

## Civil Jury Trials in a Pandemic

In the spring of 2020, the coronavirus pandemic ground courts nationwide to a halt. As states and cities issued stay-at-home orders and health authorities forbade indoor gathering, the legal industry initially entered what might be thought of as a “great pause.” That pause is now lifting. Clients, colleagues, and courts have approached the practical challenges of remote or distanced litigation with creativity and resourcefulness. Over the last six months, we have learned that certain proceedings, such as depositions, hearings, and even some bench trials, can in many circumstances be conducted remotely.<sup>1</sup> Technology like Zoom, Microsoft Teams, and Webex have allowed for surprisingly seamless interaction over the Internet from our homes.

The jury trial, and particularly the civil jury trial, has proven to be a stickier wicket. The entire idea of a trial—“bringing together strangers and confining them in close quarters to hear arguments over the course

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<sup>1</sup> Although there may be circumstances in which each of these proceedings is not amenable to being conducted remotely, courts are increasingly moving towards allowing them. Several courts, for example, have noted that “conducting depositions remotely is becoming the new normal.” *H & T Fair Hills, Ltd. v. All. Pipeline L.P.*, No. CV 19-1095 (JNE/BRT), 2020 WL 5512517, at \*3 (D. Minn. Sept. 14, 2020) (quoting *Rouviere v. DePuy Orthopaedics, Inc.*, No. 1:18-cv-04814(LJL)(SDA), 2020 WL 3967665, at \*3 (S.D.N.Y. July 11, 2020)); *Wilkens v. ValueHealth, LLC*, No. 19-1193-EFM-KGG, 2020 WL 2496001, at \*2 (D. Kan. May 14, 2020) (“Video or teleconference depositions and preparation are the ‘new normal’ and most likely will be for some time. Litigation cannot just come to an indefinite halt.”); see *In re Broiler Chicken Antitrust Litig.*, No. 16-cv-08637, 2020 WL 3469166, at \*1 (N.D. Ill. June 25, 2020) (“depositions will need to be taken by remote means if this case is going to move forward as it must”); *Grano v. Sodexo Mgmt., Inc.*, 335 F.R.D. 411, 415 (S.D. Cal. 2020) (observing that “[a]ttorneys and litigants all over the country are adapting to a new way of practicing law, including conducting depositions and deposition preparation remotely”); Endorsed Ltr. Mem. at 6, *Joffe v. King & Spalding LLC*, No. 17-cv-03392-VEC-SDA (S.D.N.Y. June 4, 2020), ECF No. 239 (ordering parties to proceed with remote deposition over plaintiff’s objection); *Valdivia v. Menard Inc.*, No. 19 CV 50336, 2020 WL 4336060, at \*2 (N.D. Ill. July 28, 2020) (“There is no evidence that the risks relating to COVID-19 will somehow be more manageable or nonexistent in six months to allow for Plaintiff’s in-person deposition.”). And there have been multiple civil bench trials held since the pandemic began, including *Centripetal Networks Inc. v. Cisco Systems, Inc.*, No. 18-cv-00094-HCM-LRL, in the Eastern District of Virginia in June 2020; *Bioventus LLC v. Trident Consulting Int’l Inc.*, No. 1:18-cv-00815, in the Middle District of North Carolina in August; and *Exxon Mobil Corp. v. United States*, No. CV H-10-2386, in the Southern District of Texas, which transitioned from an in-person trial in March to a remote bench trial in April. The court in the latter case commended the “lawyers and their IT staffs for the seamless transition to the remote bench trial,” finding that the “benefits of proceeding far outweighed the harms that would result” from further delay and that the “technology allowed a clear, efficient, and thorough presentation of the witnesses and the relevant evidence, and that the remote presentation of part of the proceedings did not infringe on any rights of either party or cause any prejudice.” 2020 WL 5573048, at \*5 n.2 (S.D. Tex. Sept. 16, 2020).

of hours, sometimes days”—still “violates dozens of CDC guidelines.”<sup>2</sup> Moreover, the legal issues presented by fully or partially virtual jury trials “create completely novel problems for the judicial system.”<sup>3</sup> It simply is not obvious how to conduct a fair jury trial from a distance.<sup>4</sup> Acknowledging these challenges, as of April 2020, in the first months of most states’ and cities’ lockdown, 88 federal district courts and 42 states had suspended all jury trials.<sup>5</sup>

But this, too, is changing. In the words of the Southern District of New York, “the interests of justice require the court to continue to convene juries in this district, and will not permit a delay until the health risks associated with the pandemic have diminished.”<sup>6</sup> Courts are now setting trial dates.<sup>7</sup> The Northern District of California, for example, initially suspended all civil trials by general order until October 1, 2020,<sup>8</sup> but changed the order as of September 16. Now, “Jury trials and bench trials may proceed in accordance with the logistical considerations necessitated by the Court’s safety protocols.”<sup>9</sup> Lawyers and their clients are thus starting to consider how the altered nature of the jury trial might affect their choices and strategy.

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<sup>2</sup> Michael Fente, *Statutory and Constitutional Hurdles Confronting the Judicial System During the COVID-19 Pandemic*, DIGIT. COMMONS @ AM. UNIV. WASH. COLL. L., 2020, at 31; *see also id.* at 32 (“[T]here is an extremely limited amount of precedent for a total shutdown of jury trials.”).

<sup>3</sup> *Id.* at 32.

<sup>4</sup> *See* Ann E. Marimow & Justin Jouvenal, *Courts Dramatically Rethink the Jury Trial in the Era of Coronavirus*, WASH. 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://www.washingtonpost.com/local/legal-issues/jury-trials-coronavirus/2020/07/31/8c1fd784-c604-11ea-8ffe-372be8d82298_story.html) (quoting consultants and lawyers, such as Paula Hannaford-Agor, principal research consultant of the National Center for State Courts: “The difficulties are pretty daunting, so it will be really slow coming back.”; Anna Dvorchik, attorney: “The biggest takeaway is that it’s possible, it’s just going to be super expensive.”; Chief Judge James K. Bredar of the District Court of Maryland: “The mountain is very steep.”; Judge Juliet McKenna: “So much about jury service runs counter to social distancing . . . The idea of putting 12 or 14 individuals in a jury room together is a nonstarter.”).

<sup>5</sup> Mem. from Emma McDermott, *Constitutional Adequacy of Distanced Trial and Jury Pools During COVID*, at 1 (Apr. 18, 2020), [https://defensenet.org/wp-content/uploads/2020/04/DistanceTrial\\_JuryPool.Memo-002.pdf](https://defensenet.org/wp-content/uploads/2020/04/DistanceTrial_JuryPool.Memo-002.pdf) [hereinafter McDermott Mem.].

<sup>6</sup> Standing Order, *In Re: Coronavirus/COVID-19 Pandemic*, No. 1:20-mc-00316-CM (S.D.N.Y. Sept. 9, 2020), ECF 1.

<sup>7</sup> In *Garrison v. Honeywell*, for example, Judge Harold Kahn of the Superior Court of California in San Francisco on August 11 denied the defendants’ request for a continuance, after the parties submitted briefs on practical issues with trials in COVID circumstances. *Garrison v. Honeywell Int’l Inc.*, Case No. CGC19276790 (Cal. Super. Ct. Aug. 11, 2020); *see also* Hannah Albarazi, *Fears of Virus and Distracted Jury Won’t Stop Asbestos Trial*, LAW360 (Aug. 11, 2020), <https://www.law360.com/articles/1300359/fears-of-virus-and-distracted-jury-won-t-stop-asbestos-trial>.

<sup>8</sup> Northern District of California, General Order 72-5, under “Civil Trials”: “No new jury trial will be conducted through September 30, 2020. Any jury trial currently scheduled to commence before October 1, 2020, will be postponed or vacated.”

<sup>9</sup> Northern District of California, General Order 72-6 (effective September 16, 2020).

So what does the COVID-era civil jury trial look like? It depends on the jurisdiction. The first thing that many courts did, relatively early in the pandemic, was to put in place safety protocols to protect the health of the public and staff in conducting court business. The Judicial Council of California, for example, launched a Pandemic Continuity of Operations Working Group to “collect best practices and publish a framework to help the state’s 58 superior courts address interrupted services in the wake of the COVID-19 pandemic.”<sup>10</sup> Its June 2020 resource guide identifies safety protocols that courts should implement, like mandatory health screenings, providing masks for jurors, limiting the congregation of jurors and prospective jurors in a variety of ways, avoiding passing exhibits between jurors, and providing markers on seats to assist with social distancing.<sup>11</sup> The American Board of Trial Advocates published a white paper, titled “Guidance for Conducting Civil Jury Trials during the COVID-19 Pandemic,” that contains similar recommendations.<sup>12</sup> But each jurisdiction, and to some extent, each judge, is a little bit different, and court protocols are evolving along with changing health guidance in each jurisdiction.<sup>13</sup>

With precautions, some courts are bringing jurors, witnesses, and lawyers back into the courtroom for fully or partially in-person proceedings. A pilot program has been underway this summer in Colorado, for example, for in-person trials with safety measures in place, such as placing the jury in the courtroom gallery for social distancing; requiring masks of attorneys and witnesses (even while testifying); and holding jury

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<sup>10</sup> Merrill Balassone, *Judicial Council Launches Working Group to Aid Courts in Pandemic Recovery*, CAL. CTS. NEWSROOM (May 12, 2020), <https://newsroom.courts.ca.gov/news/judicial-council-launches-working-group-to-aid-courts-in-pandemic-recovery>.

<sup>11</sup> JUD. COUNS. CAL., PANDEMIC CONTINUITY OF OPERATIONS RESOURCE GUIDE (June 2020), <https://www.courthousenews.com/wp-content/uploads/2020/06/CalifJudicialCouncil-CovidGuide.pdf> [hereinafter CAL. PANDEMIC RESOURCE GUIDE].

<sup>12</sup> AM. BD. TRIAL ADVOCATES COVID-19 TASK FORCE, GUIDANCE FOR CONDUCTING CIVIL JURY TRIALS DURING THE COVID-19 PANDEMIC, [https://www.abota.org/Online/Resources/Guidance\\_for\\_Conducting\\_Civil\\_Jury\\_Trials\\_During\\_the\\_COVID-19\\_Pandemic.aspx](https://www.abota.org/Online/Resources/Guidance_for_Conducting_Civil_Jury_Trials_During_the_COVID-19_Pandemic.aspx) [hereinafter ABOTA WHITE PAPER].

<sup>13</sup> See *Federal Judges Reinventing the Jury Trial During Pandemic*, U.S. CTS. (Aug. 27, 2020), <https://www.uscourts.gov/news/2020/08/27/federal-judges-reinventing-jury-trial-during-pandemic> (noting judges’ efforts to rethink trials and accommodate a pandemic); COMM’N TO REIMAGINE FUTURE N.Y.’S CTS., GOALS AND CHECKLIST FOR RESTARTING IN-PERSON GRAND JURIES, JURY TRIALS AND RELATED PROCEEDINGS 1 (July 2020), <https://www.nycourts.gov/LegacyPDFS/press/pdfs/Commission-on-Future-Report.pdf> [hereinafter GOALS AND CHECKLIST FOR RESTARTING] (“Each court should generate its own plan, based on local conditions, that prioritizes health and safety when restarting in-person grand juries, jury trials and related proceedings.”); U.S. CTS., REPORT OF THE JURY SUBGROUP: CONDUCTING JURY TRIALS AND CONVENING GRAND JURIES DURING THE PANDEMIC 1 (June 4, 2020), [https://www.uscourts.gov/sites/default/files/combined\\_jury\\_trial\\_post\\_covid\\_doc\\_6.10.20.pdf](https://www.uscourts.gov/sites/default/files/combined_jury_trial_post_covid_doc_6.10.20.pdf) [hereinafter REPORT OF JURY SUBGROUP] (“Each court will be impacted by its location, stage of recovery, funding, and own decision regarding the appropriate steps to take to ensure safety.”) (identifying guidelines for jury trials).

deliberations in an adjoining courtroom.<sup>14</sup> Texas federal courts have held in-person trials as well; the Eastern District of Texas in early August 2020 held what was described as the “country’s first in-person jury trial over patents since the COVID-19 pandemic led to nationwide court closures.”<sup>15</sup>

On the other hand, some courts are experimenting with fully or partially remote trials. For instance, a court in Collin County, Texas held what might have been the nation’s first jury trial on May 18, 2020 via Zoom, in which twenty-six potential jurors called in on laptops, iPhones, and tablets for *voir dire* and to ultimately hear a one-day civil proceeding with a non-binding verdict.<sup>16</sup> In Florida, the state Supreme Court in May authorized a pilot program for remote jury trials for civil cases in five of the state’s twenty judicial circuits.<sup>17</sup>

In most jurisdictions, criminal cases are being handled first, as the need to solve the practical and legal issues raised by our current circumstances is particularly urgent. Speedy Trial statutes mean that indefinite delay of criminal jury trials can be problematic. Some COVID-related challenges are unique to the criminal context, as well. The Confrontation Clause may pose issues if witnesses testify via video, or masked. Rules may require defendants to be physically present for certain stages of criminal actions against them.<sup>18</sup> This paper does not address these issues.<sup>19</sup> Instead, we identify a few of the legal principles, rules, and strategic issues that litigants may wish to think about if asked to consider, or ordered to conduct, a civil jury trial in this altered procedural environment. We focus on federal civil trial practice, but many of these ideas may apply in some state courts as well. To state the obvious, a full “issue spot” requires a detailed analysis of the

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<sup>14</sup> Daniel Siegal, ‘Guilty Feelings’ for Atty After In-Person IP Jury Trial Dud, LAW360 (July 30, 2020), <https://www.law360.com/articles/1296856>.

<sup>15</sup> See Dani Kass, *Texas Jury Says Apple Owes \$506M Over 4G LTE Patents*, LAW360 (Aug. 11, 2020), <https://www.law360.com/articles/1300409/texas-jury-says-apple-owes-506m-over-4g-lte-patents>.

<sup>16</sup> Fente, *supra* note 2, at 34.

<sup>17</sup> Supreme Court of Florida Administrative Order No. AOSC20-31, Remote Civil Jury Trial Pilot Program (Fla. May 21, 2020).

<sup>18</sup> Fente, *supra* note 2, at 20–30 (Speedy Trial Act); *id.* at 34–36 (Confrontation Clause); Fed. R. Crim. P. 43(a); *United States v. Williams*, 641 F.3d 758, 764–65 (6th Cir. 2011) (“Rule 43 requires that the defendant be present, which simply cannot be satisfied by anything less than physical presence in the courtroom. Being physically present in the same room with another has certain intangible and difficult to articulate effects that are wholly absent when communicating by video conference.”).

<sup>19</sup> See, e.g., Shaila Dewan, *Jurors, Please Remove Your Masks: Courtrooms Confront the Pandemic*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/us/coronavirus-jury-trial-oregon.html> (noting constitutional issues with witnesses being allowed to wear masks in a criminal trial); Brian Jacobs & The Insider, *Zooming In On the Flaws of Virtual Court*, FORBES (Sept. 15, 2020), <https://www.forbes.com/sites/insider/2020/09/15/zooming-in-on-the-flaws-of-virtual-court/#5aa031c13fe2> (“Although this new [virtual] adjudicative medium may provide a certain ease of access for attorneys and litigants in many areas of the law, not to mention some cost savings, criminal defendants should remain wary. Previous studies in the bail and immigration contexts in particular suggest that virtual court can prejudice defendants the most.”).

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facts of the case, strategic considerations of the parties, and the specific procedures the court and judge have put in place. But we identify a few common threads.

### Is a fair trial possible at all?

The first question that parties should ask is whether it is possible, consistent with constitutional guarantees and applicable rules, to hold a fair trial at all, or whether a party should object to the entire proceeding and seek a continuance until ordinary procedures can be restored. We are in relatively uncharted legal waters; there is “no legal precedent in support of a completely virtual (remote) trial.”<sup>20</sup>

There are at least two overarching constitutional guarantees that may be implicated by a fully or partially remote trial. First, the Seventh Amendment guarantees that in certain suits at common law “the right of trial by jury shall be preserved.”<sup>21</sup> The American Board of Trial Advocates has written that because “live trials provide jurors with the best opportunity to evaluate witnesses, weigh the evidence and engage in robust deliberation . . . we believe that in-court, in-person jury trials are most consistent with the constitutional rights granted by the Seventh Amendment.”<sup>22</sup>

Second, the Due Process Clauses of the Fifth and Fourteenth Amendments require that the court system protect principles “of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>23</sup> Though rarely invoked in suits between private parties, the state must provide some fundamental safeguards. For example, absent class members in class actions “notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel,”<sup>24</sup> and private parties have a constitutional right to an impartial judge.<sup>25</sup>

Litigants facing a fully or partially remote proceeding might ask whether the trial they face—based on the unique facts of the case, and the court’s COVID-era procedures—is consistent with these principles. The

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<sup>20</sup> ABOTA WHITE PAPER, *supra* note 12, at 8; *see also* McDermott Mem., *supra* note **Error! Bookmark not defined.**, at 1. As noted herein, there are specific contexts where some precedent for at least partially remote proceedings does exist.

<sup>21</sup> U.S. Const. amend. VII. The United States Courts Jury Subgroup has stated that “[j]ury trials are the bedrock of our justice system, expressly provided for in the Constitution and in the Sixth and Seventh Amendments. When each court determines that the time is right, the judiciary must reconstitute jury trials during the COVID-19 pandemic.” REPORT OF JURY SUBGROUP, *supra* note **Error! Bookmark not defined.**, at 1.

<sup>22</sup> ABOTA WHITE PAPER, *supra* note 12, at 5.

<sup>23</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

<sup>24</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985).

<sup>25</sup> *See, e.g., Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889–90 (2009) (finding that judge who accepted \$3 million in election campaign contributions from private litigant should have recused himself as a matter of due process in a dispute between civil litigants).

Seventh Amendment does not define a “trial by jury,” but there is little doubt that a trial by videoconference or telephonic jury deliberations were not in the minds of the Framers at the time the Bill of Rights was adopted. And do the court’s procedures offer the litigants notice plus an opportunity to be heard and participate in the litigation, as due process generally requires?

There is limited precedent challenging some aspects of remote trial practice on constitutional grounds. In *Thornton v. Snyder*, a case from 2005, the Seventh Circuit found that a prisoner had no due-process right to be present in person, as opposed to by video, for his civil-rights trial. The court explained that the “civil, not criminal, nature of Thornton’s trial is important. Although due process prohibits the denial of access to the courts, a prisoner does not have a constitutional right to attend the jury trial of his civil rights claim involving the conditions of his confinement.”<sup>26</sup> At the same time, the court noted the limitations of a trial by video; stated that denying a plaintiff the right to be “physically present at a civil rights trial he initiates is not one that should be taken lightly”; and emphasized the facts that, in the case before it, made appropriate the court’s denial of the plaintiff’s right to be present, including the fact that the plaintiff was a flight risk.<sup>27</sup>

Now that many courts are putting remote procedures to the test, we can anticipate the case law in the area will develop more rapidly. Litigants are starting to raise due-process and general fairness issues to trials under COVID-era procedures, identifying problems with witness presentation, jury selection, and potential interruptions in proceedings.<sup>28</sup> At least one court has rejected a due-process challenge to the lack of in-person witness testimony, in part because—as described further below—the Federal Rules do allow for testimony by contemporaneous video transmission under delineated circumstances.<sup>29</sup>

Parties should also consider whether the court’s rules may affect one party differently than another.<sup>30</sup> Recently, Judge Stark of the District of Delaware ordered that all witnesses in a patent-infringement trial

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<sup>26</sup> 428 F.3d 690, 697 (7th Cir. 2005).

<sup>27</sup> *Id.* at 698.

<sup>28</sup> See, e.g., Def.’s Mot. to Continue Trial at 13, *VirnetX Inc. v. Apple Inc.*, No. 6:12-cv-00855-RWS (E.D. Tex. July 29, 2020), ECF No. 918 (arguing that proceeding with the trial in August, under COVID-era procedures, will “undermine Apple’s due process rights and deny it a fair trial” based on the absence of certain witness’s live testimony); Def. Google LLC’s Motion to Continue Trial at 10–12, No. 2:18-cv-00090-JRG (E.D. Tex. Sept. 4, 2020), ECF No. 359 (arguing that altered jury-selection procedures, witness presentation by video, and potential interruptions would be unfair and prejudicial).

<sup>29</sup> *Gould Elecs. Inc. v. Livingston Cnty. Rd. Comm’n*, No. 17-11130, 2020 WL 3717792, at \*4–5 (E.D. Mich. June 30, 2020) (“Any argument that principles of due process require that testimony and cross-examination take place in-person is undercut by the Federal Rules of Civil Procedure . . . [which] expressly authorize courts to permit witnesses to testify via contemporaneous transmission for good cause and in compelling circumstances.” (citing Fed. R. Civ. P. 43(a))).

<sup>30</sup> *Lindsey v. Normet*, 405 U.S. 56, 74–79 (1972) (conditioning appeal in eviction action upon tenant posting bond, with two sureties, in twice the amount of rent expected to accrue pending appeal, is invalid when no similar provision is applied to other cases);

should testify remotely, expressing concern that if the parties and witnesses made a case-by-case determination about whether to testify live or in person, there would be a “risk of unfair prejudice to the side which has more witnesses who end up being unable to come to the courtroom.”<sup>31</sup> Similarly, parties may consider whether there may be any constitutional questions if one party’s lawyer was physically present in the courtroom for trial, but the other’s appeared by video.

In addition to these constitutional principles, other rules may bear on whether a civil trial is possible to conduct at all. Federal Rule of Civil Procedure 77 requires that “Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom,” and “no hearing—other than one ex parte—may be conducted outside the district unless all the affected parties consent.” The Rules contemplate that certain evidence can be presented either through pre-recorded depositions (Rule 32) or videoconferencing (Rule 43); read in that context, one might argue that the “regular courtroom” language of Rule 77 requires that jurors, judges, and counsel—at least—be in a single district, in “open court.”<sup>32</sup> There is little precedent on this question, however. Recently, Judge Goldsmith of the Eastern District of Michigan carefully considered whether Rule 77 allowed for a remote bench (not jury) trial, and concluded that the phrase “so far as convenient” provided flexibility to permit a bench trial by videoconference in light of the good cause created by the COVID-19 pandemic, and the phrase “open court” is sufficiently broad to encompass proceedings that do not physically take place in a courtroom.<sup>33</sup>

As an alternative to a fully or partially remote jury trial, parties may consider whether to seek a postponement. Early in the pandemic, parties asking for adjournments routinely got them.<sup>34</sup> But that trend

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*Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83–85 (1988) (assessment of 15% penalty on party who unsuccessfully appeals from money judgment meets rational basis test under equal protection challenge, since it applies to plaintiffs and defendants alike and does not single out one class of appellants).

<sup>31</sup> *Sunoco Partners Mkt’g & Terminals, L.P. v. Powder Springs Logistics, LLC*, No. 17-1390-LPS-CJB, 2020 WL 3605623, at \*2 (D. Del. July 2, 2020).

<sup>32</sup> See ABOTA WHITE PAPER, *supra* note 12, at 8 (positing this argument).

<sup>33</sup> *Gould Elecs*, 2020 WL 3717792, at \*1–4 (“In view of the text and history of Rules 77(b) and 43(a), as well as the considerations set forth in Black’s Law Dictionary and caselaw, the Court is persuaded that conducting a bench trial by videoconference is consistent with the requirement that such proceedings take place in open court.”); see also *Sentry Select Ins. Co. v. Maybank L. Firm, LLC*, No. 5:15-cv-04984-JMC, 2020 WL 5441305 at \*1–2 & n.3 (D.S.C. Sept. 10, 2020) (adopting *Gould’s* reasoning in considering Rule 77 in the context of Rule 43 and allowing video testimony of an expert at trial due to his risk of travel in the COVID-19 pandemic).

<sup>34</sup> See, e.g., Endorsed Ltr. Mem., *Ferring Pharms. Inc. v. Serenity Pharms., LLC*, No. 1:17-cv-09922-CM-SDA (S.D.N.Y. Apr. 28, 2020), ECF No. 680; *Choi v. 8th Bridge Cap., Inc.*, No. 2:17-cv-08958-CAS(AFMx), 2020 WL 3964035, at \*1 n.1 (C.D. Cal. July 13, 2020) (noting that no *voir dire* or empanelment would occur before November 4, but if coronavirus conditions have not improved the, the court will consider continuing the trial date *sua sponte*).

may be changing; courts are increasingly discouraging litigants from seeking COVID-related delays,<sup>35</sup> and unduly delayed trials may themselves present constitutional issues.<sup>36</sup> That said, when considering whether a remote trial is preferable to a delayed trial, litigants may choose to highlight a variety of factors, including (a) how long the case has been pending; (b) how long the trial will last; (c) how many issues there are to resolve; and (d) the number of parties and witnesses.<sup>37</sup> Some litigants are arguing that larger trials will be less safe due to the need to have more people in the courtroom; for example, an antitrust litigation with several defendants will lead to a packed courtroom compared to a negligence dispute between two parties.<sup>38</sup>

Alternatively, litigants with a jury right might consider whether to consent to a bench trial. Bench trials may present fewer practical and legal difficulties, and will likely allow faster adjudication—but it may be tricky to balance these potential benefits over the loss of a constitutional right to a jury. Litigants may also consider urging for shorter trials, given the massive backlog of civil cases.<sup>39</sup>

### Jury selection

One of the most challenging aspects of jury trials in the pandemic is picking a jury. Under most states' public health guidelines, the ordinary ways in which juries are picked—congregating dozens, or hundreds, of people in a courtroom in a large venire, and then participating in public *voir dire*, prospective jurors' facial

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<sup>35</sup> See *IceMOS Tech. Corp. v. Omron Corp.*, No. CV-17-02575-PHX-JAT, 2020 WL 3451994, at \*4 (D. Ariz. June 24, 2020) (declining a continuance arising out of COVID-19 concerns when moving party could not show prejudice simply because of travel restrictions making travel difficult for counsel and witnesses and when health risks had been mitigated by court, even if those risks limited the size of trial teams permitted in courtroom); Notice to Counsel, *Ferring Pharms. Inc.*, No. 1:17-cv-09922-CM-SDA (S.D.N.Y. Apr. 23, 2020), ECF No. 678 (chief judge presiding over bench trial telling parties to be prepared to try the case because she “need[s] to get this case tried, and [is] not prepared to wait until the world is back to normal to get it done”).

<sup>36</sup> See David Hittner & Kathleen Weisz Osman, *Federal Civil Trial Delays: A Constitutional Dilemma?*, 31 S. TEX. L. REV. 341 (1990) (exploring several theories to be advanced in support of an argument that backlog and delay have deprived litigants of their constitutional rights); R.E. McGarvie, *Judicial Responsibility for the Operation of the Court System*, 63 AUSTL. L.J. 79, 79 (1989) (“A system . . . which keeps people waiting for years before recovering money due to them, is not providing applied justice.”).

<sup>37</sup> *Argonaut Ins. Co. v. Manetta Enters.*, No. 19-cv-00482 (PKC) (RLM), 2020 WL 3104033, at \*2 (E.D.N.Y. June 11, 2020) (finding remote trial preferable over defense's objections because case has been pending 18 months, only two to three days of trial time was expected, and all briefing is complete, and question of liability was already decided, leaving only question of damages outstanding for trial); Def.'s Br. in Supp. of Expedited Mot. Opp. Trial Entirely by Video Conf. at 4–8, *Centripetal Networks v. Cisco Sys., Inc.*, No. 18-cv-00094-HCM-LRL (E.D. Va. Apr. 10, 2020), ECF No. 388 (arguing that patent case at issue is too complex and large for trial by videoconference, particularly due to the number of witnesses and exhibits).

<sup>38</sup> See *Federal Judges Reinventing the Jury Trial During Pandemic*, *supra* note **Error! Bookmark not defined.**

<sup>39</sup> ABOTA WHITE PAPER, *supra* note 12, at 6 (arguing that the time is right to focus on key issues and otherwise encourage shorter trials).

reactions closely watched by trial attorneys—is no longer possible. In addition, many community members are experiencing different hardships during the pandemic, which may impact their ability or willingness to serve. Some do not have access to video technology or a reliable Internet connection that would permit them to receive evidence remotely; some have increased child- or elder-care duties; some may have sensitive health conditions or be members of higher-risk demographic groups; and some may simply “use the pandemic as an excuse to avoid jury duty altogether.”<sup>40</sup>

Courts are attempting to allow jurors to safely gather for selection in person in a variety of ways. Some are considering smaller jury pools to reduce crowding in jury assembly areas.<sup>41</sup> Some states are reducing the number of peremptory strikes.<sup>42</sup> Some courts are proposing that some aspects of *voir dire* be conducted via questionnaire.<sup>43</sup> But parties are still raising the health concerns associated with gathering jury pools as unacceptable dangers requiring adjournment of trial.<sup>44</sup>

In navigating these complications, parties should first consider how the pandemic and the court’s procedures may impact jury composition. Under the Jury Selection and Service Act of 1968, federal juries in both civil and criminal cases must be “selected at random from a fair cross section of the community in the district or division where the court convenes.”<sup>45</sup> Many state laws provide similar guarantees.<sup>46</sup> If courts and litigants consider COVID-related hardships in excusing jurors from service, such as child care obligations, technological challenges at home, or identification with a sensitive group, the result may be a less representative jury pool. Excluding anyone without adequate technology or a high-speed Internet

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<sup>40</sup> Fente, *supra* note 2, at 33; *see also* Dewan, *supra* note 19 (noting of a May 2020 trial in Oregon: “Out of 500 potential jurors summoned on May 4, only 121 appeared—about half the usual number, according to figures provided by a court spokeswoman.”).

<sup>41</sup> CAL. PANDEMIC RESOURCE GUIDE, *supra* note **Error! Bookmark not defined.**, at 14–15.

<sup>42</sup> Dewan, *supra* note 19 (“The Arizona Supreme Court, anticipating that many calls to jury duty would be ignored, has reduced the number of potential jurors that can be struck by each side to two, from the usual six.”).

<sup>43</sup> *See* Joint Ltr. to C.J. Stark, *Sunoco Partners Mktg. & Terminals L.P. v. Powder Springs Logistics, LLC*, No. 1:17-01390-LPS-CJB (D. Del. July 6, 2020), ECF No. 587 (offering questionnaire for jurors to fill out with summons and noting that only the court should see answers to COVID-19 related questions to protect juror privacy).

<sup>44</sup> *See* Def.’s Mot. to Continue Trial at 4–11, *VirnetX Inc. v. Apple Inc.*, No. 6:12-cv-00855-RWS (E.D. Tex. July 29, 2020), ECF No. 918 (arguing that asking jurors to come into the city in the midst of a pandemic is unreasonable, particularly given the high volume of traffic in the court room and the sheer size of the 60–70-person jury pool).

<sup>45</sup> 28 U.S.C. § 1861.

<sup>46</sup> *See, e.g., McBride v. Sheppard*, 624 So. 2d 1069, 1071 (Ala. 1993) (statute); *Celotex Corp. v. Wilson*, 607 A.2d 1223, 1227 (Del. 1992) (statute); *Brady v. Fibreboard Corp.*, 857 P.2d 1094, 1096 (Wash. App. 1993) (statute).

connection may skew the venire away from economically disadvantaged populations.<sup>47</sup> Some groups—such as Black Americans, Latinx, and the elderly—have been disproportionately affected by the pandemic, both as a public-health and as an economic matter, potentially impacting service.<sup>48</sup> Some criminal defendants have raised these challenges to jury selection in urging the court not to proceed with trial at all.<sup>49</sup>

Apart from jury-composition issues, increasing the number of conditions that qualify as hardships may make it harder to empanel a jury, potentially extending delays. State courts in California are reporting that it can take up to two weeks to select a jury given the practical issues posed by the pandemic.

Litigants should also scrutinize the process of jury selection itself. Federal Rule of Civil Procedure 47(a) provides that the “court may permit the parties or their attorneys to examine prospective jurors or may itself do so.” The rule thus broadly addresses the “who” of jury selection, but not the “how” or “where.”<sup>50</sup> Litigants may therefore consider requesting initial questionnaires to pre-qualify the venire, or ask that some hardship challenges be handled telephonically. These procedures could minimize the amount of time that prospective jurors must spend in the venire in person.<sup>51</sup>

Is the technology up to the task of remote jury selection? Ordinarily, lawyers closely watch potential jurors’ reactions to *voir dire* questions. Body language is hard or impossible to read via videoconference, particularly when a lawyer is speaking to a large group of prospective jurors, and effective *voir dire* is hard to imagine through masks, as “attorneys struggle to pick up on changes in emotion from jurors—smirks,

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<sup>47</sup> ABOTA WHITE PAPER, *supra* note 12, at 9 (“Other challenges include the ability to assure the veracity of the prospective jurors’ responses because they are not physically present before their peers, attorneys and the judge; the ability to evaluate the prospective jurors due to limitations in registering non-verbal communication and making direct eye contact; and the lack of diverse prospective jurors due to unavailability and access to technology.”); see Paula Hinton & Tom Melsheimer, *The Remote Jury Trial Is a Bad Idea*, LAW360 (June 9, 2020), <https://www.law360.com/articles/1279805/the-remote-jury-trial-is-a-bad-idea>; Jennifer Lapinski, Robert Hirschhorn and Lisa Blue, *Zoom Jury Trials: The Idea Vastly Exceeds the Technology*, Law.com (September 29, 2020), <https://www.law.com/texaslawyer/2020/09/29/zoom-jury-trials-the-idea-vastly-exceeds-the-technology/> (finding representativeness problems based on a Travis County, Texas criminal jury trial held via Zoom, positing that access to the required technology skewed the jury pool in a variety of ways).

<sup>48</sup> Fente, *supra* note 2, at 34.

<sup>49</sup> Bill Wichert, *NJ Judge Rejects Challenge to Pandemic Jury Selection*, LAW360 (Sept. 28, 2020), <https://www.law360.com/articles/1314266/nj-judge-rejects-challenge-to-pandemic-jury-selection> (reporting on court’s rejection of constitutional and jury-cross-section challenge by defense counsel seeking to halt remote trial in criminal arson case where jurors were required to have Zoom connections, among other qualifications).

<sup>50</sup> ABOTA WHITE PAPER, *supra* note 12, at 8.

<sup>51</sup> *Id.* at 8–9.

giggles, clenched teeth, all patterns that may show bias or disinterest in the case.”<sup>52</sup> Some parties are raising these issues in trial briefing, and even moving for a mistrial on this basis, arguing it is impossible to pick a jury under these conditions.<sup>53</sup>

### Presenting evidence to the jury

Once a jury is picked, courts are proceeding in a variety of ways to allow the jurors to hear evidence and argument. Some courts are experimenting with fully or partially remote juries, with presentations conducted over a videoconferencing platform. To address potentially uneven access to technology, some courts are considering providing jurors with webcams and tablet computers for grand-jury and other proceedings.<sup>54</sup> Alternatively, some are spreading jurors six feet apart around the courtroom, and may require jurors to wear masks.

If the jury is to hear evidence remotely, litigants should carefully think through the logistics and potential ramifications. Trials with remote juries have reported attentiveness issues, such as jurors engaged in cooking, cleaning, and child care while also listening to evidence.<sup>55</sup> In August, defendants in a pair of asbestos trials in California state court moved for a mistrial after uncovering evidence that jurors were “working during opening statements and improperly making nice with a plaintiff” while the attorneys and the judge were together in a Zoom breakout room.<sup>56</sup> It also may not be possible, with remote technology, to prohibit a witness’s testimony from being inadvertently or illicitly recorded, in contravention to many

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<sup>52</sup> Fente, *supra* note 2, at 34; see also ABOTA WHITE PAPER, *supra* note 12, at 9 (“Despite these protective measures, there are a series of limitations and challenges with jury selection during the pandemic,” including problems with efficiency, reduction in diversity, and “difficulty in effectively assessing a prospective juror’s reactions, body language and non-verbal affect and assuring the quality and veracity of responses by potential jurors since they are not participating in person . . .”).

<sup>53</sup> Def. Fryer-Knowles, Inc.’s Mot. for Mistrial, *Wilgenbusch v. Am. Biltrite, Inc.*, No. RG19029791, at 4 n.1 (Cal. Super. Ct. July 16, 2019) (arguing for mistrial because, among other things, that, because of the configuration of the remote platform, “it was not possible to see all 18 prospective jurors that were questioned as part of the first panel of jurors” and thus counsel could not see “the reactions and facial expressions of the potential jurors simultaneously when the attorney conducting voir dire was asking questions.”).

<sup>54</sup> See Marimow, *supra* note **Error! Bookmark not defined.** (court officials in New Jersey have hand-delivered webcams or tablets with broadband access to grand jurors).

<sup>55</sup> See Albarazi, *supra* note 7 (“[The defense attorney] said across the San Francisco Bay, in Alameda County, jurors appearing remotely there have been seen working out, cooking and doing child care during court proceedings. She said attentive jurors are a crucial part of a fair trial and that must not be compromised.”).

<sup>56</sup> Daniel Siegal, *Juror Irregularities Mar Asbestos Zoom Trials, Defendants Say*, LAW360 (Aug. 18, 2020), <https://www.law360.com/articles/1302365/juror-irregularities-mar-asbestos-zoom-trials-defendants-say>.

court's rules.<sup>57</sup> Technological problems may crop up during witness testimony, interfering with a juror's ability to hear or see testimony.

An Oxford pilot study testing mock jury trials in England concluded that for a virtual trial to succeed, there must be a good deal of backstage technical support, analysis of jurors' hardware capabilities to ensure reliable connectivity, and instruction as to how to prepare the room from which they will appear.<sup>58</sup> Parties should consider these issues and may propose procedures for the court to address them. If remote jurors have issues as to attentiveness or technological problems in hearing and weighing the evidence, litigants may also consider challenging the trial proceedings or requesting a postponement.<sup>59</sup>

In addition, some courts are requiring remote jurors to take oaths, including to remain in a private location; to use headphones to prevent eavesdropping, as appropriate; and to report technical problems immediately.<sup>60</sup> Parties may propose similar instructions or oaths for the court to deliver to remote jurors.

### Witness presentation

One of the few areas of law where remote jury trials do have precedent is in presentation of witness testimony by video. Federal Rule of Civil Procedure 43(a) grants courts discretion to "permit testimony in open court by contemporaneous transmission from a different location" for "good cause" and "with appropriate safeguards."<sup>61</sup> The extensive advisory notes, especially those to the 1996 amendments, make clear that in-person testimony is preferred—the "opportunity to judge the demeanor of a witness face-to-

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<sup>57</sup> See generally Christopher Green & Sara Fish, *Remote Proceedings Bring New Wrinkles for Court Records*, LAW360 (Aug. 26, 2020), <https://www.law360.com/articles/1302552/remote-proceedings-bring-new-wrinkles-for-court-records>.

<sup>58</sup> An Oxford pilot study testing mock jury trials in England found that there were some benefits to technology use as well as some negative effects. LINDA MULCAHY ET AL., *EXPLORING THE CASE FOR VIRTUAL JURY TRIALS DURING THE COVID-19 CRISIS* 4–6 (Oxford Brookes U., Apr. 2020). For instance, once the lay participants learned the technology, they suggested that attending remotely might be less stressful than traveling to the courthouse, and there were no concerns about juror sightlines being temporarily interrupted as can occur in a physical courtroom. *Id.* The authors also report that engagement was improved, because of the "presence of all key participants in the trial on a screen just a few centimetres away." *Id.* at 20. On the other hand, the trials found that if there were bandwidth problems or other issues that affected video quality could result in the inability for a juror to hear or see the proceedings and lead to an unfair judgment. *Id.* at 5. Furthermore, participants did not always seem to understand the importance of remaining in a room alone during the trial, keeping their space distraction-free, and avoiding internet use during the trial. *Id.*

<sup>59</sup> See Fente, *supra* note 2, at 30–37.

<sup>60</sup> See Marimow, *supra* note **Error! Bookmark not defined.**

<sup>61</sup> Fed. R. Civ. P. 43(a).

face is accorded great value in our tradition”—but that there may be circumstances where testimony via transmission may be preferable to delay of a trial.<sup>62</sup>

First, litigants should consider whether good cause is present. “The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place.”<sup>63</sup> Today, travel restrictions, health concerns, and other exigent circumstances related to the current pandemic may qualify as “good cause” permitting witnesses to testify by video. Several courts have so held.<sup>64</sup> But this outcome is not preordained. During the pandemic, the Southern District of West Virginia denied a request for testimony to be given via videoconference as opposed to live, finding that only “inconvenience” had been shown, and this was not enough to warrant remote testimony.<sup>65</sup> Parties can also agree that testimony should be presented by transmission, though the court is not bound by such a stipulation.<sup>66</sup>

Second, litigants should test whether appropriate “safeguards” are in place. Rule 43 requires that these safeguards “ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.”<sup>67</sup> The American Board of Trial Advocates has summarized these safeguards as requiring (1) verification of the identity of the witness; (2) assurance that remote technology will work; (3) identifying evidentiary objections prior to testimony; (4)

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<sup>62</sup> Fed. R. Civ. P. 43(a) advisory committee’s note to 1996 amendment; *see also United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001) (“[V]irtual reality is rarely a substitute for actual presence and . . . even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it.”).

<sup>63</sup> Fed. R. Civ. P. 43(a) advisory committee’s note to 1996 amendment.

<sup>64</sup> *See, e.g., Sutphin v. Ethicon, Inc.*, No. 2:14-cv-01379, 2020 WL 5229448, at \*2 (S.D. W. Va. Sept. 1, 2020) (“[T]he ongoing COVID-19 pandemic constitutes ‘good cause in compelling circumstances’ for allowing trial testimony via live videoconference.” (quoting Fed. R. Civ. P. 43(a)); *In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d 967, 971 (D. Minn. 2020) (“First, with respect to good cause, the occurrence of COVID-19—and its impact on the health and safety of the parties and witnesses—is undoubtably an ‘unexpected’ occurrence that nevertheless still permits witnesses ‘to testify from a different place.’ . . . Under the circumstances, COVID-19’s unexpected nature, rapid spread, and potential risk establish good cause for remote testimony.” (quoting Rule 43(a) and advisory committee’s note)); *Sentry Select Ins.*, 2020 WL 5441305, at \*2 (66-year-old expert’s “concerns about testifying in person during the time of COVID-19 demonstrate good cause and compelling circumstances to allow him to testify at trial by videoconference”).

<sup>65</sup> *Graham v. Dhar*, No. 1:18-cv-00274, 2020 WL 3470507, at \*1–\*2 (W.D. Va. June 25, 2020); *see also* Christopher Green & Sara Fish, *Weighing the Virtual Courtroom Option in Civil Cases*, LAW360 (Aug. 19, 2020), <https://www.law360.com/articles/1302546/weighing-the-virtual-courtroom-option-in-civil-cases> (citing cases on both sides of this issue).

<sup>66</sup> Fed. R. Civ. P. 43(a) advisory committee’s note to 1996 amendment.

<sup>67</sup> *Id.*

identifying documents to be used with the witness during testimony; (5) providing those exhibits to the witness; (6) ensuring that the witness is alone, and has only the approved exhibits in the room during the testimony; and (7) ensuring that the witness does not access the Internet or contact the parties during the testimony, which may require ordering the witness to report to a secure location with an authorized court agent.<sup>68</sup> The litigant requesting remote testimony may be required to bear the costs associated with it, as well.<sup>69</sup>

Remote witness testimony might raise other issues that litigants should consider. Parties have argued, to varying degrees of success, that complex expert testimony may be more difficult to follow via remote feed, for example.<sup>70</sup> In addition, if the court has invoked a sequestration rule under Federal Rule of Evidence 615, litigants may need to take steps to ensure that it is followed.<sup>71</sup> Parties should also consider whether confidentiality or other issues may warrant concerns about the presence of others in the same room as the testifying witness.<sup>72</sup> While in most matters, concerns about eavesdropping by non-witnesses would not be a concern due to the public nature of trials, there could potentially be issues related to privacy in cases where confidential or sealed material must be presented to the court. Similarly, there may be concerns as to whether the technology has security risks.<sup>73</sup> And finally, litigants may wish to investigate applicable social science as to juror perceptions of video versus live testimony. As one example, in a study of mock-jury

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<sup>68</sup> ABOTA WHITE PAPER, *supra* note 12, at 10–11 & n.13 (citing authority).

<sup>69</sup> *Id.* at 11 (citing *Monserate v. K.K. Mach. Co.*, No. 10-3732, 2013 WL 1412194, at \*4 (E.D.N.Y. Apr. 8, 2013)).

<sup>70</sup> *Compare RFC*, 444 F. Supp. 3d at 972 (noting that concerns about clarity of expert testimony via videoconference may be minor in the instant bench trial, but conceding that those concerns “would perhaps be heightened” in a jury trial), *with Sentry Select Ins.*, 2020 WL 5441305, at \*2 (allowing expert testimony to proceed via videoconference). *See Gould Elecs.*, 2020 WL 3717792, at \*6 (in the context of a bench trial, rejecting argument that videoconference would impair the party’s ability to convey “complex, technical subject matter” effectively, but expressly noting that the court was the fact finder).

<sup>71</sup> *See* Def.’s Br. in Supp. of Expedited Mot. Opp. Trial Entirely by Video Conf., *Centripetal Networks*, No. 18-cv-00094-HCM-LRL (Apr. 10, 2020), ECF No. 388.

<sup>72</sup> *In re Rand Int’l Leisure Prods., LLC*, No. 10-71497-ast, 2010 Bankr. LEXIS 1986, at \*14 (E.D.N.Y. June 16, 2010) (limiting who could be present during remote testimony to an attorney who was prohibited from conferring with the witness, a videoconference operator, and a translator, if necessary); *Mission Cap. Works, Inc. v. SC Rests., Inc.*, No. C-07-1807, 2008 WL 5100313, at \*1 n.12 (W.D. Wash. Dec. 3, 2008); *Scott Timber, Inc. v. United States*, 93 Fed. Cl. 498, 501 (2010) (approving as a reasonable safeguard the requirement that no one other than the witness be present during remote testimony and provide documentary evidence in advance).

<sup>73</sup> *See* Def.’s Br. in Supp. of Expedited Mot. Opp. Trial Entirely by Video Conf., *Centripetal Networks*, No. 18-cv-00094-HCM-LRL (Apr. 10, 2020), ECF No. 388; *but see* Order, *Centripetal Networks*, No. 18-cv-00094-HCH-LRL (Apr. 23, 2020), ECF No. 406 (finding that court’s choice of Zoom technology poses no security risks, and, in any event, the trial would be open to the public).

participants from 1998, researchers found that jurors exhibited more bias toward child witnesses testifying via closed-circuit video feed than live.<sup>74</sup>

Courts and parties might also consider presentation of trial witnesses by deposition video under Federal Rule of Civil Procedure 32. Depositions are regularly proceeding remotely, as parties may consent to taking depositions in any manner they choose under Federal Rule of Civil Procedure 29, including by waiving the ordinary requirement that an oath be administered in person.<sup>75</sup> Courts routinely allow litigants to take depositions remotely.<sup>76</sup> Today, many depositions are recorded, and Rule 32 permits the use of deposition videos at trial for “unavailable” witnesses who “cannot attend or testify because of age, illness, infirmity, or imprisonment.” The American Board of Trial Advocates believes it is “likely that the circumstances of a pandemic would warrant a finding that a witness is ‘unavailable’ within the meaning of” Rule 32.

If witnesses appear in person, must they wear masks? Many courts are allowing or requiring witnesses to testify without masks,<sup>77</sup> reasoning that a mask may hinder or preclude assessment of a witness’s demeanor, which can have a major impact on the fact-finder’s determination of credibility.<sup>78</sup> Cases considering the Confrontation Clause may provide some guidance, though their context is unique.<sup>79</sup> As courts’ guidance and rules are different and evolving, litigants may need to consider their options if a critical witness must testify while masked.

### Documentary and physical evidence

In some ways, the review of documentary evidence may be one of the less challenging aspects of trials during a pandemic. Documents can be submitted to the court electronically. Jurors can be provided with electronic copies of admitted exhibits or a notebook of documentary evidence; such compilations are commonly exchanged in advance of trial anyway.<sup>80</sup>

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<sup>74</sup> Gail S. Goodman et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children’s Eyewitness Testimony and Jurors’ Decisions*, 22 L. & HUM. BEHAV. 165 (1998).

<sup>75</sup> See ABOTA WHITE PAPER, *supra* note 12, at 11 (“These methods have become very important in this COVID-19 era . . . a pandemic should suffice” to show a “legitimate reason” for a deposition by remote means under Rule 30(b)(4)).

<sup>76</sup> *Id.* at 12 & n.17 (citing cases).

<sup>77</sup> *E.g.*, Dewan, *supra* note 19.

<sup>78</sup> See Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158, 162–63 (2020).

<sup>79</sup> *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (“face-to-face” confrontation is “irreducible”).

<sup>80</sup> ABOTA WHITE PAPER, *supra* note 12, at 13 (describing precautions); GOALS AND CHECKLIST FOR RESTARTING, *supra* note **Error!**  
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Things might become more complicated with physical evidence; litigants may also want to consider whether the color, texture, or operation of a particular physical object is particularly important in a way that videoconferencing technology may mask or distort. By analogy, Rule 901 requires a proponent of a telephone recording to provide additional evidence of the identity of the speaker.<sup>81</sup> A party objecting to introduction of evidence in a way that alters its character in some material way might move the court to require the proponent to provide additional evidence of the contested attribute under Rule 901, or exclude the evidence altogether as misleading under Rule 403.

It may also be difficult to ensure that jurors base their understanding on the case only on the evidence admitted. “The theory of our [legal] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.”<sup>82</sup> Traditionally, courts admonish the jury via an instruction, sometimes given at the end of every court day, that they must not research the case or post about jury service via social media. We usually assume that jurors follow this admonition, absent evidence to the contrary.<sup>83</sup> But that evidence might be hard to come by if jurors are participating remotely, where they cannot police each other’s behavior and their actions may be more difficult for attorneys to observe. Lawyers and courts might consider remedial measures to forestall and uncover misconduct.<sup>84</sup>

### Jury Deliberation

Can jury deliberation ever be conducted remotely? Some commentators think that the answer must be “no.” The American Board of Trial Advocates, for example, asserts that only in-person gatherings give jurors the opportunity to “think together, discuss the evidence, reason and make a collective and informed decision,” and thus retain “the civil jury trial as the truly democratic, bedrock component of our judicial system.”<sup>85</sup>

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<sup>81</sup> Fed. R. Evid. 901 advisory committee’s note to 1972 proposed rules (“Example (6). The cases are in agreement that a mere assertion of his identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that additional evidence of his identity is required. The additional evidence need not fall in any set pattern.”).

<sup>82</sup> *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

<sup>83</sup> See, e.g., *Silverthorne v. United States*, 400 F.2d 627, 641 (9th Cir. 1968) (“[A]ppellate courts are slow to impute to juries a disregard of their instructions . . .”).

<sup>84</sup> Cf. Frank J. Mastro, *Preventing the “Google Mistrial”: The Challenge Posed by Jurors Who Use the Internet and Social Media*, LITIGATION, Winter 2011, at 23, 27 (noting that jury instructions are “not the panacea for inquisitive or talkative jurors”; suggesting that courts consider taking away jurors’ handheld devices during jury service or that attorneys monitor jurors’ social media posts; and noting that one commentator suggested setting up a monitoring system where one juror is randomly selected to affirm compliance with oath).

<sup>85</sup> ABOTA WHITE PAPER, *supra* note 12, at 13.

Most practice guides seem to assume that juries will deliberate in a room, physically together.<sup>86</sup> But some jurisdictions are experimenting with remote jury deliberations. In the “first-ever” Zoom non-binding pilot trial in Texas, jurors deliberated remotely.<sup>87</sup>

Video changes communication. Only one person can speak at a time, eliminating both interruption and exuberant agreement (like finishing one another’s sentences). Body language is harder to read. Distraction is easier to hide. Deliberating via videoconference may be tiring for some jurors, as they experience “Zoom fatigue.”<sup>88</sup> Parties may want to consider whether a remotely deliberating jury is more likely to get tired and cut deliberations short; some research indicates that longer deliberations favor criminal defendants and shorter deliberations favor civil defendants.<sup>89</sup>

Moreover, a cardinal principle of jury deliberations is that they remain private and secret.<sup>90</sup> It may be inordinately difficult in a remote deliberation to prevent family members, children, and others from entering the “virtual jury room” and even from weighing in. Litigants may wish to investigate the procedures that the court is employing to protect the “black box” of jury deliberations, with these concerns in mind.<sup>91</sup>

### Public access to the courts

In *Waller v. Georgia*, the Supreme Court declared public trials to be “essential,” guaranteed by as many as three constitutional amendments in criminal cases, because “the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.”<sup>92</sup> Some state constitutions also embed the right to observe trials.<sup>93</sup> Spaced-out jurors may leave no additional room

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<sup>86</sup> See, e.g., GOALS AND CHECKLIST FOR RESTARTING, *supra* note **Error! Bookmark not defined.**; REPORT OF JURY SUBGROUP, *supra* note **Error! Bookmark not defined.**, at 15.

<sup>87</sup> Jake Bleiberg, *Texas Court Holds First US Jury Trial via Videoconferencing*, ASSOCIATED PRESS (May 22, 2020), <https://apnews.com/article/e434e2df6e0b09fba1a32ec3fc4670a>.

<sup>88</sup> See Julia Sklar, ‘Zoom Fatigue’ Is Taxing the Brain. Here’s Why That Happens, NAT’L GEOGRAPHIC (April 24, 2020), <https://www.nationalgeographic.com/science/2020/04/coronavirus-zoom-fatigue-is-taxing-the-brain-here-is-why-that-happens/>.

<sup>89</sup> Thomas L. Brunell et al., *Factors Affecting the Length of Time a Jury Deliberates: Case Characteristics and Jury Composition*, 5:1 REV. L. & ECON. 555, 570–71 (2009).

<sup>90</sup> See, e.g., *United States v. Va. Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964).

<sup>91</sup> Jennifer Lapinski, Robert Hirschhorn and Lisa Blue, *Zoom Jury Trials: The Idea Vastly Exceeds the Technology*, Law.com (September 29, 2020), <https://www.law.com/texaslawyer/2020/09/29/zoom-jury-trials-the-idea-vastly-exceeds-the-technology/> (identifying a variety of issues with Zoom).

<sup>92</sup> 467 U.S. 39, 46 (1984) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979)).

<sup>93</sup> The Oregon State Constitution guarantees this right, for example, in Article 1, Section 10.

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in the public seats, and many federal courts still do not permit televised or recorded proceedings.<sup>94</sup> Courts are ensuring public access by using closed-circuit television or simulcasting a video feed of the trial into other rooms of the courthouse, in which the court's policies for social distancing and face coverings may be more easily enforced.<sup>95</sup> Litigants should examine the procedures put in place by the court to guarantee public access even while protecting the safety of the trial participants, and could consider asking for closed-circuit broadcasting to allow for public access to the trial.

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One natural question a reader may be thinking is this: aren't these issues a bit ephemeral? Won't we set aside all of these learnings the moment we have a cure, or a vaccine? We hope that we are able to congregate at trials once more the way we used to. But this pandemic is reshaping our industry. Who knows which of these lessons may prove useful in the future? Rule makers might take these lessons into account in later amendments or readiness plans in case future calamities again require us to adjust the way we practice. And the case law that will develop out of this unique year, even as an "edge case," will set boundaries and inform later disputes. It may even solidify the legal necessity for in-person proceedings, if courts find that some parts of fully or partially remote procedures fail to live up to legal guarantees. In other words, trial practitioners will do what we have always done: we will adapt, and we will carry this moment's lessons into the future.

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<sup>94</sup> See *History of Cameras in Courts*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/history-cameras-courts>. Some courts, including the Northern District of California, are participating in a pilot program where some trial proceedings are recorded if both parties consent and other conditions are met.

<sup>95</sup> *Sunoco Partners*, 2020 WL 3605623, at \*2.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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