

Practicing Ethically in Virtual Environments and the Rise of Remote Proceedings in a Post COVID-19 Era

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INTRODUCTION

Nearly every aspect of society was affected by the Coronavirus Pandemic (“COVID-19”). Along with the millions of lives lost and affected by the virus, most businesses and industries were forever altered; the legal community was no exception. This Note focuses on the recent move towards virtual legal proceedings and electronic communications between lawyers and clients, driven primarily by COVID-19, and its effects on due process rights and the ethical and professional codes of conduct. While legal articles exist which discuss the possible due process implications regarding virtual court proceedings pertaining to the right to in person hearings, there is less discussion addressing the data privacy, evidentiary and ethical implications of virtual court proceedings. These concerns are addressed in the Model Rules of Professional Conduct (“Model Rules”) as they dictate how lawyers communicate with clients, safeguard client’s confidentiality, and competently represent clients. This Note will focus on how a practitioner’s ethical duty to represent their client can be altered in a virtual environment, while also focusing on ways jurisdictions have adapted to these challenges and ways to move forward. First, this note will provide a brief overview of the CARES Act and the increased use of virtual legal proceedings. Part Two of this note will examine the due process concerns of these virtual proceedings. Part Three will examine the data and cybersecurity implications, which implicate various Model Rules of Professional Conduct such as Rule 1.6 regarding client confidentiality and Rule 1.4 pertaining to client communications. Part Four will provide an overview of general witness credibility and presentation issues in virtual proceedings and competency under Rule 1.1. Part Five will provide possible solutions and effective tools for practitioners to utilize to meet the ethical requirements while representing clients in an increasingly virtual and complex environment.

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I. CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY (“CARES”) ACT AND VIRTUAL LEGAL PROCEEDINGS

The Coronavirus (“COVID-19”) pandemic led to drastic changes in many aspects of life, including the law. One of these drastic changes affecting legal practice came in the form of the largest economic stimulus legislation in history.¹ In March of 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act.² The bill provided emergency assistance and stipulated health care response protocols for individuals, families, and businesses affected by the COVID-19 pandemic.³ While primarily known for its economic assistance, Section 15002 of the CARES Act authorized certain legal proceedings to be conducted virtually.⁴ Section 15002 allows for the Judicial Conference of the United States—upon a finding that the emergency conditions of the COVID-19 pandemic —“will materially affect the functioning” of a Federal District Court to authorize the chief judge of the district court to allow for video-teleconferencing for certain legal proceedings.⁵ While the statute expressly authorized virtual proceedings for Federal District Courts, many courts across the country, from the Supreme Court to state courts, have implemented different virtual proceedings in response to the COVID-19 pandemic.⁶ While these virtual proceedings mitigated Covid exposure risks and allowed for the continuance of key judicial proceedings, they also exposed the judicial system to cyber security risks, possible due process violations, and implicated lawyers’ ethical duties under the *Model Rules of Professional Conduct* (“*Model Rules*”).

II. DUE PROCESS RIGHTS IN VIRTUAL PROCEEDINGS

One of the most obvious concerns regarding virtual proceedings are possible due process violations and whether virtual proceedings offer the requisite procedural and substantive protections that in-court proceedings offer. These rights

1. Clare Foran, Manu Raju, Haley Byrd & Ted Barrett, *Trump signs historic \$2 trillion stimulus after Congress passes it Friday*, CNN (Mar. 25, 2020, 9:00 AM), <https://www.cnn.com/2020/03/27/politics/coronavirus-stimulus-house-vote/index.html> [<https://perma.cc/WPG9-ELU8>].

2. CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

3. *Id.*

4. *Id.*

5. *Id.*

6. See Stephanie Wylie, Anushree Thekkedath & Clay Cortez, *The Supreme Court Must Continue to Provide Live Audio Broadcasts of Oral Arguments*, AMERICAN PROGRESS (Mar. 31, 2021, 9:00 AM), <https://www.americanprogress.org/article/the-supreme-court-must-continue-to-provide-live-audio-broadcasts-of-oral-arguments/> [<https://perma.cc/6XRQ-MHFL>]; see also Nina Totenberg, *Supreme Court Arguments Resume But With A Twist*, NPR (May 4, 2020), <https://www.npr.org/2020/05/04/847785015/supreme-court-arguments-resume-but-with-a-twist> [<https://perma.cc/G5EH-RXW4>]; Pew, *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, PEW (Dec. 1, 2021), <https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations> [<https://perma.cc/LG7A-K6RY>] (providing overview of different courts’ transition to virtual proceedings in response to COVID-19).

have been challenged in various lawsuits in the past two years challenging virtual judicial proceedings under both the 14th and 5th Amendments.⁷

A. DUE PROCESS CONCERNS

Procedural and substantive due process rights have been affirmed and reformed long before the COVID-19 Pandemic.⁸ However, the increased use of technology platforms present new due process challenges that have only been affirmed or struck down in the past two years of the pandemic. Thus, although the proliferation of remote proceedings is relatively recent, there are many relevant judicial decisions pertaining to possible due process violations.⁹ For example, in New Jersey, a defendant filed a lawsuit claiming that her due process rights under the 14th Amendment were violated when a judge denied her request to appear in person for a domestic violence case.¹⁰ In this case, both the defendant and the plaintiff appeared *pro se* at an initial hearing.¹¹ It became clear that the defendant had never been properly served a Temporary Restraining Order (“TRO”) in person.¹² During the virtual hearing, the judge told the defendant that he would email her the TRO “so [she] get[s] service today.”¹³ The judge then scheduled the Zoom proceeding for the next day.¹⁴

On appeal at the Superior Court of New Jersey, the court found that the defendant’s due process rights were violated.¹⁵ Citing the court’s responsibility in “preserv[ing] the integrity of the judicial process, even from the appearance of impropriety,” the Supreme Court of New Jersey found that the defendant’s due process rights were violated from deficiencies in service of the TRO and a rush to

7. Eric Solotoff, *Remote Proceedings: Zooming Past Litigants’ Due Process Rights*, FOX ROTHSCHILD LLP (May 14, 2021), <https://www.jdsupra.com/legalnews/remote-proceedings-zooming-past-1511308/> [https://perma.cc/AH6X-TEWT].

8. For procedural due process cases, see *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976) (holding that terminating disability benefits prior to an evidentiary hearing does not violate an individual’s due process rights); *Goldberg v. Kelly*, 397 U.S. 254, 254 (1970) (holding that procedural due process requires a full hearing before welfare benefits are terminated); *Cf. United States v. Raddatz*, 447 U.S. 667, 679 (1980) (holding that “[T]he process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself.”).

9. Eric Solotoff, *Remote Proceedings: Zooming Past Litigants’ Due Process Rights*, FOX ROTHSCHILD LLP (May 14, 2021), <https://www.jdsupra.com/legalnews/remote-proceedings-zooming-past-1511308/> [https://perma.cc/AH6X-TEWT] (discussing *D.M.R. v. M.K.G.*, 252 A.3d 567, 567(App. Div. 2021) (addressing how a judge should assess a party’s request to appear at trial and present virtual testimony)); *see also United States v. Dinuwelle*, No. 1:21-CR-00797-KWR, 2022 WL 952082, at *3 (D.N.M. Mar. 30, 2022) (ruling that “defendant failed to show that the use of Zoom teleconferencing technology at the suppression hearing to present the testimony violated defendant’s due process rights or his right to confront witnesses”).

10. *See D.M.R. v. M.K.G.*, 252 A.3d 567 (N.J. Super. A.D. 2021).

11. *Id.* at 571.

12. *Id.*

13. *Id.* at 572.

14. *Id.* at 571.

15. *Id.*

trial the following day.¹⁶ The lower court's practice of emailing the TRO and "for all intents and purposes" serving the defendant via email was also deemed insufficient as a means of process.¹⁷ These types of expedited TRO services via online platforms could also implicate Rule 1.1, affecting how a practitioner competently represents their client.¹⁸

This case also presented tangential issues undermining the sanctity and decorum required of court proceedings that are especially vulnerable in virtual environments.¹⁹ For example, in *D.M.R. v. M.K.G.*, the opinion emphasized that the plaintiff's mother was in the room with the plaintiff and could be heard answering the judge's questions, which were directed at the plaintiff.²⁰ While the due process concerns implicated in *D.M.R. v. M.K.G.* are not confined to practicing in a pandemic and can arise in any virtual environment, the increased use of virtual proceedings during Covid-19 increases the likelihood of further due process violations and concerns.

Although many courts across the nation embraced the virtual environment, some judges ordered defendants to appear in person.²¹ On two separate occasions, a Massachusetts Suffolk County Judge ordered two different defendants to appear in court, despite the State's COVID-19 regulations that mandated that defendants did not have to appear in court for certain proceedings.²² While these contrasting methods both demonstrate inherent vulnerabilities of practicing in a pandemic, they also highlight how the lack of consistency requires practitioners in different jurisdictions to monitor which proceedings will be conducted in different environments to most competently represent their clients.

III. DATA PRIVACY CONCERNS AND CLIENT CONFIDENTIALITY IMPLICATIONS

Regardless of exigent circumstances stemming from a pandemic, the digitization of business documents and the ever-increasing use of technology and electronic storage of information, raise serious confidentiality and data security concerns regarding client's data and confidentiality. Even prior to the COVID-19 pandemic, most industries and businesses rated cyber security and data privacy as

16. *Id.* at 575 (quoting *H.E.S. v. J.C.S.*, 175 N.J. 309, 323-24 (App Div. 2003) (holding that a defendant's due process rights are violated when they are forced to go forward with an FRO trial twenty-four hours after being served with a domestic violence complaint).

17. *See D.M.R. v. M.K.G.*, 252 A.3d 567, 575 (N.J. Super. A.D. 2021)

18. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2016) [hereinafter MODEL RULES].

19. *D.M.R. v. M.K.G.*, 252 A.3d 567, 572. (N.J. Super. A.D. 2021).

20. *See id.*

21. Matt Breilis, *DA Rachael Rollins and Defendant Argue COVID-19 Standing Order was Violated and Arrest Warrant was in Error*, MASSACHUSETTS SUFFOLK COUNTY DISTRICT ATTORNEY (Nov. 12, 2020), <https://www.suffolkdistrictattorney.com/press-releases/items/2020/11/12/da-rachael-rollins-and-defendant-argue-covid-19-standing-order-was-violated-and-arrest-warrant-was-in-error> [https://perma.cc/YLQ2-BGV7].

22. *Id.*

top concerns.²³ These concerns also affected the legal industry and are evident in the filing of a class action lawsuit against a law firm for failure to properly safeguard client information, as described below.²⁴

A. CYBER SECURITY CONCERNS

Even before the use of virtual proceedings during the COVID-19 pandemic, law firms and attorneys were vulnerable to cyber security attacks that could compromise and expose client information.²⁵ In 2016, a Chicago-based law firm was subject to the first ever class action lawsuit for alleged failure to properly safeguard client information.²⁶ In the complaint, the plaintiffs, former clients of the Johnson and Bell law firm, claimed that the law firm's computer systems suffered from "critical vulnerabilities in its internet-accessible web services."²⁷ Due to these deficiencies, the plaintiffs claimed that their confidential information was compromised and exposed to an increased and continued risk of unauthorized disclosure.²⁸ The plaintiffs also claimed that the law firm was utilizing below industry standards for data protection.²⁹ While the extent of any cyber-attacks exposing the client information was not clear in the complaint, the plaintiffs took great issue with the deficiencies in abiding by industry-wide cyber standards.³⁰

While the complaint was moved to arbitration, it highlights the risks involved with data protection as more law firms utilize updated technology platforms, such as storing information on third party servers via the "cloud."³¹ Furthermore, while this lawsuit pertains to possible legal malpractice for failure to properly safeguard client information, it also implicates the duty of confidentiality under the *Model Rules*, most specifically Rule 1.6.³²

23. See L.S. Howard, *Cyber-Attacks Named as Top Business Risk in U.S., Canada and Europe*, by WEF Survey, INSURANCE JOURNAL (Oct. 1, 2019), <https://www.insurancejournal.com/news/international/2019/10/01/541672.htm> [<https://perma.cc/NYS3-HYU4>].

24. See Shore et al v. Johnson & Bell, Ltd., Docket No. 1:16-cv-04363 (N.D. Ill. Apr 15, 2016) (seeking to "put an end to Defendant's practice of systematically exposing confidential client information and storing client data without adequate security.>").

25. For a report for the American Bar Association discussing cyber security risks inherent in virtual legal environments, see David G. Ries, *2021 Cybersecurity*, ABA (Dec. 21, 2021), https://www.americanbar.org/groups/law_practice/publications/techreport/2021/cybersecurity/ [<https://perma.cc/C6UX-884U>].

26. See Shore et al v. Johnson & Bell, Ltd., Docket No. 1:16-cv-04363 (N.D. Ill. Apr 15, 2016).

27. See Shore et al v. Johnson & Bell, Ltd, Verified Class Action Complaint and Request for Jury Trial at ¶ 2, Apr. 15, 2016, (complaint seeking to compel Johnson & Bell to stop exposing client confidential information, which claimants stated could be achieved by implementing industry standard protocol).

28. *Id.*

29. *Id.*

30. *Id.* at ¶ 4.

31. *Id.*

32. MODEL RULES R. 1.6.

B. RULE 1.6 AND CLIENT CONFIDENTIALITY

Rule 1.6 represents the foundation of effective representation. To facilitate effective representation and proper flow of information required for effective representation, an attorney must safeguard a client's confidential information. While the attorney-client privilege protects a client by prohibiting an attorney from being required to testify against a client or to produce information regarding the client, client confidentiality under Rule 1.6 requires more.

The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client, whatever its source.³³

Thus, attorneys have a duty to safeguard all information regarding their client and to ensure that the information is properly stored electronically and protected with industry standard data security measures. While this duty requires attorneys and law firms to keep up with current technology and cyber security platforms, it becomes a more complex duty in virtual environments.

Cyber security and data privacy concerns are implicated in Rule 1.6, which requires attorneys to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."³⁴ Risks relating to both the confidentiality of clients and the unauthorized disclosure of sensitive information are ever present with the increased use of digital platforms to conduct virtual proceedings. While the *Johnson & Bell* complaint concerned a law firm's failure to adopt industry wide data protection standards, recent guidance from the American Bar Association ("ABA") highlights the importance of remaining ethical in virtual court proceedings.³⁵

In Formal Opinion 498, issued on March 21, 2021, the ABA stated that "[a]t all times, but especially when practicing virtually, lawyers must fully consider and implement reasonable measures to safeguard confidential information and take reasonable precautions when transmitting such information."³⁶

33. See *Virginia State Bar Professional Guidelines*, VSB, <https://www.vsb.org/pro-guidelines/index.php/rules/client-lawyer-relationship/rule1-6/> (last accessed on Jan. 1, 2023) [<https://perma.cc/N9PE-UEMQ>].

34. MODEL RULES R 1.6.

35. See *Shore et al v. Johnson & Bell, Ltd*, Docket No. 1:16-cv-04363 (N.D. Ill. Apr 15, 2016); see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498 (2021).

36. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498 (2021).

C. ZOOM CYBER-SECURITY CONCERNS

Cyber security incidents during the pandemic targeting Zoom highlight the risk of nefarious organizations and hackers compromising virtual platforms.³⁷ While any recent updates and measures taken to address any alleged cybersecurity issues with these platforms are outside the scope of this note, the alleged incidents reveal key vulnerabilities inherent to virtual videoconferencing platforms.³⁸ The cyber-attacks and increased usage of the platform during the pandemic highlighted cyber security issues with Zoom's alleged lack of end-to-end encryption, which is the most effective method for securing communications.³⁹

There were also instances of "Zoombombing," where hackers were able to enter private Zoom conferences and display inappropriate messages and severely disrupt meetings.⁴⁰ These cyber security deficiencies culminated in the filing of a class action suit against Zoom in 2021, alleging "(1) invasion of privacy, (2) breach of implied contract, (3) breach of the implied covenant of good faith and fair dealing, (4) unjust enrichment; (5) a violation of the UCL, and (6) a violation of the CLRA."⁴¹ While courts throughout the country utilize other virtual platforms in addition to Zoom, these concerns and risks are inherent to the very nature of remote proceedings, regardless of the platform.

Confidentiality and data privacy concerns also raise issues pertaining to the fundamental sanctity and structure of certain proceedings. While courts did not attempt to conduct virtual criminal trials due to the constitutional requirements, several states have experimented with virtual grand jury proceedings.⁴² The New Jersey Supreme Court held that the use of virtual grand juries did not violate a defendant's constitutional right to have their case presented to a grand jury.⁴³ Instead of focusing solely on the possible due process implications, the Defendant argued that the use of virtual proceeding "is incompatible with the secrecy requirements mandated by our Court Rules."⁴⁴ The court reasoned that there was no evidence presented to support the scenario that jurors swearing in from their homes seriously undermined the secrecy of the proceeding.⁴⁵ The court

37. Anthony Spadafora, *Zoom security issues: What's gone wrong and what's been fixed*, TOM'S GUIDE (Jan. 23, 2023), <https://www.tomsguide.com/news/zoom-security-privacy-woes> [<https://perma.cc/7MUB-YDGB>].

38. *Id.*

39. Micah Lee & Yael Grauer, *Zoom Meetings aren't end-to-end encrypted, despite misleading marketing*, THE INTERCEPT (Mar. 30, 2020), <https://theintercept.com/2020/03/31/zoom-meeting-encryption/> [<https://perma.cc/BAC5-WG7V>].

40. Anthony Spadafora, *Zoom security issues: What's gone wrong and what's been fixed*, TOM'S GUIDE (Jan. 23, 2023), <https://www.tomsguide.com/news/zoom-security-privacy-woes> [<https://perma.cc/7MUB-YDGB>].

41. *See In re Zoom Video Commc'ns Inc. Priv. Litig.*, 525 F. Supp. 3d 1017, 1017 (N.D. Cal. 2021).

42. *See e.g.*, *State v. Vega-Larregui*, 248 A.3d 1224, 1224 (N.J. 2021).

43. *Id.* at 1225.

44. *Id.* at 1242.

45. *Id.*

also negated concerns that a virtual environment was not a proper representation of the community because certain jurors could be excluded if they did not have proper technology.⁴⁶ The court stated that this concern was not valid because the court would provide the technology needed and any training if required.⁴⁷

However, critics of virtual grand jury proceedings echo concerns of compromising the secrecy of the proceeding.⁴⁸ Matthew Adams, vice president of the Association of Criminal Defense Lawyers of New Jersey, called the online endeavor an ‘ill-advised experiment’ that he said will exacerbate inequities in the justice system by compromising confidentiality and allowing ‘prosecutors to phone in’ indictments.⁴⁹ To mitigate these concerns, courts using virtual grand jury proceedings should provide the same technology and training and ensure that prosecutors require jurors to utilize the voice recognition and require speakers to identify themselves prior to speaking.⁵⁰

D. CLIENT COMMUNICATIONS: RULE 1.4

Technological advancements can make some lawyering skills and duties easier to abide by. Rule 1.4 entails the continuing duty to keep a client informed.⁵¹ This duty requires a lawyer to “(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules.”⁵² To fulfill this duty, the lawyer must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”⁵³ This reasonable consultation entails the prompt delivery of information from opposing counsel but also requires a lawyer “to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”⁵⁴ While technology like email and videoconferencing devices can make it easier for attorneys to inform their clients, it gets more complex if the litigation itself takes place on a virtual platform, especially if a client is participating in a virtual proceeding from a different location than their attorney.

Courts utilized video conferencing for certain proceedings before the pandemic and, in 2010, the National Center for State Courts (“NCSC”) conducted a study to

46. *Id.* at 1244.

47. *Id.*

48. Ann Marimow & Justin Jouvenal, *Courts dramatically rethink the jury trial in the era of the coronavirus*, WASHINGTON POST (July 31, 2020), https://www.washingtonpost.com/local/legal-issues/jury-trials-coronavirus/2020/07/31/8c1fd784-c604-11ea-8ffe-372be8d82298_story.html [https://perma.cc/EDJ7-RLJ8].

49. *Id.*

50. *See State v. Vega-Larregui*, 248 A.3d 1224, 1248 (N.J. 2021) (while the court ruled that the grand jury was fundamentally fair, it did emphasize that in the future, courts should provide technology and training to mitigate any concerns mentioned in the complaint).

51. MODEL RULES R 1.4.

52. MODEL RULES R 1.4.

53. MODEL RULES R 1.4.

54. MODEL RULES R 1.4.

analyze the effects of these virtual proceedings.⁵⁵ The data indicated that at the time, only 36.9 percent of courts utilizing video conferencing had capabilities to support a private communication feature between an attorney and their client.⁵⁶ While this study predates the COVID-19 pandemic, the increased use of video conferencing perpetuates the inequities.

Although video conferencing platforms have made strides to ensure there are sufficient privacy safeguards like Zoom breakout rooms to facilitate client communications, their proper use has not been fully studied. The Supreme Judicial Court of Massachusetts, Essex Division, addressed these challenges during the COVID-19 pandemic in a May 2022 case where a mother argued that the virtual parental termination proceedings violated her due process rights.⁵⁷ The court in this case was operating under an order issued in response to the COVID-19 pandemic that authorized the Juvenile Court's termination proceedings to continue "at the discretion of the trial judge, but only virtually."⁵⁸ The Judicial Supreme Court had already affirmed in previous cases like *Vasquez v. Diaz*, that certain types of virtual criminal proceedings like suppression hearings were not a *per se* violation of a defendant's due process rights, and in the *Adoption of Patty*, the court affirmed that virtual termination proceedings, which are civil in nature, are also not a *per se* violation of the parent's due process rights.⁵⁹ However, the court emphasized that these proceedings are not a "*per se* violation provided that adequate safeguards are employed."⁶⁰

However, the court in *Adoption of Patty* ruled that the trial court failed to provide adequate safeguards and thus violated the mother's due process rights.⁶¹ In *Adoption of Patty*, the first day of the trial was "plagued by technological issues."⁶² The mother was constantly dropping from the call and unable to question the opposing party's witnesses and was unavailable when the state called her as its fourth witness.⁶³ The judge suspended the proceeding until the court could determine the cause of the mother's absence.⁶⁴ Two days later, the trial continued, despite two requests from the mother for an in-person hearing.⁶⁵ Although the mother appeared to have better technical connectivity, she declared a certain

55. Eric T. Bellone, *Private Attorney- Client Communications and the Effect of Videoconferencing in the Courtroom*, 8 J. OF INT'L COMMERCIAL L. AND TECH. 24, 24 (2013).

56. *Id.* at 44.

57. *Adoption of Patty*, 186 N.E.3d 184, 198 (Mass. 2022).

58. *Id.* at 189 (citing Juvenile Court Standing Order 8-20(IV)(B) (2020)).

59. *Id.* at 194 (citing *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822 (2021)); *see also Commonwealth v. Curran*, 178 N.E.3d 399, 399 (2021) (holding that courts can offer defendants the option to partake in virtual bench trials).

60. *Adoption of Patty*, 186 N.E.3d 184, 198 (May 9, 2022).

61. *Id.* at 200.

62. *Id.* at 188.

63. *Id.*

64. *Id.* at 191.

65. *Id.*

explicative and dropped from the call.⁶⁶ Three days later, the judge terminated her parental rights.⁶⁷ In its ruling, the Supreme Judicial Court found that the trial court had failed to maintain the proper safeguards required of it under the 14th Amendment.⁶⁸

The court listed adequate safeguards such as maintaining private virtual rooms for clients to consult with attorneys, taking steps to ensure clients could introduce evidence and exhibits virtually, and properly discerning whether clients had sufficient access to the technology required for virtual proceedings.⁶⁹ The Supreme Judicial Court ultimately ruled that the trial court never attempted to determine whether the mother had the necessary technology to participate in the proceeding.⁷⁰ It also highlighted how there was no evidence that the Zoom platform had the requisite “private ‘breakout- room’ so the mother could consult with stand-by counsel.”⁷¹ These technological deficiencies were also present as the record indicated that there was no attempt by the trial court to offer ways for the mother to share exhibits and introduce evidence.⁷² While these deficiencies violated her due process rights, they also present the significant challenges lawyers face in effectively and ethically communicating with clients in a virtual proceeding. The lack of a break-out room or simply the lack of properly informing clients of break-out room functions significantly undermines a lawyer’s ability to communicate and “explain matters” to their client.⁷³ Thus, the client’s ability to make an informed decision regarding their case, based on the information communicated to them, as protected under Rule 1.4, is severely undermined.

E. PROPER COMMUNICATIONS IN A VIRTUAL ENVIRONMENT

As the court in *Adoption of Patty* ruled, there are adequate safeguards that courts and practitioners can utilize to both protect client’s constitutional rights, but more specifically, pertaining to practicing ethically, uphold the ethical duties of the *Model Rules*. In a Judicial Decision meeting, the American Bar Association laid out basic guidelines that practitioners should follow in a virtual environment.⁷⁴ One of the most pertinent guidelines for communications involved knowing and understanding the technology.⁷⁵

66. *Id.*

67. *Id.*

68. *Id.* at 200.

69. *Id.* at 194 (citing safeguards the court considered sufficient in *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 822 (2021)).

70. *Adoption of Patty*, 186 N.E.3d 184, 200 (Mass. 2022).

71. *Id.* at 187.

72. *Id.* at 200.

73. MODEL RULES R 1.4.

74. American Bar Association, Judicial Division, *How to Stay Ethical in Virtual Court*, ABA (Nov. 07, 2021), <https://www.americanbar.org/news/abanews/aba-news-archives/2022/11/virtual-court-ethics/> [https://perma.cc/NU53-E8CC].

75. *Id.*

F. VIRTUAL INTRODUCTION OF EVIDENCE

Virtual proceedings also entail the virtual submission and handling of evidence, which leads to preservation and authenticity concerns.⁷⁶ As the *Adoption of Patty* case highlighted, clients can face significant hurdles in presenting exhibits and documents over video-conferencing platforms.⁷⁷ The court in *Adoption of Patty* described safeguards to mitigate the difficulties in introducing evidence. For example, the court described common screen sharing functions “which permits participants to show electronic documents to the other participants.”⁷⁸ In the event that a participant cannot or does not wish to use the screen sharing function, the court noted that a participant can simply “hold a physical document in front of the camera to display it to the other participants.”⁷⁹ While the *Adoption of Patty* court highlighted measures that participants can utilize to introduce evidence, it failed to evaluate the possible authenticity and record preservation issues specific to these measures. However, various courts and organization have released guidance and amended rules for managing and submitting virtual evidence.⁸⁰

IV. WITNESS CREDIBILITY AND EFFECTIVE REPRESENTATION

Virtual proceedings also present more nuanced barriers to effectively representing a client due to evidence and witness credibility issues that can implicate Rule 1.1 of the *Model Rules*. Rule 1.1 establishes the foundational competency requirement: “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁸¹

A. COMPETENCY UNDERMINED BY VIRTUAL COMMUNICATIONS

The already complex notion of competency gets more nuanced by technological advancements that perplex even the most apt technology users. The American Bar Association released a formal opinion highlighting the various *Model Rules* that are implicated through the increased use technology, most specifically with the virtual proceedings as a result of COVID-19 stay at home orders.⁸² The opinion focused on Rules 1.1, 1.4, and 1.6. For Rule 1.1, the Formal Opinion 498 maintained that this competency requires that attorneys remain knowledgeable on all relevant technology that can affect their representation.⁸³ This type of

76. See generally *Adoption of Patty*, 186 N.E.3d 184 (Mass. 2022).

77. See *id.*

78. *Id.* at 198 (quoting *Vazquez- Diaz v. Commonwealth*, 167 N.E.3d 822, 829 (Mass. 2021)).

79. *Id.*

80. *Managing Evidence for Virtual Hearings*, NATIONAL CENTER FOR STATE COURTS JOINT TECHNOLOGY CONFERENCE (June 25, 2020).

81. MODEL RULES R 1.1.

82. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498 (2021).

83. *Id.*

competency can be undermined in instances that appear jovial in nature like the viral virtual proceeding where an attorney accidentally displayed a cat filter on Zoom.⁸⁴ However, it can also be highlighted by more serious reported instances where court reporters and lead counsel have dropped off virtual proceedings in the middle of key examinations or depositions.⁸⁵

Some jurisdictions have introduced trainings to try and mitigate these concerns. For example, Maryland Courts created a “Remote Hearing Toolkit” that provides resources and information on gaining access to technology and training, as well as general information to assist with remote hearings.⁸⁶ This toolkit was cited by the Maryland subcommittee, which was created to analyze the effects of virtual proceedings during Covid-19 as one of the many resources provided during the pandemic.⁸⁷ This report also studied the effects virtual proceedings could have on administering justice effectively and efficiently during the pandemic. One of the subcommittee’s concerns was how it was “more difficult for the finder of fact to adequately assess the credibility of witnesses using existing remote technology.”⁸⁸

While the Maryland subcommittee offered an overview of suggestions and protocols to enact for remote proceedings, other studies, like a mock trial simulation, conducted by Karen Lisko and Jeff Frederick, in coordination with a task force created by the Maricopa County (Arizona) Judiciary, conducted in depth analyses to study witness credibility in remote proceedings.⁸⁹ The simulation involved two separate mock trials for a civil defamation case, with two separate pools of jurors.⁹⁰ In the first trial, an in-person trial, jurors heard testimony from a witness that “was masked or behind Plexiglass.”⁹¹ A second set of jurors, heard testimony from an unmasked witness in a remote video proceeding.⁹² While the in person jurors indicated they could “generally assess [the witness’s] emotion”, . . . “the remote jurors expressed a stronger consensus that they could readily see her emotion and assess her credibility because her image was so prominent on their screens.”⁹³

84. See Daniel Victor, ‘I’m Not a Cat,’ says Lawyer Having Zoom Difficulties, *NEW YORK TIMES* (May 21, 2021, 9:00 AM), <https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html> [<https://perma.cc/HA6D-644E>].

85. Staci Zaretski, *Some Of The Tech Mishaps Lawyers Have Experienced During Virtual Court Are Bonkers*, *ABOVE THE LAW* (Mar. 17, 2021, 1:43 PM), <https://abovethelaw.com/2021/03/some-of-the-tech-mishaps-lawyers-have-experienced-during-virtual-court-are-bonkers/> [<https://perma.cc/C2VH-V2KF>].

86. *Remote Hearing Toolkit*, MARYLAND COURTS <https://www.mdcourts.gov/legalhelp/remotehearing> (last accessed on Apr. 15, 2023) [<https://perma.cc/W7BY-TVFP>].

87. See generally Report of Joint Subcommittee on Post-COVID Judicial Operations, MARYLAND JUDICIARY (Mar. 09, 2021).

88. *Id.*

89. Karen Lisko, *Bearing Witness To, Well, Witnesses: An Examination of Remote Testimony Versus In-Court Testimony*, 51 *SOUTHWESTERN L. REV.* 63, 63 (2021).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 66.

While the Lisko study primarily focused on jurors' perception and preference towards remote proceedings, it also cited the different response from members of the legal profession.⁹⁴ Lisko cited a 2020 ABA Judicial Decision Survey, regarding remote proceedings, measuring lawyer's and judge's responses to virtual proceedings.⁹⁵ In the survey, lawyers had both positive and negative responses to the increased use of virtual proceedings.⁹⁶ Of the negative responses, some lawyers believed virtual proceedings were "bad for trials," "very impersonal," and created an environment where "witnesses [and] attorneys could cheat offline."⁹⁷

B. JURORS' DIMINISHED ABILITY TO PERCEIVE WITNESS CREDIBILITY

While the Lisko simulation demonstrated that, in certain instances, jurors may be more likely to view the witness favorably if they can clearly and more closely view the witness over video, some members of the legal community state otherwise. While specifically discussing jurors' ability to perceive dishonest witnesses, some attorneys stated that it is harder for jurors to do so in a virtual environment. For example, one Massachusetts attorney stated: "Dishonest witnesses tend to fidget, perspire, and have difficulty maintaining eye contact. These critical emotional cues can become ambiguous when a witness is not physically present."⁹⁸

C. CORRELATION BETWEEN AUDIO QUALITY AND WITNESS CREDIBILITY

While the Lisko study demonstrated that jurors may prefer virtual proceedings and attorneys and judges have less favorable opinions of remote proceedings, there are psychological studies which indicate that virtual proceedings and technical difficulties could cause a juror to perceive the witness as less credible. In a study researching the relationship between audio quality issues in virtual proceedings and lowered perception of witness credibility, researchers found that the poorer the audio quality and other technical glitches, the less likely jurors would be to perceive the witness favorably.⁹⁹ The study found that low audio quality leads to less favorable evaluations of witnesses and lower weighting of

94. Karen Lisko, *Bearing Witness To, Well, Witnesses: An Examination of Remote Testimony Versus In-Court Testimony*, 51 SOUTHWESTERN L. REV. 63, 67 (2021) (citing *Judging During the Pandemic: What Judges and Lawyers (and Jurors) Think About Remote Proceedings and the Future of Court Operations*, ABA (May 20, 2021), https://www.americanbar.org/groups/judicial/events_cle/program-library/judging-during-the-pandemic/ [<https://perma.cc/6VGX-97N7>]).

95. *Id.*

96. *Id.*

97. *Id.*

98. Andrew Myers, *Virtual Court: Can they Zoom away Right to Appear in Court?* LAW OFFICES OF ANDREW MYERS (OCT. 18, 2020), <https://attorney-myers.com/2020/10/virtual-court-can-they-zoom-away-right-to-appear-in-court/> [<https://perma.cc/CZZ8-EAS3>] (quoting Atty. Vikas Dhar, *Mass. Lawyers Weekly*, p. 25, Aug. 31, 2020).

99. See Elena Bild, Annabel Redman, Eryn J. Newman, Bethany R. Muir, David Tait & Norbert Schwarz, *Sound and Credibility in the Virtual Court: Low Audio Quality Leads to Less Favorable Evaluations of Witnesses and Lower Weighting of Evidence*, 45(5) LAW AND HUMAN BEHAVIOR, 481, 481 (2021).

evidence.¹⁰⁰ The premise of the research stemmed from the “[m]etacognitive research show[ing] that the subjective ease or difficulty of processing information can affect evaluations of people, belief in information, and how a given piece of information is weighted in decision making.”¹⁰¹ The study discussed how even small and mundane technological issues like “[a]n echo or static on the audio may be enough to influence jury decision making, even when the jury is not actually missing out on content and merely experiences some difficulty in listening to evidence.”¹⁰² The study also addressed how more significant technological errors like actually dropping from a call in the middle of testifying could have a large impact on juror perception.¹⁰³ Nonetheless, the study stated that both types of technological difficulties “have obvious consequences for human judgment and cognition[.]”¹⁰⁴

The study relied on metacognitive research to explain why these technological difficulties can affect juror’s perception of witnesses. The researched showed that “processing the content of a message is accompanied by subjective experiences of ease or difficulty, which can shape how much people trust the communicator, agree with the message, remember its details, and rely on it when making a decision.”¹⁰⁵ To analyze whether “audio quality influenced people’s perceptions of a witness’s statement and impressions of a witness,” the study conducted various experiments, and particularly one experiment (“Experiment 1”), with witnesses presenting the same testimony but with different sound and audio quality.¹⁰⁶ The study concluded that “low-quality audio systematically led to less favorable evaluations of witnesses, poorer memory for factual evidence, and reduced the weighting of the evidence in jurors’ decision making.”¹⁰⁷

These studies indicate that jurors can clearly be affected and perceive witnesses differently depending on whether it is a virtual proceeding or not. This change in perception as well as the specific deficiencies in lawyers being able to “read the room” can alter a lawyer’s ability to competently represent their client and abide by Rule 1.1.

V. SOLUTIONS AND RECOMMENDATIONS

A. MAINTAINING COMPETANCY IN A VIRTUAL ENVIRONMENT: UPHOLDING RULE 1.1. DUTIES

While lawyers may not be able to control for all technical difficulties, maintaining technological knowledge can contribute significantly to a lawyer’s ability

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 482.

105. *Id.*

106. *Id.*

107. *Id.* at 492.

to competently represent their client and abide by Rule 1.1 duties. In a 2021 webinar hosted by the American Bar Association, Judicial Division, different attorneys and members of the legal profession offered advice for practicing in virtual environments.¹⁰⁸ The General Counsel for Stoll Keenon Ogden PLLC in Lexington, Kentucky, stated that “[y]ou are the agent for the client. And you don’t want to put yourself in a position where – because you don’t know how to use the technology, because you don’t have the right bandwidth – you are not presenting the best view in front of the judge.”¹⁰⁹ Thus, lawyers should continue to keep themselves up to date with current trainings and technology utilized in virtual proceedings. While certain jurisdictions have released different rules, regulations, and guidelines to properly practice in virtual environments, lawyers should take it upon themselves to utilize the various trainings offered by the virtual platform companies.¹¹⁰

The best way practitioners can maintain their competency is to keep abreast with the technology and ensure their clients know how to utilize the current technology.¹¹¹ Guidance from the webinar also emphasized how “[i]t is not enough that lawyers know the technology.”¹¹² Judge Peter M. Reyes Jr. of the Minnesota Court of Appeals stated that “judges need to be familiar with how the technology works.”¹¹³ To sufficiently preserve the sanctity of judicial proceedings and ensure that the defendant’s due process rights are being upheld, judges must also be well versed on the relevant technology. In cases like *D.M.R. v. M.K.G.*, the judges utilized insufficient technology standards in serving the defendants.¹¹⁴ Thus, these decisions highlight the need for all members of the legal community to maintain technological competency to abide by Rule 1.1 and ensure swift judicial proceedings.

Furthermore, when prepping for trial, practitioners should also keep up to date with the relevant studies and understand how jurors may react to different environments if the proceedings continue to be held virtually.

B. MANAGING CLIENT CONFIDENTIALITY UNDER RULE 1.6

The Judicial Division webinar also laid out guidelines for maintaining client confidentiality and properly communicating with clients during virtual

108. See American Bar Association, Judicial Division, *How to Stay Ethical in Virtual Court*, ABA (Nov. 07, 2021), <https://www.americanbar.org/news/abanews/aba-news-archives/2022/11/virtual-court-ethics/> [https://perma.cc/NU53-E8CC].

109. *Id.*

110. *Remote Hearing Toolkit*, MARYLAND COURTS <https://www.mdcourts.gov/legalhelp/remotehearing> (last accessed on Apr. 15, 2023, 9:00 AM) [https://perma.cc/W7BY-TVFP].

111. American Bar Association, Judicial Division, *How to Stay Ethical in Virtual Court*, ABA (Nov. 07, 2021), <https://www.americanbar.org/news/abanews/aba-news-archives/2022/11/virtual-court-ethics/> [https://perma.cc/NU53-E8CC].

112. *Id.*

113. *Id.*

114. See *D.M.R. v. M.K.G.*, 252 A.3d 567 (N.J. Super. A.D. 2021).

proceedings.¹¹⁵ It stipulated that lawyers should create a plan for one-on-one lawyer-client meetings to “accommodate confidential lawyer-client discussions.”¹¹⁶ Furthermore, as the court in the *Adoption of Patty* case stated that if there is an option for a breakout room, they need to know how to use it.¹¹⁷ In this case, the court was not sure if there was a breakout room feature available.¹¹⁸ This uncertainty has already been mitigated with the increased use of virtual platforms and the information and training available for utilizing the rooms. However, lawyers must keep up to date with these platforms.

VI. CONCLUSION

The ensuing virtual environment from the COVID-19 pandemic allowed courts across the country to continue issuing rulings and preserve trials and proceedings. However, the rapid move to virtual environments came with many challenges. These challenges affected how lawyers communicated with clients, safeguard client confidentiality, and competently represent clients. While there are ethical vulnerabilities inherent in these challenges, if practitioners can continue to adapt and keep themselves abreast of the mitigation measures, they can continue to ethically practice in these virtual environments.

115. American Bar Association, Judicial Division, *How to Stay Ethical in Virtual Court*, ABA (Nov. 07, 2021), <https://www.americanbar.org/news/abanews/aba-news-archives/2022/11/virtual-court-ethics/> [https://perma.cc/NU53-E8CC].

116. *Id.*

117. *Adoption of Patty*, 186 N.E.3d 184, 198 (Mass. 2022).

118. *Id.*