Virtual Bench Trial

Protocols and Procedures

Hon. Norman St. George, J.S.C.
District Administrative Judge
10th Judicial District-Nassau County

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Overview

The Covid-19 pandemic has required all Courts across New York State to innovate and adapt in order to continue to provide the effective and efficient administration of justice and Access to Justice for all Court users consistent with the highest standards of Chief Judge DiFiore's Excellence Initiative. Our Courts have uniformly transitioned to Microsoft Teams as a platform to conduct oral arguments on motions, preliminary/status/compliance/pre-trial conferences, hearings, A.D.R. settlement conferences, inquests, criminal arraignments, and pleas all by virtual means in order to ensure the safety and health of all Court users.

New York State Courts have also utilized Microsoft Teams to facilitate Virtual Bench Trials. Virtual Bench Trials are, in all respects, identical to In-Person Courtroom Bench Trials in terms of the format, content and formality. However, certain modifications are necessary regarding the presentation of testimonial, documentary, and physical evidence in order to safeguard accuracy and ensure reliability.

Although these modifications are generally applicable to all types of Virtual Bench Trials in the various Courts, each Court should adapt the foregoing to their specific needs, requirements, and concerns. Included herein is a separate section that specifically addresses Virtual Criminal Bench Trial considerations. A Proposed Stipulation and Order for the parties to review and sign prior to the commencement of a Virtual Bench Trial is attached hereto as "Exhibit A".

The following guide demystifies the proceedings and presents a simple and practical roadmap to conducting a Virtual Bench Trial. It also informs all participants on what to expect. This guide has truly been a collaborative effort. These materials represent a collection of the Best Practices from all of the Judicial Districts throughout the State. We thank all of the Administrative Judges, the Presiding Judge of the Court of Claims, the Supervising Judges, the Trial Judges, the Bar Associations, the District Attorneys, the Public Defenders, and the Lawyers who contributed their suggestions, comments, and concerns to this compilation. Special Thanks to Chief Judge Janet DiFiore, Chief Administrative Judge Lawrence Marks, Deputy Chief Administrative Judge Vito Caruso, Deputy Chief Administrative Judge George Silver, and Deputy Chief Administrative Judge Edwina Mendelson for their outstanding leadership, assistance, and guidance throughout these difficult times.

Virtual Bench Trial Decorum

All participants shall recognize that a Virtual Bench Trial is a formal proceeding. Thus, all evidentiary rules and principles that guide In-Person Courtroom Trials remain applicable. Of equal importance are the disciplinary rules and requirements of civility amongst lawyers and litigants alike. Judges' Part Rules and procedures regarding the conduct of an In-Person Courtroom Trial should be followed to the extent practicable. All participants are to have proper attire, there should be no consumption of food or drink or smoking during the proceedings.

Judges, attorneys, witnesses, and participants should appear via both video and audio with their cameras always on and operational unless otherwise instructed. Counsel and witnesses are to attend the Virtual Bench Trial from quiet and appropriate locations without background distractions. All participants shall use best efforts to eliminate all visual and auditory distractions. All parties must display their actual backgrounds, which should always remain professional and dignified. The use of virtual backgrounds should be prohibited (blurred backgrounds may be considered if appropriate). As in In-Person Courtroom proceedings, only one person may speak at a time. When present, the Court Reporter (or FTR recording device where appropriate) is required to take down an accurate contemporaneous record of the proceeding. Therefore, participants shall not speak over one another and there should be no colloquies between Counsel during the Virtual Bench Trial. Non-speaking participants should always activate the mute microphone function.

Any and all objections must be made audibly. In addition, Counsel should physically raise their hands and/or use the "raise hand" function in Microsoft Teams. Once objections are resolved by the Court, exceptions will be duly noted on the record.

At any time during the proceeding, Counsel may request that the Virtual Bench Trial be paused to allow Counsel to consult with his/her client. If Counsel and the client are in different locations, the Court may permit the use of the Breakout Room feature on Microsoft Teams to facilitate this discussion. Upon a pause of the Virtual Bench Trial the Court should direct all parties to remain on mute and disable video; leave the Virtual Bench Trial and rejoin at a time certain; or provide other appropriate instructions to ensure that ex-parte communications among the Court, attorneys, parties and witnesses do not take place.

Safeguarding the Virtual Bench Trial

Virtual Bench Trials will be conducted via Microsoft Teams under the control of Court personnel. Since Microsoft Teams is a video-conferencing platform that transmits over the Internet, Court technology personnel have taken extensive measures to ensure the security of the platform. It is incumbent that all participants involved in the Virtual Bench Trial be instructed not to allow any non-participant or third party to gain unapproved entry to the Virtual Bench Trial. In addition, parties should be strongly encouraged to attend the Virtual Bench Trial via a secure password protected Internet connection, not a public WiFi connection.

Technical difficulties during the Trial may occur. Counsel, parties, and witnesses should exchange back-up contact information, such as cell phone numbers and/or e-mail addresses, with the Court prior to the Virtual Bench Trial and discuss a protocol on how to reconnect in case the Virtual Bench Trial itself or a party is disconnected, or other technical issues arise. If appropriate, the contact information for technology support should also be shared. All participants should immediately notify the Court if it appears anyone has dropped from the Virtual Bench Trial. At all times the Court will immediately take such steps as appropriate to ensure the fairness and integrity of the proceedings. The parties are expected to work cooperatively and professionally with the Court and with each other to resolve any technical issues that arise.

Maintaining Public Access

The Virtual Bench Trials should be live-streamed, both audio and video, to ensure public access. (Note, the live stream should be paused during bench conferences and other off the record discussions). In addition, upon specific application, the press and members of the public can be provided with a restricted Microsoft Teams link. Arrangements can also be made for remote access to the Virtual Bench Trial from a courthouse location where ample social distancing can be assured. Each of the Courthouses already have Kiosks set up for this purpose. To the extent possible, any live-streams and Microsoft Teams link should include a notice/banner prohibiting recording of the proceedings.

Pre-Trial Considerations

Since Virtual Bench Trials will be conducted using the Microsoft Teams platform, Judges presiding over Virtual Bench Trials must be familiar with the Microsoft Teams platform and should ensure that their staff and Courtroom Clerks

are familiar with the platform. A Courtroom Clerk must be present during all stages of the Virtual Bench Trial with audio and video connections in working order.

In selecting cases for a Virtual Bench Trial, it is recommended that Judges initially begin with cases that involve a single Plaintiff, a single Defendant, and a modest number of witnesses. Cases that are more complex, are anticipated to require weeks to complete, or where the testimony of a minor is required should be considered after the presiding Judge has already conducted some straightforward Virtual Bench Trials.

Once a case has been selected for a Virtual Bench Trial, the attorneys and the litigants must stipulate in writing to waive a Jury Trial (where authorized), and proceed via Virtual Bench Trial. Judiciary Law 2-b(3) provides inherent power and broad discretion to Courts to employ innovative procedures where necessary "to carry into effect the powers and jurisdiction possessed by it." Although this arguably authorizes a Court to proceed with Virtual Bench Trials (in Civil matters) without the consent of the parties, best practices recommend having the parties stipulate to the Virtual Bench Trial. Following the parties' execution of the written Stipulations, the Stipulations should be made part of the record at Trial as a Court Exhibit.

In cases where one of the litigants is proceeding Pro se, the Court must make proper inquiry concerning the Pro se litigant's ability to access the required computer hardware, the Microsoft Teams platform, and the Internet. Should the Pro se litigant advise the Court that he/she is not able to access the Virtual Bench Trial through appropriate means, the Court should work with its Clerk's Office or the Court's Help Center to provide the Pro se litigant with a safe, confidential, socially distanced environment at the Courthouse or other facility where the Pro se litigant may access and participate in the Virtual Bench Trial. Most Courts already have Pro se Kiosks available in the various Courthouses for this purpose.

Virtual Pre-Trial Conference

The Court should conduct a Virtual Pre-Trial Conference at least seven (7) to ten (10) days prior to the commencement of the Virtual Bench Trial. During the Pre-Trial Conference, the Court will address and resolve all issues regarding Exhibits, witnesses, demonstratives to be used at Trial, and Motions *In Limine*.

Prior to the Virtual Pre-Trial Conference, Counsel for the parties must confer with each other and make a good faith effort to agree on Exhibits that will be offered into evidence without objection and the redaction of such Exhibits as necessary. The parties must electronically submit agreed upon Exhibits and objections to the

introduction of Exhibits to the Court (at an e-mail address designated by the Court) at least forty-eight (48) hours prior to the Virtual Pre-Trial Conference. The Court will hear arguments on any objections during the Virtual Pre-Trial Conference and will rule on the objections to the contested Exhibits at the earliest possible time before the Virtual Bench Trial commences.

Counsel must confer with each other regarding the witnesses to be called and the order that they will be called prior to the Virtual Pre-Trial Conference. The parties must electronically submit agreed upon Witness Lists and objections to the calling of witnesses to the Court (at an e-mail address designated by the Court) at least forty-eight (48) hours prior to the Virtual Pre-Trial Conference. The Court shall expeditiously resolve all disputes related to the calling of witnesses prior to the commencement of the Virtual Bench Trial. The Court can continue to issue "So Ordered" subpoenas to secure the attendance of witnesses as may be requested by Counsel.

Similarly, all Motions *In Limine* should be made to the Court at least seven (7) to ten (10) days prior to the commencement of the Virtual Bench Trial. Motions *In Limine* will be discussed during the Virtual Pre-Trial Conference. As soon as possible before the Virtual Bench Trial, the Court will determine and expeditiously advise the parties which Motions *In Limine* will be resolved Pre-Trial and which motions will be referred to the Virtual Bench Trial.

Counsel are encouraged to stipulate to factual and evidentiary matters to the extent possible. Litigants should consider whether to stipulate in advance to waive the right to make a prima facie motion, motion for a directed verdict, to set aside the verdict and any other post-trial motions.

In Family Court or other Courts where the Family Court Act or other Acts and statutes mandate an immediate Hearing/Trial, the time requirements regarding the exchange of Trial Exhibits and Witness lists contained herein shall be modified accordingly or eliminated.

Opening Statements

Prior to the commencement of the Opening Statements, Counsel must confer with each other and make a good faith effort to agree upon any demonstratives to be used during the Opening Statement. The Court should be advised of the use of demonstratives during the Virtual Pre-Trial Conference. At a time to be specified by the Court, Counsel should e-mail the Court (at an e-mail address designated by the Court) copies of the demonstratives to be used in the Opening Statements for the

Court's approval. Upon Court approval, Counsel may e-mail demonstratives to the Court Reporter for inclusion in the official record.

The Court will allow Counsel to use the "share screen" function in Microsoft Teams to display Court-approved demonstratives during Opening Statements.

Exhibits

The Exhibits to be used at the Virtual Bench Trial should be submitted electronically to the Court (at an e-mail address designated by the Court), all Counsel, and the Court Reporter at a date and time to be directed by the Court. All Exhibits of more than one (1) page must be "Bates Stamped" in order to prevent any confusion as to which page of the Exhibit is being referred to. With the Courts approval, other pagination methods may be used. Once agreed to by the parties and approved by the Court, Counsel introducing the Exhibits must pre-mark them for identification prior to the Virtual Bench Trial. The Exhibits of Plaintiff/Petitioner/People shall be marked with numbers and the Exhibits of Defendant/Respondent/Defense shall be marked with letters.

If an Exhibit to be presented is something other than a document (i.e., a physical object), it must be submitted to the Court no less than fifteen (15) days prior to the Virtual Pre-Trial Conference. All Counsel, the parties and prospective witnesses will have an opportunity to view and photograph the physical Exhibit prior to the Virtual Pre-Trial Conference by appointment with the Court. Prior to the Virtual Pre-Trial Conference, Counsel for the parties must confer with each other and make a good faith effort to agree on the physical Exhibits that will be offered into evidence without objection. The parties must electronically submit a list of agreed upon physical Exhibits and objections to the introduction of the physical Exhibits to the Court (at an e-mail address designated by the Court) at least forty-eight (48) hours prior to the Virtual Pre-Trial Conference. The Court will hear arguments on any objections during the Virtual Pre-Trial Conference and will rule on the objections to the contested physical Exhibits at the earliest possible time before the Virtual Bench Trial commences. The parties may stipulate, or the Court may Order that a photograph or video of the physical Exhibit be used during the Virtual Bench Trial.

During the Virtual Bench Trial, where an Exhibit is offered into evidence and a proper foundation has been established, the Court will direct that the Exhibit be marked into evidence by the Court Reporter. The Court Reporter will make the appropriate notation of the admission on his/her copy of the Exhibit and properly notate the record. In Courts using a FTR recording device, the Courtroom Clerk will accomplish same.

In the event that an Exhibit is altered in any way during the Virtual Bench Trial (*e.g.*, written upon, highlighted, marked, enhanced, reduced/enlarged and/or zoomed in upon), the Exhibit will be saved at the time of the alteration and exchanged electronically with the Court and all Counsel in "actual size" immediately or as soon as practicable following the alteration of the Exhibit. The Exhibit will be exchanged in the same orientation, scale, and color format as altered during the Virtual Bench Trial.

Exhibits received into evidence shall be retained or returned pursuant to the Court's current procedures for retention/return of Exhibits.

Witness Testimony

The names, e-mail addresses and back-up telephone numbers of all prospective witnesses expected to be called during the course of the Virtual Bench Trial must be furnished to the Court at the Virtual Pre-Trial Conference. If any of the witnesses or the parties need a language interpreter, the Court must be advised accordingly at the Pre-Trial Conference so appropriate arrangements can be made. The Court will send the witness(es) the access link to Microsoft Teams for the Virtual Bench Trial. Counsel shall instruct all witnesses that they are to log onto the proceeding at the time of the commencement of the daily session and remain in the Microsoft Teams "lobby" area until called as a witness and admitted by the Court into the Virtual Bench Trial Courtroom. Alternatively, the Court can establish various login times for each witness which is at least a half hour before their testimony times.

Absent extenuating circumstances discussed with the Court in advance, all witnesses must give testimony with both audio and video on and operational. It is strongly recommended that Counsel and his/her witnesses run a test using the Microsoft Teams platform prior to the scheduled trial date.

Prior to their testimony, all witnesses must be instructed by Counsel, and should be admonished by the Court, that any recording of the Virtual Bench Trial by any individual other than the official Court Reporter (or FTR recording device where appropriate) is strictly prohibited. Any unauthorized recording of the Virtual Bench Trial shall be considered a violation of the Court's Order.

Witnesses must be instructed by Counsel, and should be admonished by the Court, that written or oral communications of any kind, via electronic means or otherwise, between a witness or party and Counsel for the witness during the Virtual Bench Trial testimony is strictly prohibited. Communications between the witness and Counsel shall be restricted as if the Virtual Bench Trial were being conducted

In-Person. Counsel and parties may not speak with a witness until the witness's testimony has been completed. Counsel must ensure that a remote witness is not being coached, assisted, or signaled in any way.

Witnesses must be instructed by Counsel, and should be admonished by the Court, that they are not permitted to read or refer to any Exhibit, image, document, or other writing of any kind (*e.g.*, notes, e-mails, texts, pdf's, or digital communications of any kind) during their Virtual Bench Trial testimony other than Exhibits, images, documents or other writing provided to them by Counsel in the course of direct or cross examination. In addition, there shall be no information available to the witness whether written or otherwise out of the sight of the Court. There shall be no other computer monitor, screen, TV screen, cell phone or the like in the room wherein the witness is testifying. The room that the witness is testifying from shall be displayed to the Court and all Counsel prior to the testimony beginning and periodically thereafter. Any document or other writing which the witness is permitted to refer to shall be published to the computer's camera being used by the witness.

Witnesses must be instructed by Counsel, and should be admonished by the Court, that no other individual may be present, either physically or electronically, in the same room as the witness or so near the witness as to be seen and/or heard by the witness. The witness should be advised, where appropriate, that exceptions can be made for individuals who are not a witness to the events under consideration at the Virtual Bench Trial if they are present only to assist the witness in the use of the computer equipment/camera or because the witness requires physical assistance due to a medical condition. The presence of any such party or person must be disclosed to the Court, all parties and their Counsel, and the Court Reporter. Once disclosed, the Court Reporter shall note the presence of the third party on the record. Additionally, identification of the individual should be presented on the record.

It is strongly recommended that the Court confirm with all witnesses all instructions given by Counsel.

Counsel who calls the witness for Direct Examination is responsible for ensuring the witness has a suitable location and access to suitable computer equipment and screen(s) that are necessary for the visual and audio nature of the proceedings and Exhibits/images shared, including the ability to highlight a document or alter it. It is important that where possible all witnesses have a substantially similar computer screen in both size and quality so that when an Exhibit is shown to them the witness shall each have the benefit of seeing the image on the screen in the same way. Unless specifically authorized by the Court in advance, witnesses shall not be permitted to testify from a cell phone, whether through the phone's camera and video features or via calling in to the Virtual Bench Trial. All

witnesses must appear on camera and be easily seen for the purpose of assessing credibility. A sample pre-testimony Witness Inquiry is attached hereto as "Exhibit B".

The Court, Court Reporter, Counsel, witnesses, and parties shall be in separate/remote locations participating via Microsoft Teams. Should a participant in the Virtual Bench Trial, including Counsel, choose to be in the same location as another participant, Counsel shall have a separate camera available for each individual so that the Court can see Counsel and all participants at all times simultaneously. Participants should not share the same camera or screen. No one participating in the Virtual Bench Trial should be off screen or turn their computer camera off without the express prior permission of the Court.

The Court Reporter, who must be physically located in the State of New York, will swear in the witnesses. In the event that a FTR recording device is being used, the Courtroom Clerk will swear in the witness. The identity of the witnesses must be confirmed prior to the administration of the Oath. Any objection to the administration of the Oath should be waived. Regarding witnesses that are testifying from an out of state location, Counsel should consider waiving the requirement, where appropriate, that the witness be sworn by an official located in the State in which that witness is present.

Sidebar Conferences

Should the need arise for any reason and at any time during the course of the Virtual Bench Trial, for Counsel and the Court to confer on any objections or any other matters, the Court may make use of the Breakout Room feature on Microsoft Teams so that the witness is not privy to the sidebar discussion. The Courtroom Clerk will remain on the main link to monitor the witness. Alternatively, the Court can direct that a cell phone conference call occurs with all parties muting their audio on the Microsoft Teams platform.

Closing Arguments

As with Opening Statements, it is recommended that Counsel confer and make a good faith effort to agree upon the use of any demonstratives during Closing Arguments prior to the Virtual Pre-Trial Conference. Any needed changes or additions to the demonstratives that may be required based upon the Virtual Bench Trial testimony or other factors must be approved by the Court prior to use and should be discussed during a Virtual Pre-Summation Conference. At a time specified by the Court, Counsel should e-mail the Court (at an e-mail address designated by

the Court) copies of any demonstratives to be used in the Closing Arguments for the Court's approval. In addition, during the Pre-Summation Conference the Court will discuss with Counsel the form of the Court's Verdict.

Record on Appeal

Only the official transcript of the Virtual Bench Trial as taken down by the Court Reporter, or FTR recording device where appropriate, including Exhibits marked into evidence, shall constitute the record for appeal.

Virtual Criminal Bench Trial Considerations

The Virtual Criminal Bench Trial should be conducted in the order required by the Criminal Procedure Law. Other than the following considerations, the general Virtual Bench Trial Protocols and Procedures contained herein apply to Virtual Criminal Bench Trials.

The additional considerations for Virtual Criminal Bench Trials are essential to protect the Constitutional rights of a Defendant. A Virtual Criminal Bench Trial may only proceed with the consent of the Defendant and his/her Counsel. Accordingly, it is recommended that all parties make an In-Person appearance prior to commencement of the Virtual Criminal Bench Trial for the express purpose of obtaining the Defendant's consent to proceed with a Virtual Criminal Bench Trial.

Initially, the Court must, on the record, explain to the Defendant that he/she would be waiving their right to a Jury Trial. The Defendant must waive that right In-Person and on the record and must also execute a Waiver of Jury Trial in writing. This form, once executed by the Defendant, is to be made a Court Exhibit.

Following the Waiver of the Jury Trial, the Court must explain to the Defendant that he/she has the right to an In-Person Trial, and, that he/she would also be waiving that right. The Court should instruct the Defendant on how the Virtual Criminal Bench Trial would be conducted. The Defendant, Defendant's Counsel and the People must state, on the record, that they are waiving an In-Person Bench Trial and consenting to a Virtual Criminal Bench Trial. All parties must execute the Waiver of In-Person Trial/Consent to a Virtual Bench Trial Form. This form, once executed by the parties, is to be made a Court Exhibit. Attached as "Exhibit C" is a Sample Waiver of In-Person Criminal Bench Trial Form with a Sample Inquiry.

Having obtained the necessary consents to proceed virtually, it is recommended that the Court conduct an In-Person Pre-Trial Conference. During the conference, it is recommended that all documentary evidence be pre-marked and inspected by the parties to accommodate the virtual exchange of Exhibits during the Virtual Criminal Bench Trial. With regard to physical evidence, the Court shall encourage the parties to make a good faith effort to stipulate to physical evidence being entered into evidence on consent, in advance, wherever possible. If possible, any chain of custody issues regarding physical evidence should be determined in advance of the Virtual Criminal Bench Trial. A Stipulation should be agreed upon to allow the documents to be displayed through Microsoft Teams and, once properly authenticated, entered into evidence during the Virtual Criminal Bench Trial. The provisions related to physical Exhibits referred to above should also be followed in Virtual Criminal Bench Trials.

On the first day of the Virtual Criminal Bench Trial, Defendant should again state on the record that he/she is waiving an In-Person Trial, consenting to a Virtual Criminal Bench Trial, and acknowledging that he/she signed the waiver of the right to an In-Person Trial and consents to a Virtual Criminal Bench Trial.

With regard to the Defendant's identification, to the extent that it is an uncontested issue, a Stipulation to that effect should have been reached prior to the commencement of the Virtual Criminal Bench Trial. If the Defendant's identification is a contested issue and the Defendant is wearing a face covering for health reasons during the Virtual Criminal Bench Trial (either due to proximity with Corrections' staff, if incarcerated, or because otherwise necessary), appropriate steps must be taken during the Virtual Criminal Bench Trial to permit the complaining witness to identify the Defendant during their testimony. Arrangements may be made in advance to have the Defendant lower his/her face covering during the identification process.

Of greatest significance during a Virtual Criminal Bench Trial is that a mechanism must be in place to ensure that Defense Counsel and the Defendant are able to privately confer and communicate at all times – before, during, and at the conclusion of the Virtual Criminal Bench Trial. Counsel and the Defendant should be permitted to meet using the Microsoft Teams Breakout Room feature during breaks or at any time requested. Regarding the need for real time conversations, Counsel and the Defendant may use cell phone audio or text communications with headphones. Provisions for such communications should be established during the In-Person Pre-Trial Conference.

In the event of technological difficulties causing a delay in the conduct of the Virtual Criminal Bench Trial, the Court will consider whether any party should be charged with any of the time arising therefrom.

Summary

Overall a Virtual Bench Trial is no different in sum or substance than an In-Person Courtroom Bench Trial. The challenges, as indicated above, relate to the presentation of witness testimony, documentary, and physical evidence. With careful attention, consideration, and discussion, these challenges can be effectively overcome.

We are grateful to the many Judges, Judicial Districts and Attorneys that provided their thoughts, concerns, and best practices regarding Virtual Bench Trials.

EXHIBIT A

_____ COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____ Plaintiff(s)/Petitioner(s), v. _____ Defendant(s)/Respondent(s).	Index No. **PROPOSED STIPULATION AND ORDER FOR VIRTUAL BENCH TRIAL PROTOCOLS AND PROCEDURES**

I. PROTOCOLS AND PROCEDURES

A. Parties Agreement: This Stipulation and Order is to be read in conjunction with the Protocols and Procedures implemented for Virtual Bench Trials in this Judicial District and annexed hereto. The Protocols and Procedures are incorporated by reference herein and are deemed agreed to by the parties upon execution of this Stipulation.

II. MAINTAINING THE DECORUM OF THE COURT

A. Rules of the Court: Counsel and the parties agree that the Virtual Bench Trial is in fact being conducted in a Virtual Courtroom and they should govern themselves accordingly. Counsel and the parties consent to observing the rules and procedures related to In-Person Courtroom Trials, including, without limitation, rules related to proper attire, the prohibition against the consumption of food or drink or smoking during the Virtual Bench Trial. Counsel and the parties agree that the Judges' Part Rules

regarding the conduct of an In-Person Trial should be followed to the extent practicable. Counsel and the parties shall use best efforts to eliminate all visual and auditory distractions.

B. No Colloquies. Counsel and the parties agree that as in In-person Courtroom Trials, only one party may speak at a time. Participants are not to speak over one another and there should be no colloquies between Counsel. Non-speaking participants should always activate the mute microphone function of Microsoft Teams.

C. Objections. Counsel acknowledge that any and all objections must be made audibly. In addition, Counsel will physically raise their hand and/or use the "raise hand" function in Microsoft Teams. Once objections are resolved by the Court, exceptions will be duly noted on the record.

III. PROHIBITION ON RECORDING

A. No Recording Permitted: Counsel and the parties acknowledge that as with In-Person Courtroom Trials, the Court Reporter (or FTR recording device where appropriate) must prepare an official recording of the proceeding and that any recording of a Court proceeding held by video or teleconference, including "screen-shots" or other visual or audio copying of a Virtual Bench Trial is strictly prohibited. Violation of these prohibitions will be deemed a violation of this Order and may result in sanctions as deemed appropriate by the Court.

IV. PRE-TRIAL CONSIDERATIONS

A. Microsoft Teams Platform: Counsel and the parties acknowledge that all Virtual Bench Trials will be conducted using the Microsoft Teams platform. Counsel, the parties and witnesses must all be familiar with the Microsoft Teams Platform. Counsel

confirm that it is incumbent on them to ensure all participants are familiar with the platform.

B. Pro se Litigants: Pro se litigants agree that they are subject to the same requirements for accessing the Virtual Bench Trial and must have the required computer hardware, access to the Microsoft Teams Platform, and the Internet. The Pro se litigant must advise the Court if he/she is not able to access the Virtual Bench Trial through the appropriate means. The Court will then work with its Clerk's Office or the Court's Help Center to provide the Pro se litigant with a safe, confidential, socially distanced environment at the Courthouse or other facility where the Pro se litigant may access and participate in the Virtual Bench Trial.

C. Virtual Pre-Trial Conference: The Court will conduct a Virtual Pre-Trial Conference at least seven (7) to ten (10) days prior to the commencement of the Virtual Bench Trial. At the Virtual Pre-Trial Conference all issues regarding Exhibits, witnesses, demonstratives to be used at Trial, and Motions *In Limine* will be discussed and resolved by the Court.

D. Motions *In Limine*: Counsel agree that Motions *In Limine* will be made to the Court at least seven (7) to ten (10) days prior to the commencement of the Virtual Bench Trial and discussed with the Court during the Pre-Trial Conference. As soon as possible before the Virtual Bench Trial, the Court will determine and expeditiously advise the parties which Motions *In Limine* will be resolved Pre-Trial and which motions will be referred to the Virtual Bench Trial.

E. Stipulations to Facts: Counsel agree that they will, where possible, stipulate to factual and evidentiary matters to the extent possible. Litigants should consider whether to stipulate in advance to waive the right to make a prima facie motion, motion for a directed verdict, to set aside the verdict, and any other post-trial motions.

V. OPENING STATEMENTS

A. Use of Demonstratives: Prior to the commencement of the Opening Statements, Counsel agree that they will confer with each other and make a good faith effort to agree upon any demonstratives to be used during the Opening Statement. Counsel will advise the Court on the use of demonstratives during the Virtual Pre-Trial Conference. At a date and time to be specified by the Court, Counsel should e-mail the Court (at an e-mail address designated by the Court) copies of the demonstratives to be used in the Opening Statements for the Court's approval. Upon Court approval, Counsel may e-mail demonstratives to the Court Reporter for inclusion in the official record. The Court will allow Counsel to use the "share screen" function in Microsoft Teams to display Court-approved demonstratives during Opening Statements.

VI. EXHIBITS

A. Electronic Submission of Documentary Exhibits: Prior to the Virtual Pre-Trial Conference, Counsel acknowledge that they must confer with each other and make a good faith effort to agree on the Exhibits that will be offered into evidence without objection and the redaction of such Exhibits as necessary. Counsel must electronically submit (at an e-mail address designated by the Court) agreed upon Exhibits and objections to the introduction of Exhibits to the Court at least forty-eight (48) hours prior to the Virtual Pre-Trial Conference. The Court will hear arguments on any objections during the Virtual Pre-Trial Conference and will rule on the objections to the contested Exhibits at the earliest possible time before the Virtual Bench Trial commences.

1. **Form of Documentary Exhibits.** All Exhibits of more than one (1) page must be "Bates Stamped" in order to prevent any confusion as to which page of the Exhibit is being referred to.
2. **Marking Documentary Exhibits for Identification.** Once consented to by Counsel and the parties and approved by the Court, Counsel introducing the Exhibits may pre-mark them for identification prior to the Virtual Bench Trial. The Exhibits of Plaintiff/Petitioner/People shall be marked with numbers and the Exhibits of Defendant/Respondent/Defense shall be marked with letters. Once a documentary Exhibit has been marked for identification, it must be resubmitted to the Court (at an e-mail address designated by the Court) for use during the Virtual Bench Trial.
3. **Marking Documentary Exhibits into Evidence.** Counsel agree where a proper foundation has been established and an Exhibit is offered into Evidence, the Court will direct that the Exhibit be marked into evidence by the Court Reporter. The Court Reporter will make the appropriate notation of the admission on his/her copy of the Exhibit and properly notate the record. In Courts using a FTR recording device, the Courtroom Clerk will accomplish same.

B. Physical Exhibits: Counsel acknowledge that if an Exhibit to be presented is something other than a document (a physical object), it must be submitted to the Court no less than fifteen (15) days prior to the Virtual Pre-Trial Conference. Counsel, the parties and prospective witnesses will have an opportunity to view and photograph the physical Exhibit prior to the Virtual Pre-Trial Conference by appointment with the Court. Prior to the Virtual Pre-Trial Conference, Counsel must confer with each other and make a good faith effort to agree on the physical Exhibits

that will be offered into evidence without objection. Counsel must electronically submit a list of agreed upon physical Exhibits and objections to the introduction of the physical Exhibits to the Court (at an e-mail address designated by the Court) at least forty-eight (48) hours prior to the Virtual Pre-Trial Conference. The Court will hear arguments on any objections during the Virtual Pre-Trial Conference and will rule on the objections to the contested physical Exhibits at the earliest possible time before the Virtual Bench Trial commences. Counsel may stipulate, or the Court may Order, that a photograph or video of the physical Exhibit be used during the Virtual Bench Trial.

C. Alteration of Exhibits: Counsel acknowledge that in the event that an Exhibit is altered in some way during the Virtual Bench Trial (*e.g.*, written upon, highlighted, marked, enhanced, reduced/enlarged and/or zoomed in upon), the Exhibit will be saved at the time of the alteration and exchanged with the Court and all Counsel in "actual size" as soon as practicable following the alteration of the Exhibit. The Exhibit will be exchanged in the same orientation, scale, and color format as altered during the Virtual Bench Trial.

D. Return of Exhibits: Counsel agree that Exhibits received into evidence shall be retained or returned pursuant to the Court's current procedures for retention/return of Exhibits.

VII. WITNESSES

A. Witness Lists: Counsel shall agree, to the extent possible, on the witnesses to be called and the order they will be called prior to the Virtual Pre-Trial Conference. Counsel shall electronically submit agreed upon Witness Lists and objections to the calling of witnesses to the Court (at an e-mail address designated by the Court) at

least forty-eight (48) hours prior to the Virtual Pre-Trial Conference. The Court shall expeditiously resolve all disputes related to the calling of witnesses prior to the commencement of the Virtual Bench Trial.

B. Subpoenas Ad Testificandum: The Court may issue "So Ordered" subpoenas to secure the attendance of witnesses at the Virtual Bench Trial as may be requested by any party.

C. Witness Contact Information: Counsel agree to provide the names, e-mail addresses and back-up telephone numbers of all prospective witnesses expected to be called during the course of the Virtual Bench Trial. The contact information must be furnished to the Court at the Virtual Pre-Trial Conference.

D. Language Access: Counsel must advise the Court during the Virtual Pre-Trial Conference if any of the witnesses or the parties need a language interpreter so appropriate arrangements can be made.

E. Witness Access to Virtual Courtroom: Counsel and the parties acknowledge that the Court will send the witness(es) the access link to Microsoft Teams for the Virtual Bench Trial. Counsel shall instruct all witnesses that they are to log onto the proceeding at the time of the commencement of the daily session and remain in the Microsoft Teams "lobby" area until called as a witness and admitted by the Court into the Virtual Bench Trial Courtroom. Alternatively, the Court can establish various login times for each witness which is at least a half hour before their testimony times. Absent extenuating circumstances discussed with the Court in advance, all witnesses must give testimony with both audio and video on and operational. It is strongly recommended that Counsel and his/her witnesses run a test using the Microsoft Teams platform prior to the scheduled trial date.

F. **Witness Advisory on Recording:** Counsel will instruct all witnesses prior to their testimony that any recording of the Virtual Bench Trial by any individual other than the official Court Reporter (or FTR device where appropriate) is strictly prohibited. Any unauthorized recording of the Virtual Bench Trial shall be considered a violation of the Court's Order.

G. **Prohibition on Communications:** Counsel will instruct all witnesses prior to their testimony that written or oral communications of any kind, via electronic means or otherwise, between a witness or party and Counsel for the witness during the Virtual Bench Trial testimony is strictly prohibited. Communications between the witness and Counsel shall be restricted as if the Virtual Bench Trial were being conducted In-Person. Counsel and parties may not speak with a witness until the witness's testimony has been completed. Counsel agree to ensure that a remote witness is not being coached, assisted, or signaled in any way.

H. **Prohibition on Use of Documents:** Counsel will instruct all witnesses prior to their testimony that they are not permitted to read or refer to any Exhibit, image, document, or other writing of any kind (*e.g.*, notes, e-mails, texts, pdf's, or digital communications of any kind) during their Virtual Bench Trial testimony other than Exhibits, images, documents or other writing provided to them by Counsel in the course of direct or cross examination. In addition, there shall be no information available to the witness whether written or otherwise out of the sight of the Court. There shall be no other computer monitor, screen, TV screen, cell phone or the like in the room wherein the witness is testifying. The room that the witness is testifying from shall be displayed to the Court and all Counsel prior to the testimony beginning and periodically thereafter. Any document or other writing which the witness is

permitted to refer to shall be published to the computer's camera being used by the witness.

I. **Prohibition on Third Parties Presence During Testimony:** Counsel will instruct all witnesses prior to their testimony that no other individual may be present, either physically or electronically, in the same room as the witness or so near the witness as to be seen and/or heard by the witness. The witness should be advised, where appropriate, that exceptions can be made for individuals who are not a witness to the events under consideration at the Virtual Bench Trial if they are needed to assist the witness in the use of the computer equipment/camera or because the witness required physical assistance due to a medical condition. The presence of any such party or person must be disclosed to the Court, all parties and their Counsel, and the Court Reporter.

J. **Proper Witness Equipment:** Counsel agree that the party who calls a witness for Direct Examination is responsible for ensuring the witness has a suitable location and access to suitable computer equipment and screen(s) that are necessary for the visual and audio nature of the proceedings and Exhibits/images shared, including the ability to highlight a document or alter it. It is important that all witnesses have a substantially similar computer screen in both size and quality so that when an Exhibit is shown to them the witness shall each have the benefit of seeing the image on the screen in the same way. Unless specifically authorized by the Court in advance, witnesses shall not be permitted to testify from a cell phone, whether through the phone's camera and video features or via calling in to the Virtual Bench Trial. All witnesses must appear on camera and be easily seen for the purpose of assessing credibility.

K. Participation from a Remote Location: Counsel and the parties acknowledge that the Court, Court Reporter, Counsel, witnesses, and parties shall be in separate/remote locations participating via Microsoft Teams. Should a participant in the Virtual Bench Trial, including Counsel, choose to be in the same location as another participant, Counsel shall have a separate camera available for each individual so that the Court can simultaneously see Counsel and all participants at all times. Participants should not share the same camera or screen. No one participating in the Virtual Bench Trial should be off screen or turn their computer camera off without the prior express permission of the Court.

L. Administration of the Oath: Counsel agree that the Court Reporter, who must be physically located in the State of New York, will swear in the witnesses. In the event that a FTR recording device is being used, the Courtroom Clerk will swear in the witness. The identity of the witnesses must be confirmed prior to the administration of the Oath. Any objection to the administration of the Oath is waived. Regarding witnesses that are testifying from an out of state location, Counsel should consider waiving the requirement, where appropriate, that the witness be sworn by an official located in the State in which that witness is present.

VIII. SIDEBAR CONFERENCES

A. Confidentiality of Sidebars: Counsel agree that should the need arise at any time during the course of the Virtual Bench Trial, for Counsel and the Court to confer on any objections or other matters, the Court may make use of the Breakout Room feature on Microsoft Teams so that the witness is not privy to the sidebar discussion. The Courtroom Clerk will remain on the main link to monitor the witness.

Alternatively, the Court can direct that a cell phone conference call occurs with all parties muting their audio on the Microsoft Teams platform.

IX. CLOSING ARGUMENTS

A. Use of Demonstratives: Counsel agree to consult with each other and make a good faith effort to agree upon the use of any demonstratives at the Closing Argument prior to the Virtual Pre-Trial Conference. Any needed changes or additions to the demonstratives that may be required based upon the Virtual Bench Trial testimony or other factors must be approved by the Court prior to use. A Pre-Summation Conference will be conducted to address such issues. At a time and place to be specified by the Court, Counsel should e-mail the Court copies of any demonstratives to be used in the Closing Arguments for the Court's approval. The Court will allow Counsel to use the "share screen" function in Microsoft Teams to display Court-approved demonstratives during Closing Arguments.

X. RECORD ON APPEAL

A. Official Record: The parties acknowledge that only the official transcript of the Virtual Bench Trial as taken down by the Court Reporter, or FTR recording device where appropriate, including Exhibits marked into evidence, shall constitute the record for appeal.

XI. TECHNOLOGICAL CONSIDERATIONS DURING THE TRIAL

A. How to Join: Each attorney, witness, and party who plans to attend any portion of the Virtual Bench Trial will receive login credentials from the Court. Such credentials shall not be shared with anyone other than Counsel, the parties, and witnesses.

B. Breakout Rooms: The Court may use a Virtual Breakout Room for bench conferences during the Virtual Bench Trial. Counsel may request that the bench conference be transcribed. Nevertheless, discussions that take place in the Breakout Room will not be transcribed unless ordered by the Court. With the approval of the Court, Breakout Rooms may also be used for Attorney/Client conferences during the Trial. Breakout Rooms will not be used for any other purpose unless Ordered by the Court.

C. Addressing Technological Difficulties: Any Counsel, party, or witness who is disconnected from the videoconference or experiences some other technical failure shall use best efforts to promptly re-establish the connection and shall take no action which threatens the integrity of the proceeding (*e.g.*, communications with a third party related to anything other than resolving the technical issue). If the connection cannot be re-established within approximately five minutes, the Court may take steps to "pause" the Virtual Bench Trial. If the Court deems it unfair to any party to continue the Virtual Bench Trial because of a technical failure, the Court may postpone or terminate the proceedings at any time and take such other steps as may be necessary to ensure the fairness and integrity of the proceedings.

[STIPULATED BY AND THROUGH COUNSEL OF RECORD]

DATED: _____

_____

Attorneys for Plaintiff(s)/Petitioner(s)

DATED: _____

_____

Attorneys for Defendant(s)/Respondents(s)

[PURSUANT TO STIPULATION, IT IS] SO ORDERED.

DATED: _____

_____

Judge

EXHIBIT B

Sample Witness Inquiry

1. Is anyone present in the room with you?
2. Do you agree to keep others out of the room?
3. Is there anyone present who can prompt you?
4. Is there anyone available electronically or in any manner who can prompt you? Will you identify to the Court anyone who does or attempts to do so?
5. Do you agree that you are not to confer or consult with anyone by any means (in person, electronically, telephonically, text, e-mail, etc.) regarding any of my questions or any of your responses?
6. Do you have any documents or photographs in front of you? If yes, please identify such documents.
7. Should any new or additional document or photographs become available, do you agree to make the Court aware of it?
8. Do you agree to look into the camera while contemplating and answering the questions posed to you?
9. Do you understand that this virtual proceeding is a formal court appearance and all of the rules and decorum of the court are in full force and effect and must be adhered to and followed?
10. Do you understand that there shall be no video or audio recording of the proceeding other than that by the official court reporter?
11. Do you understand that you shall not broadcast, stream or reproduce any video or audio of the virtual proceeding?

EXHIBIT C

SAMPLE DEFENDANT WAIVER OF IN – PERSON BENCH TRIAL FORM

COURT OF THE STATE OF NEW YORK
COUNTY OF

----------x

THE PEOPLE OF THE STATE OF NEW YORK,

Waiver of In-Person Bench Trial

Docket No. CR-

-against-

Defendant(s)

----------x

I, the defendant in this case, having been charged by way of information with the crime(s) of:

as specified in the above-numbered Docket No., and having been informed of my right to be tried by way of an In-Person Bench Trial, hereby, in open court, waive my right to an In-Person Bench Trial and consent to be tried by the Court in a virtual electronic manner.

_____

Defendant

_____

Attorney for the Defendant

SO ORDERED:

_____

Judge

SAMPLE WAIVER INQUIRY AND CONSENT TO A VIRTUAL BENCH TRIAL

I understand that all the parties have indicated that they wish to proceed with this Bench Trial by Virtual means.

Mr./Ms. (Defendant), I need to advise you that the law gives you the right to have this bench trial conducted In-Person, where the attorneys, any witnesses and you would be required to be present in this Courtroom In-Person for the trial proceedings.

The Court can conduct the trial in a virtual manner using Microsoft Teams whereby all parties would appear electronically and not In-Person.

If you wish to proceed with this trial virtually by electronic means using Microsoft Teams, it can be done only with your consent.

Do you wish to waive your right to an In-Person Bench Trial and have your Bench Trial be conducted by Virtual means whereby you, your attorney, the witnesses and the Court will only appear virtually?

Have you had the chance to discuss this waiver and consent with your attorney?

Are you waiving your right to an In-Person Bench Trial voluntarily?

Is anyone forcing, threatening, or coercing you to waive your right to an In-Person Bench Trial?

Do you consent to have your Bench Trial conducted by virtual electronic means?

Finally, for your waiver to be acceptable, you must sign in Court a writing expressly stating that you waive your right to an In-Person Bench Trial and Consent to the Bench Trial being conducted by virtual electronic means.

Please execute the waiver now.

I have before me an executed waiver, by Defendant _____, of an In-Person Bench Trial which will be marked as Court Exhibit _____.