

1B Judges in “Lawyerless” Courts

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Colleen Shanahan:

Hi everybody, I'm Colleen Shanahan. I'm a professor at Columbia Law School. Thanks for joining us today for our session, which is titled The Role of Technology in Lawyerless Courts. So I'm going to kick it off today. Our speakers today, in addition to me, are Columbia Law Students: Nkechi Erondy, Tara Kade, and Katherine Wilkin. And they are students in the Community Advocacy Lab clinic, the clinic I run at Columbia Law School, and they worked last semester on a series of projects supporting communities in New York City that are disproportionately burdened by the legal system, both civil and criminal. And all three students are continuing this semester in our advanced clinic, in particular, working on distilling and presenting information from the academy and research about legal services, civil courts, and lawyerless courts about how to make meaningful justice more accessible. So they're here today to do some of that and, in keeping with the theme of this year's conference, talking in particular about the role of technology in lawyerless courts and what we can learn from current research around the pandemic.

So before they kick it off, I'll just say some preliminary remarks, which is that you are welcome to put your comments and questions in the chat along the way, but we are going to engage those comments and questions at the end of the presentation. And in fact, we'll have some questions for you. We're quite eager to learn about your reactions to this research and how it might line up, or not, with your experiences. So with that, I will hand it off to Nkechi.

Nkechi Erondy:

Thanks so much, Colleen. So today, as Professor Shanahan just said, we're going to be discussing research conducted by her and her co-authors, Professors Mark, Carpenter, and Steinberg on the role of judges in lawyerless courts and what it reveals about the role of state civil courts themselves. So we'll build on this work with our synthesis of research regarding virtual proceedings, highlighting some of the unique challenges and benefits to virtual proceedings and lawyerless courts. And then we'll conclude the presentation by offering some recommendations based on current research, and then we'll open up the space to answer questions and discuss.

So Professor Shanahan's team focused on the role of trial judges in state civil courts, legal scholarship, and critically, much of the way law professors teach students assumes that most civil courts look like this one, an ideal of lawyer-driven adversarial dispute resolution with lawyers representing each party to the case. And this isn't just theoretical. It matters what research and scholarship is focusing on because for better or worse, it influences policy and the way policy evolves. The civil trial courts, where Professor Shanahan's team

worked and practice, as do many of you in the audience today, looked a lot more like this one [referring to illustration in PowerPoint slide]. The judge is the only lawyer in this courtroom of self-represented litigants. You have a bailiff on the left, a clerk on the right next to the judge, and the balance of the room is made up of people mostly representing themselves. This is what many, if not most, state civil courts look like today. Most parties in civil trial courts don't have counsel. Most civil courts are largely lawyerless. Our definition is that a lawyerless court is one where at least 75% of civil cases involve an unrepresented party. Today, most litigants represent themselves. Rather than trained advocates, our civil courts are filled with people who have, at best, only a loose sense of what matters under the law and how to navigate court and a very strong sense of what matters most in their lives. And again, the judge is sometimes the only lawyer in the room.

Over the past two decades, as self-represented litigant rates have grown, a deeply pragmatic, or arguably opportunistic, access to justice intervention has emerged. And that is a new role for judges in lawyerless courts. Advocates for this new role argue that "Yes, judges have a duty to be impartial and neutral, and they can do so while also offering accommodation, assistance, and information to people without lawyers." The research from Professors Mark, Carpenter, Shanahan, and Steinberg was focused specifically on the behavior gestures in lawyerless courtrooms and was based on a review of over 200 hours of courtroom interactions.

The key findings were somewhat counterintuitive. Despite the recent trend of ethical guidance allowing judges to support and accommodate self-represented litigants, across jurisdictions with different judicial guidance and different state court characteristics, judges behaved in remarkably similar ways. Rather than offering that accommodation assistance and simplification as reform suggests, judges maintained court's legal complexity and exercised strict control over evidence presentation. A fundamental structural problem seems to drive this unexpected finding. Civil courts were not designed for unrepresented people, and judicial behavior is shaped by three factors that result: ethical ambiguity and traditional assumptions about a judge's role in adversarial litigation, docket pressure, and systematic legal assistance provided to petitioners only. In many ways, this finding about judicial behavior is but one symptom of lawyerless courts' fundamental issue: The mismatch between courts' adversarial, lawyer-driven dispute resolution design, and the complex social, economic, and interpersonal problems they're tasked with solving for users without legal training.

If that's what research shows about lawyerless courts, in light of the pandemic and the massive and swift shift to virtual proceedings, we were interested in assessing the research showing the impact of virtual proceedings in lawyerless courts and the extent to which technology can both be the problem and a solution. As courtrooms begin to reopen for in-person proceedings, one thing

from the research is clear, there's some real benefits to conducting some proceedings virtually, even when arriving in person is safe. And it's likely that many courts will maintain some level of virtual proceedings or accommodations moving forward.

We are now going to turn to introducing some current research on virtual proceedings and discussing the lessons folks have learned as they've studied different types of hearings in different communities across the United States. We'll begin by discussing some of the positive aspects of virtual hearings before turning to some of the challenges. After that, we'll transition to introducing some suggestions that this research proposes for promoting the positives and mitigating the challenges. Then, we'll respond to any questions from you all, as Colleen said. I'll now turn over to my colleague, Katherine,

Katherine Wilkin:

Thanks, Nkechi. So to start off, the benefits of virtual court proceedings are quite well-documented by the literature. Some of those benefits include judicial system cost savings, shorter and more focused proceedings, increased opportunities for both flexible scheduling and decreased travel time, and ease of communication between all actors involved in litigation. Greater flexibility in virtual proceedings can result in higher rates of attendance and fewer default judgments. For example, a Texas study found that witnesses who lived far away were able to join proceedings at higher rates than when hearings were in person. That study also found parties were able to join hearings during their work breaks rather than lose an entire day's pay to come to the courthouse for what was ultimately a very quick appearance. A study in Arizona's civil courts showed that a shift to virtual proceedings was followed by an 8% drop in rates of default judgments between June of 2019 and June of 2020.

A Montana study found that the use of virtual hearings allowed legal aid organizations to reach previously underserved parts of the state. The Indiana Coalition for Court Access similarly found that remote appearances allowed folks in underserved parts of the state to acquire and appear with counsel more often than they had before. Other organizations, such as the Conference of Chief Justices, have called for the expanded use of video or telephone proceedings in civil cases, particularly for self-represented and low-income litigants as a way of reducing costs for those who, for example, may need to take time off of work to travel to court. A virtual courtroom can also provide a psychologically-equalizing atmosphere because images on Zoom are all relatively the same size. On this, the chief justice of Michigan Supreme court said, "The litigants really like the Zoom platform, and I think it has something to do with the equalizing nature of every Zoom box being the same size." It empowers them to feel like they can speak their mind in a way, because they're the same size as the judge and the lawyers. Furthermore, in domestic violence

cases, a Texas study also found that people were able to seek justice without being forced to testify in the same physical room as their abuser.

So with all these benefits, researchers have also identified some critical drawbacks associated with virtual proceedings. Some of those drawbacks involve issues of access to technology. There are logistical challenges associated with technology. For example, it may be difficult for some litigants to access the necessary hardware and software for virtual proceedings. Self-represented parties, and those who are detained, may not have access to appropriate hardware and software, such as high-speed internet, that will support a video conferencing format. Further, remote options during the pandemic were sometimes not available to everyone. Not all localities adopted virtual operations, and those that did shift to virtual did not do so for all types of cases or for those who were self-represented. Others failed to offer adequate accommodations for people with disabilities and limited English proficiency.

One study of online court proceedings found that a number of states didn't allow self-represented litigants to participate in the e-filing process. One analysis from Pew found that in the first several months of the pandemic, self-represented litigants were prohibited from e-filing in 8 states for debt collection cases, 9 states for eviction cases, and 10 states for child support modification. Those who were represented in these types of cases by counsel were still allowed to file documents electronically with the court. And well-represented parties took advantage of this early in the pandemic. For example, after court operations closed in person, debt collectors increased the rate at which they filed cases. One Indiana study found that shifting to virtual hearings may also exacerbate social inequities because of who has access to technology, who has access to reliable internet connection, and who has the technological savviness to make effective use of the tools available and necessary.

These access to tech problems can also lead to issues with assessments of credibility of litigants and witnesses. The Indiana study further found that asymmetries in the technology people used in hearings led folks in the court to make assumptions about individuals involved in proceedings. There's a significant risk that those with more technology issues and fewer resources will be unfairly judged. Often, it was the defendant in a case that not only did not have access to counsel but also did not have access to the same technology as the opposing party. There are additional drawbacks related to perceptions of credibility in virtual courtrooms. Studies raise the possibility that remote witness testimony is generally less likely to be seen as credible, regardless of access to technology. This disadvantages litigants and raises fairness concerns in cases where testimony is likely to be a critical aspect of a party's case. For example, several studies of remote witness testimony by children found that the children were perceived as less accurate, believable, consistent, and confident when appearing over video. Further, when decision-makers interact

with defendants through the barrier of technology, they're more likely to be detached and less sensitive to the impact of negative decisions on the defendant.

In addition, there are several procedural justice issues associated with virtual proceedings. Online hearings can increase feelings of being disempowered or not heard. For example, one assessment of the impressions of detained litigants participating in virtual proceedings showed that while some aspects of the virtual proceedings support a sense of respect for a litigant by reducing some of the more dehumanizing procedures associated with attending court, litigants were also less likely to feel generally heard or feel that they have had their day in court during virtual proceedings. Further, virtual proceedings raise issues of privacy. A Texas study identified some of the privacy concerns associated with streaming hearings on YouTube. While these hearings are more accessible to the public when they're streamed like that, they also flagged that more people could watch a YouTube stream than could physically attend court, and folks could record and distribute these streams. A similar Texas study found that judges and parties could not ensure that a witness was not being coached while they testified. Though a judge could request a 360-degree view of the room, they could not be certain a witness who was not reading from notes, being texted by an attorney, or otherwise coached by a legal professional, which further puts self-represented litigants at a disadvantage. That same study also found that judges could not stop witnesses from hearing testimony they were supposed to be excluded from, by logging into the stream. Finally, there are drawbacks we see when analyzing the outcomes of virtual proceedings. Researchers have noted more negative outcomes in virtual criminal and immigration proceedings compared to outcomes in-person hearings. While they're a different context than the civil cases we're focusing on today, this emerging research can inform how we think about civil courts going forward. In the context of criminal cases, one study of bail hearings found that defendants whose hearings were conducted over video had substantially higher bond amounts than their in-person counterparts, with increases ranging from 54 to 90%, depending on the offense. One study of immigration courts found that detained people were more likely to be deported when their hearings occurred over video conference rather than in person. So now that we've looked at some of the benefits and drawbacks of virtual proceedings, I'll turn it over to my colleague, Tara, as we go through some of the recommendations.

Tara Kade:

Thank you, Katherine. So we've seen that there are some positive aspects of virtual hearings and some incredibly negative ones. Fortunately, researchers have proposed strategies to increase and improve the positive aspects and to help mitigate some of the challenges. Unsurprisingly, these recommendations

track what we told you about the research. Technology plays a role here, but many of the underlying recommendations track what's already out there about pre-pandemic in-person civil courts. Research from the Civil Legal System Modernization Project at Pew recommends that courts utilize technology going forward in particular ways. Specifically, courts can combine technological tools with process improvements to better facilitate resolution of legal problems. Before adopting new tools, they can test them with and incorporate feedback from intended users, and they can collect and analyze data to help decisions on the use and performance of the tools. Some jurisdictions are focusing on training judges about both technology and the needs of self-represented litigants.

For example, in Indiana, they're creating educational resources for judges to learn about remote tools for improving the self-represented litigant experience. Privacy concerns around streaming hearings on YouTube, as many jurisdictions do, can be mitigated by pausing the hearing at appropriate points, redacting documents shown on screen, sharing documents off screen, using breakout rooms, and taking videos down after the hearing. A Texas study found that the most important factors in determining the efficacy of the online hearings were the judge's skill in using the available technology and ability to somehow provide a sense of justice and empathy, despite the lack of physical presence. And they concluded most hearings do not have technical issues that cannot be resolved with a knowledgeable and empathetic judge.

As with their study in-person hearings, Professor Shanahan and her team's early results from research on remote hearings show the judicial role as essential and as challenging in virtual proceedings as in-person. The Brennan Center has concluded that in access to justice more broadly, we need to consider limited legal assistance to help with technology as part of legal needs. They urge courts to prioritize offering remote versions of self-help desks and related programs, and take extra steps to publicize these resources and identify parties in court who might benefit from them. Similarly, Indiana research found that virtual waiting rooms could be utilized as a space to provide information on how the court process works to self-represented litigants. And data from an ongoing study by Professor Shanahan and her team show success in jurisdictions that have used this type of approach.

A final type of solution is one proposed by the Indiana study. To address inequities based on technology, they recommend text symmetry. This means that in advance of a hearing, parties should agree on the hearing type, so for example, a dial-in hearing versus a video one. Finally, across the research inside courthouses and in Zoom rooms, there's a clear and crucial recommendation: Engage a diverse array of justice system actors. It's critical that courts engage and listen to stakeholders both inside and outside the judicial system. Among others, courts should involve members of communities most likely to suffer if remote proceedings go poorly, including communities of

color, immigrant communities, and communities of people with disabilities. Courts should incorporate the insights of community advocates, public defenders, and prosecutors, civil legal service providers, tenant representatives, survivors of domestic violence, public health experts, disability rights advocates, court employees, and others.

A final point about the information we share today and steps to move forward: Our court system and so many judges, clerks, and court leaders face an incredible challenge. Not only do lawyerless courts pose a challenge, but lawyerless virtual courts add the additional layer of technical difficulty and disconnect. We know this audience understands the breadth and scope of these challenges, but even today, with all of the current attention to access to justice and access to tech issues, many members of the bar and the public remain unaware of these challenges. Further, many are unaware of the ways they can address these challenges. That is why our goal today was to present current research and distill it into actionable recommendations that many of you are operationalizing successfully right now. At a minimum, we need to be talking more to each other about the challenges, the opportunities, and the ideas we're trying every day to provide access to justice. It's been such a pleasure to share this time with you, and we look forward to a conversation about your reactions to these ideas. We're interested in your questions and whether this raises any thoughts about your experience in virtual courtrooms.

Katherine Wilkin:

Thanks, Tara. So as we mentioned, because of the webinar format, you're welcome to send questions or comments in the chat. We're really interested in whether the research we've presented is the same or different from experiences that you've had. So to start off, we have a question. "Can you give some examples of utilizing waiting room times." Tara, I believe that was one of the things that you were looking into.

Tara Kade:

Mm-hmm. So one of the suggestions from the research was using time that self-represented litigants are sitting in the waiting room to display informational materials about how the court process works, procedures, things that they can expect, and ways that they can advocate for themselves. This would work differently depending on the type of court but would generally involve some sort of specifics about the case type that they are proceeding with. So for example, in family court, you would want informational material on how family court proceeds.

Colleen Shanahan:

Can I jump in there, Katherine, for a second?

Katherine Wilkin:

Yeah, go ahead.

Colleen Shanahan:

So one of the other things in the ongoing research that my co-authors and I are doing, that we observed in some jurisdictions, was courts were setting up waiting rooms, basically, as a triage point for limited legal assistance, basically akin to the way we've done it in real life. So the judge or the clerk would see people coming in to the docket call virtual courtroom and say, "Well, okay, we've checked you in. We're going to send you to this Zoom waiting room while..." and in some cases, almost adding a soft requirement like, "This is the thing you're going to do now." And then in one jurisdiction that was subject to our study, there was basically a lawyer on call doing lawyer of the day limited legal assistance work in those Zoom rooms. In another jurisdiction we studied, it was an actual intake triage, where either folks were getting limited information and sent back to the hearing room or were screened for more robust legal services and the legal services lawyer would then go get a continuance. So there're really a bunch of models emerging, and I find it a particularly interesting intervention on the side of ways the virtual environment may create some efficiencies compared to the in-person environments.

Katherine Wilkin:

Thanks for sharing that, Colleen. So the next question we have is, "Were you looking at proceedings where both parties were unrepresented or where one was represented and the other wasn't?" Speaking specifically to the research that we looked at in virtual courtrooms, it was actually a mix, it seems. Some of the information we found was also from virtual courtrooms where both parties were represented. So we tried to provide a synthesis of all types of scenarios in which virtual proceedings were ongoing and then highlighting some of the specific issues to self-represented parties or unrepresented parties. Colleen, could you speak a little bit to the research that your team is doing?

Colleen Shanahan:

Yeah, so we saw... I'll tell you more specifically... I can't tell you what jurisdictions we've looked at because of IRB protections, but I can tell you what kind of dockets. So our data includes protective order dockets, eviction dockets, and small claims debt collection cases. And our particular research interest is where both parties are unrepresented, but in order to collect that information, you, as many of you know, end up seeing some number of cases, either where there's representation on both sides or, more typically, there's what we call asymmetrical representation, the predictable, more powerful party has a lawyer. What we saw in the... Just anticipate the next question,

what we saw in the virtual courtroom was similar in terms of docket management and the way hearings were conducted compared to the in-person courtroom, which is to say, in these cases where there are typically a mix but some meaningful number of unrepresented folks, when a lawyer is present, that case gets pulled.

And so some courts have a version of the lawyer calls in the day before and says, "I'm going to be coming. Can I do it at 2 o'clock instead of 9 o'clock?" So there's preemptive lawyer activity, but then also, even in a morning docket call, we observed in our in-person data and also in our virtual data the judge saying, "Okay, oh, I see a lawyer" and those cases either getting handled first or getting pushed to an afternoon docket. And so what that ended up meaning is that, effectively, the dockets are separating. So you end up getting the morning docket of all unrepresented folks, and then you get a separate docket because the presence of the lawyer has created a different path.

Katherine Wilkin:

Thank you, Colleen. So the next question we have is, "Did you find any research or data regarding racial discrimination in virtual courts versus in-person?" I think that touches on a lot of the research that we looked at. Nkechi, do you want to maybe kick that off?

Nkechi Erundu:

Yeah, sure. So I remember one study that we found was around how Black defendants, in particular, the virtual nature of virtual proceedings made them more difficult to see. So going into perceptions of credibility, not seeing someone's facial expression would obviously affect your perception of their credibility. So there's certainly some findings around racial discrimination and racism in virtual proceedings.

Katherine Wilkin:

Thanks, Nkechi. And one of the bits of research that I looked at discussing the psychological changes that can go on with virtual proceedings versus in-person is folks were more likely to hang on to their stereotypes of individuals or their preconceived notions of individuals in a virtual format because there was less non-verbal body language, non-verbal communication, less informal communication. So it was harder for people to break out of those stereotypes that they may hold subconsciously or consciously.

So we have a comment and a question. "I see one of the hardest issues to resolve as being the dehumanization of the litigants on screen. Is there anything that speaks to mitigating this problem?" This seems like it's related to the tech symmetry a little bit. Tara, do you want to speak on that?

Tara Kade:

Yeah. I see this as two different things. I would say, on the tech symmetry side, there's a study that's being done right now about potential perceptions and biases and things that exist when you can, for example, see one party in a case but can only hear the other party through dial-in and the ways that might dehumanize the party that has access to less technology or technology that has less capabilities. And that comes up both when you can't see one party, when their audio is cutting in and out, when they're in a location that looks "less professional," or anything like that. And one of the ways to mitigate that is to ensure that both parties are on the same footing. So if one person does not have access to a camera, both parties would agree to dial in to the hearing. And if one party only has access to certain areas in which they would not be able to be in front of a camera in a way that would be meaningful participation, then again, both parties would agree to dial in. On the other side, another issue is just the fact that you are behind a screen leading to some dehumanization. And I don't know, Colleen, if you've seen any of that in your research, but I haven't seen myself any kind of solution to that.

Colleen Shanahan:

I would actually say I... And I think some of the... The Elizabeth Thorm paper that's in the synthesis in the presentation speaks to this a little bit. And Justice Bridget McCormick's quote about everybody's the same-sized square in the Zoom room actually leads to a more complicated story about dehumanization on the screen. And I think that's how I would capture it. It seems like it, in fact, is a more complicated story because certainly, in the ways Tara just articulated, the screen provides some dehumanization, but the other side of the equation is the in-person courtroom experience, which also provides dehumanization at various levels of the experience. And so I think the thing that the hope of ongoing research, but I don't think anybody quite has results yet, is to try and untangle some of those things, because I think it's one of those circumstances where both are true. It's not either/or.

Katherine Wilkin:

Yeah, that's a really helpful thing to highlight, that this is a significantly complex problem for sure. So the next question we have is, "What were the dominant platforms for virtual court sessions, Zoom, Teams, GoToMeeting, and did the choice of software have impacts on the proceeding?" I know in the research that I was looking at, I didn't see any particular articulation of what the format was. Nkechi and Tara, I don't know if you saw that in anything that you were reading. Colleen, can you speak a little bit about some of the ones that you attended?

Colleen Shanahan:

Yeah, I saw the question in the chat. I don't know. I haven't seen numbers. I mean, I have to believe that capitalist impulses are causing these companies to have data about who's using what platforms. Somebody must know, but I actually haven't seen it. And certainly, if anybody in the audience has seen information responsive to this question of which platforms dominate for virtual court, we're all ears, but I don't know.

Katherine Wilkin:

Yeah, I think if anyone has any insights on that, that would be much appreciated if you could drop it in the chat. I think, as a preliminary matter, as far as access to technology, I'm sure that there are some disparities in how well people are able to access the technology if it's one that they're less familiar with. So I know, from a personal standpoint, Zoom is extremely ubiquitous, at least for us students, whereas Teams is a little bit less familiar to me at least. So I'm sure that plays a little bit of a role as well.

So we have a comment. "One of the major shifts currently occurring in New York courts is the rollback to in-person proceedings in consumer courts for unrepresented litigants. Normally, in many of these proceedings, credit companies are suing low-income defendants for unpaid debts. However, represented defendants are still not required to attend the proceedings in person. Since about 97% of defendants in consumer court cases are unrepresented, do you believe there are any implications related to your research in requiring pro se litigants to show up in person, while represented litigants remain remote i.e. costs of travel and risks of taking time off from work?" That's a really good point and an interesting question. Tara and Nkechi, do you all have any thoughts on that? Anything in particular?

Tara Kade:

So nothing came up in the research that I looked into in terms of cases where one party was remote and the other party was in person. But I will say, anecdotally, through attorneys I've worked with and externships and things like that, I have seen a push from just legal counsel to remain virtual in cases where that's possible because it increases efficiency. And I think some of the implications that we can anticipate coming up are the things that we touched on in the research. So I believe it was Catherine who discussed a little bit about how there was an increase in people who actually came to court rather than defaulting when cases were virtual. And so different things like that I think are implicated.

Katherine Wilkin:

Thanks, Tara. I'm seeing one more question. "Are any courts using technology to help parties reach a settlement asynchronously under court supervision, perhaps with a mediator, so that cases might never need to go to a hearing,

virtual or otherwise?" I don't have a ton of details on that. I did see a little bit of research, again, relating to some of the psychological implications of in-person versus virtual that started to dive a little bit into mediation settings, but it didn't give any particular details on what courts are doing specifically. Colleen, have you seen any of that?

Colleen Shanahan:

Yeah, I can jump in on this. And hi, Jonathan Pile, it's nice to see your name in the chat. So yeah, so this wasn't really in the scope of the work we did for this presentation, because we were really thinking about the virtual courtroom environment, but in fact, I have another clinic team working on this issue separately. So there's an online dispute resolution pilot happening in New York... or sorry, New York, we're in New York, in Utah... that's pretty interesting that I think builds on some of the experience in Michigan that there's been research about. So JJ Prescott and various co-authors have done some work around the Michigan ODR experiments, but the Utah experiment is happening right now. And they're two nice early-stage reports: one that Stacy Butler did out of her Institute, and one that the National Center for State Courts did just at the design stage of Utah ODR.

But the upshot is, right now, it's being rolled out in small claims court, and it's basically a default into an asynchronous, online dispute resolution platform. There's an opt-out for litigants, but it's akin to an answer or you have to answer in order to get out of ODR. Otherwise, it's a facilitated asynchronous resolution of the claim, and if it's settled, basically, if it's satisfactorily resolved, then it doesn't go to any kind of hearing. And Utah is hoping to roll this out to additional dockets pretty soon here in the next year, including their broader debt collection docket... Not their debt collection cases are in small claims... and also their eviction docket, which adds some additional layers of complication in predictable ways. But I think, to this to this question of how courts are using technology, I think that's, in some ways, distinct but really interesting set of issues. Yeah.

Katherine Wilkin:

Thanks, Colleen. I'm seeing a few more questions come in. Let's see, "Given that there are both benefits and drawbacks to virtual and in-person hearings, would you recommend that courts work toward adopting a hybrid model where they offer pro se litigants both virtual and in-person options?" Tara, do you want to speak to that since you were going through some of the recommendations?

Tara Kade:

Yeah, so the research on symmetry is still developing and more is coming out about that as cases go on, but my impression from it is that having a symmetry

in what both parties are doing is important. And so I would say to the extent where one party would be virtual and the other would be in person, that might raise some questions and some challenges that I don't know if they've been looked into yet in the research, but I anticipate they may be coming up. And through a conversation with a legal representative in Tennessee, we did learn that Tennessee is adopting a model where some of the pretrial things are happening remotely and then they're switching to in person. So trying to balance efficiency and also, yeah, some of the other challenges that come with both models, but I don't know... And maybe somebody else might know more, Colleen... if there's been any kind of specific recommendation about offering the option.

Nkechi Erundu:

I can jump. Sorry, Colleen.

Colleen Shanahan:

No, go ahead.

Nkechi Erundu:

No, I was just going to say that I think this research is very, very nascent and so I think a lot of the recommendations have been in recognition of the benefits that come from virtual proceedings, while also acknowledging the drawbacks that we touched on. So I think it's just important that, in considering what sort of aspects of virtual proceedings that courts want to continue, just to appreciate this persistent digital divide that exists. But I do think it makes... A lot of jurisdictions I know, in New York, we're seeing that courts have been slow to return to in-person. I will be interning at the Bronx Defenders this summer, and it's very much a hybrid model. So I think it makes sense that courts are reluctant to return to fully in-person, just because of all the efficiencies that we've seen in virtual proceedings.

Colleen Shanahan:

Echoing Nkechi, I think one of the things that's important to remember here is that the challenge is access, and technology isn't an answer to the challenge. It's a different environment for the challenge. And so this question about, "Are we going to make everybody go back in-person? Are pro se litigants going to have to go in-person?" is really just two buckets of questions about access. And so when you think about technology as facilitating access or an environment where we have different tools of facilities, I think that helps us unpack to get to the point where really, the more options we can provide, the broader access litigants will have.

And I will say one thing that came to mind as I was reading some of these questions in the chat is some interventions that folks are trying in a bunch of

places, but one example is something that colleagues of mine at Columbia - Conrad Johnson and his clinic and others - are working with Legal Aid on is just this idea of "Well, can we do small-scale interventions to facilitate online access, things like having iPads that we can bring to our clients or to community centers or to neighborhood locations to facilitate the technological challenges that are barriers to access in virtual environments?" So these kinds of... I think if we think about it in granular ways, we start to see some possibilities that actually give us a breadth of options that could apply to litigants with different challenges.

I want to just hit one thing quickly here is Camilla Lopez, you had asked a question about the name of the ODR platform. I misspoke when I said New York. It's Utah. So I want to just make sure that I was clear about my mistake. And I actually don't know which platform they're using, but if you email me separately, I'm happy to dig it up. I don't know it off the top of my head.

Katherine Wilkin:

Appreciate it, Colleen. So I'm going to jump to a comment from Elise Brown before going back to some of the other questions, going back to the question about the different platforms that courts are using virtually and how they might impact the accessibility for self-represented litigants. New York City housing courts are using Teams, and Elise says, "I've only seen three pro se litigants actually appear on Teams during RTC virtual intake. The vast majority appear via telephone. Emerging problem for our attorneys is that the court's adoption of a hybrid virtual in-person since the court has no WiFi and no quiet spaces in which to attend a virtual appearance before or after a required in-person appearance." And RTC is right to counsel. Thank you for highlighting that. That's a good point. And I think it goes back to some of what we were speaking about as far as the tech asymmetry and being able to navigate both in-person and virtual courtrooms in the same space, rather than shifting from one to the other. It's going to be a continuing problem, I think, as courts weigh whether or not to go back to in-person for certain things and not others and what that's going to look like.

So we have a question, "Did you see any difference between rural and urban courts, and are there any takeaways from research specific to New York state?" I think a lot of, at least what the research that wasn't done by Professor Shanahan's team was looking at, a lot of it was statewide from what I saw, and when it wasn't all state civil courts, it was relegated by the type of court, whether it was family court or immigration court. I did see, in some of the research that came up, specifically the Pew study, that access to internet and technology was specifically exacerbated in both rural and low-income environments. So I think that's something to think about, especially. As far as takeaways specific to New York state, I did not come across anything that was specific to New York state. Tara and Nkechi, I don't think you all did either.

Colleen, I know you're keeping your research, not revealing jurisdictions for confidentiality issues, but if you want to speak to that at all.

Colleen Shanahan:

I can tell you where it's not. It's not New York state. Now you're down to one fewer candidate. Yeah, I don't think, in any of the research, that's this subject that we've mentioned here today or that's captured in the bibliography we're going to be sharing, that New York was a research site. That suggests to me that those in the audience who are willing to partner with researchers to be sites of research, by all means. I think one of the things inevitably that research is where we find available partners. So that's a very real thing. And I say that a little bit tongue in cheek, but I'm actually quite serious. If any of you are in courts, in legal services providers, in other organizations where you have an appetite for that kind of partnership - and often that partnership doesn't involve revealing publicly the identity of the court or the people or the organization - I'd be happy to talk to you, whether it's my own research or others. I think that's just a really important part of doing this work.

I think, to the question of do the takeaways apply to New York, I think, absolutely. So in the collection of research that you just heard about, one of the things I think, particularly from more rural areas, that's applicable is the Montana study. And also some of the ongoing Indiana work, which isn't published yet, but a lot of the work by Victor Catania and Margaret Hagen and some of their co-researchers that's done in Indiana really grapples with some of these questions of rural environments and really limited access to legal aid. And I think that, as we've discussed in all kinds of ways, really changes the equation when we're thinking about courts' operation in both directions. Katherine just named some of the things that are more challenging, but the Montana study actually finds that the virtual environments increased access to legal aid in a really resource-depleted state.

Katherine Wilkin:

Thanks, Colleen. So I know we have just a couple minutes left. Tara, I'm going to pass it over to you. I know you had a question that you wanted to pose, but please continue to share thoughts and questions in the chat.

Tara Kade:

Yeah. Thank you, Katherine. So one thing that we were really, really interested in is, if for all of you that are present today, there's anything you learned from virtual court that you have fully adopted or plan to fully adopt as we transition back to in-person hearings. And this is a question for judges, legal service providers, clerks. If you have any thoughts, please type in the chat.

Nkechi Erundu:

Okay. Well, hearing none, I just want to open the floor, if there are any other questions or thoughts on anything that we shared, please do feel free to drop it in the chat. But if we don't receive any more questions, we just want to thank you all so much for engaging. We really hope this was interesting and a learning experience for you and hope that you got at least some tidbit out of it. In the materials for the conference, we included a bibliography. That includes all the sources that we referenced in our presentation, so please feel free to grab that if you're interested in it, but again, thanks so much and enjoy the rest of the conference.