup>9</sup> When confronted with a recalcitrant defendant in a remote courtroom without sheriff's officers, the judge can only mute a speaker or terminate the proceeding early. The potential erosion of judicial authority is concerning in high-risk domestic violence cases.
- The impact of remote technology on assessing credibility. In FRO and FPO trials, testimonial evidence and credibility are critical, *Cesare v. Cesare*, 154 N.J. 394 (1988), especially when, as is so often the case, extrinsic evidence is lacking. Non-verbal communication helps us understand the speaker (whether a witness, defendant, lawyer, or judge) -- the fundamental first step in beginning to evaluate the credibility of the speaker.<sup>10</sup> In the courtroom, for examples, judges routinely note the witness's body language and movements, especially in response to the other party's testimony. Remote trials, by contrast, amplify the face at the expense of the ability to observe the whole

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[09/The%20Impact%20of%20Video%20Proceedings%20on%20Fairness%20and%20Access%20to%20Justice%20in%20Court.pdf](#) at 10-11 (discussing remote interpretation and comprehension).

<sup>6</sup> Compare NEW JERSEY COURTS, *New Jersey Judiciary Forms Help Page*, (last accessed August 13, 2021) <https://www.njcourts.gov/selfhelp/formshelp.html?lang=eng#browser?lang=eng> (provides tech support guide in English and Spanish), and NEW JERSEY COURTS, *La Ley de Prevención de Violencia Doméstica*, (September 2017) [https://www.njcourts.gov/forms/11253\\_dv\\_act\\_spn.pdf](https://www.njcourts.gov/forms/11253_dv_act_spn.pdf); with NEW JERSEY COURTS, *Domestic Violence Home*, (last accessed August 13, 2021) [https://www.njcourts.gov/selfhelp/selfhelp\\_domesticviolence.html](https://www.njcourts.gov/selfhelp/selfhelp_domesticviolence.html) (various help sub-pages on how to request a restraining order only in English).

<sup>7</sup> NEW JERSEY COURTS, *Judiciary Electronic Documents Submission (JEDS)*, (last accessed August 13, 2021) [https://www.njcourts.gov/selfhelp/jeds\\_submit\\_docs.html](https://www.njcourts.gov/selfhelp/jeds_submit_docs.html).

<sup>8</sup> [https://www.youtube.com/watch?v=l5pDVLQjnfw&ab\\_channel=njcourts](https://www.youtube.com/watch?v=l5pDVLQjnfw&ab_channel=njcourts).

<sup>9</sup> Comparing rates of compliance with fingerprinting, for instance, would provide insight on this issue.

<sup>10</sup> Vincent Denault, *Guilty or innocent? In virtual courtrooms, the absence of non-verbal cues may threaten justice*, available at [Guilty or innocent? In virtual courtrooms, the absence of non-verbal cues may threaten justice \(theconversation.com\)](#).

person and can impact assessments of credibility.<sup>11</sup> The limited perspective offered by video screen may affect the outcome in some FRO and FPO trials and is cause for caution in embracing remote trials permanently.

If the Court ultimately decides against prioritizing these cases for in-person trial, there remains a need for uniform procedures. We urge the Administrative Office of the Courts to develop criteria for the exercise of discretion in permitting FRO and FPO trials to proceed virtually to ensure consistent treatment of these cases. Criteria could include factors, such as the following: 1) whether the parties consent to virtual court; 2) the victim's fear of being in the courtroom with the defendant; 3) the quantity of evidence and whether evidence includes translated material; 4) the need for interpretation; 5) a party's (or counsel's) inability to get to the courthouse, i.e., because of disability, child or elder care, work responsibilities, lack of transportation, or location of pro bono counsel; 6) whether pro se litigants have the ability to navigate the remote platform to advance or defend their cases; 7) and whether victims have access to the services of domestic violence advocates in advance of their proceedings.

Finally, Partners, CSJ, and VLJ object to the omission of plenary child custody hearings from the list of cases that should ordinarily proceed in-person. Custody disputes often involve credibility issues and may require testimony of children. These high stakes and often extremely contentious disputes are best heard in a courthouse, rather than in a Zoom room.

Thank you for the Court's consideration of these comments and for the judiciary's continued commitment to expand access to justice.

Respectfully Submitted,

/s/

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<sup>11</sup> Vincent Denault & Miles L. Patterson, *Justice and Nonverbal Communication in a Post-pandemic World: An Evidence-Based Commentary and Cautionary Statement for Lawyers and Judges*, *Journal of Nonverbal Behavior* (2020); see, *The Impact of Video Proceedings on Fairness and Access to Justice in Court* (2020), *supra* n. 5 at 6-7.