

The Virtual Bench Trial Option in the Age of COVID-19

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THE VIRTUAL BENCH TRIAL OPTION IN THE AGE OF COVID-19

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Save for cases charging Murder in the First Degree, (CPL 320.10[1]), non-jury trials have always been an option for defendants charged with criminal offenses who choose not to fall on their swords and enter a plea of guilty. The decision to proceed to trial is a fundamental one that belongs to the client (RPC 1.2), and the choice of the mode of trial (jury or bench) is one that the client should make only after thoroughly discussing with counsel the risks and benefits of placing his/her fate in the hands of one person rather than twelve (or six in the case of a trial upon a misdemeanor information).

Now that the New York State justice system is slowly moving on from the COVID-based Executive Orders limiting court proceedings to essential matters (e.g. criminal arraignments, proceedings involving orders of protection, certain Family Court, Mental Hygiene Law and Election Law cases), courts are now authorized to conduct VIRTUAL BENCH TRIALS (VBT'S) of civil and criminal matters upon the consent of all parties concerned.

In deciding whether to submit to a VBT of a criminal charge, counsel and client must first ask, "would I choose to try this case with this judge sitting as fact-finder under any circumstances?" (Counsel may consider: "Is he/she fair and open-minded", "has he/she given any indication in pre-trial conference how he/she feels about the quality of the People's case," "are there complex legal issues that this judge would be well-suited to decipher rather than risk an emotion-based decision by a jury?").

Assuming that counsel and the defendant are sufficiently comfortable with the judge taking on the dual responsibilities of presiding over the legal issues and deciding the factual questions in the case, the next question is whether you wish to deprive the defendant of the right of IN-PERSON CONFRONTATION of the People's witnesses and counsel's ability to have the most DIRECT (and often dramatic) IMPACT that can often best be achieved by person-to-person cross examination and impassioned argument.

The procedures and protocols for VBT'S seem to be geared toward encouraging as much pre-trial preparation, disclosure and cooperation between counsel (e.g. with respect to proposed witnesses, exhibits and demonstrative evidence) as possible, and they seek to have evidentiary issues resolved by stipulation and if not, argued and decided by the court in advance of trial. This may be so, at least in part, because the technical and logistical challenges of conducting a virtual trial (with everyone participating remotely) can create their own causes for interruption and delay.

Before outlining the protocols for VBT'S, it is worth remembering that the substantive rules and procedures for non-jury trials remain the same: With respect to INDICTMENTS, CPL 320.10(1) states that a defendant may, at any time before trial (but not after a jury has been empaneled and sworn/ People v Kitching 78 NY2d 532 [1991]), waive a jury trial and proceed with a bench trial in the superior court where the indictment is pending.

2. The waiver must be IN WRITING and SIGNED BY THE DEFENDANT in open court in the presence of (and approved by) the court. A waiver that does not meet these requirements will be deemed invalid and subject to reversal on appeal. (People v Zawistowski 168 AD2d 950 [4th dep't 1990]).

The court must approve the waiver unless it determines that it is tendered as a stratagem to obtain an otherwise impermissible procedural advantage (e.g. to evade an earlier denial of a severance motion/People v Richiez 173 AD2d 234 [1sr dep't 1991]), or it appears that the defendant is not fully aware of the consequences of his choice.

Under the VBT protocols, the defendant is expected to waive the jury trial in writing in an IN- PERSON, pre-trial court proceeding and then will be called upon to re-iterate the waiver (and acknowledge the earlier written waiver) virtually before the commencement of trial.

CPL 320.20 NATURE AND CONDUCT OF NON-JURY TRIAL:

1. The trial is before a single judge of the Superior Court (before whom the indictment is pending);
2. The judge is the exclusive trier of the facts;
3. a. The court MUST ALLOW the parties to give an opening statement (Prosecution first followed by the defense as per CPL 260.30).
4. Same order of witnesses as in a jury trial (CPL260.30): Prosecution's case in chief, defense witnesses, if any, followed by prosecution rebuttal witnesses, if any and any defense sur-rebuttal witnesses;
5. The court MUST ALLOW summations starting with the defense followed by the prosecution;
6. Before summations, the court must inform counsel of the counts upon which it will render a verdict and any lesser included offenses, if applicable.
7. Motions and procedural rules are the same as for a jury trial.

CPL 260.30 ORDER OF JURY TRIAL:

1. People's opening statement (required);
2. Defense opening (optional);
3. People's case-in-chief;
4. Defense presentation of evidence (optional);
5. People's rebuttal evidence (if any);
6. Defense sur-rebuttal evidence (if any);
7. Defense summation (optional);
8. People's summation (optional);
9. Court's charge to the jury; (Court must also give preliminary instructions before opening statements).
10. Jury Deliberation;
11. Verdict.

While the order of jury trial generally should be followed as set forth above,(People v Fama 212 AD2d 542 [2d dep't 1985]), trial judges have some latitude to vary the order of proof and, for example, permit a witness (who would otherwise be unavailable), to testify out of order (People v Ramirez 200 AD2d 377 [1st dep't 1994]), and, in some cases (where a missing element is easy to prove, not in serious dispute and not unduly prejudicial), permit re-opening of the People's case (People v Whipple 97 NY2d 1 [2007]), or allow the defendant to testify after both sides have rested and defense counsel has summed up (People v Hendricks 114 AD2d 510

[2d dep't 1985]). The standard of review in such cases, is whether the judge abused his/her discretion in allowing the order of evidence presentation to be altered. (People v Georgescu 197 AD2d 352 [1st dep't 1993]).

CPL 350.10 NON-JURY TRIAL OF AN INFORMATION IN LOCAL CRIMINAL COURTS:

1. A bench trial of an information in a local criminal court must be before a single judge who decides all questions of law and also serves as sole fact-finder;
2. a. The court MAY PERMIT opening statements, but if it grants it to one side, it must grant it to the other;
 - b. The order of trial is the same as for a jury trial (CPL 260.30);
 - c. The court MAY ALLOW summations;
 - d. The court must consider the case and render a verdict;
4. The rules for motions and general procedures are the same as for a jury trial;
5. If the court is considering multiple counts, it must render a verdict on each count (not previously dismissed). A verdict that does not dispose of each count constitutes a not guilty verdict for any count not disposed of.
6. The court may find the defendant guilty of any offense (or lesser included offense) for which there is legally sufficient evidence.

VIRTUAL BENCH TRIAL PROTOCOLS AND PROCEDURES:

The VBT protocols and procedures were written by Hon. Norman St. George JSC, District Administrative Judge for the 10th Judicial District /Nassau County (after consultation with administrative judges, trial judges, public defenders and prosecutors). The rules for VIRTUAL CRIMINAL BENCH TRIALS incorporate those for civil trials (set forth below) but include additional considerations that are intended to protect the constitutional rights of criminal defendants.

The first is that a VBT CANNOT GO FORWARD without the WRITTEN CONSENT of the defendant and his/her attorney. The rules recommend that the defendant's consent be obtained in an IN-PERSON court proceeding with all parties present. (It would appear that this could be accomplished virtually but the court would also have to obtain the defendant's waiver of an in-person appearance for purposes of the waiver).

The court must first explain the defendant's right to a jury trial and then obtain his/her signed, written waiver in open court per CPL 320.10(2). The waiver is then marked as a COURT EXHIBIT.

Next, the court must advise the defendant of his RIGHT TO AN IN-PERSON trial which he must also waive if he/she wishes to proceed virtually. The court would then have to explain how the VBT would be conducted. The defendant, his/her attorney AND THE PROSECUTOR MUST ALL STATE THEIR CONSENT TO A VBT (and waiver of an in-person trial) ON THE RECORD. THEY ALL MUST ALSO SIGN A WRITTEN WAIVER/CONSENT FORM which is also marked as a court exhibit.

The form states that : I, _____, the defendant in this case, having been charged by way of indictment/information with _____, 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. (s/defendant, defense counsel and SO ORDERED/judge).

The sample WAIVER INQUIRY/STATEMENT states:

I understand that all parties have indicated their desire to proceed with the bench trial by virtual means;

I understand that I have the right to have this bench trial conducted in-person where the attorneys, witnesses and I would be physically present in court for the proceedings;

I also understand that the court can conduct the trial virtually using MICROSOFT TEAMS whereby all parties would appear virtually (via computer) rather than in person;

I understand that a the trial cannot proceed in this manner without my consent;

It is my wish to waive my right to an in-person bench trial and have the trial conducted virtually which means that any witnesses, counsel and I will appear remotely and not in person in the courtroom.

I have discussed this waiver/consent with my attorney.

I am waiving my right to an in-person trial and consenting to a virtual trial knowingly, voluntarily and intelligently.

No one is forcing, threatening or coercing me to waive my right to an in-person trial and consent to a virtual trial.

Therefore, I hereby consent to have my trial conducted by virtual electronic means.

Signed (in court and on the record)/ defendant.

The protocols also recommend that the court take advantage of everyone's physical presence by conducting a PRE-TRIAL CONFERENCE at which all proposed documentary evidence (e.g. photographs, records, reports) should be pre-marked for identification and inspected to facilitate the VIRTUAL EXCHANGE of exhibits.

Counsel will also be expected to determine what, if any exhibits can be stipulated to (with or without redaction). The same holds true for any PHYSICAL EVIDENCE (e.g. weapon), that the parties may or may not agree to admit by stipulation. Any chain of custody issues should also be addressed and resolved either by agreement or by court ruling. (In an in-person trial, whether or not to object to the admission of evidence based on chain of custody is often a "game-day" decision that is made when the exhibit is actually offered into evidence).

The court may also address any pre-trial substantive issues including motions in limine (e.g. Molineux and Sandoval issues, as well as other motions to preclude or permit, as the case may be, the admission of certain testimony or evidence on evidentiary grounds).

Prior to the commencement of trial, the court will confirm the defendant's waivers of jury trial and of in-person proceedings/consent to proceed in a virtual format. The trial will then proceed in the usual order described above.

With respect to the issue in-court identification, if it is uncontested, the parties are expected to stipulate to the identification PRIOR to the commencement of the VBT. If it is in dispute (i.e. identity is in issue or counsel otherwise questions the reliability or veracity of the witness' identification of the defendant), the witness will be asked to identify the defendant (who should be visible on screen), during his/her testimony. If the defendant is wearing a mask for COVID purposes, he/she will be expected to lower or remove it until the identification is made.

Of greatest importance, according to the protocols, is the ability of counsel and client to CONFER and COMMUNICATE with each other at all times during the trial (except if/when the defendant is actually testifying). Toward this end, they should be allowed to communicate privately using the MICROSOFT TEAMS (MST) BREAK-OUT ROOM/PLATFORM.

If there is a need to communicate while the trial is in progress they may, subject to court approval during the pre-trial conference, communicate via cell phone or text messaging.

If technological difficulties arise which cause delay, the court is supposed to consider whether either party should be charged with any time accumulated as a result thereof. (As a practical matter, this would only seem to apply to delays in the COMMENCEMENT of trial since the Speedy Trial rules apply to periods of delay between the commencement of the action [usually by the filing of the first accusatory instrument], and the start of trial rather than to continuances granted after the trial has begun).

Overall, a VBT is supposed to be the same in sum and substance as an in-person trial. The main differences purportedly relate to the challenges associated with the remote presentation of witness testimony and documentary as well as physical evidence. There are also technical and logistical challenges to ensuring that all parties are: present and accounted for, have audio and visual access to the entire proceedings (except those things that they shouldn't see or hear while waiting to testify as in an in-person trial), and the defendant's due process rights are properly protected.

GBT PROTOCOLS AND PROCEDURES FOR CIVIL AND CRIMINAL TRIALS:

The New York State Unified Court System uses the MICROSOFT TEAMS (MST) platform for conducting virtual proceedings including arraignments, conferences, motions and now non-jury trials. The format is considered to be the same as with in-person trials except that technology is now required to accommodate the presentation of testimonial, documentary and physical evidence with the goal of ensuring the accuracy and reliability (and constitutionality) of the proceedings.

While a virtual trial may create a sense of informality, counsel, parties and witnesses are expected to comport themselves (in manner of dress and conduct) as if proceeding in person. The RULES OF EVIDENCE and APPLICABILITY apply (but it appears that courts are likely to address proposed testimony and objections before trial. Nevertheless, if a question asked of a witness at trial or an exhibit offered in the context of the trial is objectionable, counsel should not hesitate to object).

Video and audio must always be up and operational (unless the court directs otherwise), and all participants should attend from a quiet and respectable location (with no background distractions), (e.g. counsel's office or conference room, not a coffee shop), and witnesses or parties who have no internet access or capability must arrange for access to the VBT at a safe and secure court-house kiosk with a computer terminal.

Only one person can speak at a time (lawyers should not talk at or over each other), and non-speakers must hit "mute" until invited or allowed to speak. A court reporter (who must be located in New York State to administer oaths), must take everything down in real-time, and if a tape-recorder is used, the court clerk (who must be present at all times), will administer oaths to witnesses.

OBJECTIONS MUST BE MADE AUDIBLY and counsel should also raise his/her hand (or hit the "raised-hand" function). Once the issue is resolved, any exceptions will be noted on the record (though the Rules of Evidence technically do not require that counsel "take an exception" after making a timely and specific objection, to preserve the record for appeal).

At any point in the proceedings (except where the client is testifying), counsel may request that the VBT be PAUSED so that counsel can confer with his/her client. If counsel and client are in separate locations (not the ideal scenario), the court may allow them to use the BREAK OUT feature of the MST. During such a break in the action, the court will direct all parties to stay on MUTE and disable the video until invited back into the proceedings at a time set by the court. It is important that the court avoid any ex parte conversations with attorneys, parties or witnesses during the proceedings.

SAFEGUARDING THE VBT:

The court's staff (clerk and any tech. support personnel) control the operation of the MST platform. Because it transmits via the Internet, all participants must be instructed not to allow any NON-PARTICIPANT to have UNAPPROVED ACCESS to the VBT. Parties should also be STRONGLY ENCOURAGED to participate by way of a SECURE PASSWORD PROTECTED internet connection (rather than via WIFI or some other public connection).

To account for possible (if not likely) technical glitches, counsel, parties and witnesses should share back-up contact information (e.g. cell phone #'s, email addresses), with the court beforehand and discuss how to re-connect if cut out of the proceedings.

If it appears that anyone has dropped out of the trial, the court should be advised immediately so appropriate action can be taken to re-connect the person who has been disconnected (or otherwise stepped out). All parties and counsel are expected to WORK TOGETHER to help resolve any technical problems that may arise.

PUBLIC ACCESS:

The VBT should be LIVE STREAMED (audio and video) but must be paused for BENCH CONFERENCES and any other off-the-record discussions which may be conducted in the BREAK OUT format or via cell-phone among the court and counsel.

Upon application, the MEDIA may obtain a RESTRICTED MST link. (Arrangements can also be made for remote access to the VBT from a courthouse site where appropriate social distancing can be achieved. To the extent possible, any live-stream and MST links should include a "RECORDING PROHIBITED" notice.

PRE-TRIAL MATTERS:

The presiding judge must take steps to ensure that his/her staff and every participant in the VBT becomes sufficiently familiar with the MST format. The clerk must be PRESENT for the proceedings and ensure that all audio/video connections are working properly.

Judges are instructed to select cases based on relative simplicity in terms of expected length, number of witnesses and volume/nature of exhibits. (In the criminal context, it would seem that the defendant's custodial status and the age of the case would be primary considerations).

Once a case has been selected for VBT, the attorneys and litigants MUST STIPULATE in writing to waiving a jury trial (in a criminal case, as noted above it is the defendant's decision), and all parties (including the People) must consent to proceed via VBT. In civil cases, the courts would appear to have the "inherent" authority to order a VBT but in a criminal case, it is questionable whether the court could compel a virtual trial where the People object. (If the defendant objects, it does not appear that he/she could be forced to have a virtual trial, especially since he/she could withdraw his/her waiver of jury trial if push came to shove).

With pro se parties, the court must inquire into their ability to access the requisite computer hardware, the MST platform and the Internet. If a litigant cannot access the VBT, the court should work with the clerk's office or Help Center to provide him/her with a safe and confidential courthouse location to participate in the VBT.

VIRTUAL PTC:

Counsel who agree to participate in a VBT will have to make early decisions with respect to witnesses, exhibits, motions and objections. While this will be helpful to the defense (insofar as the People will have to show their cards sooner than later), the defense may well not decide until the close of the People's case (and after a motion for a trial order of dismissal), whether to call witnesses or introduce evidence. Much of the tactical advantage of "laying in wait" may be reduced if not eliminated by a process that appears to favor cooperation and early disclosure over tactical decision making in an adversarial system of case resolution.

The court is supposed to conduct a PTC (in-person for criminal, virtual for civil), at least SEVEN TO TEN DAYS before trial. The court should resolve ALL ISSUES with respect to motions, exhibits, witnesses and any demonstrative exhibits that counsel may want to use during opening statements and/or closing arguments.

Counsel are expected to CONFER BEFORE the PTC and make a GOOD FAITH EFFORT to agree on whatever exhibits that can be introduced by STIPULATION (with or without redactions). The parties must submit (electronically) ALL AGREED UPON EXHIBITS AND ANY OBJECTIONS TO ANY EXHIBITS AT LEAST 48 HOURS before the PTC. The court will then HEAR ARGUMENTS ON ANY OBJECTIONS to the contested exhibits and RULE AS SOON AS POSSIBLE BEFORE THE START OF THE VBT.

While this process will force counsel to think about the evidentiary issues and strategic considerations of their case sooner than later, as a practical matter, counsel may well not know (and the court may well not be in a position to make an informed ruling), until the evidence is offered IN THE CONTEXT OF THE TRIAL ITSELF (especially if evidence may be offered SUBJECT TO CONNECTION).

Counsel must also confer with each other (BEFORE THE PTC) about the WITNESSES TO BE CALLED and the ORDER in which they will be called. They must ELECTRONICALLY SUBMIT (by email to the court) AGREED-UPON WITNESS LISTS and any OBJECTIONS to the calling of witnesses AT LEAST 48 HOURS before the PTC. The court MUST EXPEDITIOUSLY RESOLVE all witness-related disputes BEFORE the start of the VBT (but it may issue "so-ordered" subpoenas to secure witness attendance as counsel may request).

ALL MOTIONS IN LIMINE should be made SEVEN TO TEN DAYS BEFORE THE COMMENCEMENT OF THE VBT. Such motions should be discussed (if not made and resolved) during the PTC. As soon as possible before trial, the COURT WILL DETERMINE AND PROMPTLY ADVISE COUNSEL WHICH MOTIONS WILL BE DECIDED PRE-TRIAL AND WHICH MOTIONS WILL BE DECIDED AT THE TIME OF THE VBT. (As with in-person trials, judges may well feel he need to RESERVE DECISION on a particular motion and decide the matter when the evidence is offered at trial).

Counsel are also encouraged to STIPULATE TO FACTUAL AND EVIDENTIARY MATTERS to the extent it is possible (i.e. without compromising the defendant's right to a fair trial). Litigants (at least in the civil realm) are encouraged to consider WAIVING THE RIGHT TO MAKE PRIMA FACIE MOTION , MOTION FOR DIRECTED VERDICT OR TO SET ASIDE THE VERDICT.

IN A CRIMINAL TRIAL, DEFENSE COUNSEL SHOULD NEVER WAIVE THE RIGHT TO MOVE FOR A TRIAL ORDER OF DISMISSAL (on specifically stated grounds), NOR SHOULD COUNSEL EVER WAIVE THE RIGHT TO MOVE BEFORE SENTENCING TO SET ASIDE/ VACATE AN ADVERSE VERDICT. (TO DO SO WOULD BE TO SACRIFICE IMPORTANT RIGHTS FOR THE SAKE OF ACCOMMODATION AND EXPEDIENCY).

In deciding how far to go in disclosing evidentiary information to the prosecution before trial, counsel (and the court) should be mindful of CPL 245.20(4) which states that:

- a. the defendant shall, SUBJECT TO CONSTITUTIONAL LIMITATIONS, disclose to the prosecution and permit them to discover any material and relevant evidence within his/her possession or control (that he/she intends to introduce at trial) as set forth in subdivisions: f (expert witness information), g (tapes and electronic recordings including 911 calls), h (photos and drawings made by persons whom the defense intends to call as witnesses), j (reports, records notes regarding any physical/mental examinations or scientific tests), l (any promises made or other consideration offered to a witness in exchange for their testimony), o (all tangible property related to the subject matter of the case). The defense must also disclose the NAMES, ADDRESSES, D.O.B.'S and ALL STATEMENTS (written, recorded or summarized) of those persons OTHER THAN THE DEFENDANT whom the defense intends to call as witnesses at trial.
- b. DISCLOSURE OF WITNESS INFORMATION WITH RESPECT TO A PERSON WHOM THE DEFENDANT INTENDS TO CALL AS A WITNESS SOLELY FOR PURPOSES OF IMPEACHING A PROSECUTION WITNESS (e.g. to contradict on a material fact, to show bias or the witness' reputation for untruthfulness), IS NOT REQUIRED UNTIL AFTER THE PROSECUTION WITNESS HAS TESTIFIED AT TRIAL.

Counsel, therefore, can justifiably resist early disclosure of witnesses who may be called solely to impeach a prosecution witness.

Pursuant to CPL 245.10(2), the defense must disclose otherwise discoverable information/ material within 30 days of the People's filing of a Certificate of Compliance with their discovery obligations. If discoverable information is unavailable despite the exercise of due diligence, such period will be stayed (without the need for a motion per CPL 245.70). Discovery must

then be provided as soon as practicable (keeping in mind the continuing duty of disclosure per CPL 245.60).

OPENING STATEMENTS:

Before opening statements, counsel must CONFER and make a good faith effort to agree on any demonstrative exhibits that may be used in the opening. The court should be advised of this prospect DURING THE VPTC. At a time the court sets, counsel should e-mail copies of the proposed demonstrative for the court's approval. If so approved, counsel should then e-mail the demonstrative to the court reporter for inclusion in the record of the proceedings. Counsel may use the "SHARE SCREEN" function to display the demonstrative during the opening statement.

EXHIBITS:

Exhibits to be used at the VBT should be SUBMITTED ELECTRONICALLY by email to the court, to opposing counsel and the court reporter as the court directs. Exhibits greater than one page in length must be "BATES STAMPED" to facilitate following the correct pages when they are referenced.

Once agreed to by the parties and approved by the court, the proponent should have the court reporter (or clerk in a tape recorded proceeding), PRE-MARK the exhibit BEFORE THE VBT. As in regular trials, People's exhibits are NUMBERED and defense exhibits are designated by LETTERS.

Any NON-DOCUMENTARY EXHIBITS (i.e. physical evidence), MUST BE SUBMITTED TO THE COURT AT LEAST 15 DAYS BEFORE THE PTC. The parties (and prospective witnesses) will be allowed to view and photograph the exhibit before the PTC by appointment with the court.

Before the PTC, counsel MUST CONFER and make a GOOD FAITH EFFORT to AGREE on the PHYSICAL EXHIBITS that will be OFFERED into evidence WITHOUT OBJECTION.

The parties must then electronically submit by e-mail to the court (AT LEAST 48 HRS BEFORE THE PTC), a LIST OF AGREED-UPON EXHIBITS (i.e. physical evidence) and any OBJECTIONS to the introduction of such exhibits.

The court will HEAR ARGUMENT on any OBJECTIONS DURING THE PTC and will RULE on the admissibility of any CONTESTED PHYSICAL EXHIBITS AT THE EARLIEST POSSIBLE TIME BEFORE THE START OF THE VBT.

The parties may STIPULATE (or the court may ORDER) that a PHOTOGRAPH OR VIDEO of the physical exhibit be used during the VBT.

When an exhibit is offered into evidence upon a proper foundation at the VBT, the court will direct the court reporter (or the court clerk in a tape-recorded proceeding) to MARK IT INTO EVIDENCE.

If an exhibit is ALTERED (i.e. highlighted, marked up, enlarged, reduced, zoomed in on), during the trial, the exhibit WILL BE SAVED at the time of alteration and exchanged electronically with the court and counsel in ACTUAL SIZE immediately (or as soon as practicable after alteration). It will be exchanged IN THE SAME ORIENTATION, SCALE, AND COLOR FORMAT, as altered during the VBT.

Exhibits received in evidence shall be RETAINED OR RETURNED per the court's existing procedures with respect to same.

WITNESS TESTIMONY:

The NAMES, E-MAIL ADDRESSES AND BACK-UP PHONE NUMBERS OF ALL PROSPECTIVE WITNESSES EXPECTED TO BE CALLED DURING THE VBT MUST BE GIVEN TO THE COURT AT THE PTC. (Counsel should advise whether any witness will require an INTERPRETER so that proper arrangements can be made).

The court will SEND the witnesses the ACCESS LINK to MST for the VBT.

COUNSEL MUST INSTRUCT ALL WITNESSES THAT THEY MUST LOG ONTO THE PROCEEDINGS AT THE START OF EACH SESSION WHERE THEIR PRESENCE IS REQUIRED AND TO REMAIN IN THE MST "LOBBY" UNTIL CALLED AS A WITNESS AND ADMITTED INTO THE VBT COURTROOM. (The court may also stagger witness log-in times so that the witnesses are on-deck a half-hour before their expected testimony).

Except for EXTENUATING CIRCUMSTANCES (brought to the court's attention ahead of time), ALL WITNESSES MUST GIVE TESTIMONY WITH BOTH AUDIO AND VIDEO UP-AND-RUNNING. (Counsel and witnesses are urged to do a "test-run" before the trial date).

ALL WITNESSES MUST BE INSTRUCTED BY COUNSEL BEFORE TRIAL (and by the court) that any recording of the proceedings (other than by the court reporter or court recorder) is STRICTLY VERBOTEN, and any unauthorized recording will be considered a violation of a court order.

Counsel must also INSTRUCT ALL WITNESS that there can be NO WRITTEN OR ORAL COMMUNICATION of any kind (by electronic or other means) between a witness/party and counsel during testimony (other than proper examination of the witness). Such communications are forbidden just as they would be in an in-person trial. Unlike a base-coach in baseball, counsel must also ensure that a remote witness is NOT BEING PROMPTED, ASSISTED OR IMPROPERLY SIGNALLED in any way.

Witnesses must also be warned that they CANNOT READ OR REFER TO ANY EXHIBIT, IMAGE DOCUMENT OR OTHER WRITING (e.g. noted, e-mails, texts, digital communications), DURING THEIR TRIAL TESTIMONY OTHER THAN EXHIBITS THAT ARE PROPERLY PRESENTED TO THEM BY COUNSEL DURING THEIR TESTIMONY.

Also, no other information can be made available to the witness out of the court's view. There shall not be any other computer monitor, screen, tv screen, cell phone etc. in the room where the witness is testifying. Such room should be visible to the court and all counsel before and during his/her testimony. Any document that the witness can properly see SHALL BE PUBLISHED to the computer's camera that the witness is using.

Witnesses must also be advised that NO OTHER PERSON MAY BE PRESENT (in person or electronically), in the same room or so close to the witness as to be seen or heard by him/her. (Exceptions can be made for witnesses who require special assistance due to technological challenges or medical condition. In such case, the third party must be identified for the record).

The proponent of a witness (who called him/her to testify), must ensure that such witness is in a suitable location with access to appropriate computer equipment to permit audio and visual presentation of testimony and viewing of exhibits (and alteration of exhibits if warranted).

Ideally, all witnesses should have a similar screen so that all exhibits can be viewed in the same way by all participants. Unless expressly allowed by the court in advance, NO WITNESS shall be permitted to testify via cell phone. ALL WITNESSES MUST APPEAR ON CAMERA AND BE EASILY SEEN FOR PURPOSES OF ASSESSING THEIR CREDIBILITY (e.g demeanor, posture, attitude, responsiveness).

HERE, THERE AND EVERYWHERE:

The court, court reporter, counsel witnesses and parties SHALL BE IN SEPARATE/REMOTE LOCATIONS PARTICIPATING VIA MST. (Defense counsel and the defendant in a criminal case can and should be in the same place. In such case, counsel should have a SEPARATE CAMERA AVAILABLE FOR HIM/HERSELF AND THE CLIENT so that the court can see all participants at the same time throughout the proceedings.

PARTICIPANTS SHOULD NOT SHARE THE SAME CAMERA OR SCREEN. NO ONE PARTICIPATING IN THE VBT SHOULD BE OFF SCREEN OR TURN THEIR COMPUTER CAMERA OFF WITHOUT THE COURT'S EXPRESS PERMISSION BEFORE GOING DARK.

The court reporter (WHO MUST BE PHYSICALLY PRESENT IN NYS) WILL SWEAR IN WITNESSES. With respect to witnesses testifying from out-of-state, counsel is urged to waive the requirement that such witness be sworn in by an appropriate official from that state).

BENCH CONFERENCES:

The court and counsel may use the BREAK OUT FEATURE for conferences about objections or other matters of evidence. Witnesses should not be privy to sidebar discussions involving the court and counsel. (The defendant should be allowed to listen in on sidebar discussions unless he expressly waives his/her presence which is probably less likely to occur in a bench trial than in a jury trial). The court can also conduct bench conferences via cell phone while everyone not involved is muted out of the discussion).

SUMMATIONS:

Counsel is urged by these protocols to CONFER and MAKE A GOOD FAITH EFFORT to agree upon the use of any demonstrative evidence during closing arguments. The rules also say that counsel should email the court copies of any demonstratives to be used in the closing argument for the court's approval.

In this regard, defense counsel should specifically request that the court direct the prosecutor to submit any POWER POINT PRESENTATION that he/she intends to use in summation. Consistent with the directive to confer and seek agreement with respect to the use of demonstratives, defense counsel should ask the prosecutor to reveal his/her Power Point to make sure that it fairly reflects the evidence and does not present it in a misleading or otherwise prejudicial way. (Most prosecutors will probably resist providing defense counsel with a preview of their closing argument and these rules don't seem to compel disclosure of a Power Point to defense counsel. Nevertheless, there is certainly no harm in asking).

PRE-SUMMATION CONFERENCE:

At this stage, the court should discuss the charges upon which it will deliberate including any requested lesser included offenses that are supported by a reasonable view of the evidence.

RECORD ON APPEAL:

The official transcript of the VBT as taken down by the court reporter (or as recorded), included any exhibits received into evidence constitutes the record on appeal.

FINAL COMMENT:

As is apparent, virtual bench trials represent an attempt to return the courts and the practice of law to some approximation of the reality that we once knew (and perhaps took for granted) before the COVID pandemic forced everyone into varying degrees of seclusion and social distancing.

As with most innovations, VBT'S should not be rejected out of hand for fear of technology or out of knee-jerk resistance to change, but they should be considered cautiously insofar as they seem to encourage a "go-along to get-along" approach to trying cases that may favor minimizing technological obstacles over maximizing protection of the client's constitutional rights in what is still supposed to be an adversarial system of justice.

To the extent that the rules for VBT'S require prosecutors to lay out their case in advance by disclosure of expected witnesses and exhibits, and compel both sides to seriously think about and prepare their cases sooner than later, they represent a welcome change. However, as with in-person proceedings, counsel and client should only decide to submit to a virtual trial (assuming the judge is an acceptable fact-finder in the first place), only if they are satisfied that the case should be tried sooner than later and that, on balance, the benefits of going virtual outweigh the risks of trying a case from a distance on a computer screen.

Hopefully, COVID-19 will soon wane, vaccines will become readily available and the prospect of trying cases remotely in the Twilight Zone of a Pandemic rather than in a courtroom where trial lawyers belong will disappear right along with it. In the meantime, it is an option that is at least worth considering in appropriate cases.