

Weighing The Virtual Courtroom Option In Civil Cases

By **Christopher Green and Sara Fish**

In an effort to keep federal civil dockets progressing, some district courts have waded into the murky waters of remote videoconferencing to hold hearings and trials.

Though the debate continues over whether virtual proceedings are advisable or effective, many courts have turned to videoconferencing out of necessity. All can agree, however, that conducting civil proceedings over videoconferencing platforms raises several new considerations.

Parties and courts should carefully consider how they will implement videoconferencing in order to effectively conduct the proceedings but also maintain the appropriate balance between public access and confidentiality.

What portions or how much of the proceedings will take place via videoconference? Which witnesses or participants will need to be remote? Will some individuals still be present physically in the courtroom?

While we cannot yet fully see where the future tides of video proceedings will shift, careful consideration of the use of video proceedings now will help attorneys navigate clients through the current waters. Several recent federal district courts' approaches offer insight and guidance.



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Authority for Remote Proceedings and Testimony

The federal judiciary, relying on a provision in the recent Coronavirus Aid, Relief and Economic Security Act^[1] has expressly temporarily approved the use of video and teleconferencing technology during the pandemic for certain criminal proceedings and for civil proceedings.^[2]

In civil matters in particular, the Federal Rules of Civil Procedure had also been interpreted, pre-pandemic, as permitting some remote video testimony under Rule 43.^[3] Since the pandemic, several courts have likewise found that "contemporaneous transmission from a different location" is permitted under Rule 43 because the public health risks posed by the pandemic satisfy the "good cause in compelling circumstances" requirement.^[4]

In *Gould Electronics Inc. v. Livingston County Road Commission*, the U.S. District Court for the Eastern District of Michigan court recently explained that after surveying the history of the rule, "Rule 43(a)'s requirement that testimony take place in open court was designed to serve two functional purposes: (i) to ensure that the accuracy of witness statements may be tested by cross-examination, and (ii) to allow the trier of fact to observe the appearance and demeanor of the witnesses."^[5]

The court found these purposes were still satisfied through remote witness testimony and trial by videoconference and further noted that remote video proceedings may prove especially necessary to keep civil matters moving along given that "once public proceedings do resume, ... a backlog of criminal proceedings will take precedence over civil matters" for in-person trials.^[6]

Though many courts have reached these same conclusions during the current pandemic, not all courts agree, indicating hesitancy by some to float along with the current videoconference tide.[7] Such hesitancy may certainly be justified, as exemplified by the recent experience of the U.S. District Court for the Northern District of Georgia.

The court attempted to hold a public teleconference hearing over whether issuing weapons carry licenses qualified as an essential service during the pandemic, but the proceedings "were frequently interrupted by loud music, running water, background conversations and occasional vocal interjections by at least one person who took issue with the lawyers' assertions," despite numerous attempts by the court to warn listeners to mute their lines.[8]

After the court's warnings went repeatedly unheeded, it was forced to terminate the call after about an hour of attempting to wrangle cooperation from the nearly 100 call participants.

Balancing all Remote Video With Partial Remote Options

Courts that have recently approved use of remote video proceedings in civil matters have utilized a variety of implementations. In some matters, courts have found implementing remote videoconferencing for the entirety of the proceedings appropriate. For example, in *Centripetal Networks Inc. v. Cisco Systems Inc.*,[9] the U.S. District Court for the Eastern District of Virginia ordered a fully remote bench trial held via Zoom over the parties' objections, and the trial was held as ordered in June.

Similarly, the U.S. District Court for the Middle District of North Carolina in *Bioventus LLC v. Trident Consulting International Inc.*[10] ordered everyone to be remote for a July bench trial, finding that "[t]he public health emergency, restrictions on travel, and need for a safe court environment unavailable in-person provide compelling circumstances for all testimony to be taken by contemporaneous transmission from a different location," citing Rule 43(a).

In *Bioventus*, the court went so far as to expressly prohibit counsel, witnesses and party representatives from being physically present in the same offices, requiring that everyone appear separately on separate screens or video feeds.[11] And as the aforementioned Northern District of Georgia telephonic hearing incident instructs, when holding this type of entirely remote proceeding, it would be advisable to ensure the court has control of the audio for all participants, or at least can mute all participants, acting akin to a virtual bailiff to limit interruptions to the hearing.

Alternatively, other courts have found the pandemic only to merit allowing remote testimony from some witnesses, but otherwise requiring the rest of the courtroom participants, including judge, jury, attorneys and their clients, be physically present in the courtroom together.

For example, in *Optis Wireless Tech LLC et al. v. Apple Inc.*,[12] an order from the U.S. District Court for the Eastern District of Texas allows for remote video testimony from selected Europe-based witnesses, but for all others mandates strict social distancing and sanitary standards for conducting an in-person jury trial.

Some of the detailed requirements for conducting the in-person jury trial include requiring clear face shields to "allow for a full view of the lawyers' and jurors' faces and expressions while providing substantial protection,"[13] and that any trial counsel appearing in person

before the jury must arrive within the division the Friday prior to commencement of trial and remain there until conclusion of the trial, principally to limit participants' travel through the extremely populous and busy airports in the region.[14]

Depending on whether the civil proceeding is a jury trial, bench trial or hearing, the location of the witnesses, and the current public health situation at the trial venue, differing amounts of remote videoconferencing may be appropriate. Thus, use of remote videoconference proceedings could range from only having selected witnesses testifying via live video feed into a single courtroom to having all participants separately joining one joint videoconference from distinct locations, or some other mixture of in-person and live video participation.

How Does This Impact My Case?

Many experienced lawyers will emphatically tell you that nothing resolves cases faster than a court date. This is as true for a virtual proceedings as it is for in-person trials and hearings. The rationale of courts seeking to forge ahead using remote video technologies under the pressure of increasing caseloads and speedy trial guarantees is therefore understandable, even if not yet altogether comfortable for litigants.

Should you request a proceeding conducted fully or partially in virtual format absent existing guidance from the court? The answer is no different than for many questions in the law and in life: It depends, and it's complicated.

The underlying equation is multivariate and requires factoring in at least your — and, of course, your client's — comfort level with the remote format, the court's resources and level of acclimation with videoconferencing technology, whether judge or jury will serve as the finder of fact, the impact to your client's interests from alternatively waiting on a return to pre-pandemic procedures, and the backlog of cases that will be ahead of you should you pass up an opportunity to proceed now. This is not to say that each factor should receive equal weighting, or even the same weighting across all cases.

If your decision calculus from these and other factors leads to the conclusion that sooner is better, you may avail yourself of an ever-expanding base of protocols issued by courts around the country to use as a suggested go-by in your forum, such as those exemplary cases discussed herein.

If you find the court remains unsure of its willingness to undertake a virtual proceeding, you might also suggest the conventional notion of bifurcation, with issues — or a singular central issue — of liability to be decided now, and issues of damages or equitable relief to be reserved for later, if needed at all.

The bifurcation approach is common in many civil matters, and is followed as a matter of course by some districts for certain types of cases. Moreover, bifurcation compresses the immediate proceeding timeline, thus giving the court assurances that a fatiguing, drawn-out, monitor-gazing experience will be avoided, as well as providing an opportunity to adapt its procedures as needed for any subsequent phase.

If, conversely, you are dead set against anything but a fully in-person proceeding with all participants appearing live, then ground your opposition to virtual proceedings in tangible and specific reasons. That is, you should expect to be challenged on why remote appearances by any participant will impose manifest unfairness and inefficiency.

The notion that some witnesses will appear virtually is not new, especially with video deposition testimony being commonplace and a staple in some types of proceedings with disparately located witnesses. Moreover, if a hybrid proceeding is in the offing, with some participants designated to appear in person, opposing this structure on generalized public health concerns may likely prove insufficient, as recent opinions like *Centripetal* and *Optis*, discussed above, have shown.

Though public health concerns pervade public and private sectors alike, perspectives on how best to manage them remain divergent, and conditions on the ground vary widely from region to region. Above all, be wary of staking a position that is easily outed as a strategy of delay. Experienced judges understand when and where such incentives lie, and bundling a transparent delay tactic with other, more legitimate rationales to hold off on trial or hearing will only undermine your entire opposition, regardless of whether in-person or remote video proceedings are on the horizon.

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[1] CARES Act, Pub. L. No. 116-136 (H.R. 748) at § 15002 (enacted March 27, 2020).

[2] See U.S. Courts, "Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic," (March 31, 2020), available at <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic>.

[3] See, e.g., William M. Droze and Ashley Cameron, "Litigating in the Age of COVID-19," (May 7, 2020) available at <https://www.lexology.com/library/detail.aspx?q=fc69f78b-ac77-4668-8859-3da524411ac4> (reviewing Rule 43 cases).

[4] See, e.g., *Argonaut Ins. Co. v. Manetta Enterprises Inc.*, No. 19CV00482PKCRLM, 2020 WL 3104033 at *2 (E.D.N.Y. June 11, 2020) (applying Rule 43(a), "The same circumstances and reasoning apply here to justify the Court's exercise of its discretion to hold the bench trial via video-conference"); *In re: RFC & ResCap Liquidating Tr. Action*, No. 013CV3451SRNHB, 2020 WL 1280931 at *2 (D. Minn. Mar. 13, 2020) ("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.").

[5] *Gould Elecs. Inc. v. Livingston Cty. Rd. Comm'n*, No. 17-11130, 2020 WL 3717792 at *3 (E.D. Mich. June 30, 2020) (overruling party objections, ordering bench trial via videoconference in civil matter).

[6] *Id.* at *4.

[7] See *Graham v. Dhar*, No. CV 1:18-00274, 2020 WL 3470507 at *1 (S.D.W. Va. June 25, 2020) (denying motion for video witness testimony in view of pandemic finding "the court

does not find that sufficiently compelling circumstances exist in this case.").

[8] R. Robin McDonald, "'Uncharted Territory': Judge Ends Phone Hearing After Unruly Audience Keeps Interrupting His Call," The Daily Report (April 15, 2020), available at https://www.law.com/dailyreportonline/2020/04/15/uncharted-territory-judge-ends-phone-hearing-after-unruly-audience-keeps-interrupting-his-call/?kw=Judge%20Ends%20Gun%20Rights%20Telephone%20Hearing%20After%20Too%20Many%20Interruptions&utm_source=email&utm_medium=enl&utm_campaign=newsroomupdate&utm_content=20200415&utm_term=dro.

[9] Centripetal Networks, Inc. v. Cisco Systems Inc., Civ. No. 2:18-CV-94, D.I. 406 (E.D. Va. April 23, 2020).

[10] Bioventus LLC v. Trident Consl. Intl. Inc., Case No. 1:18-CV-815, D.I. 71 (M.D.N.C. June 26, 2020).

[11] Id. at 4.

[12] Optis Wireless Tech, LLC et al. v. Apple Inc., Civ. No. 2:19-cv-00066, D.I. 387 (Gilstrap, J., E.D. Tex. July 21, 2020).

[13] Id. at 4-5.

[14] Id. at 8. For a similar partial-remote trial approach, see the court's orders in Sunoco Partners Marketing & Terminals L.P. v. Powder Springs Logistics LLC and Magellan Midstream Partners LP, Civ. No. 17-cv-1390, D.I. 583 (D. Del. July 2, 2020) (ordering an in-person trial with remote live video testimony; this trial was, however, ultimately postponed again due to the pandemic, see D.I. 599, Order (July 17, 2020)).