

**ACBA- Federal Court Section**  
**2022 Bench Bar Conference CLE**  
***Materials Index***

1. Ethical Issues Regarding Virtual Lawyering, Witness Prep, and Arbitration  
[https://www.americanbar.org/content/dam/aba/events/labor\\_law/2021/midwinter/rla/materials/ethical-issues-regarding-virtual-lawyering.pdf](https://www.americanbar.org/content/dam/aba/events/labor_law/2021/midwinter/rla/materials/ethical-issues-regarding-virtual-lawyering.pdf)
2. Ethical Considerations for the Remote Practice of Law, Inns of Court  
<https://inns.innsofcourt.org/media/195603/ethical-considerations-for-remote-litigation-rev.pdf>
3. Expert Witnesses in the Age of Covid-19, Expert Witnesses in Civil Trials
4. *In re RFC and ResCap Liquidating Trust Action*, 444 F. Supp.3d 967 (2020).
5. As Courts Restore Operations, COVID-19 Creates New Normal  
<https://www.uscourts.gov/news/2020/08/20/courts-restore-operations-covid-19-creates-new-normal>
6. COVID Technology Law Update: The Law of Virtual Court Proceedings  
<https://www.law.com/legaltechnews/2022/02/08/covid-technology-law-update-the-law-of-virtual-court-proceedings/>

# ETHICAL ISSUES REGARDING VIRTUAL LAWYERING, WITNESS PREP, AND ARBITRATION

**ABA RLA Midwinter Meeting  
March 11-12, 2021**

Joshua B. Shiffrin  
Bredhoff & Kaiser, P.L.L.C.  
805 15<sup>th</sup> Street NW, Suite 1000  
Washington, DC 20005  
jshiffrin@bredhoff.com  
www.bredhoff.com

Joyce Klein  
Arbitrator  
PO Box 186  
Ocean Grove, NJ 07756  
joycemkein@gmail.com

Chris Harrison  
Ogletree Deakins  
6510 Poplar Avenue, Suite 300  
Memphis, TN 38119  
chris.harrison@ogletree.com  
www.Ogletree.com

# ABA Model Rules

## Covered in Today's Presentation

---

- Rule 1.2 (Scope of Representation)
- Rule 1.6 (Confidentiality of Information)
- Rule 3.3 (Candor Toward the Tribunal)
- Rule 3.4 (Fairness to Opposing Party and Counsel)
- Rule 5.5 (Unauthorized Practice)
- Rule 8.4 (Misconduct)

*All references are to the ABA Model Rules of Professional Conduct; you should always consult the rules for the jurisdictions in which you are barred*

# Problem # 1

---

One day, Gus has a great idea while staring at a colleague's zoom background of a beach with palm trees. Why not relocate to the beach for a couple months? He rents a condo in Florida, flies down with his family from DC (where he is barred), and gets to work on his pending matters. Is Gus engaged in the unauthorized practice of law?

- A) You said Florida, so the answer is probably yes.
- B) It depends. What is he working on?
- C) Come on, we all work on vacation. This is just like that. That's ok, right?
- D) This is a pandemic. The normal rules don't apply to things like this.

# Unauthorized Practice During the Pandemic

---

- What if you practice in DC, but have been working from home in MD? NY/NJ?
- The rules haven't been suspended due to the pandemic, but many jurisdictions have applied them in reasonable ways
- Rule 5.5(b): A lawyer who is not admitted to practice in a jurisdiction shall not . . . establish an office or other systematic and continuous presence in the jurisdiction for the practice of law
- Rule 5.5(c): May provide legal services on a temporary basis in a jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice
  - Also, can provide legal services re arbitration, mediation, or other alternative resolution proceeding if the services arise out of or are reasonably related to the lawyer's practice where he or she is barred and are not services for which the forum requires pro hac vice admission

# Unauthorized Practice During the Pandemic

---

- **ABA Formal Opinion 495 (Dec. 16, 2020):** An attorney may practice law outside of his/her local jurisdiction if: (1) the local jurisdiction has not determined that working remotely from the local jurisdiction is UPL; (2) the attorney does not hold out to the public an address in the local jurisdiction; (3) the attorney does not state or imply that the lawyer is licensed to practice law in the local jurisdiction; (4) the attorney does not actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.
- **DC Court of Appeals Committee on UPL Op. 24-20 (Mar. 23, 2020):** A non-DC attorney may practice from the attorney's residence in DC under the "incidental and temporary practice" exception, if the attorney: (1) is practicing from home due to the COVID-19 pandemic; (2) maintains a law office in a jurisdiction where the attorney is admitted to practice; (3) avoids using a DC address in any business document or otherwise holding out as authorized to practice law in DC, and (4) does not regularly conduct in-person meetings with clients or third parties in the DC.
- **FL Bar Proposed Advisory Opinion #2019-4:** Patent lawyer from NJ did not engage in UPL when he moved to FL but maintained practice in NJ because there was no attempt to create public presence in FL.

## Problem #2

---

The condo is small. Gus works at the kitchen table on his personal laptop, alongside his two children in virtual school. It is sometimes hard to hear his clients with all of the noise, so he got fancy white earbuds that look cool on Zoom. Any ethics issues to worry about?

- A) No, the pandemic has created similar circumstances for everyone.
- B) No, most of the calls with his clients probably aren't that interesting anyway.
- C) No, school aged kids don't count for privilege analysis.
- D) Yes, this is an ethics presentation, after all.

# Confidentiality and Technology Concerns

---

- **Rule 1.6(c):** A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
- **Rule 1.1, Comment [8]:** To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology
- **Considerations:**
  - Who else is present for your privileged conversations?
  - Is Zoom recording? Alexa? Siri?
  - How secure are your personal devices? What steps have you taken to mitigate risks?
    - **ABA Opinion 477R (May 22, 2017):** evaluate your information security from the point of view that your organization may be the subject of a cyber attack

## Problem #3

---

Gus is getting ready for a system board at the end of the month: a flight attendant, Jaime, was terminated following a verbal altercation with a passenger regarding mask compliance. Gus's witnesses are all over the place (literally and figuratively), and it doesn't help that the hearing will be over Zoom. Gus's first call is to Jaime. Before asking any questions, Gus explains to Jaime what the hearing will be like, what the just cause standard is, and what other flight attendants have said in similar cases to avoid termination.

Has Gus crossed any ethical lines?

A) Yes.

B) No.

# Rules Pertaining to Witness Preparation

---

## When does zealous advocacy and good preparation cross the line into unethical witness coaching?

- Rule 1.1, Comment: “Competent handling of a particular matter includes . . . adequate preparation”
- Rule 1.2(d): A lawyer shall not counsel a client to engage in criminal or fraudulent conduct, but can discuss the legal consequences of any proposed course of action
- Rule 3.3.(a)(3): A lawyer shall not knowingly “offer evidence the lawyer knows to be false”
- Rule 3.4(b): A lawyer shall not “counsel or assist a witness to testify falsely”
- Rule 8.4: A lawyer shall not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation; or engage in conduct that is prejudicial to the administration of justice”

# Rules Pertaining to Witness Preparation

---

## Section 116 of the Restatement (Third) of the Law Governing Lawyers:

### A lawyer CAN do the following:

- Discuss the role of the witness and effective courtroom demeanor
- Discuss the witness's recollection and probably testimony
- Reveal other testimony or evidence that will be presented and ask the witness to reconsider his/her recollection or recounting of events in that light
- Discuss the applicability of the law to the events in issue
- Review the factual context into which the witness's observations or opinions will fit
- Reviewing documents or other physical evidence that may be introduced
- Discuss probable lines of cross examination the witness should be prepared to meet
- Practice witness's testimony and suggesting choice of words

**But CANNOT assist the witness to testify falsely as to a material fact**

# Principles Pertaining to Witness Preparation

---

## Section 116 of the Restatement (Third) of the Law Governing Lawyers:

### A lawyer CAN do the following:

- Invite the witness to provide a truthful testimony favorable to the lawyer's client
- Discuss the role of the witness and effective courtroom demeanor
- Discuss the witness's recollection and probably testimony
- Reveal other testimony or evidence that will be presented and ask the witness to reconsider his/her recollection or recounting of events in that light
- Discuss the applicability of the law to the events in issue
- Review the factual context into which the witness's observations or opinions will fit
- Reviewing documents or other physical evidence that may be introduced
- Discuss probable lines of cross examination the witness should be prepared to meet
- Practice witness's testimony and suggesting choice of words

**But CANNOT assist the witness to testify falsely as to a material fact**

# Principles Pertaining to Witness Preparation

---

- “[The lawyer’s] duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know.”  
-Richard C. Wydick, *The Ethics of Witness Coaching*, 17 Cardozo L. Rev. 1, 2 (1995) (quoting *In re Eldridge*, 37 N.Y. 161, 171 (NY 1880))
- “It is one thing to ask a witness to swear to facts which are knowingly false. It is another thing, in an arms-length interview with a witness, for an attorney to attempt to persuade her, even aggressively, that her initial version of a certain fact situation is not complete or accurate.”  
-*Resolution Trust Corp. v. Bright*, 6 F.3d 336 (5th Cir. 1993)
- “It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer . . . and is to be commended because it promotes a more efficient administration of justice and saves court time.”  
-*State v. McCormick*, 298 N.C. 788 (1979)
- “An attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way.”  
-*Ibarra v. Baker*, 338 F. App'x 457, 465 (5th Cir. 2009)

# “The Lecture”

---

- “The Lecture” from “Anatomy of a Murder”: does it cross any lines?



- What if Gus asked the Flight Attendant to tell his/her story before delivering “the lecture?” What are the risks of doing that?

# Summary

---

- A lawyer CAN:
  - Suggest a choice of words to make the witness's meaning clear, provided the change is consistent with witness's genuine memory of the facts
  - Tell a witness her responses are misleading or unclear or likely to be misinterpreted
  - Familiarize a witness with relevant documents and refresh a witness's recollection of the facts to ensure the witness's memory is accurate
  - Attempt to persuade a witness her initial version of a fact situation is incomplete or inaccurate, IF a lawyer has a good faith basis for believing it is so.
- A lawyer CANNOT:
  - Prepare a witness in a manner designed to fabricate a recollection that does not actually exist (vs. facilitating an actual recollection)
  - Intentionally cause the witness, knowingly or unwittingly, to mislead the factfinder
  - Engage in conduct that creates a substantial risk of being perceived as an invitation to testify falsely

## Problem #4

---

Gus's next call is to Pat, another flight attendant who saw the entire altercation while deadheading home. To facilitate their first conversation, Gus sends Pat a written statement from Jaime, Jaime's disciplinary write up, and a list of questions Gus intends to ask Pat during the system board hearing.

Anything wrong here?

Any other concerns?

# Writing to Refresh Recollection

---

- Federal Rule of Evidence 612:
  - Generally, an adverse party is entitled to have a writing used to refresh a witness's recollection produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.
  - Has been held to apply to documents used to refresh witnesses' memories in preparation for depositions (under the rule, disclosure of documents used before a hearing may occur when "justice requires it")
- What if lawyer uses a privileged document to prepare a witness for deposition? Courts are split on whether disclosure is then required:
  - *State ex rel. Polytech, Inc. v. Voorhees*, 895 S.W.2d 13 (Mo. 1995)(witness's use of a privileged document to refresh her recollection before testifying [as compared to using them while testifying] did not abrogate the attorney-client privilege).
  - *Las Vegas Development Associates, LLC v. Eighth Judicial District Court*, 325 P.3d 1259 (Nev. 2014)(when a witness uses a privileged document to refresh her recollection before giving a deposition, the opposing party is entitled to have the document produced at the deposition).
  - *Suss v. MSX Int'l Eng'g Servs., Inc.*, 212 F.R.D. 159, 165 (S.D.N.Y. 2002)) (Disclosure is only required where the witness "relied upon" the document, *i.e.*, the document had some "demonstrated impact on the witness testimony")

## Problem #5

---

Grievant was discharged for assaulting a co-worker. The Company asserts that Grievant has threatened potential witnesses. Counsel for both the Company and the Union convene a conference call with the arbitrator to determine "security" issues for the Zoom hearing and to determine the arrangements for before, during and after the hearing. Company Counsel makes it clear that none of its witnesses are willing to testify unless they can be protected from the Grievant. The Company asks that special arrangements be made to ensure that the Grievant is never in contact with witnesses and that Grievant be excluded from the hearing during the complainant's testimony. Union counsel expresses concern that the request will irreparably prejudice the arbitrator.

# Problem # 5

---

The arbitrator should:

- A) Explore options that would assure that witnesses are comfortable appearing and testifying.
- B) Explore how best to balance Grievant's right to be present and assist in his defense throughout the hearing with the concerns raised by the Company
- C) Assures both parties of her continuing impartiality and explains that the matter will be decided based upon the record at hearing rather than any allegations raised during procedural prehearing discussions.
- D) All of the above.

# Arbitrator Ethics: Impartiality

---

## NAA CODE OF PROFESSIONAL RESPONSIBILITY

### A. General Qualifications

1. Essential personal qualifications of an arbitrator include honesty, integrity, impartiality and general competence in labor relations matters.

An arbitrator must demonstrate ability to exercise these personal qualities faithfully and with good judgment, both in procedural matters and substantive decisions.

2. An arbitrator must be as ready to rule for one party as the other on each issue, either in a single case or in a group of cases. Compromise by an arbitrator for the sake of attempting to achieve personal acceptability is unprofessional.

# Arbitrator Ethics: Impartiality

---

## NAA CODE OF PROFESSIONAL RESPONSIBILITY

### C. Responsibilities to the profession

1. An arbitrator must uphold the dignity and integrity of the office and endeavor to provide effective service to the parties.
3. An arbitrator shall not engage in conduct that would compromise or appear to compromise the arbitrator's impartiality.

# Arbitrator Ethics: Impartiality

---

## **NAA CODE OF PROFESSIONAL RESPONSIBILITY**

### **PREHEARING CONDUCT**

1. All prehearing matters must be handled in a manner that fosters complete impartiality by the arbitrator.

### **HEARING CONDUCT**

1. An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument.
  - a. Within the limits of this responsibility, an arbitrator should conform to the various types of hearing procedures desired by the parties.

## Problem #6

---

A Zoom arbitration concerning the discharge of Grievant is in process. The discharge is a she said/she said situation. Both parties have raised credibility issues regarding the opposing party's witnesses. Each witness has been instructed not to look at any documents or messages concerning the dispute except those placed in the screen share during their testimony. Jane, the Company's witness, begins her testimony and it soon apparent to the arbitrator that she seems to be reading something on her computer screen as she answers several questions. Neither party raises the issue.

# Problem # 6

---

The arbitrator should:

- A) Wait for someone to raise the issue and continue to watch Jane read her answers.
- B) Ask to speak with counsel in a breakout room and raise the issue.
- C) Say nothing and don't credit Jane's testimony; mention the reading only in the award.
- D) Interrupt the hearing to make a statement to everyone in the remote hearing room about Jane reading her testimony.

.

# Arbitrator Ethics: Fair Hearing

---

## NAA CODE OF PROFESSIONAL RESPONSIBILITY

### HEARING CONDUCT

#### A. General Principles

An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument.

C. An arbitrator should not intrude into a party's presentation so as to prevent that party from putting forward its case fairly and adequately.

## **ETHICAL CONSIDERATIONS FOR THE REMOTE PRACTICE OF LAW**

Practicing law remotely raises specific ethical concerns for attorneys relative to confidentiality, privacy and security, technical competence and supervision of less experienced lawyers. The Rules of Professional Responsibility were not drafted with a pandemic in mind. Practicing law remotely, no matter the medium, brings new challenges to attorneys relative to the manner we communicate with clients, engage in litigation and the logistics of practicing. Keeping in mind that “[t]he Rules of Professional Conduct are rules of reason”, the following offers guidance on how to maintain New Hampshire’s professional standards and stay true to our ethical principles.

### **Rule 1.1. Competence**

**(a) A lawyer shall provide competent representation to a client.**

**(b) Legal competence requires at a minimum:**

...

**(2) performance of the techniques of practice with skill;**

**(3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention;**

**(4) proper preparation; and**

**(5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interest.**

**(c) In the performance of client service, a lawyer shall at a minimum:**

...

**(4) undertake actions on the client's behalf in a timely and effective manner including, where appropriate, associating with another lawyer who possesses the skill and knowledge required to assure competent representation.**

*As applied to remote legal representation:*

- Competence is not just about the area of the law at issue, in the age of practicing using technology, competence also includes learning the medium being used by the court or administrative agency so that you can effectively communicate, present evidence and argument. “While a competent lawyer is not required to know everything about the law, they must be skilled and knowledgeable in the matter undertaken on behalf of the client. This will inevitably include skills and knowledge in the use of the tools needed to efficiently and effectively perform the tasks undertaken on behalf of the client.” *Lawyer Ethics in the Virtual Courtroom* June 3, 2020 by Gideon Christian.

- Ensure that you have the necessary technical components such as fast enough internet speed, a private area to see, hear and speak so as to not be interrupted or allow third parties access to privileged information.
- Ensure that you have the necessary technical components such as fast enough internet speed, a private area to see, hear and speak so as to not be interrupted or allow third parties access to privileged information.
- Seek assistance if you are not confident in your competence with the necessary technology.
- If available, take advantages of opportunities to practice using the technology beforehand. “Lawyers should test the platform with their clients, so they are familiar with how to enter the meeting and use the platform settings. This can help minimize the chances of technical disruptions, delays and stress from user error.” *Privacy and Confidentiality Tips for Virtual Hearings - A few considerations to keep in mind while you navigate the many logistical issues involved in remote court hearings.* By Cathy Krebs, July 01, 2020, American Bar Journal.

### **Rule 1.3. Diligence**

**A lawyer shall act with reasonable diligence and promptness in representing a client.**

*As applied to remote legal representation:*

- Diligence, like competence, requires learning what is required to effectively represent your client through the modes available.
- Make sure that you can meet your technical obligations in advance of a proceeding or event.
- Review any technical requirements that may apply to your client with your client before the relevant proceeding.

### **Rule 1.4. Client Communications**

**(a) A lawyer shall:**

...

**(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;**

...

**(b) A lawyer shall explain the legal and practical aspects of a matter and alternative courses of action to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding the representation.**

*As applied to remote legal representation:*

- Your client should be advised of how the case will proceed, which includes the technical aspects involved.
- Explain the pros and cons of remote versus in-person attendance at events and phone versus video participation.
- Know when to demand in-person events when important to your client's representation.

### **Rule 1.6. Confidentiality of Information**

**(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph**

**(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:**

...

**(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.**

*As applied to remote legal representation:*

- Ensure that your client has a device and technical wherewithal to communicate and exchange information securely and in a manner that does not destroy the attorney-client privilege.
- Ensure that your communications take place when you are in private area to see, hear and speak so as to not be interrupted or allow third parties access to privileged information.
- Consider reviewing with your client the importance of maintaining confidentiality when using wireless devices to participate in legal consultation or proceedings.
- Use a service that your firm has verified as safe, with unique links, password protection or PINs and lock the event to avoid uninvited guests.

## **Hacker Streams Porn Into Florida Court Hearing by Infiltrating Zoom**

An intruder marred the court proceedings.

By **Raychel Lean** (<https://www.law.com/dailybusinessreview/author/profile/Raychel-Lean/>) | July 10, 2020 at 02:35 PM



Hacker. Photo: Lifestyle discover/Shutterstock.com.

It began like any other court hearing over Zoom, but this lawsuit challenging Leon County's COVID-19 mask order took an X-rated turn Friday morning. While Florida attorneys prepared to present their legal arguments, hackers infiltrated with bursts of music and a strange sort of rap involving offensive sexual language, then began streaming porn.

### **Law Firms M**

**Radley Law Firm .**  
/?q=Radley+Law+&Submit=Search&source=decisions&endDate=)

### **Trending Sta**

1 **'My Career Working Pa for Empath (/americanl /19/my-career-over-workir pleas-for-er firms/)**

THE AMERICAN (/AMERICANL/

2 **Biden Will I President V the 'T-14' in /01/19/bide lawyer-pres from-the-t-?**

LAW.COM (HT

- Opt to be the host. The host or moderator frequently has the most control over whether privacy settings are enabled in the platform. When you can't request basic confidentiality safeguards.
- Use private breakout rooms to allow for a private place for confidential communications.
- Limit screen sharing and the chat function. Set up a separate confidential way to communicate with client during a hearing

#### **Rule 3.4. Fairness to Opposing Party and Counsel**

**A lawyer shall not:**

**(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;**

**(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;**

**(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;**

...

**(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:**

**(1) the person is a relative or an employee or other agent of a client; and**

**(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.**

*As applied to remote legal representation:*

- The same rules of honesty and integrity still apply even when opposing counsel isn't present in person. A lawyer has a duty to be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings, including cooperating with opposing counsel at all stages of remote proceedings.
- Do not take advantage of technological mistakes by the opposing party or counsel that do not go to the merit of the case or that are not prejudicial to the rights of the client.
- Do not take advantage of the area off camera to make gestures or pass notes to your client he/she is testifying. Coaching is not permitted.
- Third persons should not be permitted in the room while client or witness is testifying unless disclosed ahead of time to other counsel.
- In the event that other parties are in the room, note that New Hampshire both parties must consent to a recording. Consent may be implied by surrounding circumstances however. *See Fischer v. Hooper*, 143 N.H. 585, 598 (1999).

#### **Rule 5.1. Responsibilities of Partners, Managers, and Supervisory Lawyers**

**(a) Each partner in a law firm, and each lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.**

**(b) Each lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.**

*As applied to remote legal representation:*

- Make sure all attorneys in the firm acquire the necessary education to practice ethically through technology. This includes providing the necessary tools and training.
- Consider planning ahead to make sure support personnel are available if necessary to assist attorneys with technology associated with remote advocacy.

There are a number of articles on-line that go into detail about best practices. We recommend reading some of these to make sure that you are doing your ethical best when practicing remotely. This is especially important for litigating criminal cases due to the defendant's confrontation rights and right to a jury trial and right to a speedy trial.

The Zoom boom: How videoconferencing tools are changing the legal profession By Ellen Rosen, ABAJournal (June 3, 2020), <https://www.abajournal.com/web/article/ethics-videoconferencing-tools-are-changing-the-legal-profession>.

Ethics and Litigating a Criminal Case from Afar By Joel Cohen | August 20, 2020, New York Law Journal via Law.com. <https://www.law.com/newyorklawjournal/2020/08/20/ethics-and-litigating-a-criminal-case-from-afar/?slreturn=20210101084610>.

Privacy and Confidentiality Tips for Virtual Hearings - A few considerations to keep in mind while you navigate the many logistical issues involved in remote court hearings. By Cathy Krebs, July 01, 2020, American Bar Journal. <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/privacy-and-confidentiality-tips-for-virtual-hearings/>.

Ethics Forum: Questions and Answers on Professional Responsibility - What is a Webex or Zoom hearing or trial like? By Samuel C. Stretton | August 27, 2020, New York Law Journal via Law.com. <https://www.law.com/thelegalintelligencer/2020/08/27/ethics-forum-questions-and-answers-on-professional-responsibility-137/>.

Ethics of Virtual Consultations By Megan Zavieh, Attorney at Work. <https://www.attorneyatwork.com/ethics-of-virtual-consultations/>

## Expert Witnesses in Civil Trials § 7:11

Expert Witnesses in Civil Trials | October 2021 Update  
Damian D. Capozzola

### Chapter 7. Working with Experts—Retention and Initial Issues

# § 7:11. Expert witnesses in the age of COVID-19

## References

During the second quarter of 2020 every aspect of life was impacted by the Coronavirus pandemic and COVID-19, including the legal profession. As businesses closed and states passed safer-at-home orders, courts adopted emergency procedures to address the new problems brought on by social distancing norms. Much of the litigation process relies on in-person appearances. Depositions, mediations, and in-court proceedings require the presence of judges, clerks, attorneys, witnesses, or jurors. In light of the health crisis, video-conferencing technology is gaining momentum and may become the new standard even when the crisis abates, but it also raises significant questions relating to the utility and propriety of “virtual” depositions or expert testimony.

Two main themes have emerged in court cases under the health crisis. One is whether depositions may be conducted remotely using video conferencing technology. The second is how medical malpractice and personal injury cases will be affected since the pandemic has created an “all hands on deck” type of situation, where doctors are being called to help regardless of their specialty and certainly do not have the ability to take time off from their practice for the purpose of testifying in a malpractice case. Both themes are further discussed in Chapter 8.

While it is impossible to predict whether this “new normal” will last six months, a year, or more, it is clear that litigators will have to create new strategies and learn how to use new tools to overcome the novel challenges in the age of COVID-19. One of the questions that is recurring with more frequency is whether conducting proceedings remotely will be detrimental to one’s case. This issue has been raised by many attorneys who seem to prefer obtaining a continuance until in-person proceedings may resume, rather than moving forward via audio or video conferencing. The basis for this argument is that, especially when it comes to examining witnesses, the effect of holding the proceeding in person is much different from conducting it from behind a screen. Litigators often will shine more brightly in a courtroom or a conference room. A video call, although an effective means of communication, will not have the same effect. Further, remote proceedings provide greater opportunities for witness coaching and raise concerns about privacy, since not all software provides the same level of encryption and security. On the other hand, attorneys are also striving to keep their cases on schedule as much as possible, and, realistically, conducting proceedings remotely may be the only option for the months to come. Nevertheless, ultimately, courts will exercise their discretion in determining whether to grant continuances or not. Therefore, attorneys should be ready to embrace “virtual” trials and depositions, and prepare accordingly.

The opinion from *In re RFC and ResCap Liquidating Trust Action*, provides some insight as to how courts may resolve the question of in-person appearances vs. a delay in proceedings. Here, a coronavirus outbreak occurred during the final stages of a bench trial. Defendant’s Primary Residential Mortgages, Inc.’s (PRMI) final two witnesses had yet to appear and PRMI moved for a continuance of trial until a date that would allow for in person appearance. Plaintiff Res Cap Liquidating Trust (Res Cap) moved to allow the final two witnesses to appear via video conference. The court ruled in favor of proceeding via video conference, albeit recognizing that “conducting a trial by videoconference is certainly not the same as conducting a trial where witnesses testify in the same room as the factfinder.”<sup>1</sup>

PRMI's counsel, in fact, objected to proceeding via video conference and argued that "presenting testimony in this way would be patently unfair" since Res Cap's experts had presented testimony in person and, further, that PRMI's experts would be "severely hindered" in their ability to "convey [...] testimony in a clear and comprehensible manner to the court." The court rejected these arguments and gave a detailed explanation of why continuing proceedings remotely was in order. First, the court explained that Federal Rule of Civil Procedure 43(a) requires that a "trial witness's testimony must be taken in open court" unless otherwise provided. However, the court noted that the rule allows for an exception "for good cause in compelling circumstances" where the court may permit a remote simultaneous transmission so long as "appropriate safeguards" are taken. Thus, the decision to continue proceedings remotely, fell within the court's discretion.<sup>2</sup>

Second, while acknowledging that "remote transmission [of testimony] is to be the exception and not the rule,"<sup>3</sup> the court explained that advances in technology allow for instantaneous transmission of video and sound, and allows all persons involved (including the jury) to see the witness' facial expressions and hear his or her tone of voice. Ultimately, this reduces any concerns that may have existed in the past. Thirdly, the court provides insight as to situations that courts in the past have held as qualifying "special circumstances" so as to warrant remote testimony. Specifying that mere inconvenience does not qualify as a justification for transmitting remote testimony, the uncertainty surrounding the Coronavirus outbreak qualifies as an event warranting the use of testimony transmission in that requiring witnesses to travel would put their health and safety at risk. Lastly, the court also took into account the "need for expeditious trial proceedings."

The coming months will see a re-shaping of several procedural practices, and all of these issues will need to be carefully considered when selecting and working with expert witnesses.<sup>4</sup>

Westlaw. © 2021 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

#### Footnotes

<sup>1</sup> On this point, the court identified previous decisions that raised concerns as to how Certain features of testimony useful to evaluating credibility and persuasiveness, such as "[t]he immediacy of a living person' " can be lost with video technology, and the "ability to observe demeanor, central to the fact-finding process, may be lessened[.]" " In re RFC and ResCap Liquidating Trust Action, 111 Fed. R. Evid. Serv. 1184, 2020 WL 1280931, \*2 (D. Minn. 2020) (quoting U.S. v. Lawrence, 248 F.3d 300, 304 (4th Cir. 2001)).

<sup>2</sup> The court also stated that its discretion was supplemented by the court's "wide latitude in determining the manner in which evidence is to be presented" under the Federal Rules of Evidence. 2020 WL 1280931, \*2 (quoting Parkhurst v. Belt, 567 F.3d 995, 1002 (8th Cir. 2009) (citing Fed. R. Evid. 611(a))).

<sup>3</sup> In re RFC and ResCap Liquidating Trust Action, 2020 WL 1280931, \*2 (quoting Lopez v. NTL, LLC, 748 F. Supp. 2d 471, 479 (D. Md. 2010)).

<sup>4</sup> More thoughts along these lines can be found at Section 8:31, *infra*.

444 F.Supp.3d 967  
United States District Court, D. Minnesota.  
IN RE: RFC AND RESCAP LIQUIDATING TRUST  
ACTION

This document relates to: ResCap Liquidating Trust  
v.

Primary Residential Mortgage, Inc.

Case No. 0:13-cv-3451 (SRN/HB), Case No.  
16-cv-4070 (SRN/HB)

|  
Signed March 10, 2020

|  
Filed 03/13/2020

**Synopsis**

**Background:** Following global virus outbreak which occurred during ongoing bench trial, defendants moved to allow their final two witnesses to appear via videoconference testimony, and plaintiffs moved for continuance of trial.

The District Court, Susan Richard Nelson, J., held that outbreak constituted good cause and compelling circumstances so as to warrant videoconference testimony by final two defense witnesses.

Defendants' motion granted and plaintiffs' motion denied.

**Procedural Posture(s):** Motion for Continuance.

**Attorneys and Law Firms**

\***968** Adam M. Abensohn, Pro Hac Vice, Alexandria Deep Conroy, Pro Hac Vice, Deborah Kay Brown, Pro Hac Vice, Elisabeth Bach Miller, Pro Hac Vice, Eric H. Huang, Pro Hac Vice, Geneva B. McDaniel, Pro Hac Vice, Guyon H. Knight, Pro Hac Vice, Heather K. Christenson, Pro Hac Vice, Isaac Nesser, Pro Hac Vice, Jacob J. Waldman, Pro Hac Vice, Jeffrey Carl Miller, Pro Hac Vice, Jennifer Jackson Barrett, Pro Hac Vice, Kanika G. Shah, Pro Hac Vice, Kathleen Marie Sullivan, Pro Hac Vice, Matthew A. Lee, Pro Hac Vice, Peter Evan Calamari, Pro Hac Vice, Richard I. Werder, Jr., Pro Hac Vice, Sascha N. Rand, Pro Hac Vice, Serafina Concannon, Pro Hac Vice, Thomas D. Pease, Pro Hac Vice, Tyler Whitmer, Pro Hac Vice, Darren Mitchell

Goldman, Pro Hac Vice, Kate E. Cassidy, Pro Hac Vice, Quinn Emanuel Urquhart & Sullivan, LLP, Joshua S. Margolin, Pro Hac Vice, Selendy & Gay PLLC, New York, NY, Alexander J. Merton, Pro Hac Vice, Amroh Faisal Idris, Pro Hac Vice, Gabriel F. Soledad, Pro Hac Vice, Jonathan Eser, Lauren Weeman Misztal, Pro Hac Vice, Michael J. Madigan, Pro Hac Vice, Quinn Emanuel Urquhart & Sullivan LLP, Washington, DC, Anthony Paul Alden, Pro Hac Vice, Claire Disston Hausman, Pro Hac Vice, Danielle L. Gilmore, Pro Hac Vice, Danielle Marie Shrader-Frechette, Pro Hac Vice, David C. Armillei, Pro Hac Vice, Dawn Utsumi, Pro Hac Vice, Diane L. Cafferata, Pro Hac Vice, Duane R.A. Lyons, Pro Hac Vice, Harry A. Olivar, Jr., Pro Hac Vice, Jeffrey J. Ung, Pro Hac Vice, Johanna Yao Ong, Pro Hac Vice, John Steven Gordon, Pro Hac Vice, Kenneth John Shaffer, Pro Hac Vice, Kristen Bird, Pro Hac Vice, Matthew R. Scheck, Pro Hac Vice, Michael Jude Galvin, Pro Hac Vice, Molly Caroline Stephens, Pro Hac Vice, Rachael L. McCracken, Pro Hac Vice, Randa A.F. Osman, Pro Hac Vice, Richard Allen Schirtzer, Pro Hac Vice, Sarah J. Cole, Pro Hac Vice, Viola Trebicka, Pro Hac Vice, William Charlie Price, Pro Hac Vice, Zena Jacobsen, Pro Hac Vice, Melissa Andrea Dalziel, Pro Hac Vice, David Michael Grable, Pro Hac Vice, Robert Jason Becher, Pro Hac Vice, Quinn Emanuel Urquhart & Sullivan, LLP, Noah S. Helpert, Pro Hac Vice, Browne George Ross, Los Angeles, CA, Christina Wu, Pro Hac Vice, Zoe P. Chernicoff, Pro Hac Vice, Linda J. Brewer, Pro Hac Vice, Quinn Emanuel Urquhart & Sullivan LLP, San Francisco, CA, Donald G. Heeman, Jessica J. Nelson, Laurie M. Quinn, Randi J. Winter, Spencer Fane LLP, Minneapolis, MN, Jeffrey Alan Lipps, Pro Hac Vice, Jennifer A.L. Battle, Pro Hac Vice, Michael N. Beekhuizen, Pro Hac Vice, Carpenter Lipps & Leland LLP, Columbus, OH, Nicholas Aaron Leefer, Pro Hac Vice, Valerie Jon Ramos, Pro Hac Vice, Quinn Emanuel Urquhart & Sullivan, LLP, Redwood Shores, CA, Nicole Y. Altman, Pro Hac Vice, Honolulu, HI, for RFC and ResCap Liquidating Trust Action.

**ORDER RE: VIDEOCONFERENCING OF  
REMAINING WITNESSES**

SUSAN RICHARD NELSON, United States District Judge

**\*969** This matter comes before the Court regarding a recent development involving the coronavirus, otherwise known as COVID-19.<sup>1</sup> Currently, Plaintiff ResCap Liquidating Trust (“ResCap”) and Defendant Primary Residential Mortgage, Inc. (“PRMI”) are engaged in a bench trial before the Court that began on February 10, 2020. (See Minute Entry [Doc. No. 5425].) The Court held trial on February 10, 11, 12, 13, 14, 18, 19, 20, and 21, as well as March 3 and 4, 2020. (See Minute Entries [Doc. Nos. 5425, 5429, 5432, 5433, 5434, 5446, 5447, 5450, 5451, 5464, 5465].) The trial is scheduled to resume on Thursday, March 12, 2020, with closing arguments anticipated the following day. (See Minute Entry [Doc. No. 5465].) There are two PRMI witnesses remaining: Dr. Justin McCrary and James Crawford.

On March 10, 2020, the Court was informed of the following facts. Sometime prior to March 2, 2020, a Quinn Emanuel attorney in New York who is not a member of ResCap’s trial team contracted COVID-19. (See Pl.’s March 10, 2020 Letter [Doc. No. 5467] at 1.) During the week of February 24, 2020, prior to any diagnosis of the infected attorney, [redacted] This past weekend, Quinn Emanuel became aware that the infected attorney had been diagnosed with COVID-19. (Pl.’s March 10, 2020 Letter at 1.) [redacted] Out of an abundance of caution, Quinn Emanuel’s New York office was temporarily closed after the infected attorney tested positive. (*Id.*)

Upon learning of the temporary closure of Quinn Emanuel’s New York office, PRMI’s counsel contacted counsel for ResCap, as well as PRMI’s two remaining witnesses, Dr. McCrary and Mr. Crawford. (Def.’s March 10, 2020 Letter [Doc. No. 5468] at 1.) Dr. McCrary, who lives in New York, and Mr. Crawford, who lives in Utah, have requested that they not be ordered to travel to Minnesota to provide testimony on March 12. (*Id.* at 2.) [redacted]<sup>2</sup>

ResCap proposes that trial continue as scheduled, with the Court and parties exploring safety measures by which the witnesses could testify in person, while reducing the risk of viral transmission. (Pl.’s March 10, 2020 Letter at 2.) Alternatively, ResCap proposes that Dr. McCrary, and Mr. Crawford, as necessary, participate by videoconference. (*Id.*) Doing so would allow trial to continue as scheduled, without requiring either witness to travel to Minnesota. (*Id.*)

PRMI’s counsel, however, objects to the use of videoconferencing technology for this purpose. (Def.’s March 10, 2020 Letter at 2–3.) Counsel contends that presenting testimony in this fashion would be **\*970**

“patently unfair,” given Dr. McCrary’s “compelling interest in presenting his testimony in person, just as Plaintiff did with respect to its expert, Dr. Snow.” (*Id.* at 2.) Counsel argues that Dr. McCrary would be hindered in his ability to clearly convey his testimony if he was required to do so via videoconference. (*Id.* at 2–3.) Counsel also objects to any suggestion that PRMI submit Mr. Crawford’s testimony by deposition. (*Id.* at 3.) Counsel contends that because it had planned to present Mr. Crawford’s live testimony at trial, it had no reason to ask him questions on redirect during his deposition and did not do so. (*Id.*) Counsel argues that requiring PRMI to submit designations from its own witness, based on Plaintiff’s questions, would be fundamentally unfair. (*Id.*)

PRMI therefore requests that the Court reschedule the final two days of trial for the first available dates amenable to the Court and the parties. (*Id.*) ResCap states that while it is sympathetic to the witnesses’ concerns, reasonable arrangements can be made to avoid the prejudice of further delays in the trial schedule. (Pl.’s March 10, 2020 Letter at 3.)

Pursuant to Federal Rule of Civil Procedure 43(a), “[a]t trial, the witnesses’ testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise.” However, the rule also provides that “[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.” Fed. R. Civ. P. 43(a). Accordingly, the decision to require testimony by videoconference falls within the Court’s discretion. See Thomas v. Anderson, 912 F.3d 971, 977 (7th Cir. 2018) (“[U]nder Rule 43(a), the judge has discretion to allow live testimony by video for ‘good cause in compelling circumstances and with appropriate safeguards.’”), *cert. denied*, \_\_\_ S.Ct. \_\_\_, 140 S.Ct. 533, 205 L.Ed.2d 334 (2019). Moreover, the Court’s discretion on this question is supplemented by its “wide latitude in determining the manner in which evidence is to be presented” under the Federal Rules of Evidence. Parkhurst v. Belt, 567 F.3d 995, 1002 (8th Cir. 2009) (citing Fed. R. Evid. 611(a)).

Conducting a trial by videoconference is certainly not the same as conducting a trial where witnesses testify in the same room as the factfinder. Thornton v. Snyder, 428 F.3d 690, 697 (7th Cir. 2005), *cert. denied*, 547 U.S. 1192, 126 S.Ct. 2862, 165 L.Ed.2d 896 (2006). Indeed, “[v]ideoconference proceedings have their shortcomings.” *Id.* “[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.’ ” *Id.* (quoting *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001)). Certain features of testimony useful to evaluating credibility and persuasiveness, such as “[t]he immediacy of a living person’ ” can be lost with video technology, and the “ ‘ability to observe demeanor, central to the fact-finding process, may be lessened[.]’ ” *Id.* (citations omitted). Accordingly, “remote transmission [of testimony] is to be the exception and not the rule.” *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 479 (D. Md. 2010).

Still, advances in technology minimize these concerns. The near-instantaneous transmission of video testimony through current technology permits “the jury [or, in a bench trial, the Court] to see the live witness along with his hesitation, his doubts, his variations of language, his confidence or precipitancy, [and] his calmness or consideration[.]” \*971 *In re Vioxx Prods. Litig.*, 439 F. Supp. 2d 640, 644 (E.D. La. 2006) (citations omitted) (cleaned up). Given the speed and clarity of modern videoconference technology, where good cause and compelling circumstances are shown, such testimony “satisfies the goals of live, in-person testimony and avoids the short-comings of deposition testimony.” *Id.*

“Courts most frequently allow remote testimony in special circumstances, such as where a vital witness would be endangered or made uncomfortable by appearing in a courtroom.” *Eller v. Trans Union, LLC*, 739 F.3d 467, 478 (10th Cir. 2013) (citing *Parkhurst*, 567 F.3d at 997 (child victim of sexual abuse); *Jennings v. Bradley*, 419 Fed. App’x 594, 598 (6th Cir. 2011) (unpublished) (three witnesses posed security threats while fourth witness would be deprived of necessary mental health support if forced to testify in person)). Courts also occasionally permit the use of remote testimony in situations where a witness is located far from the site of the trial or hearing. *Id.* (collecting cases). The variations in the case law illustrate that the question of whether good cause and compelling circumstances exist such that remote testimony should be permitted is a case-specific question.

The Advisory Committee Notes to Rule 43(a) are instructive here. After observing the “good cause in compelling circumstances” requirement, the advisory committee notes that “[t]ransmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.” Fed. R. Civ. P. 43(a) advisory committee’s note to 1996 amendment. Rather, “[t]he 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.” *Id.* Notably, the use of “[c]ontemporaneous transmission may be better than an attempt to reschedule the trial[.]” *Id.* (emphasis added).

Turning to the facts of this case, the Court finds that there is good cause and compelling circumstances that, with appropriate safeguards, justify the use of contemporaneous remote video testimony for both Dr. McCrary and Mr. Crawford, as opposed to postponing the trial any further. 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 undoubtedly an “unexpected” occurrence that nevertheless still permits witnesses “to testify from a different place.” Fed. R. Civ. P. 43(a) advisory committee’s note to 1996 amendment. The virus was detected in China only recently in December 2019, and in three months has spread around the world.<sup>3</sup> The International Health Regulations Emergency Committee of the World Health Organization has declared the virus outbreak a “public health emergency of international concern” and the United States Health and Human Services Secretary has declared the virus a “public health emergency.”<sup>4</sup> Moreover, the severity of the illness is not yet fully understood.<sup>5</sup> And while the exact method by which the virus spreads is not known with certainty, the CDC has generally classified the virus as a “community spread” disease that “spread[s] easily and sustainably in the community[.]”<sup>6</sup> Under the circumstances, COVID-19’s unexpected nature, rapid spread, and potential risk establish good cause for remote testimony. Indeed, one court faced with a request for \*972 a temporary restraining order addressing the movement of patients infected with COVID-19 considered the virus to pose a “threat of an immediate and irreparable injury.” *City of Costa Mesa v. United States*, No. 8:20-cv-00368-JLS (JDE), 2020 WL 882000, at \*1 (C.D. Cal. Feb. 21, 2020). Several courts have announced COVID-19-related restrictions on in-person appearances.<sup>7</sup> And, of particular concern here, the virus has been positively identified near—though not directly in contact with— [redacted]. (See Pl.’s March 10, 2020 Letter at 1.)

Compelling circumstances also exist for the witnesses in this case. As PRMI notes in its letter, Dr. McCrary, who lives in New York, and Mr. Crawford, who lives in Utah, have requested that they not be ordered to travel to Minnesota to provide testimony on March 12 in light of the COVID-19 virus. (Def.’s March 10, 2020 Letter [Doc. No. 5468] at 2.) [redacted] The Court is very sympathetic to these concerns, particularly in light of the many unknowns inherent in a virus outbreak. While the Court is unaware of a case fitting these exact circumstances, remote testimony is most often permitted “in special

circumstances, such as where a vital witness would be endangered or made uncomfortable by appearing in a courtroom.” *Eller*, 739 F.3d at 478. The desire to avoid potentially infecting family members with a disease whose risk factors, transmission vectors, and characteristics are not entirely understood certainly falls within that category, particularly where the witnesses at issue remain “able to testify from a different place” that does not present the risk or discomfort avoided by requiring live testimony. *Fed. R. Civ. P. 43(a)* advisory committee’s note to 1996 amendment.

The Court is also confident that “appropriate safeguards” designed to “ensure accurate identification of the witness and that protect against influence by persons present with the witness” can be established through videoconference testimony. *Id.* Moreover, the Court is certain that “[a]ccurate transmission” of the contents of the witnesses’ testimony will occur. *Id.* Finally, the Court is unpersuaded by defense counsel’s assertions that “[r]equiring testimony by videoconference” from Dr. McCrary would “severely hinder [his] ability to convey his testimony (which concerns complicated subject matters) in a clear and comprehensible manner to the Court.” (Def.’s Mar. 10, 2020 Letter at 2–3.) If this were a jury trial, the Court’s concerns about clarity would perhaps be heightened. However, as this is a bench trial, the Court is confident it will adequately understand Dr. McCrary’s testimony, even through videoconference technology. In any event, any issues with clarity can be addressed during testimony. *See Fed. R. Evid. 614(b)* (permitting the Court to examine a witness regardless of who calls the witness).

Finally, the Court holds that the use of “[c]ontemporaneous transmission” for remote testimony is absolutely preferable over “an attempt to reschedule the trial[.]” *Fed. R. Civ. P. 43(a)* advisory committee’s note to 1996 amendment. This trial has been spread out over nearly a month and a half, and it is unclear precisely when the Court could schedule additional trial days in the near future. The next two consecutive open days in the Court’s schedule, \*973 which are in late April 2020, are being

held open in light of a *pro se* criminal jury trial that may carry over from the preceding week. In addition, the prospect of a delay until late April would prejudice Plaintiff, as it would give PRMI an additional seven to eight weeks to prepare their damages expert. Moreover, the COVID-19 outbreak itself presents further complications, as postponing the trial for any length of time could merely postpone the possibility of infection at a later date, which itself might require additional delays. Given the availability of contemporaneous videoconference technology for receiving the testimony of both Dr. McCrary and Mr. Crawford, such a lengthy delay is untenable. The use of videoconference technology in this case balances the witnesses’ valid concerns about safety with the need for expeditious trial proceedings.

Accordingly, the Court denies PRMI’s request to reschedule the final two days of trial. Instead, the Court will preside over the final two days of trial by videoconference. The Court is advised by IT staff in this District that the most reliable, secure video link may be obtained at other federal courthouses. The parties are therefore directed to conduct their direct and cross examinations on Thursday and Friday, March 12 and 13 respectively, from a local federal courthouse of their choice. By 11:00 a.m., Eastern Time, tomorrow, Wednesday, March 11, 2020, they shall identify the courthouse and the lead IT videoconferencing person from each courthouse so that our IT videoconferencing staff can communicate with them promptly. The videoconference link will allow all three locations to be seen on a split screen, simultaneously.

## IT IS SO ORDERED.

## All Citations

444 F.Supp.3d 967, 111 Fed. R. Evid. Serv. 1184

## Footnotes

<sup>1</sup> The coronavirus (COVID-19) is a respiratory disease that was first detected in China but has now been identified in more than 100 locations internationally, including the United States. The “COVID-19” moniker is an abbreviation of the disease name “coronavirus disease 2019.” *See Coronavirus Disease 2019 (COVID-19) Situation Summary*, CDC (Mar. 9, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/summary.html>.

The Court takes judicial notice of the Centers for Disease Control and Prevention website. *See Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 793 (8th Cir. 2016) (citing *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632,

648 (7th Cir. 2011) for the authority of a court to take judicial notice of government websites).

<sup>2</sup> The CDC has indicated that the symptoms of a COVID-19 infection may appear anywhere from two to fourteen days after infection. See *Symptoms*, CDC (March 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/about/symptoms.html>.

<sup>3</sup> See *Coronavirus Disease 2019*, *supra* n.1

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See *How COVID-19 Spreads*, CDC (Mar. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/about/transmission.html>.

<sup>7</sup> See United States Courts for the Ninth Circuit, March 9, 2020 Announcements, [https://www.ca9.uscourts.gov/content/view.php?pk\\_id=0000001034](https://www.ca9.uscourts.gov/content/view.php?pk_id=0000001034); see also United States District Court for the Eastern District of Texas, Marshall Division, Standing Order Regarding the Novel Coronavirus (COVID-19) (providing guidance and directing parties to “meet and confer regarding the appropriate means to conduct [impacted] ... trial[s]” and to “consider, among other things ... [w]hether video conferencing would be appropriate and effective”).

# As Courts Restore Operations, COVID-19 Creates a New Normal

*Published on August 20, 2020*

*This is the first of a multi-part series on how federal courts are working to recover from the COVID-19 crisis.*



Chief Judge James K. Bredar will wear a plastic face shield and sit behind plexiglass when jury trials resume in the U.S. District Court for the District of Maryland.

For more than 230 years, the federal Judiciary has spanned the horseback era to the internet age, but in one key respect it has never changed. Just as in the nation's earliest years, the Constitution still requires federal courts to conduct many critical legal proceedings in person.

When coronavirus (COVID-19) cases spiked in March, court practices changed almost overnight, relying on virtual hearings that make it possible to conduct most court-related

activities without coming to the building. Now, with courts seeking to restore in-person proceedings, one thing already is clear: Justice in a pandemic environment will have a very different look and feel.

“On August 24, when we start our first trials, jurors will enter courtrooms that look nothing like what they would expect,” said Chief Judge James K. Bredar, of the U.S. District Court for the District of Maryland. “Plexiglass shields erected throughout. No public gallery. All participants masked, and lawyers wearing headsets so they look like air traffic controllers. Stand-alone jury chairs spread across the back and one side of the courtroom, all at least six feet apart.”

Like federal judges across the country, Bredar is reinventing his courtroom in an attempt to achieve two vital interests: protecting public health from COVID-19 infection while also ensuring Constitutional rights that date back centuries. Despite obvious risks and public anxieties, he and other judges said they are working through the challenges.

“It’s a balancing act, and a tough one, but balancing acts are not unfamiliar to judges,” Bredar said. “When the proceedings begin, the trials will have a familiar structure and cadence, with counsel making opening statements and presenting evidence in the ordinary, time-honored sequence. At their core, these will still be orderly jury trials, and easily recognized as such.”



James K. Bredar, chief judge of the District of Maryland: "For over two centuries, the federal courts have always remained open."



• In a Baltimore courtroom, plexiglass divides the parties and court staff, and juror chairs are being kept at a safe social distance.

- [1](#)
- [2](#)

New courtroom layouts are among the many ways courts are seeking to limit the risk of COVID-19 infection.

In Manhattan, federal court staff and visitors must now fill out an online health survey and be cleared by a digital temperature reader before they can access the building. In Boston, the District of Massachusetts has begun pre-paying a nearby parking lot, so that members of the public do not have to depend on public transit. In Boise, the court's air-conditioning system is pumping more air into the building from outdoors, to keep exhaled breath from stagnating.

Courts have moved forward, and sometimes backward, as local COVID-19 caseloads have fallen and then risen again.

In early June, the Northern District of Texas held one of the first federal jury trials since the pandemic threat escalated. The trial unfolded without a hitch, and jurors reported feeling safe, but in early July, additional jury trials in the Dallas courthouse were postponed for the rest of the month as new COVID-19 cases spiked.

"It's going to be baby steps. We're all doing the best we can," said Chief Judge Barbara M.G. Lynn, of the Northern District of Texas. "The ideals of justice and rule of law are vital to our country, and those principles cannot stop. But we need to temper a desire to go full speed ahead with a focus on safety."

Overshadowing much of the planning by courts is the U.S. Constitution. Even in a health crisis, the Sixth Amendment guarantees rights that must be provided in an open court of law. These include the right to confront accusers and the right to confer confidentially with counsel. Most critically, jury trials must be conducted in person, and the backlog is rapidly growing.

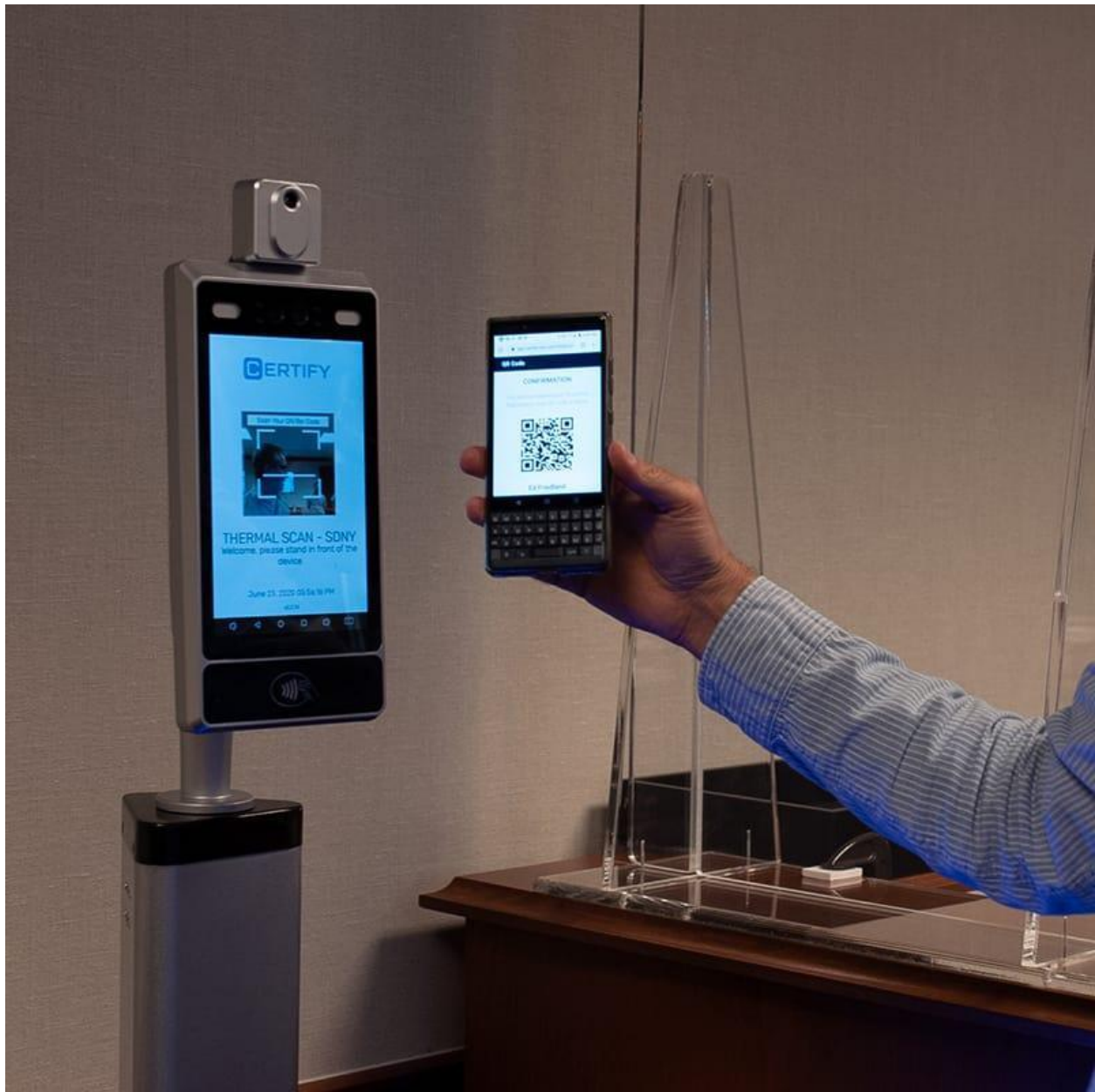
"We have more than 80 criminal trials waiting, everything since last February," said Robert M. Farrell, clerk of court for the District of Massachusetts. "We normally have about 20 cases that are trial ready. Starting in September, we plan to have four jury trial courtrooms and one magistrate judge courtroom for initial appearances."

In their efforts to balance safety and justice, judges and clerks of court say they have gained expertise in such arcane topics as building air flow, and many have consulted with epidemiologists.

In the Southern District of New York, the court's safety strategy begins, but does not end, with a required health questionnaire and a no-contact digital temperature check for all employees and visitors before they enter the courthouse.

Everyone must wipe their hands with disinfectant, and protective masks are mandatory in all public areas. Elevator ridership is severely restricted, and staff are starting as early as 6 a.m., or as late as 10 a.m., to avoid crowded trains.

"Before employees got on public transportation, there was a lot of anxiety about how commuting was going to work," said Edward Friedland, district executive for the Southern District of New York. "Those so far who have ridden on public transportation generally have been okay with it."



Before entering the Southern District of New York, employees and visitors must obtain and flash a code verifying that they have submitted an online health questionnaire and meet court safety criteria.

While many courts are not requiring formal health screenings, social distancing is nearly universal. That already has posed challenges for minor hearings, involving just litigants and lawyers, who must sit apart from one another.

In addition to plexiglass, some courts have installed audio systems with headsets that enable clients and lawyers to whisper to each other, much as they would in a traditional courtroom, but from a safe distance.

Courts also have wrestled with the question of who must wear masks in the courtroom.

In Colorado, everyone—including lawyers, jurors and witnesses—will be required to wear masks inside the courtroom. The court also will permit witnesses to be examined without masks, via video from a separate jury deliberation room that is not in use.

Many other courts, citing the Sixth Amendment right to confront witnesses, are requiring that witnesses not wear masks while testifying.

“The attorneys were very specific that that’s what they wanted,” said David C. Nye, chief judge of the District of Idaho, which has resumed jury trials. “They wanted to have the jurors see the witness’s face, to assess credibility.”

As in-person courtroom proceedings ramp up, the biggest cost of social distancing is the physical space that it requires. With participants forced to sit six feet apart, courts are using multiple courtrooms for one proceeding. This includes overflow rooms for the public to see or hear courtroom proceedings, and extra space for witnesses and jury deliberation.

An added complication is that many federal court districts have both large urban courthouses and smaller buildings in suburban and rural areas. Each courthouse must develop its own strategy for handling cases.

## *Read the Series*

This is the first in a series of articles about how federal courts are working to recover from the COVID-19 crisis.

- [View other coronavirus-related articles.](#)

*Next in this series: Courts overcome challenges to conduct jury trials.*

“One size likely will not fit all,” said Mark R. Hornak, chief judge of the Western District of Pennsylvania. “Our physical footprint in each of the divisions is quite different. Proceedings that can occur in our larger buildings may be handled differently, and in a different time frame, than in our smallest physical facility.”

For all the efforts to protect public health, Judiciary leaders acknowledge that the greatest uncertainty is beyond their control. On the question of whether the public, and even court staff, will trust that courthouses will be safe from infection, the jury literally is still out.

Judges and court clerks say that early jury trials have proceeded on schedule, but they are going to great lengths to assure jurors their health will be protected.

Bredar, who on Aug. 24 will preside over the District of Maryland's first jury trial since March, has commissioned an educational video showing jurors the many steps being taken to make the district's two courthouses safe. He also says the public needs to know how much they contribute to the delivery of impartial justice.

"For over two centuries, the federal courts have always remained open—through wartime, natural disasters, and even previous pandemics," Bredar said. "It remains true now, because of the dedication of judges, court staff, attorneys, and members of the public, who dutifully continue to serve as jurors and witnesses."

## Legaltech® news

- Law Topics
  - LegalTech Event(current)
- LegalWeek Event Perspectives(current)
  - All Sections



Photo courtesy of the New York Unified Court System

COMMENTARY

# COVID Technology Law Update: The Law of Virtual Court Proceedings

An examination of relevant case law and Congressional action reveals that—although courts have embraced the new virtual world—there have been hesitations and hijinks along the way.

February 08, 2022 at 07:00 AM

8 minute read

Court Administration

By David Horrigan, Relativity

---

It goes without saying that the pandemic has made dramatic changes to many aspects of life, and the law is no exception. One of the biggest changes for the law is the virtual court hearing, which has gained popularity since the beginning of the pandemic.

But can virtual court proceedings really replace going to the courthouse?

What about a criminal defendant's right to confront her accuser, a right provided by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution? What about the practical aspects of a remote legal proceeding?

An examination of relevant case law and Congressional action reveals that—although courts have embraced the new virtual world—there have been hesitations and hijinks along the way.

## **Courtroom Cameras**

While many organizations held various types of meetings via videoconference before the pandemic, most federal court proceedings were not one of them. In fact, Fed. R. Crim. P. 53 banned them specifically, providing, “Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.”

This prohibition is not limited to criminal matters. Although there have been various pilot programs over the years, video equipment has not been allowed in federal courts in most instances.

After a three-year pilot program, which concluded in 1994, the Judicial Conference of the United States—the policymaking body of the federal courts, which includes the chief judges of the 13 circuits, a district judge from each of the 12 geographic circuits, and the chief judge of the Court of International Trade—concluded that the intimidating effect of cameras on some witnesses and jurors was cause for concern, and it declined to approve a committee recommendation to expand camera coverage in civil proceedings.

However, after the Judicial Conference authorized each U.S. Circuit Court of Appeals to decide the camera issue themselves, the Second, Third, and Ninth Circuits have allowed cameras in certain circumstances. Yet, after another three-year pilot program, in 2016, the Judicial Conference declined to change its camera policy.

On the other hand, most states do allow some type of camera coverage. The Radio Television Digital News Association (RTDNA), in coordination with the law firm Wiley Rein, developed a state-by-state guide to cameras in state courts. You can see what your state allows [here](#).

However, the federal restrictions are substantial, and there are many state restrictions as well.

Then came COVID.

## **CARES and Cameras**

It took the COVID pandemic for the Judicial Conference of the United States to change its tune on cameras in courtrooms.

Pursuant to the Coronavirus Aid, Relief, and Economic Security (CARES) Act, passed by Congress in the early days of the pandemic, the CARES Act allowed videoconferencing for court proceedings in response to the pandemic, and on March 31, 2020, the Judicial Conference gave temporary authorization for the use of video and teleconferencing for certain criminal proceedings and access via teleconferencing for civil proceedings during the COVID-19 national emergency.

The CARES Act provisions were written to expire 30 days after the date on which the national emergency ends, or the date when the Judicial Conference finds that the federal courts are no longer materially affected, whichever is earlier, but on February 24, 2021, President Joe Biden extended the national emergency declaration until March 1, 2022. Earlier this year, Andrew Peck, senior counsel at DLA Piper and retired U.S. magistrate judge, predicted the CARES Act provisions would be extended.

## Meanwhile at the Courthouses

Virtual proceedings have been very popular. As Senior U.S. District Judge Nora Barry Fischer (W.D. Pa.) noted at the [2021 Relativity Fest Judicial Panel](#), criminal defendants and their families have been among those embracing the new remote way of doing things. Before videoconferencing, many families were not able to attend judicial proceedings. Now with video, they can. (You can see Judge Fisher's remarks at the 9:48 mark of the video.)

Also at the 2021 Judicial Panel, Judge Victoria McCloud noted that virtual hearings have resulted in greater media attendance at her court in the Courts of England and Wales because it's simply easier for the press to attend, and you can find her remarks at the 18:43 mark of the video.

Although the reception has been overwhelmingly favorable, there have been challenges in the new world of remote court proceedings.

In *Vasquez Diaz v. Massachusetts*, the Massachusetts Supreme Judicial Court in May of last year held a virtual hearing during the pandemic was not a per se violation of a criminal defendant's constitutional rights—but that was not the end of the court's analysis, and the court reversed a trial judge's decision denying Mr. Vasquez Diaz's request for a continuance of a suppression hearing until it could be held in person.

In *Vasquez Diaz*, the criminal defendant in the cocaine trafficking case argued a virtual suppression hearing violated several of his constitutional rights, including his right to be present, to confrontation, to a public trial, and to effective assistance of counsel.

Although the Massachusetts Supreme Judicial Court held virtual hearings were not a per se violation of any of these rights, the court held that the trial court—entering uncharted waters in a case posing a “novel question”—erred in denying Mr. Vasquez Diaz’s request for an in-person hearing here where he had waived his right to a speedy trial and where there were no civilian victims or witnesses.

In a concurrence in which he cited scholarly articles noting the shortcomings of virtual proceedings, Associate Justice Scott Kafker wrote, “I write separately to emphasize that as we zoom into the future of this brave new digital world, judges must be acutely attentive to the subtle and not so subtle distorting effects on perception and other potential problems presented by virtual evidentiary hearings.”

Among the challenges Justice Kafker noted from the still-developing scholarship of virtual proceedings were video altering fact-finders’ perception of witnesses, the inability to make eye contact in certain cases, such as this one, where the camera and the display were in different places, and video conferencing technology disrupting the effects of the physical court room atmosphere, taking away from parties appreciating the importance and gravity of the proceedings.

U.S. Magistrate Judge William Matthewman ran into that problem of litigants being too casual in the virtual world in *Ludwin v. Proman*.

In *Ludwin*, a deponent was “smirking, cursing, and yelling” at opposing counsel during a deposition. The deponent also refused to show his face on the camera, and he appeared to be drinking wine during the deposition. In addition, he turned on the television and cooked pasta during the deposition, and he left the room multiple times, at one point

saying was “going to take a leak. Do you want to come to the bathroom with me? Is that what you want to do?”

Needless to say, Judge Matthewman sanctioned the cursing, yelling, pasta-cooking litigant.

Of course, the virtual world can get judges into trouble, too. In *In re EB*, (Colo. App. Jan. 6, 2022), a juvenile neglect proceeding, a father appealed the termination of his parental rights. Due to the pandemic, a hearing on the matter was held via WebEx. The dad was a no-show, but the court informed his counsel that he was apparently attempting to access the hearing intermittently.

The father’s counsel learned his client was using a payphone at a gas station. He was forced to leave the gas station, and he requested a continuance. The trial judge denied the request, holding that she could not find good cause for the continuance or that it would be in the best interest of the child. The father appealed.

Reversing, an intermediate Colorado appellate court held the trial judge abused her discretion and that her refusal to grant a continuance denied the father due process.

Noting that the trial judge did nothing to accommodate the father except pause the hearing briefly, the appellate court cited recent Colorado case law and said, “Holding a hearing via WebEx affords a parent due process when, among other things, the court is willing to make accommodations to ensure that a parent who wants to personally participate in the hearing is able to do so.”

## **Why the Remote Proceedings Question Matters**

Although some state courts have been doing it for years—and even though remote depositions were commonplace even before the pandemic—remote video proceedings are a fundamental change for many courts and the people litigating before them.

However, as Judge Fischer and Judge McCloud noted above, there have been some real benefits to the move to remote video proceedings. In addition, other courts have rejected constitutional arguments against remote video hearings. In *Ciccone v. One W. 64th St. Inc.*, a New York court rejected a litigant’s argument that a hearing should be postponed indefinitely due to the pandemic because a remote hearing would violate her due process rights. The court cited the “extraordinary circumstances” of the pandemic.

The case law shows that courts will allow remote video proceedings if proper procedures are followed, but, as Justice Kafker cautioned, we should beware of potential problems as we “zoom into the future of this brave new digital world.”

*David Horrigan is Relativity’s discovery counsel and legal education director. An attorney, law school guest lecturer, and award-winning journalist, David is the author of the annual Data Discovery Legal Year in Review, and he was First Runner-Up for Best Legal Analysis in the 2020 LexBlog Excellence Awards.*