

Socially Distant Trials and Errors



ANNUAL MEETING 2021
WEDNESDAY, AUGUST 4

INTRODUCTION

PANEL



Robert Sumner - *Panelist*
Butler Snow LLP
Attorney, South Carolina

Tillman Breckenridge - *Panelist*
Breckenridge, PLLC
Attorney, Washington D.C.

Edward Ruff - *Panelist*
Pretzel-Stouffer
Attorney, Illinois

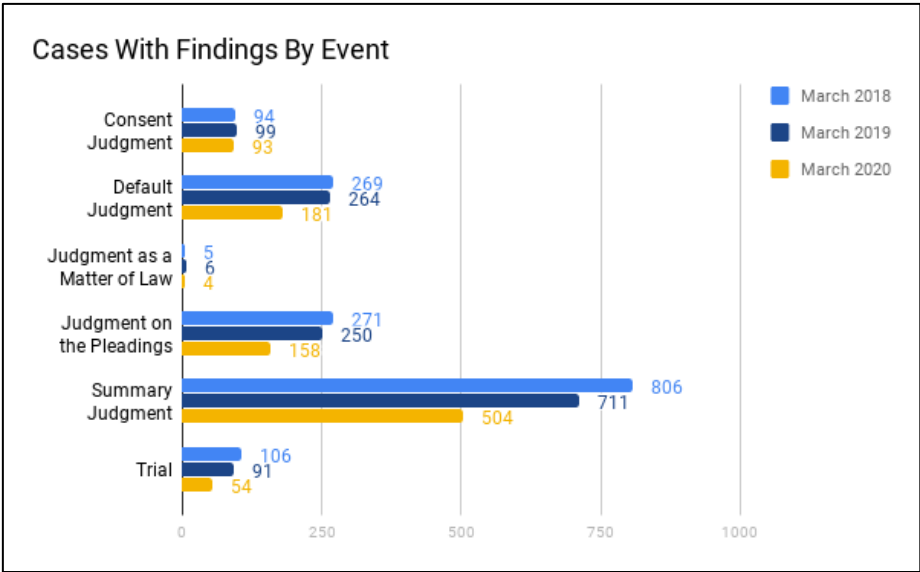
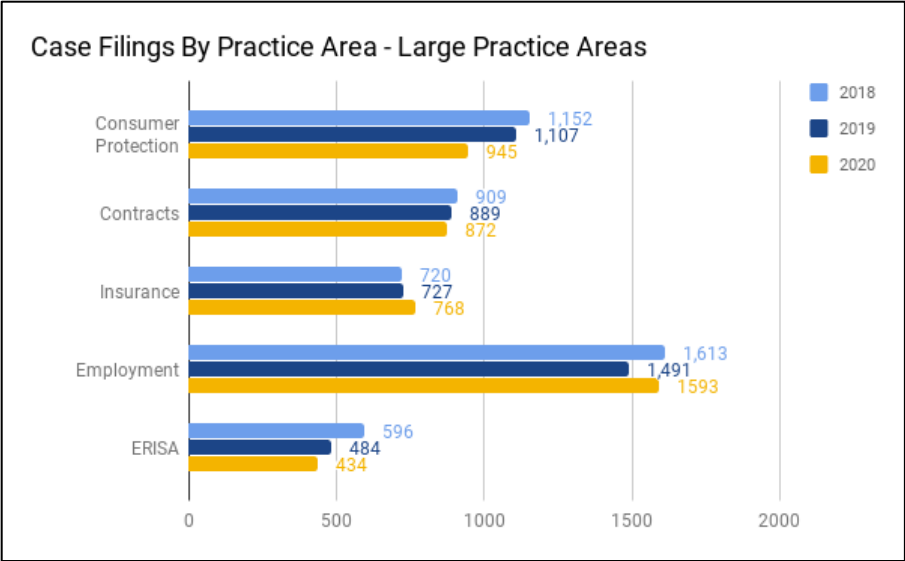
Hon. Edmund A. Sargus, Jr. - *Panelist*
U.S. District Judge, Southern District of Ohio

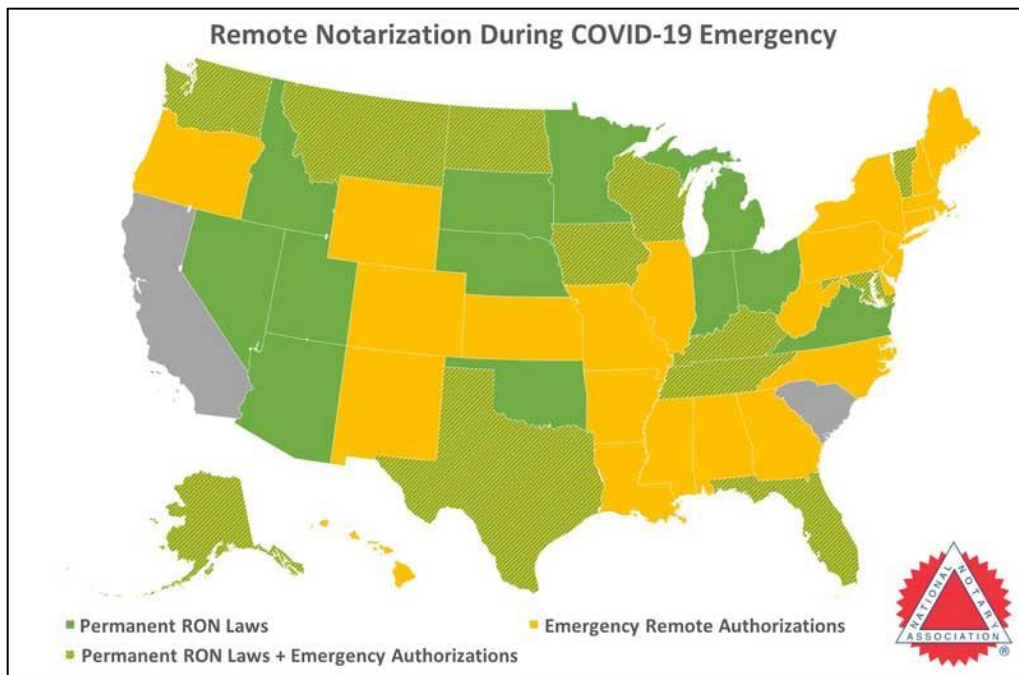
Richard Coyne - *Moderator*
Wegman Hessler
Attorney, Ohio

The presentation addresses evidentiary problems and preservation of appellate issues arising from the presentation of remote testimony at trial.

Presented by the **Commercial Litigation, Appellate, Trial Tactics, and ADR** Sections.

STATS AT A GLANCE





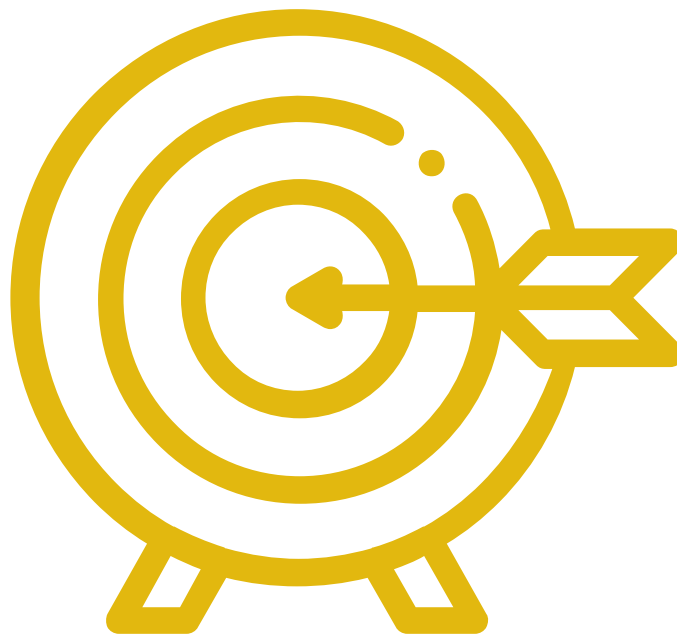
As part of their mission to bring openness and transparency to the law, Lex Machina is exploring how courts are affected by the social changes due to COVID-19. There is still daily court activity. In order to gain a better understanding, Lex Machina compared court activity for four full weeks during March 2018, 2019, and 2020. In order to include 20 business days each year, the specific dates are March 4 to March 31, 2018; March 3 to March 30, 2019; and March 1 to March 28, 2020.

Takeaways based on Lex Machina data:

1. Case filings have not yet been significantly impacted year-over-year. This suggests that litigants are moving forward with planned litigation.
2. Case activity is down. Terminations and findings are lower year-over-year. In particular, findings at trial are down 41% from 2019. This suggests that, while litigants are moving forward with filing, courtrooms have been impacted in their ability to handle normal litigation loads.
3. COVID-19 is showing up in court records mainly due to general orders regarding procedural changes. The social changes due to the virus have also affected individual cases as courts changed their operating procedures.

FACT PATTERN

- A. Lengthy complex jury trial
- B. Multiple experts for both sides
- C. Mid-trial surprise from Plaintiffs' counsel requesting that her key expert witness be permitted to present testimony the next day by live video feed because of COVID fears
- D. No advance notice of this potentiality
- E. Judge agrees to permit the live video testimony
- F. Judge asks counsel: Are there any issues we need to deal with in advance before we begin?



DUE PROCESS



Procedural due process within the court system is aimed at ensuring that the law is administered fairly and uniformly. Procedural due process places restrictions on and requirements for government power over individuals during criminal proceedings. Such restrictions and requirements reflect constitutional principles limiting the government's power exercise of power and are designed to protect the rights of all participants in the legal process by requiring all levels of government to apply uniform rules of practice and procedure.¹ These principals are embodied in the Due Process Clauses of the 5th and 14th Amendments of the United States Constitution.

Furthermore, Federal Rule of Civil Procedure (FRCP) 77(b) states a clear and unambiguous preference that trials be conducted in a courtroom. The rule states, "Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom."

However, the Due Process Clauses and preference for open trials can and should be balanced by the powers granted by FRCP 43(a), which 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."²

The broad grant of discretionary powers in FRCP has been recognized across the country as a basis for judges to permit remote testimony and remote trials,

¹ Brian A. Jackson, Duren Banks, Dulani Woods, Justin C. Dawson, *Building a Research Agenda to Address the Effects of Technological Change on the Protection of Constitutional Rights*.

² *Gould Elecs. Inc. v. Livingston Cty. Rd. Comm'n.*, 470 F. Supp. 3d 735 (E.D. Mich. 2020).

especially during the COVID-19 pandemic. The United States District Court for the Eastern District of Michigan in *Wyona Apartments LLC v. Ramirez* found that “any argument that principles of due process require that testimony and cross-examination take place in-person are undercut by the Federal Rules of Civil Procedure.”³

Wyona Apts provides a good example of some of the due process concerns someone might raise to virtual trials. Nonetheless, the court ruled that having a virtual trial did not deprive any party of due process.⁴ “Said in another way, a virtual trial, while an imperfect mode to administer a trial, is not an unconstitutional one.”⁵

Nevertheless, remote appearances diminish the court's ability to assess matters such as credibility, competence, understanding, physical and psychological wellbeing, and voluntariness of any waivers of rights that the defendant may be called upon to make. Any combination of these determinations raises serious procedural due process concerns.⁶

Studies comparing credibility judgments and other assessments of live versus televised child witnesses have found that the method of receiving the testimony affected witness ratings; in one study, mock jurors rated child witnesses who testified in person as more accurate, intelligent, attractive, and honest than children who testified on closed circuit television.⁷



³ *Id.*

⁴ *Wyona Apartments LLC v. Ramirez*, 70 Misc. 3d 591, 137 N.Y.S.3d 653 (N.Y. Civ. Ct. 2020).

⁵ *Id.*

⁶ Albert Fox Cahn, and Melissa Giddins, *Virtual Justice, Online Courts During COVID-19* (July 23, 2020), <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f1b23e97ab8874a35236b67/1595614187464/Final+white+paper+pdf.pdf>.

⁷ Orcutt, H.K., Goodman, G.S., Tobey, A.E. et al. *Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials.* *Law Hum Behav* **25**, 339–372 (2001), <https://doi.org/10.1023/A:1010603618330>.

TECHNICAL CONCERNS

It is imperative to handle technical concerns in advance. All participants shall treat video and telephonic hearings as though they were in a courtroom.⁸

What Electronic Program?

Different courts throughout the country are utilizing different remote conferencing platforms. While most all counsel are familiar with using Zoom and Microsoft Teams, some platforms are less common. It is critical that litigators check with the court to determine what program they are using.⁹ It is equally important that litigators spend time learning the system or request a training session with the court well in advance of trial.

Method for presenting testimony to jury?

When examining a witness, the attorney must be able to specify the page and/or page ranges of the document to be referenced during examination. It is equally important that the court officer be able to locate these references and present the referenced pages to the judge and the jury. It is also advisable to ensure that the PDF is fully searchable and/or has been adequately formatted so that the desired information can be easily found.¹⁰

It is also important that witnesses be prepared on the unique aspects inherent in such trials, including, among other things: the method the witness will use to dial-in to the court for video and audio purposes; the witness's location during



⁸ Virtual Trials Bench & Jury A Handbook for Attorneys, United States Court Western District of Washington.

⁹ As of the end of April 2020 Iowa was using GoToMeeting; New York, Oregon, and Puerto Rico are using Skype for Business; Oregon and Wyoming are using Microsoft Teams; Colorado, New Hampshire, Oregon, Pennsylvania, Tennessee, Utah, and Virginia are using WebEx; and Alabama, Michigan, New Jersey, Tennessee and Texas are using Zoom. See Coronavirus and the Courts, NAT'L CTR. FOR STATE COURTS, <https://www.ncsc.org/newsroom/public-healthemergency>; Tennessee Judges Take Lead in Using Technology to Weather Pandemic, COURT NEWS (Apr. 23, 2020), <https://us1.campaign-archive.com/?e=b2de395411&u=726c22e195595bb5150eb4c3b&id=96df3947ea>

¹⁰ Benjamin West Janke and Christopher Vitenas, "ZOOM-ing" in on Virtual Trials: Four Key Considerations for Success (August 26, 2020). <https://www.bakerdonelson.com/zoom-ing-in-on-virtual-trials-four-key-considerations-for-success>.

¹¹ *Id.*

Volume/speakers?

Using headphones with a microphone is preferred to reduce other noise and feedback.¹²

Reliable internet connection?

Make sure your internet connection is reliable:

<https://www.pcworld.com/article/2048594/how-to-test-your-home-internet-speed.html>. Connection via a hard-wire Ethernet cable will always be faster and more reliable than WiFi.



Ability to screen share and present documents to witness?

<https://www.citedepos.com/video-training/how-to-present-exhibits-with-zoom/>

Some participants find it useful to have multiple devices available such as a laptop for accessing documents and calendars and another smartphone, tablet, or other device for video.

Ability to present documents to the jury?

In remote advocacy, even more than in live trials, the parties should seek judicial orders or protocols governing pretrial disclosure of exhibits, as well as resolutions to challenges of those exhibits. Such pretrial practice is already quite common; and in remote advocacy, when there may be little or no opportunity for all parties to debate about an exhibit in a sidebar, having those decisions – and any objection to a decision – on the record before trial is imperative.¹³

A **pretrial management protocol** may require a stipulation to authenticity of all designated exhibits, or a presumption that all exhibits are deemed authentic unless specifically challenged on that ground before the trial. If they are not, a mechanism will have to be established for the authenticating witness to be “shown” an exhibit that both parties can also see but that the trier of fact cannot yet review.¹⁴

¹² *Id.*

¹³ Jules Epstein, *Admitting and Using Exhibits in a “Remote” Trial*.

<https://www2.law.temple.edu/aer/admitting-and-using-exhibits-in-a-remote-trial/>

¹⁴ *Id.*

The simpler manner is the use of an **e-binder** with exhibits and the witness is directed to view a page and then is asked traditional authentication questions.

Alternative mechanisms for display might involve the use of **trial management software**. The advantage of this is that the party proffering the item controls its display. However, it is often difficult to present evidence to a remote witness using trial management software unless the remote witness has multiple screens.

With the use of physical evidence, only one party or one witness can be able to actually use the physical evidence. Due to this limitation of electronic trials, and the uneven playing field this might create, a judge might choose to, pursuant to Fed. Rules of Evidence 403 and/or 611 preclude all parties from using the real object and instead ensure parity by having each use the same two-dimensional depiction.¹⁵

Ability to utilize documents not previously provided for cross/impeachment?

Barring specific guidance from the court, it is advisable to save potential impeachment evidence in a manner that allows easy access so that the practitioner or an assistant can quickly send the necessary documents to the court when necessary.¹⁶



¹⁵ *Id.*

¹⁶ Janke and Vitenas, "ZOOM-ing" in on Virtual Trials: Four Key Considerations for Success. In one trial, the court preferred impeachment evidence be presented to the law clerk during trial before use; in the other, the court preferred the practitioner use the Zoom "presentation" mode for presenting the evidence without prior review from the court.

HOW SHOULD COUNSEL HANDLE OBJECTIONS

Contemporaneous Objection Rule:

The contemporaneous objection rule refers to the well-regarded legal principle that objections must be interposed at the time of the alleged error so that the trial court may be given an opportunity to rule. Timely objections, followed by appropriate and timely motions, are necessary to preserve such points on appeal.

Before the commencement of any proceeding you need to come to an agreement with judge and counsel on how to handle objections. This becomes critically important with a remote witness who is offering live testimony by video.

Because audio tends to lag behind video, for evidentiary objection simply state “objection” and make a visible signal such as waving or raising a hand to draw the court’s attention, and allow the court to stop the witness, recognize the objecting party and then allow the objecting party to make their objection.¹⁷

Specific objections:

1. Due process objections to video testimony
2. Non-responsive testimony
3. Non-cooperative witness
4. Improper witness influence



Jury instructions:

In addition to advanced agreements on how to handle objections, it is critical that the parties ensure the jury receives clear instructions on the role on objections and rulings. While jury instructions cannot un-ring the bell, they will serve as an important reminder for the jury at the end of the case.

¹⁷ Instructions for Attorneys Special Video Conferencing Procedures in Response to Worldwide Covid-19 Pandemic for Kansas’ 8th Judicial District.

HOW SHOULD COUNSEL HANDLE CROSS EXAMINATION

Exhibits in advance?

Remember that barring specific guidance from the court, it is advisable to save potential impeachment evidence in a manner that allows easy access so that the practitioner or an assistant can quickly send the necessary documents to the court when necessary.¹⁸

What to do if witness objects or refuses to review electronic documents on screen (demands a paper copy)?

Ask the court what the best method is to handle this. The witness will look like the bad guy and the document will be incriminating.

As always, cross is all about the lawyer asking the questions - this might be better with a remote witness.

Set yourself up for success – literally. In an in-person courtroom setting, you would be conducting your cross-examination from the podium, facing the judge and the witness, with your team behind you. The setup is conducive to eye contact in that you can look easily from your outline to your witness and the judge. In a Zoom trial, you get to decide how to set up your "courtroom." Do so in a way that allows you to use the methods that work best for you.

Stand up if possible. Trial lawyers generally agree it is easier to perform better when standing up. And it's not just folklore, it's science. Standing up improves concentration and gives you a wider vocal range. Movement also releases endorphins, which boost your alertness and energy. All these truths hold in the Zoom context.¹⁹

¹⁸ Janke and Vitenas, "ZOOM-ing" in on Virtual Trials: Four Key Considerations for Success.

¹⁹ Jay Odom, Lauren Zimmerman, and Megan Larkin, *Tips For Effective Witness Cross-Examination In Remote Trials* (August 13, 2020), <https://www.selendygay.com/news/publications/2020-08-13-tips-for-effective-witness-cross-examination-in-remote-trials>.

Listen carefully (more important with remote witness)

It's not just the words they are saying that matter; it's how the words are said. Facial expressions, body language and voice matter. These often-subtle cues to a witness's state of mind can help inform split-second judgments about whether to pursue a line of questioning, take a risk or move on.

Luckily, the voice is what you can assess best over Zoom. You may not be able to tell if the witness is nervously working his hands, but you can tell if he hesitates before he answers or if his voice becomes more high-pitched. Prepare yourself for a different sensory experience over videoconference, and to zero in on the inputs you do get, such as the witness's voice.²⁰

Slow - be courteous and do not speak over witness.

Use appropriate voice modulation to wake up listeners fatigued from hours of engagement in remote proceedings. Good voice modulation also conveys your confidence to your witness, which will make him more likely to follow where you lead. But bear in mind that dramatics play less well with a remote witness than one who is present in the courtroom.²¹

Use of demonstrative or illustrative exhibits.

Using demonstrative or illustrative exhibits can be challenging when crossing a witness who is appearing remotely. Parties should discuss how to handle such exhibits in advance of the examination. It is advisable to have a stipulation or agreement sign off on by the court.

Making sure the witness is not being coached or influenced by outside factors (cell phone, texts, extra computer and/or screen).

If you see something that may be influencing the testimony of a witness say something.

Expert Witnesses

During the remote hearing, the testifying expert witness needs to be alone in a room, and they cannot be in contact with any individuals in-person or online. The testifying expert cannot have access to any notes, and as the Seoul Protocol describes: "The video conferencing system at the Venue shall allow a reasonable part of the interior of the room in which the Witness is

²⁰ Odom, Zimmerman, and Larkin, *Tips For Effective Witness Cross-Examination In Remote Trials*.

²¹ *Id.*

located to be shown on screen, while retaining sufficient proximity to clearly depict the Witness. The Witness shall give his/her evidence sitting at an empty desk or standing at a lectern, and the Witness's face shall be clearly visible."

From a testifying expert's point of view, giving evidence remotely offers a less intimidating environment and a more comfortable personal-distance from the attorney during cross examination. That might also represent an advantage to the outcome of the hearing, with the testifying expert being less susceptible to some of the attorney's cross-examination techniques and better able to assist the tribunal with their evidence.

The cross-examining attorney, and even the court, might have a more difficult job to assess the credibility and strength of the evidence of an expert without the opportunity to observe the expert's behavior in the box. This is probably something that everyone will train themselves to do more efficiently if the remote hearings become the new reality.²²



PRESERVATION OF ISSUES FOR APPEAL

Careful what you agree to - may waive objections for appeal.

The easiest way to avoid pitfalls is transparency and communication amongst the parties and the court and avoiding last minute compilation of exhibits. Indeed, the best way to avoid these issues is to have a master electronic database of exhibits that the court can access and mark, and which all parties can simultaneously utilize for the virtual proceeding. While taking care to assure the exhibits are correctly identified it should also be a priority of trial counsel, to the extent possible, to file a written stipulation to any exhibits that will be stipulated to. If this is not possible, an advocate or the court may be forced to attempt to utilize the transcript of proceedings to determine what happened to each exhibit, which is a lengthy and daunting

²² Margarita Papaioannou, *Remote hearings: is this the future? Thoughts from a testifying expert's point of view.* (June 18, 2020), <https://www.blackrockx.com/news-insights/remote-hearings-testifying-experts/>.

task that is complicated by the issues arising from transcription of virtual proceedings.²³

Make your positions on all matters clear on the record and get a ruling.

Do not rely on assumptions.

Check to see if the whole recording will be recorded and kept in case of an appeal. If so, appellate review will be more complete than with paper transcripts as judges will be able to see/hear how an exhibit was used.

Where an e-binder is created but not all exhibits in it are admitted or otherwise used at trial, the appellate record may need a modified binder, one where only the admitted or used exhibits are included. This may require cooperation of the parties or action by the trial court.²⁴



CONCLUSION

With the onset of the COVID-19 pandemic, courts across the country were forced to accept remote proceedings as a way of life. Even after the pandemic passes, it is foreseeable that remote proceedings and remote testimony will remain an integral part of the practice of law. Handling the remote testimony of a trial witness is not ideal, but with advanced consideration and careful planning litigators should be capable of effectively examining the witness.

²³ David A. Timchak, *Preserving an Accurate Record for Appeal in the Time of COVID-19 Virtual Proceedings* (January 13, 2021), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2021/winter/preserving-an-accurate-record-for-appeal-in-the-time-of-covid19-virtual-proceedings/.

²⁴ Epstein, *Admitting and Using Exhibits in a "Remote" Trial*.