

The *Zooming* of Federal Civil Litigation

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Two great forces are upon us. One is COVID-19, a highly infectious disease that has disrupted society around the globe.¹ The other is the constant push of technological advancement, which can alleviate some of the disease's disruption through remote communication. Pandemic, meet technology, and welcome to the federal courts.

The pandemic threw American legal practice into disarray almost overnight. Courtrooms and law offices were closed, hearings canceled or adjourned, and case schedules suspended.² Subsequent months of social distancing and continued closures — and reopenings and reclosures — have turned the nature of civil litigation upside-down. As one litigator recently said, “Never in our careers have we ever encountered something quite like this — a pandemic that has . . . completely changed business as usual.”³ The demands of litigation, however, have not abated.⁴ Instead, pandemic conditions have spurred lawyers and judges to adapt quickly, especially by using videoconference technology.

The legal community has, over the course of its history, often adapted to new technologies, from the telephone to photocopiers to email to social media to AI, though adaptation has been deliberate and cautious.⁵ Videoconferencing has been around, and at least accessible to the legal community, for a number of years, but the legal community has tended to spurn it in favor of in-person connections. And then came COVID-19. The pandemic has pushed lawyers and judges toward videoconferencing on a scale and at a speed never before seen, without the deliberation and care that usually has attended the legal community's acceptance and incorporation of technological innovation.⁶

Although we expect pandemic constraints to be temporary, we think the technology will persist and continue to develop. As one retired district judge recently testified: “History teaches us that a crisis often can be the catalyst of innovations that endure long after the crisis itself has ended.”⁷ How will reliance on videoconferencing during this pandemic transform lawyers, courts, and the law going forward? What changes to civil litigation practice should be embraced, what changes

should be discarded, and what changes should await further technological advances?

We — the chief judge of a federal district, a litigation partner at a major law firm, and a professor of civil procedure and federal courts — explore these questions. Surveying some key pandemic-fueled developments of videoconferencing in federal civil litigation,⁸ we conclude that the pandemic's push toward the zooming of legal practice is likely to leave enduring marks. We identify the most promising uses for videoconference technology, strike cautionary notes for more pervasive implementation, and offer some suggestions for moving forward.

Rule 1 mandates a balance between justice, efficiency, and cost.⁹ As described more fully below, we think the efficiency gains and cost savings of videoconferencing are likely to prevail routinely for internal meetings, witness interviews, court conferences, simple oral arguments, and uncontested depositions, especially when travel is required. By contrast, when justice strongly favors in-person events, such as for contentious depositions, complex motion hearings, and ▶

trials, or when videoconferencing presents its own costs and difficulties, such as for document-intensive proceedings, we think the balance will often — though not always — weigh against videoconferencing.

INTERNAL MEETINGS AND WITNESS INTERVIEWS

Much has been written about videoconference meetings.¹⁰ Some love them and some despise them, but the technology works, and the meetings can go on, often more easily arranged and less costly than before. We have learned that we no longer need hordes of attorneys, clients, experts, paralegals, and others — perhaps from distant time zones — to cram into a conference room in a downtown skyscraper for every brainstorming, drafting, and strategy session.

In addition to saving the costs and hassle of travel to the meetings, videoconference meetings themselves are often crisper, shorter, and more focused than in-person meetings. And gone is the pressure to complete the task in a single, continuous meeting — a videoconference meeting can be broken out into several sessions with hours, or even days, in between. The technology makes meetings more flexible, more efficient, and, often, more effective.

Videoconferencing also can facilitate certain kinds of client and witness interviews. True, in-person meetings might still be important for key client contacts — though perhaps more as a sign of relational respect than communicative necessity — and for witnesses whose knowledge is key to the case or is heavily based on documents or whose credibility is suspect. But videoconferencing can be an effective and efficient platform for interviewing most other witnesses.

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A lawyer's interviews of the client, the client's employees, and other friendly witnesses are good examples. Even important witnesses, such as experts or treating physicians, may be interviewed remotely if the witnesses are experienced testifiers and if the lawyer is familiar with the subject matter.

Videoconferencing technology also provides an effective platform for a lawyer to learn about internal client affairs, such as a client's IT system, document-retention and destruction policies, and the identities of the key document custodians and the servers where the documents may be found. Client personnel can be summoned virtually at a moment's notice, wherever they happen to be, to answer questions or to share electronically stored information on their computer screens. Meanwhile, the attorney need not travel to a client's location and walk from office to office, looking for — and sometimes not finding — the person with knowledge.

For these types of meetings and interviews, videoconferencing offers benefits that should be used routinely after the pandemic ends.

CONFERENCES AND ORAL ARGUMENTS

Some categories of adversarial events also are likely to migrate permanently to online platforms. The days of multiple lawyers traveling cross-country — or even cross-town — for a conference with the judge are probably over. Almost every discovery or status conference before the court — even before judges who demand meaningful conversations with the lawyers about the issues, like what discovery may be needed, what motions are likely, and what schedule should be tailored to the case — can be held more easily via videoconference, with very little sacrifice in the quality of the exchange. Because nearly all federal courts have conducted some proceedings during the pandemic via videoconference, the learning curve for many lawyers and courts alike is now fairly flat.¹¹

Reliance on videoconference technology for these kinds of tasks benefits judges, lawyers, and clients. One benefit is the ease of scheduling. Especially for proceedings involving many participants, videoconferencing allows cases to proceed expeditiously and alleviates docket pressures. A related benefit is the ease of participation and the alleviation of the stress, hassle, burden, and cost of travel. Imagine: no more air travel, car rental, and hotel room for a routine Rule

26(f) initial disclosure conference; no more traffic, courthouse parking, metal detectors, and thick briefcases for a status conference. Clients, lawyers, and judges are likely to press for permanent adoption of videoconference technology in these areas.¹²

Oral hearings in district courts offer similar videoconferencing opportunities. Many remote oral hearings work surprisingly well, with little cost to the institutional values that are important to preserve. The pandemic experience with videoconferencing has shown that lawyers can effectively argue their own contentions and point out problems in the opposition's arguments, while judges can effectively press the lawyers. Nonevidentiary hearings, particularly on matters that are not case-determinative, are particularly good candidates for routine remote argument. More crucial or complex oral hearings, such as on a motion to dismiss, a *Daubert* motion, or a motion for summary judgment, may benefit from in-person advocacy, engagement, and sparring. Though a videoconference option can still be a good alternative with consent of the parties or when lawyers are scattered geographically.

Videoconference appellate arguments have worked well and provide more widespread public access to cases of interest and import.¹³ But because

appellate arguments are before a panel of judges rather than a single judge, videoconferencing may adversely affect judge-to-judge interactions as well as judge-to-lawyer interactions. We also worry that remote argument may adversely affect the formality and tradition of in-person appellate argument. Remote argument may nevertheless offer an attractive option if formality concerns can be addressed (as we suggest below) and if videoconferencing alleviates significant travel burdens, such as a judge who cannot travel because of medical reasons or advocates who must cross many time zones to attend in person.

DEPOSITIONS, EVIDENTIARY HEARINGS, AND TRIALS

Depositions, evidence-intensive hearings, and trials present harder questions. Simple or uncontentious depositions likely can be conducted via videoconference for the same reasons that court conferences can. But more important and confrontational depositions and proceedings, as well as those that depend significantly on documentary evidence, present challenges.

Effective cross-examination of a hostile or evasive witness is more difficult by videoconference. A witness may be more likely to feel free to obfuscate, ignore, or be nonresponsive when testifying from the comfort

and security of their home office or kitchen table. Further, virtual examination makes it hard for the examiner to maintain control over pace and tone and to police the flow of information to the witness. Unbeknownst to the examining attorney (and even to the defending attorney), a witness could be referring to or receiving information from prep materials, instant messages, electronic documents, or even in-person individuals in the room but off-camera. Challenges exist for the lawyers on the other side of the "v." as well: preparing for a major deposition remotely presents challenges, as does objecting and controlling a witness during the deposition. For significant depositions, the lawyers' physical presence helps to ensure the integrity and efficiency of the deposition.

Testimonial hearings and bench trials present similar challenges. Although the judge may serve as a strong moderating presence against recalcitrant or even bombastic witnesses, effective cross-examination may still be difficult and cumbersome remotely. The need for credibility assessments of fact or percipient lay witnesses, especially hostile witnesses, can present a strong case for in-person engagement.¹⁴ Our adversarial system is designed for in-person confrontation and challenge, which can be difficult to replicate via videoconference.

As a practical matter, document-intensive depositions, hearings, and trials are difficult to replace with current videoconference technology because it is still cumbersome to organize, present, and locate large volumes of documents — especially in adversarial circumstances when the participants may not know in advance which documents (or portions of documents) will need to be used. Some software platforms and hardware setups can enable

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remote viewing of both witnesses and documents effectively, but the setups and technology are not in widespread use at this time.

Jury trials present special challenges. The logistics and the effectiveness of remote voir dire and jury deliberations are two of the most severe obstacles to the migration of jury trials to videoconferencing.¹⁵ Lawyers forced into videoconferencing jury trials have had to make uncomfortable adjustments to their trial practices.¹⁶ All of the downsides of effective witness examination via videoconferencing apply to jury trials and are made even more acute by the fact that a lay jury, rather than an experienced judge, must comprehend the evidence and make credibility determinations. In short, a videoconferencing jury trial may so erode fundamental values protected by the Constitution as to place it beyond our present technological reach.

It is true that even these kinds of major, confrontational proceedings have seen some success using videoconferencing technology during the pandemic. Some judges report no meaningful reduction in effective witness presentation or examination. Lawyers and witnesses long ago accepted the option of videotaped depositions that they knew could be played at trial. Videoconferenced depositions and trial testimony, though admittedly a step further, seems to be a step judges can make.¹⁷ Some advance practice and communication among the judge, lawyers, and testifying witnesses may be necessary to ensure smooth proceedings.

These successes should be applauded and further developed. But the question is not whether videoconferencing technology is good enough in the time of a pandemic. The question is whether videoconferencing technology is good

enough to replace in-person proceedings as a matter of course in a post-pandemic world. For the kinds of contentious, credibility-driven, or document-intensive proceedings we have discussed in this section, we think the answer is complicated. Judges and lawyers will likely take a case-by-case, and perhaps even a witness-by-witness approach. Although we suspect that most such proceedings will, at least in the immediate post-pandemic era, revert to being in person, we predict that some of these proceedings will be conducted by videoconferencing when the balance of hardships favors it.

ACCESS, TRANSPARENCY, AND DECORUM

Although videoconferencing offers great promise for federal civil litigation, not every party can obtain access to the requisite technology. The digital divide is real. Many pro se parties and prisoners do not have a hardware device or appropriate software.¹⁸ Public libraries and detention facilities can help bridge this divide by installing compatible videoconferencing software on library and facility computers to allow remote participation by such litigants, but, even then, courts should take the access burdens of vid-

eoconferencing technology seriously.

Still, unless the judge is to hold no hearing at all, courts must weigh the burdens of videoconferencing appearances against the burdens of in-person appearances, such as the difficulties and costs to an indigent party to miss work or hire childcare, or to the costs to a detention center for escorting a prisoner to court.¹⁹ For routine conferences and hearings, we think that balance will often tip in favor of videoconferencing.

Videoconferencing has additional implications for the courts. Court proceedings generally are guided by an open-courts norm that has foundations in the First Amendment.²⁰ In normal times, publicly accessible court calendars display the daily schedule of hearings so that family members, friends, media representatives, and curious members of the public may come to the courthouse and watch in person.

Videoconferencing technology shows great promise for improving transparency in civil courtrooms. During the pandemic, the Judicial Conference authorized the videoconferencing of court proceedings so that the public and media could continue to have access.²¹ Some courts have taken additional

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measures to ensure media and public access via videoconference.²² Courts have put remote-viewing access links on their websites and have publicized videoconference access using social media. These efforts have the potential not just to preserve the federal open-courts norm but to expand it in a transformative way. Approximately half a million people listened live to the Supreme Court telephonic oral arguments held during the pandemic and nearly two million have listened to the recordings online,²³ vastly more than the physical seats allowed to be filled in person.

Pandemic aside, the history of open courts has focused on in-person observation rather than broadcasting court proceedings.²⁴ Although remote viewing of live court proceedings does present risks of unauthorized making or distribution of recordings,²⁵ we are not aware of those risks materializing during the pandemic. Video access is usually accompanied by a clear directive from the court that listening is to be via audio only, on mute, with no shared video, and conditioned on an agreement not to broadcast, record, or transmit. These admonitions can be repeated in the hearing. A judge may require participants who are not lawyers or clients to identify themselves, both orally on the record, and by naming their avatars not with a phone number or a cute name, but with their real names and affiliation. These safeguards have proven effective at curbing abuses.²⁶

Other aspects of courtroom videoconferencing might adversely affect decorum. Physical courtrooms feature a judge in a robe, elevated on a bench, with flags, the court seal, and portraits of former jurists, along with the formal cry opening court and the tradition of rising when the judge enters and

leaves. These traditions of solemnity and formality bring home the fact that even in the most mundane of hearings in the least complicated of cases, this third branch of government, an institution to cherish and support, is the justice system at work.

We think some simple steps can minimize the concern that videoconferencing will erode these values. Each participant — judges included — should dress in courtroom attire. Each participant — judges included — should use a professional virtual background. Lawyers should name their virtual presence using their real names, firms, and client. Professionalizing videoconferencing can reinforce the formality and solemnity of the occasion. Such virtual norms should help ensure court decorum.

POST-PANDEMIC PRACTICE

Although many aspects of federal civil litigation are still most effective in person, efficacy has always been balanced against efficiency, cost, and convenience.²⁷ The pandemic has taught that videoconferencing can offer powerful cost savings and efficiency gains, with, in some circumstances, only marginal losses of efficacy. Permanent videoconference adaptations should be considered for witness interviews, low-value depositions, status conferences, routine court hearings, and the like, especially when those events would involve burdensome participant travel or difficult scheduling logistics.

By contrast, adversarial events that depend on extensive documentary evidence, witness confrontation, witness-credibility assessments, or the participation of a lay jury may lose too much fidelity to live proceedings or present too many complicating factors to warrant the use of videoconferencing technology.

Federal civil litigation is not yet ready for wholesale virtual migration in a post-pandemic world.

From these findings, we make three observations. First, discerning the line between videoconference-acceptable and in-person-preferred events will require time and testing. Lawyers and judges need both facility with videoconferencing technology and experience determining when the technology is inadequate for the adversarial task. Some guidance must come from attorneys, who should best know the virtues and limits of videoconferencing for a specific case or proceeding. Choice, however, can be a race to the bottom. If one party demands and is allowed to appear in person, the adversary will often feel compelled to do so as well, even if not really necessary. To minimize gamesmanship, bias, and unjust cost imposition, courts may need to set rules governing which hearings will or should be held by videoconference. The *Benchbook*,²⁸ for example, could be revised to add a section on using videoconference technology for pretrial conferences, oral arguments, evidentiary proceedings, and bench trials. We think it is crucial to nurture a working partnership between the bench and bar for implementing videoconferencing post-pandemic.

Second, some proceedings may lend themselves to hybrid approaches. A mixture of remote and in-person participation may be used in a single case to achieve the right balance. Videoconferencing is not an all-or-nothing, and certainly not a one-size-fits-all, option. One area of promise is a hybrid bench trial. Opening and closing statements and the presentation of at least some witnesses can be remote. More important witnesses and those whose examination involves significant presentation ►

of documents can be done in person. Case-by-case calibrations are required, which can be done by the judge collaborating with the lawyers.

Third, the line between videoconference-acceptable and in-person-preferred is likely to shift gradually toward videoconference-acceptable over time. The pandemic has shown just how useful videoconferencing can be, even today. The pandemic also has forced widespread, rapid adoption of videoconferencing among the bench and bar. Meanwhile, creative minds around the country — and abroad — are looking hard at these issues,²⁹ and innovators are modifying technology to deliver even more effective litigation support.³⁰ We see great promise for far more pervasive and routine use of videoconferencing in the future.

Facilitating those changes requires uniform (or at least universally compatible), widely accessible, relatively easy-to-learn, functional, and secure technology that is flexible enough to accommodate the diversity of litigation practices and cheap enough to make the game worth the candle. Such technology is not an idle daydream — not if email is any precedent. Indeed, there is reason for great optimism. Litigation technology has a long track record of success, and we think today's videoconferencing technology offers a solid foundation for foreseeable progress.³¹ Videoconferencing technology could be particularly useful if partnered with software developed for managing and displaying documents effectively. We urge — with the care and deliberation that can be afforded in a post-pandemic world — continuing advances in technology coupled with gradual adoption and use, in certain circumstances, among the bench and bar. The opportunities for creativity, and the benefits that can result, make it all worthwhile.

▶ The availability of videoconferencing ought to reduce burdens on both parties and on nonparty witnesses, thereby enabling more robust use of remote nonparty examination and testimony.

IMPACT ON THE LAW

The current successes of remote technology, coupled with the prospect of greater successes in the future, lead us to consider what impact these changes in federal civil litigation practice might have on certain laws, such as the law of personal jurisdiction³² or Rule 45.³³ Rather than press for changes in the law itself, we focus on how the prevalence of videoconferencing might affect the application of existing laws. In short, videoconferencing should affect the application of laws that require consideration of the burdens of travel and scheduling. A few examples follow.

Most directly and immediately, the option of videoconferencing will affect the proportionality calculus of what is discoverable. Rule 26 allows discovery that is “proportional to the needs of the case,” considering, among other things, “whether the burden or expense of the proposed discovery outweighs its likely benefit.”³⁴ Depositions of parties are usually proportional as a matter of course, but depositions of nonparties demand closer scrutiny of the benefits and burdens.³⁵ Far-flung nonparty witnesses create burdens and costs for parties who must travel to those witnesses for a deposition. The availability of videoconferencing ought to reduce burdens on both parties and on nonparty witnesses, thereby enabling more robust use of remote nonparty examination and testimony.³⁶ In circumstances where the deposition

burdens on a nonparty are otherwise light, an offer to take the nonparty's deposition by videoconference might even induce the nonparty to consent to the deposition without the need to resort to formal service of a subpoena.³⁷

The availability of videoconferencing should also affect determinations of venue transfer and *forum non conveniens*. The general venue statute authorizes ordinary venue transfer from a court in one district to a court in a different district, but only “[f]or the convenience of parties and witnesses, in the interest of justice.”³⁸ The multidistrict litigation statute authorizes MDL transfer and consolidation only “for the convenience of parties and witnesses and [to] promote the just and efficient conduct of such actions.”³⁹ Similarly, the doctrine of *forum non conveniens* authorizes complete dismissal of an action out of federal court for refiling in an entirely different judicial system (usually in a foreign country's courts) for, in part, the private convenience and costs of the litigants.⁴⁰

Each of these forum determinations is based, in part, on relative conveniences. Videoconferencing may not address all of the convenience considerations at stake in these determinations, but it should lessen the weight of those that are based on the difficulties and costs of traveling to one or the other location. In addition, for *forum non conveniens*, the Supreme Court has suggested that the presumption in

favor of the plaintiff's choice of forum "applies with less force when the plaintiff or real parties in interest are foreign" because of the inference that the foreign plaintiffs chose a U.S. court for reasons other than convenience.⁴¹ That inference may weaken as federal courts and practitioners more pervasively adopt remote technology.

CONCLUSION

Chief Justice John Roberts stated in a recent graduation speech that the coronavirus has "pierced our illusion of certainty and control."⁴² He challenged the students to make their way with humility, compassion, and courage in this world turned upside-down. "Humility. The pandemic should at least teach us that," Chief Justice Roberts said.⁴³ He's right. Judges and lawyers are too often not given to these virtues. It is time. As COVID-19

and technology continue to dominate how judges and lawyers serve both individual litigants and the broader interests of justice, the conversations must continue.

With the benefit of years as a federal district judge and as director of the Federal Judicial Center, Jeremy Fogel said: "[I]t would be disappointing if the measures [the federal judiciary] has taken simply were abandoned wholesale when the current emergency has passed. . . . [T]he courts also have an unexpected and unprecedented opportunity to study the costs and benefits of new ways of doing their work."⁴⁴ We agree. We look forward to how lessons learned from using videoconferencing during this pandemic can have lasting improvements on the law and its practice.



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¹ United Nations Department of Economic & Social Affairs, *Everyone Included: Social Impact of COVID-19*, U.N. DEP'T OF ECON. & SOC. AFFAIRS (Apr. 8, 2020), <https://www.un.org/development/desa/dspd/everyone-included-covid-19.html>.

² The U.S. Courts webpage contains a list of orders and announcements of federal-court closures. *Court Orders and Updates During COVID-19 Pandemic*, U.S. CTS. (Sept. 3, 2020), <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic>.

³ Eric Miller, *Nation's Courts Feeling Impact of COVID-19 Pandemic*, TRANSP. TOPICS (May 21, 2020, 3:15 PM), <https://www.ttnews.com/articles/nations-courts-feeling-impact-covid-19-pandemic>.

⁴ The pandemic has generated new litigation. See Pierce Atwood LLP, *Class Action Litigation Related to COVID-19: Filed and Anticipated Cases*, 10 NAT'L L.J. 184 (July 17, 2020).

⁵ See Nicole Black, *10 Technologies That Changed the Practice of Law*, MYCASE BLOG (July 29, 2014), <https://www.mycase.com/blog/2014/07/10-technologies-changed-practice-law/>.

⁶ See *Federal Courts During the Covid-19 Pandemic: Best Practices, Opportunities for Innovation, and Lessons for the Future: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet, H. Comm. on the Judiciary*, 116th Cong. 1 (2020) [hereinafter "Hearing"] (statement of Hon. Jeremy Fogel (ret.), executive director, Berkeley Judicial Institute) ("The federal courts, which long

have been resistant to electronic access and virtual proceedings, have been forced to implement emergency measures to facilitate them."); *id.* at 2-3 ("Always concerned (and properly so) about the unintended consequences of different ways of doing things, the federal judiciary tends to consider new ideas infrequently, at great length and in granular detail.").

⁷ *Id.* at 2.

⁸ We focus on federal practice because its uniformity offers easier and cleaner assessment; on civil practice because criminal proceedings involve unique issues of, for example, governmental prosecution and the Confrontation Clause; and on litigation rather than other forms of legal practice because litigation directly links the bench and the bar. But we think our observations may have purchase in these other areas of practice, too.

⁹ FED. R. CIV. P. 1.

¹⁰ For a sampling of recent literature on the topic, see Luc Rubinger et al., *Maximizing Virtual Meetings and Conferences: A Review of Best Practices*, 44 INT'L ORTHOPAEDICS 1461 (2020); David Rock & Khalil Smith, *The Science of Virtual Work*, PSYCH. TODAY (Apr. 8, 2020), <https://www.psychologytoday.com/us/blog/your-brain-work/202004/the-science-virtual-work>; K. VIRGINIA HEMBY, DELIVERING EFFECTIVE VIRTUAL PRESENTATIONS (2019).

¹¹ See Federal Bar Association Member Survey Submitted by the Honorable Hank Johnson, Oversight Hearing [hereinafter "Survey"], *supra* note 6, at 2 ("Approximately 70% of respondents

said they were able to participate in a mediation or court proceeding by video conferencing service without significant interruption. Since the health crisis began, 27% of respondents have participated in a remote court proceeding either by telephone, video conference, or both Of the respondents who have participated in remote court proceedings, most were very satisfied or satisfied with the process."). Pre-pandemic examples exist. See, e.g., *Soloff v. Aufman*, No. 17cv1500, 2018 WL 3474639, at *2 (W.D. Pa. July 19, 2018) ("Plaintiffs, who reside in the state of California, filed a Motion to Appear via Skype, Facetime, or conference call at the Rule 26(f) conference. . . . This Court granted Plaintiffs' request, and the Rule 26(f) conference was conducted by the Parties.").

¹² Cf. Richard Marcus, *Post Pandemic Procedure*, IN BRIEF & ON POINT (June 29, 2020), <http://sites.uchastings.edu/onpoint/2020/06/29/rick-marcus-on-post-pandemic-procedure/> ("Given the worries of travel, as well as the costs to clients, this [remote-technology] learning may cause litigators to decide not to go back to the old way [of depositions] even after the pandemic ends.").

¹³ Cf. Leah Litman, *Muted Justice* 26 (May 19, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3605444 ("All in all, the Supreme Court's telephonic arguments [during the pandemic] were a success.").

¹⁴ See 10A FEDERAL PROCEDURE § 26:455 (Lawyer's ed. 2020) ("[T]he demeanor of witnesses is recognized as a highly useful, even if not an infallible, method of ascertaining the truth and accuracy of their narratives . . ."); Fogel, *supra* note 6, at ▶

5 (“Federal judges . . . have expressed concern that lawyers who appear remotely will be less candid than they would be in person, and that judges’ ability to assess parties’ and lawyers’ non-verbal cues such as facial expressions and body language will be diminished.”).

¹⁵ See Survey, *supra* note 11, at 3 (“A majority of respondents (59%) said they would not be open to conducting a remote jury trial, if the option were available. Almost half of respondents (47%) said they would be less likely to participate in a jury trial if voir dire were conducted through video conferencing.”). *But see* Judge Jack Tuter, *Fla. Jury Selection Success Shows Viability Of Remote Trials*, *LAW360* (July 23, 2020, 4:54 PM), <https://www.law360.com/articles/1294787/fla-jury-selection-success-shows-viability-of-remote-trials>.

¹⁶ See Cara Salvatore, *May It Please The Camera: Zoom Trials Demand New Skills*, *LAW360* (June 29, 2020, 3:41 PM), <https://www.law360.com/articles/1278361/may-it-please-the-camera-zoom-trials-demand-new-skills>.

¹⁷ See, e.g., *City of Almatey v. Sater*, No. 19-CV-2645 (AJN) (KHP), 2020 WL 2765084, at *3 (S.D.N.Y. May 28, 2020) (“To the extent there are concerns about safety amid the COVID-19 pandemic, this Court already has encouraged the taking of depositions remotely by video. A laptop computer or even a smart phone can be used to access Skype or Zoom or any other Internet-based platform for purposes of appearing for a deposition. Therefore, there is no basis for finding that COVID-19 renders the

deposition unduly burdensome.”).

¹⁸ See Statement of the Honorable David G. Campbell, Hearing, *supra* note 6, at 8 (“The use of videoconferencing has been particularly challenging in court hearings with detained defendants. . . . Local jails and BOP facilities have not always had videoconference software or software compatible with courts or defender offices.”).

¹⁹ Cf. Statement of Michigan Supreme Court Chief Justice Bridget M. McCormack, Hearing, *supra* note 6, at 4 (“For all litigants, transportation, parking, child care and job responsibilities are not a barrier to participation in an online proceeding. And Zoom is less intimidating for parties who appear without a lawyer and represent themselves. There is something equalizing and less intimidating about the screens in Zoom all being the same size.”).

²⁰ See Scott Dodson, *Accountability and Transparency in U.S. Courts*, in *ACCOUNTABILITY AND TRANSPARENCY IN CIVIL JUSTICE* 273, 280 (2019).

²¹ See *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, U.S. CTS. (Mar. 31, 2020), <https://perma.cc/7HAG-L2FB>; *Judiciary Provides Public, Media Access to Electronic Court Proceedings*, U.S. CTS. (Apr. 3, 2020), <https://perma.cc/VM68-R6N7>.

²² See Testimony of Melissa Wasser, Policy Analyst, The Reporters Committee for Freedom of the Press, Hearing, *supra* note 6, at 5. See also McCormack, *supra* note 19, at 2 (“[S]ince April 1, judges and other court officers have held well over 50,000 Zoom meetings and are approach-

ing 350,000 hours of hearings held online. And to maintain public access to court proceedings, virtual hearings conducted by Zoom are being livestreamed to YouTube. To make public access to those livestreams easy, our tech team set up a Virtual Courtroom Directory with a clickable map so that users can click on their county, find their judge and watch. This directory has been used more than 25,000 times in the past month alone.”).

²³ Amy Howe, *Courtroom Access: Where Do We Go From Here?*, SCOTUSBLOG (May 13, 2020, 12:37 PM), <https://perma.cc/THX9-F8XJ>; Melissa Wasser, *SCOTUS Oral Argument Numbers*, REPS.COMM. FOR FREEDOM OF THE PRESS (Aug. 11, 2020), https://docs.google.com/document/d/1w-cPD_lucGHMzdFGeWhiO6WAlsv6ysZN-2lFZ7eZeTZel/edit.

²⁴ See *History of Cameras in Courts*, U.S. CTS., <https://perma.cc/HM4A-35F9>.

²⁵ See Fogel, *supra* note 6, at 4 (“Understandably, courts are reluctant to see images of witnesses, parties, lawyers, jurors and judges appearing widely on the internet or on social media.”).

²⁶ According to one report, “at least some of the virtual platforms with which courts have experimented since then actually can be configured to ensure more privacy than is possible in many in-person proceedings.” *Id.* at 4.

²⁷ See Fed. R. Civ. P. 1 (instructing the procedural rules to be construed to secure the “just, speedy, and inexpensive” disposition of cases).

²⁸ *Benchbook for U.S. District Court Judges*, FED. JUD. CTR. (6th ed. 2013).

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- ²⁹ The CARES Act directs the federal rulemakers to “consider rule amendments . . . that address emergency measures.” Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 (Mar. 27, 2020). And the rulemakers have diligently done so since its passage. See Marcus, *supra* note 12. Court committees are also active. See Campbell, *supra* note 18, at 3 (“On February 18, 2020, the AO established the Federal Judiciary COVID-19 Task Force . . .”). Abroad, Australia has successfully developed rules for using videoconferencing in civil litigation during the pandemic. See S.I. Strong, *Procedural Law in a Time of Pandemic: Australian Courts’ Response to COVID-19*, LEGAL RESPONSES TO THE CORONAVIRUS PANDEMIC (forthcoming 2021).
- ³⁰ See, e.g., COVID-19 JUDICIAL TASK FORCE, REPORT OF THE JURY SUBGROUP: CONDUCTING JURY TRIALS AND CONVENING GRAND JURIES DURING THE PANDEMIC 13 (June 4, 2020) (proposing the development of a “sidebar” app for electronic rulings and argument outside the presence of the virtual jury).
- ³¹ See McCormack, *supra* note 19, at 3 (“[W]e have also pioneered an online dispute resolution platform that allows residents to resolve disputes with or without a mediator on a phone, tablet, or laptop instead of going to court. By the end of June, our groundbreaking, the MI-Resolve service will be available to every resident and at no cost. You can see your doctor online, you can order groceries online, and now, in Michigan, you can resolve disputes online without hiring a lawyer, without the burden of taking off work or arranging child care but with a greater likelihood of achieving a satisfactory outcome.”).
- ³² Personal jurisdiction, with its emphasis on the burdens on parties to litigate in far-away courts, seems like a good candidate for future reconsideration in light of the burden-mitigating effects of videoconferencing. For discussions of personal jurisdiction and its burdens in various contexts, see, e.g., Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1463 (2019) (personal jurisdiction burdens on plaintiffs subject to involuntary venue transfer); William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205 (2018) (personal jurisdiction burdens on aliens).
- ³³ Rule 45 requires subpoenas of nonparties to compel compliance within 100 miles of the nonparty, to avoid overburdening the nonparty with distant travel. FED. R. CIV. P. 45(c). Such a limitation may warrant reconsideration in an age of widespread use of videoconferencing for nonparty depositions.
- ³⁴ FED. R. CIV. P. 26(b)(1).
- ³⁵ See, e.g., *Mount Hope Church v. Bash Back!*, 705 F.3d 418, 429 (9th Cir. 2012) (recognizing a special need to protect nonparties against the imposition of large discovery costs).
- ³⁶ In 2013, one court proposed using videoconferencing to stream live trial testimony into court when the witness was unable to travel because of a serious illness. See *Staley v. U.S. Bank Nat’l Ass’n*, No. 1:10-cv-00591-BLW, 2013 WL 393325, at *2-3 (D. Idaho Jan. 31, 2013).
- ³⁷ Such an offer might even be required in certain circumstances. See FED. R. CIV. P. 45 (d)(1) (“A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.”).
- ³⁸ 28 U.S.C. § 1404(a).
- ³⁹ 28 U.S.C. § 1407(a).
- ⁴⁰ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1982) (including, as factors for consideration, the “relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive”).
- ⁴¹ *Id.* at 255.
- ⁴² Greg Stohr, *U.S. Chief Justice Says Pandemic Pierces ‘Illusion of Certainty’*, BLOOMBERG.COM (May 23, 2020, 1:14 PM).
- ⁴³ Mark Sherman, *Chief justice says pandemic teaches humility, compassion*, ABC NEWS (May 23, 2020 12:36 PM).
- ⁴⁴ Fogel, *supra* note 6, at 2.

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