

Family Courts in the Virtual Age

The Legal, Sociological and Psychological Ramifications

Ms. Conklin: Hello and welcome. My name is Kristen Conklin, and I am the Executive Director of the [New York State Permanent Judicial Commission on Justice for Children](#).

The Unified Court System is producing a series of remote programs exploring technology, the benefits and the concerns of conducting virtual family law proceedings.

Today's program will examine what the small body of case law is telling us so far on where the potential appellate issues lie, as well as the psychological, sociological and ultimately legal implications for children and families.

The New York State Permanent Judicial Commission on Justice for Children is proud to partner with the [Office for Justice Initiatives](#), the [Child Welfare Court Improvement Program](#) and [Lawyers for Children](#) in presenting this program. And we are very grateful for the financial support of the [Redlich Horwitz Foundation](#) and the technical support of [Welfare Research Inc.](#)

Today, we'll hear from the [Honorable Richard Dollinger](#), a judge of the New York Court of Claims and an acting Supreme Court justice assigned to matrimonial matters in Rochester, where he routinely deals with child custody cases; [Timothy M. Tippins](#), an adjunct professor at [Albany Law School](#) who has practiced matrimonial and family law since 1975; [Dr. Jeffrey Wittmann](#), a licensed psychologist and trial consultant whose practice concentrates on trial support for attorneys in custody and access matters, and on forensic work product reviews.

If you are an attorney seeking CLE credit for attendance at this program, you must fill out both the attorney affirmation form and the evaluation form and email them to the address listed. The forms were sent with the link to this webinar and will be resent again at the conclusion of this program.

During the program, you will be asked to answer a poll question and record a code that you will need for your form, which will verify your attendance. Once the code slide is taken down, it will not be repeated. If you have any questions during the course of this program, please put them in the chat, and I will ask them of the presenters at the end. Welcome Judge Dollinger, Mr. Tippins, and Dr. Wittmann. At this time, Mr. Tippins, I'll invite you to share your screen to start us off with a review of the relevant law and the issues that are beginning to emerge.

Mr. Tippins:

I think it's probably a fair statement to suggest that a year ago most of us had very little experience, perhaps no experience, with the kind of remote platform we're working with today—Zoom or Microsoft Teams or any of the other remote platforms. Now, by necessity, we've had to learn how to use these things. We need to resist the shiny object syndrome, wanting to go crazy and applying it to just about everything. When it comes to using this in the court system, I think it's useful to break it down into non-evidentiary proceedings versus evidentiary proceedings.

With respect to non-evidentiary proceedings, anything that we might have done in the past, like telephone conference, we could now do with pictures. Why we would want to have pictures, I don't know. But if we want them, we can get them via Zoom or the other platforms.

Motion arguments are probably, a lot of them at least, if they're not too lengthy or too complex, are probably amenable to this approach. Status conferences that are conducted from time to time throughout the life of a case may be amenable to this approach. Settlement conferences become a little bit more complex, perhaps a lot more complicated, and perhaps even more trouble than it's worth to try to do it over the remote platform.

Justice Cooper in New York County in a case [S.C. v. Y.L.](#) discussed the use of the platform in the various aspects of day-to-day court administration. And he talked about doing a settlement conference, trying to do it remotely and the difficulties that would be had. And he discussed that it's typically necessary to have both parties and both attorneys present in court wherever you're going to have any kind of protracted or intensive conference thing that hopefully results in a settlement.

And we all know the drill. Sometimes the attorneys are meeting privately with the judge without the clients present, sometimes everyone is meeting together. Then they go back to their respective rooms, and each attorney is talking to the client alone and then back and forth he goes. And he discussed how difficult this would be to create a virtual

conference room, a virtual robbing room, and to replicate this over the remote approach might in fact be more trouble than it's worth and perhaps even impossible to accomplish.

When it comes to evidentiary hearings, we're in an altogether different setting here. Here, a lot of law comes into play. The general rule, and this is a quote from the Barker Alexander treatise on New York State evidence, which is a very good treatise: "The default position, the general rule is we have flesh and blood, brick and mortar trials. Remote testimony is the exception to the general rule."

And to give you the two main headlines upfront, the standard is that there are exceptional circumstances that make it necessary to do a televised testimony by the witness, and it's a witness-by-witness determination. And a good example is in the Criminal Procedure Law, Article 65, involving televised testimony by child victims of child abuse or sexual abuse.

[*People v. Wrotten*](#), which is a Court of Appeals decision from 2009, dealt not with the child witness, but a complaining witness in a criminal case. He was elderly, he was out in California, he was on a farm. It would have been a threat to his health to come to New York to testify. And *Wrotten* grappled with this issue from the perspective of the confrontation clause and preserving that Sixth Amendment right of a criminal defendant.

The complaining witness testified live from a courtroom in California. The court emphasized that he could see the judge, the witness could see the prosecutor, the witness could see the defense counsel, the defendant, and the jury, and that the witness could be seen very clearly by all of the above, including right down to the expressions on his face.

The Sixth Amendment concern in a criminal case obvious. In a dissenting opinion Judge Smith, Robert Smith, now retired, wrote a very compelling dissent. And in the course of doing that, he dealt with some of the dynamics of the Sixth Amendment confrontation concerns: "The assumption underlying the constitutional right of confrontation is that the witness be brought into the presence of the accused because he'll be less likely to lie or to swear through a false accusation when looking face-to-face with the person he's accusing."

He went on to write about the psychological effect that this has on the witness. We tend to think in terms of our ability as lawyers or the judge as a trier of fact, or if there's a jury, the jury being able to observe the body language, the demeanor of the witness. But the psychological

impact it has on the witness to be looking at the people who are calling into question the credibility of his statements is also important, as Judge Smith noted.

Very early on, [People v. Cintron](#) back in 1990 allowed the closed circuit television transmission of the witnesses, the child's testimony, and emphasize there must be an individualized showing of necessity and the steps procedurally to minimize the impact on confrontation rights. They discuss the physical arrangements that are necessary.

Apart from Sixth Amendment issues of confrontation, due process concerns are also implicated.

The U.S. Supreme court has declared that in custody cases, the interest of parents in the care, custody and control of their children is perhaps the oldest of the fundamental liberty interest recognized by this court. So, although a custody case does not implicate the Sixth Amendment because it's non-criminal, it certainly would seem to rank very high on the pecking order of interests that are at risk in the case so that a very heightened standard of due process would be applied. If not, confrontation may be a peck or two below that.

Also, we should not lose sight of the fact that when we take steps to ensure due process rights or confrontation rights, we're doing more than simply protecting the interest of the litigants. We're also enhancing the likelihood that specious evidence will be effectively challenged and kept out, and that therefore the fact finder in the case will base the decision only on reliable evidence.

[State v. Robert F.](#), a civil proceeding, was a Mental Hygiene Law Article 10 proceeding, non-criminal, but with liberty interest at stake. And the Court of Appeals again made clear that this is only to be done in exceptional circumstances.

In this case, the state psychiatrist had testified and been cross-examined and went back home to, at that point, I think it was Florida, a distant state. The defendant, or the respondent as they're known in these proceedings, got on the stand. And as part of his direct testimony, he introduced a new fact into the mix such that the prosecution desired to recall the psychiatrist for rebuttal. They made out the case that because of her job requirements in Florida, she could not come back, and the lower court allowed her to testify remotely. The court held that this was an abuse of discretion, that this was not the individualize analysis of whether or not there were exceptional circumstances making this

absolutely necessary to the proceedings. Only where exceptional circumstances require, or when all parties consent, should this kind of remote testimony be taken.

A televised testimony requires a case-specific finding of necessity; it's an exceptional procedure to be used only in exceptional circumstances.

Some recent expressions of concern with respect to remote proceedings, going back to Justice Cooper's opinion in the *S.C. v. Y.L.* case. He goes into significant detail as to the character and credibility assessment that a custody judge is required to make in determining where the child's best interest would lie. He talks about how difficult this is even in the brick and mortar, flesh and blood context. And he notes that in the course of an actual flesh and blood trial in the courthouse, the judge is able to closely view the parties, not only when they're on the witness stand testifying, but when they're sitting at the counsel table reacting to the testimony that's coming from the other side or from some other witness, and able to observe how they conduct themselves throughout the entire proceeding. And that you simply do not and cannot replicate through current available virtual platforms. "Whatever virtues of virtual justice he wrote, I remain convinced that a case such as this, a matrimonial with a custody issue, better suited for brick and mortar old fashioned trial."

A.S. v. M.S. is an interesting case, citing to the COVID-19 pandemic. The custody court held that the matter would proceed virtually to trial over counsel's objection. One of the attorneys in the case objected for one of the parents and the attorney for the child objected. And the court held over those objections they would proceed virtually because of the pandemic. Well, putting that in the context of the cases that we just discussed, the question would be, is that an individualized showing of necessity? It's certainly not individualized to a particular witness. Whether or not the court would interpret the pandemic as being that type of necessity remains to be seen. The court said the court is cognizant of the limitations, et cetera, but counsel did not set forth a prejudicial basis.

One of the things that occurred to me as I read that: Did the court misplace the burden of proof? Remember the default position is flesh and blood brick and mortar. Here's she's saying because the attorneys objecting to the televised of the remote method did not meet their burden, that may be a misplacement, and it may not be consistent with the various cases that we just discussed.

I'll close this out with some good news. Two days ago, on the 15th, the [Law Journal](#) reported on remarks, I think it was from a video that our Chief Judge DiFiore posted. And she said, "We'll be moving forward gradually, and we'll be moving into a new and presumably better normal defined by increased reliance on technology such as video conferencing and e-filing." What's interesting in that quote is she states that it's the goal of the court system to resume a full range of in-person court operations, including jury trials.

So, hopefully before too long, with the help of the universe and the vaccines, we'll be able to get back to that flesh and blood, brick and mortar evidentiary hearing and trial process with which we're all accustomed.

Ms. Conklin: Thank you so much, Mr. Tippins. At this time, I'm going to turn to Judge Dollinger and invite him to start his video and share his screen and unmute your microphone.

Judge Dollinger: I'm Rick Dollinger. I'm a matrimonial judge out in the western part of the state, in Rochester. My vantage point is to talk about a view from the bench today.

I want to talk just briefly about the current paradigm. I think everybody out there knows that almost every trial is a version of live theater. Nobody goes into a courtroom without the witnesses knowing what they're going to be asked, without having some idea of what they're going to say.

Our model for centuries has been public trials. Everybody gets a chance to be heard. There are people in the courtroom. It's very much a staged event. And part of that, of course, is the audience, people who are watching at home. The model that we have in the new courtroom is different. And I want to talk to you about some of those factors to consider in remote family law matters.

First of all, recognize that family law matters are all going to be simply judge trials, they're not jury trials. We differentiate the trials on that basis. Two, they're not really public affairs. Seldom in my career of 12 years of doing matrimonial cases has there ever been anybody in the courtroom who was not an interested party or a family member. Three, the amount of evidence in a family law matter, whether it's a divorce matter or a custody matter, is relatively minor. Oftentimes, the documents are stipulated in the evidence. They can get filed in NYCEF; we've used that tool. It's a quick way to move documents through. I've at

least found that we've had an opportunity to accelerate the production of evidence and eliminate a whole bunch of potential complications. But these are the issues I'm going to talk about briefly, and then we're going to get on to Dr. Wittmann. The key thing I want to talk about is the question of demeanor evidence.

Everyone in this entire time that we've been trial lawyers talks about the importance of demeanor evidence, trying to draw sense impressions from witnesses on the witness stand. And what I simply want to suggest to you is that there's a mystique of authenticity and legitimacy in demeanor evidence. And there's almost like a folklore knowledge that demeanor is a reliable indication of credibility and that judges or triers of fact have some elusive power that we can draw out of sense impressions, whether it's mostly visual, sometimes orally based on how you hear and tone of voice that we can somehow draw conclusions about demeanor. I would suggest to you that that may be, frankly, more in the folklore than it is to actual scientific fact based on social science.

We believe that in court proceedings you must observe people personally. And it's an article of faith that access to demeanor helps decision makers decide issues of credibility. That's what our entire system has been built on—trying to figure out, especially in family law cases, where the only witnesses may be the litigants, trying to figure out who's telling the truth becomes the central focus of a court.

There's one thing I want to toss in this, it's somewhat off topic, but I have become a big opponent of the “hybrid method.” We have tried to do trials where witnesses and lawyers wear surgical masks in the courtroom. I've become an opponent of that. I would rather do it remotely than have people walking around in my courtroom with masks on because what it does is it completely destroys your ability to read anyone's face or their demeanor.

Given a choice between a virtual hearing and a hybrid hearing in which people wear masks, I'm a fan of the remote virtual hearing. But most importantly, the social science research generally debunks the common sense belief that demeanor is a reliable cue to credibility. The social science shows that, frankly, judges are less accurate than they think they are when it comes to determining whether demeanor translates into credibility. And I think that's true across the board. Trying to simply look and read someone's face or read their tone of voice as an indicia of credibility can be enormously difficult. It's part of what we do as judges, but it raises the question of whether remote or in-person proceedings are best equipped to deal with that question.

I have a site here. This is a judge's rape victim study that basically said the more emotional a rape victim was, they were deemed more credible. But interestingly enough, the mere fact that the witness is more emotional may or may not be a factor in determining their credibility.

And what actually happens is that the study shows that judges and other fact-finders employed a series of cues in complex cases, like remorse, for example, trying to determine remorse or an apologetic approach or behavior. And oftentimes, because the judges are observing the same behavior in different situations, they can easily come to different conclusions.

The question is: Does remote testimony change the ability of a judge to determine credibility?

There may be an argument that it does, and in large measure that's because even in my courtroom, when a witness testifies, they spend all their time on the left side of my dais. And they testify in response to questions asked by lawyers who are looking at them in the face. I only see the side of their face. I don't get to see the whole face and look at their reaction, when they roll their eyes or when they show apprehension. If you're in a remote proceeding where you're watching the witness up close and personal, I think you can better detect those changes in their facial expression.

What about remote witnesses in the trier of fact? It seems to me that one of the things that sometimes happens when you have multiple screens in a court proceeding, in a remote court proceeding, is the witnesses can easily get distracted, the judge can get distracted by others. One of the things we have to take into account is, does the fact that there are multiple screens present in a remote proceeding, does that impede the ability of the trier of fact to get to the truth? I don't have an answer for that one, but I think it's an issue that we ought to be concerned about and take a look at.

The other thing that I think is important to realize is that this is television theater, this is not live theater, what I describe as the "WWE" effect. You never know in the privacy of their lawyer's office or testifying remotely whether the witness is actually testifying from their heart and their soul or simply because they're trying to portray a particular personal characteristic or improve their demeanor.

And I would just suggest when we look at people's facial expressions and their postures, it can all be to some extent acted through remotely. Can

that happen in a courtroom? Sure, it can. It's just another dimension that we have to look at as we try to figure out the demeanor of witnesses and the extent to which they're being credible. Can we rely on demeanor evidence? And on this, there's an article in the [Buffalo Law Journal](#) that says the issue of demeanor evidence is something that social science is saying is no longer a reliable cue to credibility. It's used by judges, it's used by trier of facts, but it's really based on the mystical faith that somehow there's an elusive and incommunicable imponderable that judges and fact-finders can discern during the course of a trial and make a determination about whether someone is telling the truth.

As this article concluded, there's a vast amount to be learned about the presentation and interpretation of demeanor evidence in traditional courtrooms. And the law review article from Buffalo concludes demeanor evidence has rested on its laurels for far too long. What about the impact of remote hearings on the litigants? And I think this is a critical issue.

This comes from an article that was published in the [Washington Post](#) in which a woman who recently got divorced said, "My virtual divorce felt dreamlike. Weeks later, I sometime wonder whether it really happened. So much of dreams feels like you're trying to grab the hem of something that dissipates right in front of you. Video conferencing has the same effect, inducing an exhausting sense of placelessness. Despite the procedures, legal efficacy, I still felt like I missed something." I think that's another factor we're going to have to consider is the reaction of litigants to all of this.

What about the uncertainty of the impact on emotional expression?

Video proceedings can both inhibit and exacerbate emotional expression. I'm not sure that we've figured out how to discern that in remote presentations. You may find that someone's crying while testifying and that the reason why they're crying may or may not be their testimony. It may also be either a rehearsed gesture or quite frankly something that is designed to win over a judge or influence the trier of fact. It seems to me in remote proceedings there's a greater likelihood of that. The emotional expression becomes another factor to be weighed by the trier of fact.

A couple of other things I want to mention, and one is the issue of public confidence in video. What's happened is, and I just quote the bottom portion of this is that there are people, the digital natives, people born after 1985.

These are the young people who are now in our juries and now in our courtrooms. And it seems to me the notion that they have is that almost everything is done remotely. They talk remotely with their friends. They have a completely different approach to video and remote proceedings. So, I think that's something we need to take into account as well. The last thing I would conclude with is that virtual proceedings offer a chance for us to look at the unprecedented opportunity to what we value about adjudication in public courtrooms and how to rethink the whole notion of what constitutes quality evidence, what constitutes demeanor evidence and how it works. These are all the new challenges for the next generation of lawyers in remote courtrooms that are going to become more prevalent in our future.

The rest of my PowerPoint, which is available, talks about a series of cases that you can consult with in which the federal courts and state courts have jumped in and embraced remote hearings and remote trials. But before we conclude, I have one personal privilege that I'm going to invoke, and then I'm going to turn it over to Dr. Wittmann. And it goes like this one (singing). Happy St. Patrick's Day all.

Ms. Conklin: Thank you so much, your honor. We all appreciate that very much, and you're getting lots of praise and compliments in the chat.

As we turn it over to Dr. Wittmann and I get ready to share my screen, I'm going to invite our tech helpers to put up a poll. This is one of the ways that we are going to verify your attendance. So, while the poll question is very simple, we ask that you do participate and pick an answer because that will help us verify your attendance here in the program, along with the code, which will come later on. And I'm going to share screen, and we can close the poll. It looks like we got most of our participants to participate, so I appreciate that very much. And now I will turn it over to Dr. Wittmann.

Dr. Wittmann: Okay, Kristen, thank you. My name is Dr. Jeff Wittmann. And how am I going to follow that performance? Do I have to sing my PowerPoint? Next slide. I think most of you know I'm a forensic psychologist and a trial consultant. I'm going to focus in the brief time that I have essentially on a summary of what we know in our field about remote interviewing and testing, what we're learning, what we're worried about. And then the main thing I want to underline is that at the end of the materials you have, my PowerPoint, there's a very meaty reference section that he has a lot of resources that I'll be referring to, and almost all of them are things that are important for you to consider putting in your library.

I want to acknowledge some of the key figures in this area that have done most of the groundwork before I came to do this today. Randy Otto and David Corey have done some really fine work on video conferencing technologies and psychology with primarily adult, and to some extent some material on children and adolescent assessment. Bud Dale and Dr. Smith have done a recent, very significant paper on video conferencing in child custody evaluation.

So, what is a remote child custody assessment? Basically, some or all the adult interviews are held remotely, some or all child or child parent interviews are remote. Testing is done to some extent or completely in a remote manner, usually doesn't change the way record review and collateral contacts happen because it's not forced or necessary.

Some of the advantages I think are obvious. We're in a pandemic context where we've all gotten stretched to the limits and had to figure out new ways of delivering the services that we deliver. And despite the public health emergency, access to remote technologies has allowed certain parts of what we do to continue. And this is happening throughout other areas of psychology and adult forensic work. Obviously, it assists in reducing health risks related to exposure. Costs tend to go down because you're not paying for things like travel either by the expert or by the person being interviewed. And for some people, there may be a reduction in anxiety by being assessed while they are on their own turf.

More advantages: It opens up the possibility, and this is an interesting thing to think about as attorneys, for access to more distant child custody experts. You could choose in certain cases to engage an expert who's outside the bounds of New York State, for example, and have them participate or do part of the case, so it opens up some more options. It also gives us more ease at audio and visual recording of what we do in our sessions with a forensic evaluatees.

And as I've been saying for a good number of years, as has Mr. Tippins, we should be audio or visually recording these evaluations as often as we can for a variety of important reasons.

It's possible that remote assessments increase some of what we refer to as the "ecological validity" of our observations, meaning it may make it easier in certain contexts to watch the children for an extended period of time actually in their own home setting without having to physically be there under pandemic conditions.

I'm sure almost all of you have seen this on YouTube or elsewhere on the internet, one of the funnier things that I've seen. But this is a situation where an attorney could not remove the cat filter from his or her screen and had to keep on saying to the judge, "I'm not a cat!" These things happen, and you should have seen us struggling in advance of this presentation today to try to get all of our screens to work well. So, some of the challenges and risks.

Obviously, we're only getting upper torso rather than full-body observation. Sometimes that can make a real difference in terms of assessing demeanor, as Judge Dollinger very nicely presented. There are no olfactory cues. What does that mean? Once in a while you get a parent come in and they drank too much the tonight before and you can smell it. Can't smell it on Zoom. So you lose certain kinds of information that could be potentially useful. There is a wide range of skillfulness with this technology, ranging from people who are very smooth with it, comes easily. Maybe they tend to be younger than those of us who are not.

And then you end up with people on the other side of the remote exchange who are terrible at this stuff, really have no idea what they're doing and are trying to figure it out. A lot of time gets wasted. Sometimes the session goes down and fails because of it. You've also got issues with bandwidth, quality of technology. I did one assessment, a public safety assessment of an evaluatee who had to sit in their car in a noisy parking lot because all they could afford was to use their phone, they didn't have a computer.

There are certain tests we can administer. It's very hard to administer something like an intelligence test, although not impossible. That's another whole topic. But school psychologists have had to struggle with this and they have come up with some interesting alternatives and workarounds for that problem. Remote assessment, if we're doing psychological testing, forces us to deviate to some extent from the way the standardized administration happened with the original instrument we're using. So, there's a slight gap between how it was exactly done when the test was developed and how we are doing it in a remote assessment.

I do think it's important to erase idealized images of what happens out here in real clinical practices in terms of how tests are administered. Not all practitioners have special-assigned test proctors, not all practitioners have a special separate room. So it's not all ideal and wonderful out in the non-remote world also. But remote assessment does make us do something somewhat different from the way tests were developed.

You've got an increased risk of interruptions. Some of you have done these kinds of sessions, the door flies open and a kid needs help going to the bathroom or has spilled their cereal on the table and mom has to go deal with it. When they're at your office, that's less likely to happen. There's some risk of cheating or the presence of some type of script, depending on the kinds of questions or instruments you're using.

It's fascinating how fast some of this is developing, though. There's a whole proctor technology area that's developed largely out of remote work with college students and is now starting to be looked at for psychological assessment. There are some testing companies that have programs that, for example, can eliminate the possibility of the person opening a second secret screen, or at least cue you that they are doing. It can eliminate their ability to access the internet.

So, these things are developing, it's interesting to see the creative work that's being done. There is some risk of privacy breaches, you might have somebody sharing very intimate important details with you, but somebody is able to stand right outside the door and hear what they're saying, therefore maybe placing them under some stress later on when they get confronted.

And then, obviously if you've got a situation with a domestic violence dynamic, if a couple is still together, you can have, for example, the woman being interviewed with a closed door and a coercive control batterer standing right outside the door, intimidating her as she tries to respond.

We also end up with situations where some practitioners are not aware that they're supposed to be using a HIPAA compliant remote technology.

Ms. Conklin: I'm going to interrupt you for one second and ask Jean to put up the code slide. For those of you who are requesting CLE credit, the code slide will go up right now. The code word is appeals, A-P-P-E-A-L-S. That's the code word for the CLE credit, you can put this code on your CLE form. And once again, that's appeals, A-P-P-E-A-L-S. Thank you very much.

Dr. Wittmann: Remember the distant evaluators who you're using, because you have the ability to have remote technology involved. They need to be authorized to practice in New York State. And there were a whole set of rules of what they have to do in order to provide psychological services to residents here. Some suggest that there could be a problem developing a trusting working alliance or relationship with the person you're evaluating because the technology induces a kind of distancing. That

means they are not feeling as connected to you or as trustworthy, that you're as trustworthy as they wish you were. And I'll discuss some of the literature in that area in a minute. And then some people raise the question of whether remote technology reduces our ability as evaluators to be accurate in our empathic reading of the person we are assessing. Does it somehow diminish that because it's via remote means?

It's important though to remember we've got to ask: Compared to what? Under conditions of a national health emergency, the best comparison is not pre-emergency models. It's best to compare remote child custody assessment with in-person masked, distant assessment. As Judge Dollinger mentioned—it was a very good example—when you're doing in-person assessment as a forensic evaluator, these days you're most likely going to have the other person completely covered with a mask and you're losing a lot of information.

So here's some things we know from the research. The first thing I want to emphasize is almost all of this, everything I'm going to talk about, was done in non-child custody settings because that really has not been researched yet. In other forensic assessment settings or remote treatment or evaluation settings, examinees on average tend to be equally satisfied with remote approaches compared with in-person assessment on average.

It also appears so far, and this has been studied now for a good 10, 12 years, which was a surprise to me pre-COVID, remote assessment and treatment tends to be equally effective to in-person modalities.

There is also good evidence, and this is particularly applicable to the child custody setting, that information that's gathered using structured interviews appears to be equivalently reliable and accurate compared with in-person structured interviews. And it also tends to have the same sources of error, because those you who have heard me ramble on about this before know that, unfortunately, the data is not very good about the accuracy of forensic evaluators in how they, for example, code or summarize the interviews that they're having. The issue of the development of the trusting working alliance has been a research, and it does not appear to be detrimentally affected by the remote approach compared to in-person.

Remote testing does tend to produce similar results to those obtained via in-person methods. Even with children and teens, testing therapy, remote observation, even investigative interviews tend to have equivalent effectiveness and accuracy to in-person modalities. There are

some exceptions. For example, there's a quirky finding that with one particular intelligence test, there's a sub-test that for some reason gets skewed under remote conditions. So, in general, the drift is equivalent accuracy and reliability.

We've got some survey research that's interesting. Forensic psychologists are worried about things like test administration, technical glitches, missing certain behavioral data. How do I build rapport and privacy issues?

We also know now that examinees appear to be equally satisfied with remote and in-person approaches but that evaluators prefer in-person. And that's not a surprise to me. Judge Dollinger did a nice job talking about the literature we have, suggesting that it also may just be a nice pleasant idea that being in-person yields a better ability to assess someone's credibility. It could be that that's not accurate, and so that's for other researchers to look at. However, no research has directly assessed this issue of remote versus in-person in the child custody context, and that's very important to remember.

I'm going to just list these, know that they're there. These are important documents that you can use to support or indict an expert witness who has used remote approaches to assessment.

There are no practice guidelines for remote forensic assessment. The ones I just showed are for in general teletherapy tele-assessment. We have no practice guidelines, parameters, or codes telling us what we should be doing under specifically forensic context. And the only state of our knowledge in the area of child custody are the two I mentioned, Dale and Smith, and also Brown at Al.

Please note that you're going to be seeing people reporting having done the MMPI-2, the Minnesota Multiphasic Personality Inventory 2 remotely. There is beginning to be certain norms about how you should do that, and I gave you a citation about, two of their best experts in that area about how they should be administered.

A few musings about Frye. We do not have survey data to confirm what the percentage is of academics and evaluators that think remote assessment is sufficiently reliable. Do we actually have consensus yet? I don't think we have it yet, but we're gathering that information now.

There are indications that, on average, people are willing to support it under the conditions of, for example, a pandemic, but prefer it as likely

more reliable in-person when you're not in that context. There's a lengthy list of practice guidelines and research on the comparability in other areas of assessment that does show we've got growing consensus here.

I know I'm running out of time here. Remember that when you're confronted with a case where you do have a custody assessment having been done in an entirely or almost entirely remote manner, the factors to scrutinize in any custody assessment still remain true.

- Did they manage the case relationships well with the attorneys, the court, the litigants?
- Was the data adequate?
- Was the technique adequate.
- And was the reasoning adequate?
- Did the evaluator issue specialized remote related informed consent?
- Did they conform to the best tele-mental health guidelines that we have?
- And did they work diligently despite doing their assessment remotely to maintain fidelity to relevant child custody guidelines?

Those are some comments about using secure, cautious test administration approaches. And also they should be clearly alerting the court in their forensic reports to the limitations related to a remote application of forensic principles. Thank you.

Ms. Conklin: Thank you very much, Dr. Wittmann. We have time, I think, for one question which came from someone who appears to be in the midst of a trial, actually a remote trial. And they noted that it was a termination of parental rights where the respondents are appearing for this trial by phone. They would like your thoughts on that specifically, about how to judge someone's credibility over the phone.

Mr. Tippins: I'll defer to the judge because he has to assess credibility every day.

Judge Dollinger: And my answer is real simple: Impossible, I can't do that. I'm not going to trust a phone. I don't know who's in the room! There's a case that came out from North Dakota or something, Tim, you may know it, Jeff, you may know it, where a witness was testifying with the phone, a FaceTime phone and the witness kept looking over to the side. It was a domestic violence case and the witness kept glancing sideways in this way and that way. And finally, the judge, he's got the defendant on one FaceTime and the witness on the other side, and he says to the defendant, "Are you in

the same room with the witness?" And he says, "Oh, no, no, I'm not." And she kind of goes like this. He sent the police and arrested the guy, posted like a half a million dollar bail. But the point is, when you're on the phone, there's absolutely no way you can determine whether it's rehearsed. I have no idea what document is in front of them. Don't do it by phone. I don't know anybody who's that good. I'm not that good.

Mr. Tippins:

I would like to just follow up and comment on one thing that Judge Dollinger mentioned that I think is very important, that the judge's view typically is limited to a side angle of the witness.

Two thoughts occurred to me. One, I always prep my witnesses to turn to the judge when they answer my question to try to engage eye contact so that the judge can actually see them. But it occurred to me as I listen to you, judge, one way is to have the best of both worlds. It would be very easy to put a very little camera, such as the one on my computer here, on the witness stand looking at the witness's face and a monitor on your bench. You could have the best of both worlds. You'd be able to see facial expressions when you want, you'd be able to see the rest of it because they're three feet away from you.

Judge Dollinger:

I don't think that's a bad idea. I would just tell you that the witness face-to-face can sometimes be a pretty convincing way to try to evaluate whether somebody is telling the truth or not. And the other thing I just want to emphasize, Tim's right about one thing, and Jeff is right about it as well. In child cases, almost the only basis we have to make a decision is based on the testimony of the parents. These things happen in houses where the only people that are present are parents and family members. And we're asked to try to figure out what the truth is. It's virtually impossible or incredibly difficult to start. And you've got to try to make an assessment of who's saying what, which one of them are believable? And the notion of believability is a very elusive concept. It's more based sometimes on the predilection and the perspective of the listener than it is on the actual content of the testimony. Very difficult to do.

Dr. Wittmann:

A quick comment. I can't imagine arguing for choosing an audio only approach to gathering information from people. I would go out of my way to avoid it and would probably even refuse to do it. But just a quirky thought I had: We also have to remember that visual cues also lead to bias. And it's an interesting question. "To what extent in certain highly specific cases could an audio approach eliminate cues that would lead to a judicially biased response because we know there's a decent amount of data on some of the visual cues that send judges down a path of choices

that ultimately they might prefer they didn't make. However, in the big picture, I think there's too much information lost.

The other quick thing I'll mention is, just remember that the people that are working in the remote testing issue, one of the things they're building into the protocols is a carefully timed, sometimes random approach of demanding an immediate scan of the entire physical room. Doesn't solve all the problems, but it offers us a little bit of a tool.

Judge Dollinger: I just want to add one thing to Jeff's point, he made it earlier but I want to emphasize it. As a trier of fact, you are using all your sense impressions to try to draw conclusions. Jeff made the point about smelling alcohol on someone's breath. You are listening carefully, you're looking for voice inflection. I agree with Jeff, the issue of bias in voices. If you have a voice like mine, a more kind of projecting, domineering voice, and you'd say, "Oh, there's somebody who's credible." And yet it's the meek and mild voice that should be more credible than mine. I think that we're constantly evaluating, as triers of fact, our sense impressions. And that's how we do it, that's how we've done it for centuries. I think it'll be interesting to see how this remote experience ties into new research on whether that's actually a good indicator or not.

Ms. Conklin: Thank you, judge.

Ms. Conklin: Well, we are at the end, but there is one question that I would like to ask even if we could answer it very, very briefly. Most of our participants have hung with us. It's directed at Dr. Wittmann, but I think the others can weigh in as well. And it's: Do you think the remote custodial evaluations make the assessments or could make the assessments more accessible, particularly in parts of the state where there aren't professionals who are willing or able to do these assessments?

Dr. Wittmann: Absolutely, they do make it more accessible. And you can get at professionals in areas where there's a thinner population of options that are maybe farther away. There's a service delivery advantage to it. But we also now see that there's some disadvantages. And we're still trying to figure out how that balance plays out.

Judge Dollinger: I would just add that's what triers of fact have to do is to try to figure it out. Is the remote assessment done from Albany to Wellsville, New York because they don't have the therapist. Is that valid? And what are the conclusions? It's a real challenge. Again, I think that's the next generation of social science research, Jeff.

Mr. Tippins: From my perspective as a cross examiner, it's just one more area of unreliability, or potential unreliability, to be explored on cross examination and possibly addressed by a retained rebuttal expert.

Ms. Conklin: Well, thank you all so much. We have reached the end of our hour.

I want to thank all of the panelists for joining us today and sharing your thoughts on this topic.

And on behalf of the [Permanent Judicial Commission on Justice for Children](#), I'd like to thank our partners in sponsoring this, the [Office for Justice Initiatives](#), the [Child Welfare Court Improvement Program](#) and [Lawyers for Children](#), who was our CLE accreditor, specifically Karen Freedman, Glenn Metsch-Ampel, and Maritza Mateo.

I'd also like to thank the [Welfare Research Institute](#) for the technological assistance and John Caher for his help in putting together this program. And this was all made possible with the generous grant from the [Redlich Horwitz Foundation](#). So of course, we would like to thank them as well.

This program was recorded and will be made available on our website shortly. Thank you all. Have a wonderful day.