STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Catherine A. Jacobs, P-32996,

Respondent/Appellant,

Case No. 19-132-GA

Decided: April 29, 2021

Appearances:
Nathan C. Pitluk, for Grievance Administrator, Petitioner/Appellee
Donald D. Campbell, for Respondent/Appellant

BOARD OPINION

Kent County Hearing Panel #5 of the Attorney Discipline Board sent out a notice of hearing, scheduling this matter for a virtual proceeding via Zoom videoconferencing software. Respondent filed an objection to the virtual hearing, and the Administrator filed a response. Thereafter, the hearing panel issued an order overruling respondent's objection to a virtual hearing, and respondent timely filed an interlocutory Petition for Review of that order pursuant to MCR 9.110(E)(5) and MCR 9.118(A)(1).

Respondent argues that the hearing panel's decision denying an in-person hearing is erroneous for three reasons: (1) MCR 9.115(G) requires an in-person hearing; (2) respondent is entitled to an in-person hearing under the Confrontation Clause pursuant to *People v Jemison*, 505 Mich 352; 952 NW2d 394 (2020); and (3) an in-person hearing is necessary because credibility is a core issue in this case. The Grievance Administrator has taken the position that (1) the plain language of MCR 9.115(G) does not require an in-person hearing; (2) the Confrontation Clause of the Sixth Amendment does not apply to Michigan attorney discipline proceedings; (3) even if the Sixth Amendment applies, it can be satisfied with videoconferencing during the COVID-19 pandemic; and (4) the Confrontation Clause does not apply without an adverse witness.

Pursuant to MCR 9.118(A)(1), "[t]he Board may grant review of a nonfinal order and decide such interlocutory matters without a hearing." In this case, the parties have filed extensive briefs with the hearing panel and on review. Oral argument is not likely to aid the Board in making a decision on this issue, so the Board has decided the matter without a hearing. For the following reasons, we grant respondent's request for interlocutory review, deny respondent's request for oral argument pursuant to MCR 9.118(A)(1), and affirm the hearing panel's order overruling respondent's objection to a virtual hearing.

I. Factual Background.

On May 13, 2020, the Attorney Discipline Board issued General Order ADB 2020-2 regarding operations in light of COVID-19, indicating that "[a]ll scheduled panel hearings, prehearing motions, and conferences shall be conducted telephonically or by videoconference until further notice," which is consistent with the Michigan Supreme Court's Administrative Orders and the Governor's Executive Orders then in effect.[1] Michigan Supreme Court Administrative Order 2020-6 expanded the authority for judicial officers to conduct proceedings remotely:

> On order of the Court, pursuant to 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, the Court authorizes judicial officers to conduct proceedings remotely (whether physically present in the courtroom or elsewhere) using two-way interactive videoconferencing technology or other remote participation tools under the following conditions:
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> - any such procedures must be consistent with a party's Constitutional rights;
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> - the procedure must enable confidential communication between a party and the party's counsel;

[1] The Executive Orders referenced in the ADB General Orders have been rescinded, superseded, and/or struck down by the Michigan Supreme Court. See *In re Certified Questions from the United States District Court*, Western District of Michigan, Southern Division *(Midwest Institute of Health, PLLC v Governor*), 506 Mich 332; – NW2d – (2020). However, the Court's Administrative Orders remain in effect. In addition, the Michigan Department of Health and Human Services has issued several epidemic orders which require mask wearing, limit capacity of non-residential indoor and outdoor gatherings, and require employees to work from home if possible.

> - access to the proceeding must be provided to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule;
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> - the procedure must enable the person conducting or administering the procedure to create a recording sufficient to enable a transcript to be produced subsequent to the activity.
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> While this order is in effect, and consistent with its provisions, all judges in Michigan are required to make a good faith effort to conduct proceedings remotely whenever possible. Although adjournments are permitted when necessary, courts are directed to implement measures to ensure all matters may proceed as expeditiously as possible under the circumstances, given the particular public health conditions in each locality and the technology resources and staffing situations in place at each court . . .

Administrative Order 2020-14 reiterates that "courts must continue to conduct essential functions, and are expected to use their best efforts to provide timely justice in all other matters." To achieve this goal, the Court has authorized courts and judicial officers "to conduct proceedings remotely to the greatest extent possible . . ." AO 2020-14.

Pursuant to the Court's Administrative Orders and this Board's General Order, the hearing panel issued a notice of hearing, scheduling this matter for hearing via Zoom videoconferencing software. Respondent objected based, in part, on her reading of MCR 9.115(G) and the Confrontation Clause, and the Grievance Administrator responded. After adjourning the hearing initially on the motion of respondent due to the fact that her partner contracted the coronavirus and she was required to isolate, the hearing panel issued its comprehensive order overruling respondent's objections on various grounds, including an analysis of the court rules governing these proceedings, the orders of the Court and the Board issued after the onset of the pandemic, a determination that the Confrontation Clause does not apply in attorney discipline proceedings, and a determination that even if it did, a respondent's right of confrontation would not be abridged by a videoconference hearing. This review proceeding followed.

II. MCR 9.115(G) Does Not Preclude Remote Discipline Hearings.

Respondent first argues on review that "[t]he Michigan Court Rules require an in-person hearing." Specifically, respondent relies on MCR 9.115(G), asserts that it contains the word "location," and contends that this would mean that an in-person hearing is required.

MCR 9.115(G), provides, in part, as follows:

> The board or the chairperson of the hearing panel shall set the time and place for a hearing. Notice of a hearing must be served . . . . **Unless the board or the chairperson of the hearing panel otherwise directs, the hearing must be in the county in which the respondent has or last had an office or residence**. . . . A party may file a motion for a change of venue. The motion must be filed with the board and shall be decided by the board chairperson, in part, on the basis of the guidelines in MCR 2.221. . . [Emphasis added.]

Purporting to quote from the rule, and referencing dictionary definitions of the word "location," respondent argues that unambiguous language must be applied as written without construction or interpretation, and that, "The court rule requires an in-person hearing at a single location." This argument is fatally flawed for many reasons, the first of which is that the rule does not contain the word "location."[2] However, this is not even the most important point. Construing this provision as respondent does is not at all consistent with rules of construction employed to interpret statutes and court rules. To the contrary, it requires wishful supposition to supplant the actual language of the rule. The rule establishes certain notice and initial venue provisions for discipline hearings, as well as providing broad discretion for the Board or panel chair to order otherwise. As the Administrator points out, nothing in the plain language of this rule requires that a hearing be held in-person.

More important, respondent's construction requires us to ignore the text of the very rule relied upon as well as other parts of subchapter 9.100. As noted above, the rule provides: "*Unless the board or the chairperson of the hearing panel otherwise directs*, the hearing must be in the county in which the respondent has or last had an office or residence" (emphasis added). Respondent's argument ignores this clear text. Principles of statutory construction apply when considering the meaning of court rules. *Anonymous v AGC*, 430 Mich 241, 250 n 5; 422 NW2d 648

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[2] Respondent asserts, at page 8 of her principal brief, that the rule says "the Board or chairperson of the hearing panel may 'otherwise direct[] another location . . . ,'" citing MCR 9.115(G).

(1987). A reading which requires us to disregard the plain language of the whole rule and render portions meaningless must be avoided. *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 574; 592 NW2d 360 (1999).

Other parts of the disciplinary procedure rules would have to be similarly disregarded. For example, MCR 9.115(I)(3) permits witnesses "to testify by telephonic, voice, or video conferencing." We are required to give effect to both MCR 9.115(G) and (I)(3). *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125; 860 NW2d 51 (2014). In *Speicher*, the Court elaborated upon this duty:

> "statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." An attempt to segregate any portion or exclude any portion of a statute from consideration is almost certain to distort legislative intent. Therefore, plaintiff's strained reading of an excerpt of one sentence must yield to context. [*Speicher*, 497 Mich at 137-138; emphasis in original; footnotes omitted.]

There is no merit to respondent's argument that MCR 9.115(G) requires an in-person hearing.

III. The Confrontation Clauses of US Const, Am VI and Const 1963, art 1, § 20 Do not apply in Attorney Discipline Proceedings.

Respondent next argues that: "The evolving public health crisis justifies the use of virtual hearings in many situations. But not here. Jacobs has a fundamental right to confront the witnesses against her – in person."[3] Respondent contends that because some Michigan authorities characterize attorney discipline proceedings as "quasi-criminal," the right to confrontation in criminal proceedings applies here and the hearing panels have no discretion to order that a discipline hearing be conducted via videoconferencing technology in light of *People v Jemison*, *supra*.[4]

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[3] Petition for review, p 10.

[4] In *Jemison*, the Michigan Supreme Court held that a forensic analyst's two-way, interactive video testimony violated the defendant's rights under Sixth Amendment of the United States Constitution and Article I, § 20 of the Michigan Constitution which guarantee criminal defendants the right to confront the witnesses against them, noting that the United States Supreme Court's decision in *Crawford v Washington*, 541 US 36; 24 S Ct 1354; 158 L Ed 2d 177 (2004), transformed the Court's approach to confrontation rights. Specifically, our Court summarized the transformation thus:

> For almost 25 years before *Crawford*, reliability was the touchstone of the Court's Confrontation Clause doctrine. In *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980), the

The Grievance Administrator's response traces some of the history of the evolution of attorney discipline procedures, including some cases characterizing the proceedings as civil and the adoption of rules of procedure that confirm this. And both parties agree that the phrase "quasi-criminal" simply means a proceeding that is civil in nature with some protections analogous to those in criminal proceedings, and that "it is not necessary to observe all of the rules of criminal law and procedure in a disbarment proceeding." *In re Woll*, 387 Mich 154, 161; 194 NW2d 835, 838 (1972).

A. Rules of Procedure Governing Michigan Attorney Discipline Proceedings.

MCR 9.115(A) provides that: "Except as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel. Pleadings must conform as nearly as practicable to the requirements of subchapter 2.100." In discipline proceedings a respondent "must serve and file a signed answer or take other action permitted by law or [subchapter 9.100]." MCR 9.115(D)(1). Further, "[a] default, with the same effect as a default in a civil action, may enter against a respondent who fails within the time permitted to file an answer admitting, denying, or explaining the complaint, or asserting the grounds for failing to do so." MCR 9.115(D)(2).

In keeping with the principle that "[p]rocedures must be as expeditious as possible," MCR 9.102(A), discovery proceedings such as interrogatories, requests for admission or inspection, depositions, etc., are generally not available. MCR 9.115(F)(4)(a); *Grievance Administrator v Timothy A. Stoepker*, 13-32-GA (ADB 2014) (denying interlocutory review of panel's denial of respondent's motion to compel answer to request for admissions under MCR 2.312 as outside the available discovery mechanisms parties in these proceedings may pursue unilaterally). However,

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Footnote 4 continued from preceding page –

> Court held that the Confrontation Clause is satisfied even if a hearsay declarant is not present for cross-examination at trial as long as the statement bears adequate "indicia of reliability." Citing *Roberts*, the Court held in *[Maryland v Craig*, 497 US 836, 845-846; 851; 110 S Ct 3157; 111 L Ed 2d 666 (1990)], that a defendant's right to confront a child witness may be satisfied absent a face-to-face encounter when necessary to advance an important public policy and when the testimony is reliable enough. *Craig*, 497 US at 850; 110 S Ct 3157, citing *Roberts*, 448 US at 64, 100 S Ct 2531. But in *Crawford*, the Court overruled Roberts and shifted from a reliability focus to a bright-line rule requiring a face-to-face encounter for testimonial evidence. *Crawford*, 541 US at 61-63, 68-69; 124 S Ct 1354. [¶] *Crawford* did not specifically overrule *Craig*, but it took out its legs. To reconcile *Craig* and *Crawford*, we read Craig's holding according to its narrow facts. *People v Jemison*, 505 Mich at 355–56.]

failure to comply with the abbreviated discovery procedures under MCR 9.115(F)(4)(a) may subject a party to "one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c)." See MCR 9.115(F)(4)(a) (final paragraph). Among the condensed discovery procedures in discipline is the exchange, upon request, of "nonprivileged information and evidence relevant to the charges against the respondent." MCR 9.115(F)(4)(a)(ii). The scope of discovery in that rule resembles the general scope set forth in civil matters. MCR 2.302(B)(1).

A respondent attorney is subject to discipline if a panel of three attorneys hearing the matter under the rules and procedures applicable to a civil bench trial finds by a preponderance of the evidence that misconduct has been committed. MCR 9.115(A) and (J)(3); MCR 9.111(A) and (C). Certain other rules apply in specific situations. For example, in cases involving former judges, the record of the Judicial Tenure Commission proceeding is admissible. MCR 9.116(C). Also, where a Michigan attorney has been subject to professional discipline elsewhere, a certified copy of the final adjudication by the original jurisdiction subjects the attorney to comparable discipline in this state unless a hearing panel, the Board, or the Court finds that the attorney was not afforded due process in the course of the original proceedings or that such discipline would otherwise be clearly inappropriate. MCR 9.120(C)(1).

Finally, and critically, the procedures specifically applicable to attorney discipline hearings include MCR 9.115(I)(3), which provides: "Upon a showing of good cause by a party, a panel may permit a witness to testify by telephonic, voice, or video conferencing," and the rules applicable to all civil proceedings include MCR 2.407, which also allows "the use of videoconferencing technology by any participant in any court-scheduled civil proceeding." MCR 2.407(B).

Thus, the Michigan Supreme Court designed a discipline system in which "the rules governing practice and procedure in a nonjury civil action" apply. This includes the rules of pleading in civil matters providing for the entry of a default upon a respondent's failure to answer a complaint, discovery rules with civil scope and sanctions, and rules allowing for hearing via videoconferencing technology. In addition, certain rules specifically applicable to attorney discipline proceedings include rules allowing for the imposition of discipline based on certified copies of discipline actions in other jurisdictions and a rule providing that the JTC record is admissible in proceedings involving former judges. Finally, standard of proof employed by a hearing panel in making misconduct findings is the standard applicable in civil matters – preponderance of the evidence. Subchapter 9.100, therefore, establishes a predominantly civil framework for discipline

matters, with certain adaptations consistent with the goal of "protect[ing] the public, the courts, and the legal profession." *Grievance Adm'r v Lopatin*, 462 Mich 235, 244; 612 NW2d 120, 126 (2000), citing MCR 9.105(A).

B. Arguments for Applying the Confrontation Clause in Discipline Proceedings Because They Have Been Called "Quasi-Criminal."

Respondent next argues that, "In Michigan, attorney discipline proceedings are quasi-criminal and the confrontation clause applies."[5] As we explain below, we conclude that the occasional characterization of discipline proceedings as "quasi-criminal" does not mean that the Confrontation Clause applies here. No case in Michigan has held that in-person hearings are required in discipline matters under the constitutions of the United States or Michigan, and respondent has pointed to no case in any US jurisdiction or federal circuit holding that the Sixth Amendment's Confrontation Clause applies in attorney discipline proceedings. To the contrary, there is a clear consensus that the Confrontation Clause does not apply. The hearing panel cited several of these cases in its order, which states in pertinent part:

> The Sixth Circuit has held that the Confrontation Clause does not apply in attorney discipline proceedings:
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> > Marzocco's argument that the introduction of a videotaped deposition at his disciplinary hearing deprived him of his Sixth Amendment right to confront the witness against him is without merit. The Confrontation Clause does not apply to a disbarment case. See *Rosenthal v Justices of Supreme Court of Cal.*, 910 F2d 561, 565 (9th Cir 1990), cert. denied, 498 US 1087 (1991). [*In re Marzocco*, No. 98–3960, 194 F3d 1313; 1999 US App LEXIS 24352, at *3 (CA 6 Sept 28, 1999) (unpublished).]
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> The District of Columbia Court of Appeals has rejected this argument as well, and summarized some of the authorities:
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> > Another of respondent's due-process claims is that he was not permitted to confront his accusers, because the Referee did not grant his request for subpoenas to compel the testimony of the Florida Family Court judge and judges of the Third District who sanctioned him. Although respondent suggests that his inability to obtain subpoenas implicates the Sixth Amendment Confrontation Clause, it

[5] Respondent's petition for review, p 10.

> is well-settled that there is "no confrontation right in an attorney discipline case." *In re Sibley*, [564 F3d 1335, 1341 (2009)] (citing *Rosenthal v Justices of the Supreme Court of Cal.*, 910 F2d 561, 565 (9th Cir 1990) ("The confrontation clause is a criminal law protection. Therefore, it does not apply to a disbarment case.")); see also [*In re Calvo*, 88 F3d 962, 967 (11th Cir 1996).] ("Disbarment proceedings are not criminal proceedings, and . . . there is no right to confront witnesses face to face.") (quoting *Fla. Bar v Vannier*, 498 So2d 896, 898 (Fla 1986)). [*In re Sibley*, 990 A2d 483, 492 (DC, 2010).]

[Order Overruling Respondent's Objection to Virtual Hearing, p 5.]

Respondent argues that the panel committed serious error by citing these cases because they all stemmed from proceedings in states which did not use the term "quasi criminal," but, rather, labeled their proceedings either civil in nature or sui generis. First, this is not accurate, as we discuss below. More important, we do not believe that the use of such labels advances the argument.

Courts in Michigan and elsewhere have characterized discipline proceedings differently at different times, variously regarding them as punitive and therefore quasi-criminal or as civil in nature with the principal aim of public protection.

An early statement of the position that attorney discipline proceedings are civil in nature may be found in *Ex parte Wall*, 107 US 265, 288; 2 S Ct 569, 588–89; 27 L Ed 552 (1883):

> The proceeding is in its nature civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practise in them. Undoubtedly, the power is one that ought always to be exercised with great caution; and ought never to be exercised except in clear cases of misconduct, which affect the standing and character of the party as an attorney.

See also, *Attorney Gen v Lane*, 259 Mich 283, 287–88; 243 NW 6, 8 (1932) ("The proceeding is civil, not quasi criminal, and, beyond discipline of an officer of the court, serves the purpose of protecting the public and removing from the profession an unworthy member."), and see *In re Mills*, 1 Mich 392, 395 (1850) ("The extreme judgment of expulsion is not intended as a punishment inflicted upon the individual, but as a measure necessary to the protection of the public.").

Respondent correctly points out that there is also early (and more recent) precedent in Michigan characterizing the proceedings as quasi-criminal. See, *In re Baluss*, 28 Mich 507, 508

(1874) ("While not strictly a criminal prosecution, it is of that nature, and the punishment, in prohibiting the party following his ordinary occupation, would be severe and highly penal.") This characterization was followed in Michigan for a while, then, perhaps because of *Ex Parte Wall* and *Lane*, the term "quasi-criminal" was not used as much in our state until the United States Supreme Court declared, in a case involving inadequate notice of the charges, that: "These are adversary proceedings of a quasi-criminal nature." *In re Ruffalo*, 390 US 544, 551; 88 S Ct 1222, 1226; 20 L Ed 2d 117 (1968). Thereafter, our Court called the proceedings "quasi-criminal" in decisions regarding notice[6] and involving an attorney's Fifth Amendment rights[7], but the Court has not held that attorneys facing discipline are entitled to Sixth Amendment protections enumerated for criminal proceedings, such as confrontation, trial by jury, assistance of counsel, or compulsory process for witnesses. Instead, the Court has held that "it is not necessary to observe all of the rules of criminal law and procedure in a disbarment proceedings."[8] As we explain below, courts throughout the country are in accord.

Ruffalo involved an Ohio attorney and the Sixth Circuit's reciprocal discipline of that attorney where the Supreme Court found notice, and due process, lacking. The phrase "quasi-criminal" was not tied to any state's system of attorney discipline. Briefly put, the characterization is not consistently used, is not necessary to uphold due process rights for lawyers, and does not dispose of the question here.

Most courts expressly or effectively refer to the proceedings as sui generis.[9] See, e.g., *Matter of Searer*, 950 F Supp 811, 813 (WD Mich, 1996) in which the court explained, "The nature of a disciplinary proceeding is neither civil nor criminal, but an investigation into the conduct of the lawyer-respondent. . . . The purpose of a disciplinary proceeding is not to punish, but rather to determine whether misconduct implicates fitness to continue to function as an officer of the Court."

The distinction respondent seeks to draw between jurisdictions that characterize their discipline system one way or the other, or differently at various times, does not resolve the question

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[6] *See, e.g., State Bar v Freid*, 388 Mich 711; 202 NW2d 692 (1972).

[7] *In re Woll*, 387 Mich 154; 194 NW2d 83 (1972).

[8] *In re Woll*, 387 Mich at 161.

[9] Comment, *Attorney Disciplinary Proceedings: Civil or Criminal in Nature?*, 19 J Legal Prof 257, 263–264 (1994).

whether the Confrontation Clause applies in attorney discipline matters. As one commentator has noted:

> The several descriptions articulated by the courts to describe this proceeding may unnecessarily confuse the issue, for most courts afford challenged attorneys similar procedural protections. Thus, the different terminology employed by the courts may suggest more difference between them than really exists.[10]

However, respondent argues, the panel "made the fundamental error of relying on authorities from jurisdictions that afford different constitutional status to attorney discipline proceedings than Michigan."[11] In fact, as we have explained above, the various ways of describing attorney discipline proceedings do not reflect differences in the aims of lawyer regulation or the rights generally afforded to attorneys. They are different ways of saying essentially the same thing: attorney discipline matters are not private disputes or criminal proceedings; they are for the protection of the public, the courts, and the profession; they are primarily civil in nature; and, attorneys have certain rights as a matter of due process and under court rules adopted in each jurisdiction.

Unable to present any cases supporting the application of the Confrontation Clause in discipline cases, respondent attempts to distinguish cases cited by the panel, like *Marzocco* and *Rosenthal* (holding that there is no right to confrontation in discipline matters), in a manner that is simply not convincing. Respondent notes that *Marzocco* is from the Sixth Circuit and involves an Ohio case. So, too, is *In re Cook*, 551 F3d 542, 549 (CA 6, 2009), where the court stated: "Attorney disciplinary proceedings are not civil actions and not criminal prosecutions. Nevertheless, disbarment involves 'adversary proceedings of a quasi-criminal nature.'" Thus, there is no force whatsoever to respondent's argument that the Confrontation Clause should apply to discipline proceedings in jurisdictions in which courts sometimes describe the proceedings as "quasi-criminal."

Continuing in this vein, respondent advances the argument that *Rosenthal* is suspect and "inapplicable" because the "[t]he Ninth Circuit is one of the jurisdictions that views attorney discipline proceedings as civil. . . . Michigan, on the other hand, views them as quasi-criminal." But, *Rosenthal* involved a case emanating from California which characterized its system as quasi-criminal. *Ainsworth v State Bar*, 46 Cal 3d 1218, 1230; 762 P2d 431, 437 (1988) ("State Bar

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[10] *Attorney Disciplinary Proceedings: Civil or Criminal in Nature?*, 19 J Legal Prof at 265–66.

[11] Petition for review, p 13.

proceedings are generally regarded as quasi-criminal in nature, and a State Bar member is not entitled to traditional criminal procedural safeguards.").

Similarly, respondent seeks to distinguish *In re Sibley*, 990 A2d 483, 492 (DC, 2010), and, yet again, another jurisdiction which calls its system "quasi-criminal" decisively rejects the application of the Confrontation Clause.[12]

As these cases show, the use of the term "quasi-criminal" from time to time does not lead to the incorporation of criminal procedures and the application of the Confrontation Clause. One court has explained this well:

> Mr. Moncier focuses on the phrase "quasi-criminal nature" from *In re Ruffalo* and interprets it as entitling attorneys in disciplinary proceedings to the same due process rights afforded criminal defendants. This argument goes too far. As the Colorado Supreme Court recognized, the due process rights of attorneys in disciplinary proceedings "do not extend so far as to guarantee the full panoply of rights afforded to an accused in a criminal case." *People v Harfmann*, 638 P.2d 745, 747 (Colo.1981); see also *In re Surrick*, 338 F.3d 224, 233 (3d Cir.2003) ("[A]lthough attorney disciplinary proceedings have consequences which remove them from the ordinary run of civil cases, they are not criminal in nature." (alterations and internal quotation marks omitted)); *In re Palmisano,* 70 F.3d 483, 486 (7th Cir.1995) (noting that *In re Ruffalo* "does not require courts to employ the procedures of the criminal law in disbarment matters"); *In re Cordova–Gonzalez*, 996 F.2d 1334, 1336 (1st Cir.1993) ("Although attorney discipline proceedings have been called quasi-criminal, the due process rights of an attorney in a disciplinary proceeding do not extend so far as to guarantee the full panoply of rights afforded to an accused in a criminal case." (citation and internal quotation marks omitted)); *Rosenthal v. Justices of the Supreme Court of Cal*., 910 F.2d 561, 564 (9th Cir.1990) ("A lawyer disciplinary proceeding is not a criminal proceeding. As a result, normal protections afforded a criminal defendant do not apply." (citations omitted)).

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[12] *In re Fay*, 111 A3d 1025, 1031 (DC, 2015) ("Because disciplinary proceedings are 'quasi-criminal,' attorneys subject to discipline are entitled to due process of law. . . . However, disciplinary proceedings are not criminal proceedings, and 'attorneys are not afforded all of the protections which are extended to criminal defendants.' . . . The due process requirement is therefore satisfied by adequate notice of the charges and a meaningful opportunity to be heard."); *In re Schwartz*, 221 A3d 925, 930 n 2 (DC, 2019) (same). See also a case calling the proceedings both "quasi-criminal" and "sui generis," *In re Benjamin*, 698 A2d 434, 440 n 8 (DC, 1997) ("Because disciplinary proceedings are quasi-criminal in nature," we have held that "an attorney who is the subject of such proceedings is entitled to procedural due process safeguards.". . . But it is equally clear that, given the sui generis nature of these proceedings, attorneys are not afforded all of the protections which are extended to criminal defendants.").

> Read as a whole, *In re Ruffalo* stands for the proposition that a lawyer subject to discipline is entitled to procedural due process, including notice and an opportunity to be heard. *In re Ruffalo*, 390 U.S. at 550, 88 S.Ct. 1222. [*Moncier v Bd of Profl Responsibility*, 406 SW3d 139, 156 (Tenn, 2013).]

As the authorities cited in the panel's order quoted above demonstrate, courts have consistently rejected the claim that the Confrontation Clause applies in attorney discipline proceedings. In addition to the cases cited by the panel, see: *In re Abbott*, 437 Mass 384, 393; 772 NE2d 543, 550 (2002) (admitting complainant's videotaped testimony in lieu of live testimony, holding, "there is no established right to confrontation in a bar discipline proceeding."); *In re Disciplinary Proceeding Against Sanai*, 177 Wash 2d 743, 763; 302 P3d 864, 873 (2013) ("the denial of Sixth Amendment confrontation clause rights at a discipline proceeding does not constitute manifest constitutional error"), cert den, 571 US 1202; 134 S Ct 1324; 188 L Ed 2d 307 (2014); and, *Attorney Grievance Com'n of Maryland v Zhang*, 440 Md 128, 148; 100 A3d 1112, 1123 (2014) ("The right of confrontation under the Sixth Amendment to the United States Constitution and Article 21 of Maryland Declaration of Rights applies to a criminal case, not an attorney discipline proceeding.").

We have found one case in which a court held that an adjudicative body in attorney discipline proceedings erred in admitting videoconference testimony by a witness over the respondent attorney's objection. *Iowa Supreme Court Attorney Disciplinary Bd v Akpan*, 951 NW2d 440 (Iowa, 2020). We find this case instructive.

In *Akpan*, the Iowa Supreme Court's decision was based on a discipline rule of procedure providing that: "The respondent may defend and has the right to participate in the hearing in person and by counsel to cross-examine, to be confronted by witnesses, and to present evidence." Iowa R Civ P 36.17(5). In construing the rule, it said: "As a matter of English and as a matter of Latin, the word "confrontation" refers to a face-to-face meeting." *Akpan*, 951 NW2d at 447.

The court then discussed the potential applicability of two cases from other jurisdictions:

> We have found instances where other jurisdictions have allowed testimony by videoconference or telephone over objection in attorney disciplinary proceedings. *In In re Disciplinary Proceedings Against Nunnery*, an attorney had his legal license revoked for seventeen counts of professional misconduct. 334 Wis.2d 1, 798 N.W.2d 239, 242 (2011) (per curiam). In his appeal before the Wisconsin Supreme Court, the lawyer asserted that the disciplinary proceeding referee erred in allowing the telephonic

> testimony of two clients, thereby compromising his constitutional rights. Id. at 243. The court disagreed, ruling that "[a] referee's decision to permit telephonic testimony is a discretionary determination that will be overturned only if the referee erroneously exercised his discretion." Id. at 244–45. The court relied on a general Wisconsin statute allowing video and telephonic testimony in civil proceedings under certain circumstances. Id. at 245. Under that statute, a series of factors can be considered. Id. The court noted that the client-witnesses resided in Texas and Louisiana. Id. The court further noted that the Wisconsin Office of Lawyer Regulation had provided an affidavit outlining in great detail the travel costs the office would incur to bring the witnesses to Wisconsin and that the attorney had not responded to the affidavit. Id. Considering all the circumstances, the Wisconsin Supreme Court found no abuse of discretion in allowing the telephonic testimony. Id.
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> In *Attorney Grievance Commission of Maryland v. Agbaje*, the Maryland Court of Appeals allowed video testimony by a client-witness in a disciplinary proceeding. 438 Md. 695, 93 A.3d 262, 269 (2014). That case also involved an attorney assisting a client in securing a green card. Id. at 270. The attorney had been actively pursuing lawful permanent resident status for the client at the same time that he entered into discussions with the client about investing in the attorney's real estate business. Id. at 270–72. Because of his actions, the bar counsel recommended disbarment, and the Maryland court concluded disbarment was the appropriate sanction. Id. at 284, 286.
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> One of the lawyer's primary arguments on appeal was that the client should have been required to appear in person for the disciplinary hearing. Id. at 275. By then, the client had relocated back to the United Kingdom. Id. at 269. The attorney pointed out that residents of the United Kingdom are allowed to travel freely to the United States without a visa. Id. at 275. Still, considering all the facts, the court concluded that real-time videoconference testimony constituted a reasonable alternative to in-person testimony. Id. at 275–76.
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> These cases illustrate that some other jurisdictions have allowed testimony by videoconference. However, in Iowa, the grievance commission rules do not permit live testimony by videoconference under normal circumstances. Iowa's grievance commission rules specifically give the responding attorney a right to "confront" witnesses testifying against the attorney. Iowa Ct. R. 36.17(5). [*Akpan*, 951 NW2d at 447–48.]

The Iowa court also observed: "Notably, the hearing in this case took place in early October 2019, well before the COVID-19 pandemic. We are not deciding what effect rule 36.17(5) would have under COVID-19 pandemic conditions." *Akpan*, 951 NW2d at 449. That sentence concluded

with a footnote making the basis of the holding clear: "We are not holding there is a constitutional right to confront witnesses in an attorney disciplinary proceeding. Today's decision is based on application of the rules in Iowa Court Rules chapter 36." *Id*., n 6.

Respondent's argument that the confrontation rights of defendants in criminal proceedings under the constitutions of the United States and Michigan apply in attorney discipline proceedings is contrary to the law; the hearing panel did not err in rejecting this argument.

C. In-Person Discipline Hearings are not Constitutionally Compelled, and Such a Holding Would be Inconsistent with the Procedural Rules Adopted by the Michigan Supreme Court.

Subchapter 9.100 and the rules of civil procedure it incorporates clearly establish that these proceedings are primarily civil in nature. These rules also make it clear that discipline hearings via videconferencing technology were contemplated and authorized by the Court even before the onset of the COVID-19 pandemic and the Court's Administrative Orders encouraging the use of such technology in light of the pandemic. The Grievance Administrator cited several pertinent court rules in his brief, including MCR 9.115(I)(3) which expressly allows for videconferencing in discipline hearings.[13] Respondent argues that these rules do not "undermine the Supreme Court precedent" she has cited, and that, "Constitutional requirements remain applicable regardless of enacted court rules," citing MCR 9.102 and MCR 6.001 for the proposition that rules are subordinate to constitutional requirements and severable if found invalid.[14] This is undeniably true, but utterly irrelevant here. Not only must we presume that the Michigan Supreme Court understood what it was doing in promulgating subchapter 9.100, and did not adopt unconstitutional procedures, but no compelling argument to the contrary has been offered. Cases throughout the country reflect a clear consensus that the Confrontation Clause does not apply in discipline proceedings, and that calling a discipline system "quasi-criminal" does not alter this conclusion.

Accordingly, we reject respondent's invitation to declare MCR 9.115(I)(3) and other rules invalid and to import inapplicable procedures contrary to the plain language of subchapter 9.100 adopted by our Court.

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[13] Perhaps this opinion could be criticized for not citing that rule and stopping.

[14] Respondent's reply brief, at page 4.

IV. The Hearing Panel did not Abuse its Discretion in Ordering a Remote Hearing.

Respondent's final argument is that even if an in-person hearing is not mandatory in this case, one is necessary because the specific allegations at issue will require the panel to assess the credibility and demeanor of the witnesses, including respondent.

The Court has seen fit to adopt rules allowing for such testimony in discipline cases upon a showing of good cause and in all civil matters in general following consideration of various nonexclusive factors. See MCR 9.115(I)(3) and MCR 2.407, respectively. The nature of these rules make it clear that the decision to conduct such evidentiary hearings is committed to the discretion of the hearing panel or judge.

These tools for conducting trials were in place prior to the restrictions on public gatherings brought about by the current pandemic. However, much has been learned in the past year about the benefits and drawbacks of adjudication via Zoom and other videoconferencing platforms. Lawyers and factfinders (including hearing panelists) are evaluating remote hearings in comparison to hearings conducted in-person. As with traditional in-person trials, there can be problems to address, but the video platform can also be a highly effective tool for adjudicating cases.[15] Some counsel even report a better connection with the jury in virtual trials, and think the benefits outweigh "the fear of the parade of horribles that could happen."[16] And one juror who had participated in both an in-person trial and a virtual trial reported: "doing it on Zoom 'was in almost all respects better,' saying it was easier to see the documents, exhibits and witnesses on the screen than it would have been in person."[17]

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[15] See, e.g., *Guardant Health, Inc v Found Med, Inc*, No. CV 17-1616-LPS-CJB, 2020 WL 6120186, at *3 (D Del, October 16, 2020) ("To date, the undersigned Judge has presided over three fully remote "video" bench trials (including a patent trial), each one of which involved challenges to the credibility of one or more witnesses. In each case, the undersigned Judge felt that the examinations provided the evidence necessary to assess credibility."); *Testimony In NJ Zoom Trial Wraps In Diabetes Drug IP Row* (Law 360, November 5, 2020) ("Judge Wolfson called the Zoom format 'a highly superior way of trying the case,' in part because there are no social distancing requirements or masking as there would be in an in-person trial, and so she could more easily read body language and facial expressions, and assess witness credibility" citing transcript wherein Judge Wolfson also said "I never sacrificed the ability to judge the credibility of a witness because I couldn't see them properly," [transcript at p 1132]); Brazil, *Credibility Concerns About Virtual Arbitration Are Unfounded* (Law 360, May 26, 2020).

[16] Davis, *A Tale of Two Zoom Trials* (Law 360, March 8, 2021).

[17] *Id.*

In addition to anecdotal reports, there is a growing body of scholarship and advocacy drawing on works by social scientists who have studied various aspects of trials, including the impact of video testimony on outcomes.[18] Authors of contemporary articles cite to many studies and academic papers challenging commonly held beliefs about judging things like remorse, sincerity, and demeanor in general based on nonverbal behaviors.[19] Some scholars have reached a conclusion similar to this one:

> the overwhelming weight of social science research debunks the common-sense belief that demeanor is a reliable cue to credibility. In general, people, including judges, are much less accurate than they think they are when they seek to use witnesses' demeanor to differentiate truthful from untruthful testimony.[20]

Again, the use of videoconference platforms in adjudication is prompting lawyers to reconsider commonly held assumptions as they adapt and adjust their trial preparation. One article weighs some of the considerations:

> On the one hand, the loss of the jury's ability to immediately, sensorially perceive a witness may decrease the jury's ability to evaluate testimony because many nonverbal but credibility-influencing cues are neither visible nor perceptible over video. Camera angles and video quality may obscure nervous tics such as foot tapping and fidgeting hands, or still other body language associated with trust, confidence, authoritativeness or veracity (or lack thereof).
>
> On the other hand, decreasing the jury's ability to perceive these nonverbal cues may alternatively prompt jurors to focus credibility determinations more on the content of testimony and less on amateur psychological musings driven purely by appearances.

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[18] See, e.g., Bender, *Unmuted: Solutions to Safeguard Constitutional Rights in Virtual Courtrooms and How Technology Can Expand Access to Counsel and Transparency in the Criminal Justice System*, 66 Vill L Rev __ (Forthcoming 2021) https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3672441 ; *The Impact of Video Proceedings on Fairness and Access to Justice in Court* (Brennan Center for Justice) https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court (last accessed April 7, 2021); Bandes & Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 Buff L Rev 1275 (2020).

[19] See, e.g., Bandes & Feigenson, *supra.*

[20] *Id.*, at 1286.

> In fact, in a 2018 article published by the Journal of Tort Law, Aldert Vrij and Jeannine Turgeon argued that courts should stop using pattern jury instructions that instruct the jury to consider nonverbal behaviors in evaluating credibility, because research has shown "that rather than being a valid basis, nonverbal cues have little or nothing to do with a witness's truthfulness or credibility." They further argued that:
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> > In recent years, meta-analyses ... have concluded that nonverbal cues to deceit are faint and unreliable. ... Research examining people's ability to detect deceit by observing other people's behavior shows an equally bleak picture. [One] metaanalysis, which included the veracity judgements made by almost 25,000 observers, revealed an average accuracy rate of 54% incorrectly classifying truth tellers and liars, barely above the chance level of 50%.[21]

Other scholars agree that research shows "little difference between the demeanor of deceptive and truthful people," but that witness demeanor still plays a role in understanding testimony, and that "[t]he use of stereotypical vocal and verbal cues to deceit is [also] a hazard facing jurors," in large part because "lawyers performing cross-examination can draw witnesses into these cues to make them appear nervous and untruthful."[22]

It is also becoming more widely known that biases affect determinations by triers of fact, and that bias can occur in traditional settings as well as in remote trials:

> [S]tudies show that judges and other fact-finders employ cues to complex states like remorse in an inconsistent or even contradictory manner, so that one judge may rely on a given behavior as indicative of remorse while another believes the same behavior indicates lack of remorse.
>
> To further complicate matters, legal decision-makers' assessments of demeanor evidence and their use of it in reaching judgments about others' credibility and character are subject to several cognitive-emotional biases. These include the fundamental attribution error (the tendency to ascribe the behavior of others to their inherent character, while ascribing one's own behavior to situational factors); naïve realism (people's belief that they see

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[21] Green & Fish, *Tips For Presenting A Credible Witness By Videoconference* (July 6, 2020, Law 360), citing Aldert Vrij & Jeannine Turgeon, *Evaluating Credibility of Witnesses - Are We Instructing Jurors on Invalid Factors?* 11 J Tort L 231, 232–33 (2018), and *Witnesses Appearing Live Versus on Video: Effects on Observers' Perception, Veracity Assessments and Memory*, 19 Applied Cognitive Psychology 913, 914 (2005).

[22] Denault, Dunbar & Plusquellec, *The detection of deception during trials: Ignoring the nonverbal communication of witnesses is not the solution—A response to Vrij and Turgeon (2018)*, The International Journal of Evidence & Proof (2020, Vol. 24(1) 3–11), p 5. https://journals.sagepub.com/doi/pdf/10.1177/1365712719851133

> the world as it is, underestimating or ignoring the effect of their own cultural, racial, and other biases on their perceptions and judgments); conversely, an egocentric bias according to which people place undue weight on their own conscious emotional responses in gauging others' emotional states; and a variety of other biases that complicate the ability to read the emotional states of others.[23]

We have examined these issues here not to make the claim that virtual proceedings should be equated with in-person hearings in all meaningful respects, including their flaws. Rather, it is important to understand and identify existing problems with adjudication in whatever forum or mode, note the potential that virtual hearings might replicate or exacerbate some of these problems, and not only work toward debiasing in the virtual realm, but also take this opportunity to be more conscious of cognitive biases and other impediments to truth-seeking and the dispensation of justice in all situations.[24] In furtherance of these objectives it has been suggested that witness credibility instructions based on contemporary scientific research could be used more widely, and that they "could be adapted for use in virtual courtrooms, calling attention to specific ways that the videoconferencing interface may distort perceptions and interpretations of demeanor."[25]

In addition to traditional forms of witness preparation, lawyers now consider camera angles, lighting, framing (upper body or head only in the camera's view), background, bandwidth and other factors potentially affecting the presentation of witness testimony. Courts and the hearing panels also play an important role in assuring that witnesses and counsel are not unaware of factors that could negatively affect video testimony.[26] And hearing panels should be mindful of these and other such factors, address them when possible, and keep them in perspective in any event. Tribunals must

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[23] Bandes & Feigenson, 68 Buff L Rev at 1290–91 (footnotes omitted).

[24] *Id.*, at 1292, 1303-1310.

[25] *Id.*, at 1307 (citing Bennett, *The Changing Science of Memory and Demeanor-And What It Means for Trial Judges*, and noting that experimental research has shown that cautionary instructions "have been found to limit the impact of the camera perspective bias, the otherwise robust effect of the angle from which a suspect's videotaped confession is shot on viewer's judgments of whether the confession was voluntary and whether the suspect is guilty."). See also instructions proposed by Vrij & Turgeon, *supra,* n 19, and by Denault, Dunbar & Plusquellec, *supra* n 20.

[26] See, for example, instructions promulgated by the Michigan Supreme Court:
https://courts.michigan.gov/News-Events/covid19-resources/Documents/RemoteWitnessInstruction.pdf
https://courts.michigan.gov/News-Events/covid19-resources/COVID19/ZoomTipsAttysParties.pdf
ADB hearing panels have issued instructions and tips patterned on these templates and those of other courts and attorney discipline agencies.

also consider a host of issues to assure fair, adequate, and equitable access to the tribunal by parties, counsel, witnesses, and the public.[27]

Following the onset of the pandemic and the issuance of the Court's administrative orders, the state's executive and health department orders, and this Board's general orders, hearing panels have conducted approximately 54 hearings via Zoom and live-streamed on YouTube in approximately 40 cases involving discipline or reinstatement. Court reporters have been present at every hearing, detailed instructions to parties/counsel and witnesses have been issued, and joint prehearing orders have generally been required to facilitate trial, including introduction of testimonial and documentary evidence, identification and briefing of legal issues, and identification of issues of fact to be litigated.

In this matter, the hearing panel issued its Notice of Virtual Hearing and Scheduling Order which provided a time within which objections to the use of videoconferencing technology to conduct the hearing should be filed pursuant to MCR 2.407.[28] Respondent objected on the grounds that: MCR 9.115(G) required an in-person hearing and such was possible or would soon be possible in Kent County; and, (2) an in-person hearing was required by the Confrontation Clause.[29] The hearing panel overruled respondent's objection to the virtual hearing in a detailed order disposing of the objections and concluding:

> Respondent offers nothing to show that her effective participation cannot be guaranteed by the use of videoconference procedures. To the contrary, videoconferencing facilitates respondent's meaningful participation in the hearing: she will be virtually present and able to testify, present evidence, confront witnesses, and address the hearing panel. The use of videoconferencing technology presents a reasonable alternative to respondent's physical presence at the hearing and strikes a proper balance between respondent's interests and the countervailing concerns relating to the COVID-19 pandemic.[30]

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[27] See, generally, the Michigan Trial Courts Virtual Courtroom Standards and Guidelines - https://courts.michigan.gov/News-Events/covid19-resources/Documents/VCR_stds.pdf

[28] Hearing Panel order, dated August 25, 2020.

[29] Catherine A. Jacob's [sic] Objection to Virtual Hearing, dated September 19, 2020.

[30] Order Overruling Respondent's Objection to Virtual Hearing, dated November 23, 2020.

The hearing panel's decision was not unique. During this pandemic, numerous courts and administrative agencies, acting under rules providing the discretion to order virtual trials for good cause shown, have done so notwithstanding objections based on concerns regarding the court's ability to observe witness demeanor and the right to confront and cross-examine witnesses.[31] Some courts and commentators have observed that trial via videoconferencing technology will provide a better opportunity than would an in-person hearing in light of the need for social-distancing, masks, and plexiglass for the foreseeable future.[32]

Months after the panel made its ruling, even with vaccines being rapidly administered to much of the population, the hospitalization rate is again at a critical point and public health officials continue to recommend social distancing and other preventative measures such as wearing masks – especially in light of the emergence of highly transmissable variants of the virus.

We find no basis to conclude that the hearing panel abused its discretion in directing that a virtual hearing be conducted in this matter.[33]

V. Conclusion.

Respondent has failed to provide a sufficient basis for objecting to the hearing panel's notice of virtual hearing. The plain language of the court rules permit witness testimony by videoconferencing, and the Confrontation Clause does not apply to attorney disciplinary proceedings.

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[31] See, e.g., *Gould Elecs. Inc v Livingston Co Rd Comm*, 470 F Supp 3d 735 (ED Mich, 2020) (concluding that videoconference trial was appropriate under the Federal Rules of Civil Procedure, rejecting arguments that due process right to confront and cross-examine witnesses would not be denied because the rules allow videoconferencing and the court was "unpersuaded that the parties' ability to cross-examine witnesses, and the Court's ability to effectively evaluate witnesses' credibility, will be impaired"); *William Beaumont Hosp*, 370 NLRB No. 9; 2020 WL 4754961(NLRB Case No 07-CA-244615, August 13, 2020) ("Respondent worries that the video technology will compromise the trial judge's ability to assess witness demeanor [and] prejudice the Respondent's ability to examine and cross-examine witnesses," but "Respondent fails to show that advances in current videoconferencing technology will not be able to address many, if not all, of its procedural concerns."); *In the Matter of Altria Group, Inc*, 2021 WL 915667 (FTC Docket No 9393, February 22, 2021) (respondents "have not shown that credibility cannot be adequately assessed through videoconferencing"; ALJ "can conduct an adjudication via videoconferencing consistent with due process and fundamental fairness").

[32] See, e.g., *Macias v Monterrey Concrete LLC*, No. 3:19CV830, 2020 WL 6386861, at *6 (ED Va, October 30, 2020) (remote deposition). See also, Judge Wolfson transcript, n 13, *supra*.

[33] Our affirmance of the panel's order overruling respondent's objections should not be understood as requiring extraordinary circumstances such as a public health crisis before a hearing panel may exercise its discretion to order a virtual hearing or testimony via videoconferencing. The standards and factors set forth in the MCR 9.115(I)(3) or MCR 2.407 govern such decisions by their terms.

Finally, while it is recognized that respondent has concerns about a hearing panel being able to evaluate credibility, these concerns are unfounded at this point. Given the current state of videoconferencing technology, the hearing panel should be able to observe the witnesses when they testify, including facial expressions and tone of voice – something that would not be possible or would be more difficult if the parties were in-person, wearing masks and socially distanced as required. However, when making decisions about the mode of witness interrogation and presentation of proofs, including whether to allow telephonic or video testimony under MCR 9.115(I)(3) or MCR 2.407, hearing panels should take into consideration any factors which would actually impede the panel's ability to discharge its obligations to hear and fairly decide the matter. Parties may always raise any specific, nonspeculative concern about the hearing[34], and we are confident that the panel will address such concerns appropriately.

For all of these reasons, we affirm the hearing panel's order overruling respondent's objection to a virtual hearing.

Board members Jonathan E. Lauderbach, Michael B. Rizik, Jr., Barbara Williams Forney, Karen D. O'Donoghue, Linda S. Hotchkiss, M.D., Michael S. Hohauser, Peter A. Smit, and Linda M. Orlans, concur in this decision.

Board member Alan Gershel is recused and did not participate.

[34] See, e.g., *William Beaumont Hosp*, n 31, *supra*.