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Civil Jury Trials in a Pandemic

Although technology has enabled courts and litigants to remotely handle various aspects of a litigation through surprisingly seamless interaction over the internet, conducting a civil jury trial during the COVID-19 pandemic has raised unique and novel challenges. Counsel must understand these legal, strategic, and practical issues to help ensure a fair, effective trial, and should consider how developing case law may inform and set boundaries for future disputes.



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In the spring of 2020, the COVID-19 outbreak brought courts nationwide to a halt, as states and cities issued stay-at-home orders and health authorities forbade indoor gatherings. Now, courts are gradually resuming operations with the easing of COVID-related restrictions. However, the measures necessitated by the pandemic, including the limitations on groups convening in person, have posed a number of challenges, requiring courts

and litigants to adapt to the current circumstances and modify longstanding litigation procedures.

Certain proceedings, such as depositions, hearings, and even some bench trials, are in many circumstances amenable to being conducted remotely (see, for example, *Grano v. Sodexo Mgmt., Inc.*, 335 F.R.D. 411, 415 (S.D. Cal. 2020); *Exxon Mobil Corp. v. United States*, 2020 WL 5573048, at *5 n.2 (S.D. Tex. Sept. 16, 2020)). Civil jury trials have, as a general matter, trailed, as courts and litigants have struggled to craft procedures that are both safe and fair for all participants. Nevertheless, despite the legal and practical issues raised by conducting a jury trial in the current environment, some courts are beginning to find that the interests of justice do not permit delaying all proceedings indefinitely (for example, Standing Order, *In re Coronavirus/COVID-19 Pandemic*, No. 20-MC-316 (S.D.N.Y. Sept. 9, 2020), ECF No. 1).

The procedures that the courts have crafted vary by jurisdiction. Some courts are bringing jurors, witnesses, and lawyers back into the courtroom for fully or partially in-person proceedings, implementing safety measures such as:

- Requiring health screenings.
- Requiring all individuals in the courtroom to wear masks, including lawyers and witnesses.
- Providing markers on seats to assist with social distancing.
- Limiting the congregation of jurors and potential jurors.
- Holding jury deliberations in an adjoining courtroom.

(See, for example, Judicial Council of California, Pandemic Continuity of Operations Resource Guide (June 2020), available at courthousenews.com.)

The particulars of each of these safety measures depend on the jurisdiction. For example, some courts require witnesses to wear masks when testifying while others do not. Additionally, some courts are experimenting with holding fully or partially remote jury trials, with testimony and argument occurring over a videoconferencing system like Zoom or Webex.

This article identifies the key legal, procedural, strategic, and practical matters that litigants should consider when facing altered procedures in a civil jury trial during a crisis like the COVID-19 pandemic, including:

- Rights to a fair trial.
- Jury selection.
- Presentation of evidence to the jury.
- Jury deliberations.
- Public access to the courts.
- Alternatives to proceeding with a remote jury trial.

To determine the best approach and tactical steps litigants should take, counsel should assess these issues within the context of the facts of their case and the specific procedures of the court and judge. Counsel should also keep in mind that procedures are evolving with changing health guidance in each jurisdiction.

The issues raised and lessons learned during the COVID-19 crisis may prove relevant beyond the pandemic. Certain aspects of remote trial practice may continue to be employed and rule makers may take these issues into account in later amendments or readiness plans for future calamities.



Search [Litigation & Dispute Resolution Global Coronavirus Toolkit](#) and [Federal Courts Update: Impact of COVID-19](#) for more on COVID-19's effect on litigation practice and procedure.

Search [Civil Jury Trials \(Federal\)](#) for more on conducting a civil jury trial in federal court, including the differences between jury trials and bench trials.

FAIR TRIAL RIGHTS

At the outset, litigants should consider whether it is possible to hold a fair trial that is consistent with constitutional guarantees and complies with applicable rules if the trial is conducted fully or partially remotely.

CONSTITUTIONAL PRINCIPLES

Overarching constitutional guarantees that a remote trial may implicate include:

- **The Seventh Amendment.** This guarantees that in certain suits at common law, “the right of trial by jury shall be preserved.” Although the Seventh Amendment does not define a “trial by jury,” the Framers undoubtedly could not have contemplated a trial by videoconference, and the value in conducting a jury trial in person is undeniable.
- **The Due Process Clauses of the Fifth and Fourteenth Amendments.** Due process requires that the court system protect principles “of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” (*Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). Though rarely invoked in suits between private parties, due process compels states to provide fundamental safeguards to ensure fairness in a proceeding, such as:
 - absent class members’ right to notice and an opportunity to be heard and participate in a class action (see, for example, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985)); and
 - private parties’ right to an impartial judge (see, for example, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876-77, 889-90 (2009)).

There is limited precedent challenging remote trial practice on constitutional grounds. In *Thornton v. Snyder*, the Seventh Circuit found that a prisoner had no due process right to be present in person, as opposed to by video, for a civil rights trial involving the conditions of his confinement. The court explained that the “civil, not criminal, nature of [the] trial is important.” However, the court also noted the limitations of a trial by video, stating that the decision to deny a plaintiff the right to be “physically present at a civil rights trial he initiates is not one that should be taken lightly,” and explained that the particular facts of the case made the court’s denial appropriate. (428 F.3d 690, 697-98 (7th Cir. 2005).)

Counsel can expect the case law in this area to develop more rapidly, now that litigants are increasingly raising due process and general fairness concerns in trials conducted under courts’ COVID-related procedures (see, for example, Def.’s Motion to Continue Trial at 13, *VirnetX Inc. v. Apple Inc.*, No. 12-855 (E.D. Tex. July 29, 2020), ECF No. 918).

In the meantime, litigants facing a fully or partially remote trial should evaluate whether the proceedings would be consistent with constitutional principles based on the unique facts of the case and the court’s rules. Among the issues counsel should assess is whether the court’s procedures affect one party differently than another, which may raise fairness concerns. For example, counsel should consider whether:

- **Witnesses will testify remotely or in person.** For example, if the court allows the parties and witnesses to make individual determinations about whether they will testify remotely or in person, there may be a risk of unfair prejudice to the party that has fewer witnesses testifying in person (see, for example, *Sunoco Partners Mktg. & Terminals L.P. v. Powder Springs Logistics, LLC*, 2020 WL 3605623, at *2 (D. Del. July 2, 2020) (ordering all witnesses in a patent infringement trial to testify remotely, expressing concern that the inability of all witnesses to travel to the trial location could disproportionately impact one side)).
- **Counsel will appear remotely or in person.** For example, if one party’s lawyer will be physically present in the courtroom for trial but the other party’s lawyer will appear by video, the party that has counsel present in the courtroom may have an unfair advantage.

APPLICABLE RULES

Federal Rule of Civil Procedure (FRCP) 77 provides that “[e]very trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom.” Although the FRCP contemplates that parties can present certain evidence either through pre-recorded depositions (FRCP 32) or videoconference (FRCP 43), there is little precedent for remote trials under the FRCP.

Recently, in *Gould Electronics Inc. v. Livingston County Road Commission*, the US District Court for the Eastern District of Michigan considered whether due process and FRCP 77 allow for a remote bench trial. The court concluded that the phrase:

- “So far as convenient” provides flexibility to permit a bench trial by videoconference because the COVID-19 pandemic created good cause to do so.
- “Open court” is sufficiently broad to encompass proceedings that do not physically take place in a courtroom.

The court noted that other provisions of the FRCP undercut any argument that due process requires testimony and cross-examination to take place in person. Citing FRCP 43(a), the court stated that the FRCP “expressly authorize courts to permit witnesses to testify via contemporaneous transmission for good cause and in compelling circumstances.” (2020 WL 3717792, at *1-5 (E.D. Mich. June 30, 2020); see also *Sentry Select Ins. Co. v. Maybank Law Firm, LLC*, 2020 WL 5441305, at *1-2 & n.3 (D.S.C. Sept. 10, 2020) (adopting *Gould’s* reasoning in considering FRCP 77 in the context of FRCP 43).)

JURY SELECTION

One of the most challenging aspects of a jury trial during the COVID-19 pandemic is selecting the jury. Under most states’ public health guidelines, the ordinary ways in which juries are picked are no longer possible, as gathering indoors in large groups is not permitted. Additionally, many community members are experiencing various hardships and challenges affecting their ability to serve on a jury, such as sensitive health conditions, increased child or elder care duties, and lack of access to video technology or the internet (see, for example, COVID-19 Judicial Task Force, Report of the Jury Subgroup, Conducting Jury Trials and Convening Grand Juries During the Pandemic, at 4 (June 4, 2020), available at uscourts.gov).

Courts are attempting to allow prospective jurors to safely gather in person to engage in the jury selection process by, for example:

- Using smaller jury pools to reduce crowding in jury assembly areas.
- Reducing the number of peremptory strikes.
- Proposing that some aspects of *voir dire* be conducted via questionnaire.

(See, for example, Judicial Council of California, Pandemic Continuity of Operations Resource Guide, at 14-15, available at courthousenews.com; see also Joint Ltr. to Chief Judge Stark, *Sunoco Partners Mktg. & Terminals L.P. v. Powder Springs Logistics, LLC*, No. 17-1390 (D. Del. July 6, 2020), ECF No. 587 (offering a questionnaire for jurors to fill out with the summons and noting that only the court should see answers to COVID-related questions to protect juror privacy).)

Nevertheless, litigants may still raise the health concerns associated with gathering in jury pools as unacceptable dangers requiring adjournment of trial.

When evaluating whether and how to proceed with jury selection, counsel should consider:

■ **How the court's procedures may impact jury composition.** Under the Jury Selection and Service Act of 1968, federal juries in both civil and criminal cases must be "selected at random from a fair cross section of the community in the district or division where the court convenes" (28 U.S.C. § 1861). Many state laws provide similar guarantees (see, for example, *McBride v. Sheppard*, 624 So. 2d 1069, 1071 (Ala. 1993); *Celotex Corp. v. Wilson*, 607 A.2d 1223, 1227 (Del. 1992); *Brady v. Fibreboard Corp.*, 857 P.2d 1094, 1096 (Wash. App. 1993)). If COVID-related hardships can excuse jurors from service, the result may be a less representative jury pool, and litigants should consider whether this comports with the guarantees of these laws. For example:

- the pandemic has disproportionately affected certain groups, including Black Americans, Latinx, and the elderly, potentially impacting their ability to serve; and
- excluding individuals without adequate technology or a high-speed internet connection may skew the venire away from economically disadvantaged populations (see, for example, American Board of Trial Advocates (ABOTA), *Guidance for Conducting Civil Jury Trials During the COVID-19 Pandemic*, at 9 (2020), available at abota.org).

Some criminal defendants have raised these challenges to jury selection in urging the court not to proceed with trial at all (see, for example, *State of New Jersey v. Dangcil*, No. AM-000053-20T4 (N.J. Super. Ct. App. Div. Oct. 12, 2020) (decision on appeal of an order denying the defendant's order to show cause where the defendant argued that a hybrid-virtual jury selection procedure was not random and limited demographic groups from participating in jury service) and No. S-19-084990 (N.J. Oct. 16, 2020) (disposition of emergent application)).

- **Whether the proceedings may be delayed due to difficulty in empanelling jurors.** An increased number of hardships due to the COVID-19 pandemic that can excuse a prospective juror from service may make it more difficult to empanel a jury, potentially extending delays.
- **How to maximize the venire while minimizing in-person interactions.** FRCP 47(a) provides that the "court may permit the parties or their attorneys to examine prospective jurors or may itself do so." The FRCP does not, however, address how jury selection should be conducted. Counsel should consider asking the court to implement procedures to reduce the

amount of time that prospective jurors must spend in the venire in person, such as:

- using initial questionnaires to prequalify the venire; and
- handling hardship challenges by telephone.

(See, for example, ABOTA, *Guidance for Conducting Civil Jury Trials During the COVID-19 Pandemic*, at 8-9, available at abota.org.)

If COVID-related hardships can excuse jurors from service, the result may be a less representative jury pool.

- **Whether it is possible to assess potential jurors remotely.** It may be challenging to conduct an effective *voir dire* if jury selection proceeds remotely. For example, counsel may have difficulty:

- evaluating the veracity of prospective jurors' responses; and
- reading jurors' body language, facial expressions, and emotions that may show bias or disinterest in the case (which may be similarly problematic during in-person jury selection if the jurors must wear masks), especially if counsel is speaking to a large group of prospective jurors.

Litigants have raised these issues in trial briefing, arguing that it is impossible to pick a jury under these conditions (see, for example, Def. Fryer-Knowles, Inc.'s Mot. for Mistrial, *Wilgenbusch v. Am. Bilrite, Inc.*, No. RG19029791 (Cal. Super. Ct. July 16, 2020) (arguing for a mistrial because, among other things, the configuration of the remote platform did not allow counsel to see the reactions and facial expressions of the potential jurors simultaneously during *voir dire*)).



Search [Jury Selection \(Federal\)](#) for more on the rules, methods, and best practices for selecting a jury in a federal civil case.

PRESENTATION OF EVIDENCE

Once a jury is selected, counsel must consider how the jurors can effectively hear evidence and argument. During the COVID-19 crisis, some courts are requiring jurors to sit six feet apart in the courtroom and wear masks, while others are experimenting with fully or partially remote juries with presentations conducted over

a videoconferencing platform. In the latter case, litigants must consider the logistics and potential ramifications related to:

- Juror conduct and participation.
- Witness testimony.
- Documentary and physical evidence.

JUROR CONDUCT AND PARTICIPATION

When presenting evidence to a jury remotely, litigants may encounter:

- **Juror attentiveness issues.** During the COVID-19 crisis, there have been reports that while listening to evidence, remote jurors have simultaneously engaged in other activities, such as cooking, cleaning, and child care duties (see, for example, *Garrison v. Honeywell Int'l Inc.*, No. CGC19276790 (Cal. Super. Ct. Aug. 11, 2020)).

If counsel detect attentiveness or technological problems from remote jurors, they may consider challenging the trial proceedings or requesting a postponement.

- **Privacy and confidentiality concerns.** It may not be possible to prevent a juror from inadvertently or illicitly recording a witness's testimony, in contravention to many courts' rules. Additionally, jurors may not comply with instructions on how they should prepare the room in which they will sit, including making sure nobody else is present and keeping it free from distractions.
- **Technology problems.** Internet connectivity or hardware issues may arise during witness testimony and interfere with a juror's ability to hear or see testimony. Further, jurors may have unequal access to technology. To address this problem, some courts have devised processes for providing jurors with webcams and tablet computers for grand jury and other proceedings (see, for example, New Jersey Courts, Virtual Grand Jury Pilot Program (July 27, 2020), available at njcourts.gov). (For more information on technology-related issues to consider in a remote

proceeding, search [Remote Participation in Virtual Conferences, Hearings, and Oral Arguments on Practical Law](#).)

Parties may propose procedures to the court to help minimize issues involving juror conduct and participation. For example, some courts are requiring remote jurors to take oaths, including to:

- Remain in a private location.
- Use headphones to prevent eavesdropping, as appropriate.
- Report technological problems immediately.

(See, for example, Administrative Office of the NJ Courts, Updated Supplement to Directive #23-06, COVID-19 – Virtual Grand Jury Program (Sept. 30, 2020), available at njcourts.gov.)

If counsel detect attentiveness or technological problems from remote jurors, they may consider challenging the trial proceedings or requesting a postponement.

Additionally, remote jurors may be more likely to engage in activities that can cause them to be influenced by matters outside of the proceeding. Jurors must base their conclusions regarding a case only on the evidence submitted (*Patterson v. Colorado*, 205 U.S. 454, 462 (1907)). In traditional in-person trials, courts admonish the jurors via an instruction, sometimes given at the end of each court day, that they must not research the case or post about jury service on social media. Further, when jurors are physically present, they can police each other's behavior and counsel can observe their actions. However, when jurors participate remotely, evidence of misconduct may be difficult to detect. Lawyers and courts should therefore consider implementing remedial measures to forestall and uncover juror misconduct, such as having counsel monitor jurors' social media posts.



Search [Social Media: What Every Litigator Needs to Know](#) for more on monitoring jurors' use of social media during a trial.

WITNESS TESTIMONY

Presenting witness testimony by video is one of the few aspects of a remote jury trial that does have precedent. FRCP 43(a) allows courts, for "good cause in compelling circumstances" and with "appropriate safeguards," to "permit testimony in open court by contemporaneous transmission from a different location." The Advisory Committee Notes make clear that in-person testimony is preferred but recognize that circumstances may arise where testimony via remote transmission is preferable to delaying trial (1996 Advisory Committee's Note to FRCP 43(a) (stating that the "opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition"); see also *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001) (stating that "virtual reality is rarely a substitute for actual presence"))).

Trial Toolkit (Federal)

The Trial Toolkit (Federal) available on Practical Law offers a collection of resources to assist counsel with preparing for and conducting a civil trial in federal court. It features a range of continuously maintained resources, including:

- [Preparing for Trial \(Federal\)](#)
- [Scheduling Order Under FRCP 16\(b\)](#)
- [Opening Statements and Closing Arguments in Civil Jury Trials](#)
- [Corporate Counsel Trial Readiness Checklist](#)
- [Mock Jury Exercises](#)
- [Preparing a Witness to Testify at Trial \(Federal\)](#)
- [Motion for Continuance \(Federal\)](#)
- [Final Pretrial Order Under FRCP 16\(e\): Overview](#)
- [Proposed Jury Instructions \(Federal\)](#)
- [Post-Judgment Motion Comparison Chart](#)

Before presenting witness testimony through video transmission, litigants must satisfy the “good cause” and “appropriate safeguards” requirements and consider the strategic and practical implications of remote testimony. Additionally, litigants should note that while parties can agree to present witness testimony by video, the court is not bound by such a stipulation (1996 Advisory Committee’s Note to FRCP 43(a)).

Good Cause and Appropriate Safeguards Requirements

A witness who cannot attend trial for unexpected reasons (such as accident or illness), but who can still testify from a different place, typically satisfies the “good cause in compelling circumstances” requirement under FRCP 43 (see 1996 Advisory Committee’s Note to FRCP 43). Travel restrictions, health concerns, and other exigent circumstances related to the COVID-19 pandemic may therefore qualify as good cause (see, for example, *In re RFC & ResCap Liquidating Trust Action*, 444 F. Supp. 3d 967, 971 (D. Minn. 2020); *Sentry Select Ins. Co.*, 2020 WL 5441305, at *2; *Sutphin v. Ethicon, Inc.*, 2020 WL 5229448, at *2 (S.D. W. Va. Sept. 1, 2020); but see *Graham v. Dhar*, 2020 WL 3470507, at *1-2 (S.D. W. Va. June 25, 2020) (denying a request for testimony via videoconference and explaining that a mere showing of inconvenience cannot justify remote transmission of testimony)).

Along with establishing good cause for remote witness testimony, litigants must implement safeguards that:

- Ensure accurate identification of the witness.
- Protect against influence by other individuals present with the witness.
- Enable accurate transmission of testimony. (1996 Advisory Committee’s Note to FRCP 43.)

More specifically, to satisfy the appropriate safeguards requirement, litigants may need to:

- Verify the identity of the witness, for example, by asking the witness to prove their identity with the court through some official means before the witness testifies.
- Ensure that remote technology will work, such as through a trial run of the video technology before the witness testifies.
- Pre-mark and circulate exhibits to be used during the witness’s testimony before the witness testifies, such as by sending the exhibits through email or regular mail to the court, litigants, witness, and jury.
- Ensure that the witness is alone and has only the approved exhibits in the room during their testimony,

including by requiring that the witness attest, affirm, or swear to those procedures as part of the oath.

- Ensure that the witness does not access the internet or contact the parties during their testimony, which may require ordering the witness to report to a secure location with an authorized court agent.

The litigant requesting remote testimony may be required to bear the costs associated with it. (See ABOTA, *Guidance for Conducting Civil Jury Trials During the COVID-19 Pandemic*, at 10-11 & n.13 (identifying safeguards and cases), available at [abota.org](#); see also *Mission Capital Works, Inc. v. SC Rests., Inc.*, 2008 WL 5100313, at *1 & n.12 (W.D. Wash. Dec. 3, 2008).)

Strategic and Practical Considerations

When determining whether to present witness testimony by video, litigants should consider whether:

- **The testimony may be complex in nature.** Litigants should gauge whether jurors and other trial participants may have more difficulty following complex expert testimony presented remotely as opposed to in person (see, for example, *In re RFC & ResCap Liquidating Trust Action*, 444 F. Supp. 3d at 972 (noting that concerns about the clarity of expert testimony via videoconference may be minor in the instant bench trial but conceding that those concerns “would perhaps be heightened” in a jury trial); *Sentry Select Ins. Co.*, 2020 WL 5441305, at *2; *Gould Elecs. Inc.*, 2020 WL 3717792, at *6 (rejecting an argument that conducting a bench trial by videoconference would impair the party’s ability to convey “complex, technical subject matter” effectively but expressly noting that the court was the fact finder)).
- **Jurors may perceive video testimony differently than live testimony.** Litigants should evaluate how video testimony may impact jurors’ credibility determinations (see, for example, *Guardant Health, Inc. v. Found. Med., Inc.*, 2020 WL 6120186, at *3 (D. Del. Oct. 16, 2020) (expressing confidence that the jury will be able to assess a witness’s credibility)). Litigants may also consider examining applicable

social science that addresses juror perceptions of video versus live testimony. Notably, many courts are allowing or requiring witnesses who appear in person to testify without masks because masks may hinder or preclude assessment of a witness's demeanor, which can have a major impact on the fact finder's credibility determination. If a critical witness will be required to testify with a mask, litigants may need to consider their options, including the possibility of proceeding remotely.

■ **The testimony may involve confidential materials.**

Litigants should assess whether there are any confidentiality or other issues that may warrant concerns about the presence of others in the same room as the testifying witness (see, for example, *In re Rand Int'l Leisure Prods., LLC*, 2010 WL 2507634, at *5 (Bankr. E.D.N.Y. June 16, 2010) (limiting who could be present during a witness's remote testimony); see above *Good Cause and Appropriate Safeguards Requirements*). Eavesdropping by non-witnesses should not be a concern in most matters due to the public nature of trials, but privacy-related issues may arise in cases where confidential or sealed material must be presented to the court.

■ **The technology may pose security risks.**

Litigants should consider whether the applicable videoconferencing platform has adequate privacy safeguards (see, for example, Def.'s Brief in Support of Expedited Mot. Opp. Trial Entirely by Video Conf., *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, No. 18-94 (E.D. Va. Apr. 10, 2020), ECF No. 388; but see *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 2020 WL 3411385, at *1 (E.D. Va. Apr. 23, 2020) (rejecting as unmeritorious the defendant's argument that conducting the trial via Zoom posed security risks, reasoning that a trial in the courtroom would be open to the public)).

■ **The witness may need to be sequestered.** If the court has ordered sequestration of witnesses under Federal Rule of Evidence (FRE) 615, litigants should consider the steps they will need to take to ensure compliance with the order (see, for example, Def.'s Brief in Support of Expedited Mot. Opp. Trial Entirely by Video Conf. at 7, *Centripetal Networks, Inc.*, No. 18-94 (arguing that a trial by videoconference eliminates the ability to police sequestration)).

Additionally, courts and litigants may consider whether to present trial witness testimony by deposition video under FRCP 32, which permits the use of recorded deposition videos at trial for "unavailable" witnesses who "cannot attend or testify because of age, illness, infirmity, or imprisonment." Under FRCP 29, parties may consent to taking depositions in any manner they choose, including by waiving the ordinary requirement that an oath be administered in person, and courts routinely allow remote depositions. Therefore, presenting

a witness's recorded video deposition testimony may be an appropriate alternative to testifying at trial. Circumstances related to the COVID-19 pandemic arguably would warrant a finding that a witness is unavailable within the meaning of FRCP 32.



Search [Expert Q&A on Remote Depositions](#) for more on taking and defending remote depositions.

Search [Remote Deposition Stipulated Protocol and Proposed Order \(Federal\)](#) for a sample protocol for conducting remote depositions, with explanatory notes and drafting tips.

DOCUMENTARY AND PHYSICAL EVIDENCE

Reviewing documentary evidence may be relatively straightforward in a remote trial. Even when trials are conducted in person, litigants commonly exchange documentary evidence before trial. Litigants can submit documents to the court electronically, and the court or litigants can provide jurors with electronic copies of admitted exhibits or a notebook of documentary evidence.

However, presenting physical evidence can pose more complicated issues. For example, litigants should consider whether the color, texture, or operation of a physical object that will be used as evidence is particularly important and, if so, whether videoconferencing technology may mask or distort that element (see, for example, *Mountain Valley Pipeline, LLC v. 8.37 Acres of Land Owned by Terry*, 2020 WL 5526504, at *3-4 (W.D. Va. Aug. 26, 2020) (case in which the defendants moved for an in-person view of the subject property but conceded the possible necessity of using drone footage or photographs as an alternative because of the COVID-19 pandemic)).

A party may also object to the introduction of evidence if presenting evidence remotely alters the character of the evidence in some material way. This kind of objection may prompt the court to require the proponent to provide additional evidence of the contested attribute under FRE 901 or exclude the evidence altogether as misleading under FRE 403.



Search [Evidence in Federal Court: Overview](#) for more on authentication under FRE 901 and exclusion of relevant evidence under FRE 403.

JURY DELIBERATIONS

Although it is generally understood that effective jury deliberations involve jurors discussing and weighing the evidence together while physically in the same room, some jurisdictions are experimenting with remote jury deliberations during the COVID-19 pandemic. For example, in May 2020, a Texas state court held a trial conducted via Zoom as a non-binding pilot trial in which

the jurors deliberated remotely (see Jake Bleiberg, Texas Court Holds First US Jury Trial Via Videoconferencing, Associated Press (May 22, 2020), available at apnews.com).

If jury deliberations are set to occur via videoconference, counsel should ensure the court's procedures and instructions take into account that:

- Only one person should speak at a time in a videoconference, eliminating both interruptions and exuberant agreement (like finishing one another's sentences).
- Deliberating via videoconference may be tiring for some jurors, who may experience "Zoom fatigue," increasing the possibility that jurors will cut the deliberations short.
- Holding remote jury deliberations may compromise the privacy of the proceeding, given that it may be inordinately difficult to prevent family members and others from entering the virtual jury room and possibly weighing in.

PUBLIC ACCESS TO THE COURTS

The significance of public access to the courts is well recognized (see, for example, *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (noting that "the presence of interested spectators may keep [the] triers keenly alive to a sense of their responsibility and to the importance of their functions"); Const. of Or. art. 1, § 10 (stating that "[n]o court shall be secret")).

However, allowing the public into the courtroom is more difficult during the COVID-19 crisis. Spacing jurors six feet apart may leave no additional room in the public seats, and many federal courts still do not permit televised or recorded proceedings. Some courts are taking steps to ensure public access, such as by:

- Using closed-circuit televisions.
- Simulcasting a video feed of the trial into other rooms of the courthouse to more easily enforce the court's policies for social distancing and face coverings (see, for example, *Guardant Health, Inc.*, 2020 WL 6120186, at *3; *Sunoco Partners*, 2020 WL 3605623, at *2).

Litigants should examine the court's procedures and consider requesting measures to guarantee public access while protecting the safety of the trial participants.

ALTERNATIVES TO A REMOTE JURY TRIAL

Instead of moving forward with a fully or partially remote jury trial, litigants may consider:

- **Seeking a postponement.** Although courts routinely granted adjournments early on in the pandemic, that trend may be changing. Courts are increasingly discouraging litigants from seeking COVID-related delays (see, for example, *IceMOS Tech. Corp. v. Omron Corp.*, 2020 WL 3451994, at *4 (D. Ariz. June 24, 2020)

Holding remote jury deliberations may compromise the privacy of the proceeding, given that it may be inordinately difficult to prevent family members and others from entering the virtual jury room and possibly weighing in.

(declining to grant a continuance); Notice to Counsel, *Ferring Pharm. Inc. v. Serenity Pharm., LLC*, No. 17-9922 (S.D.N.Y. Apr. 23, 2020), ECF No. 678). Moreover, unduly delayed trials may present constitutional issues. When considering whether a remote trial is preferable to delaying the proceeding, litigants may choose to highlight the following factors:

- how long the case has been pending;
- how long the trial will last;
- the number of issues that must be resolved; and
- the number of parties and witnesses.

(See, for example, *Argonaut Ins. Co. v. Manetta Enters., Inc.*, 2020 WL 3104033, at *2 (E.D.N.Y. June 11, 2020); Def.'s Brief in Support of Expedited Mot. Opp. Trial Entirely by Video Conf. at 4-8, *Centripetal Networks, Inc.*, No. 18-94.)

- **Consenting to a bench trial.** Although a bench trial will likely allow for faster adjudication and may present fewer legal and practical difficulties, litigants should balance those potential benefits against any loss of their constitutional right to a jury. (For more information on bench trials, search [Bench Trials \(Federal\)](#) on Practical Law.)
- **Urging for a shorter in-person trial.** Given the massive backlog of civil cases and ongoing public health concerns, courts and litigants should consider ways to expedite in-person proceedings.



Search [Continuance or Adjournment Based on COVID-19](#) for model language counsel can use in a motion when seeking to continue or adjourn a hearing, trial, conference, or other proceeding in civil litigation due to COVID-19, with explanatory notes and drafting tips.

