



PRESERVING FAIR-TRIAL RIGHTS IN THE TIME OF COVID AND BEYOND

by Wendy Lumish, Amanda Heitz, and Daniel A. Rock

As courts around the country begin to open back up, judges are facing increasing pressure to get through the backlog of cases caused by pandemic-related shutdowns. To do so, many courts are relying on reforms that were hastily adopted in the name of efficiency and public health, most often without the opportunity for significant debate, discussion, or meaningful study from bar associations or other groups. These unstudied remedies pose threats to the trial rights of civil litigants.

This LEGAL BACKGROUNDER will identify pandemic-induced changes that imperil fair-trial rights and provide guidance on where to focus when challenging their use in litigation now and in the future. In particular, the limited availability of jurors and efforts to reduce the amount of time the venire spends in a courtroom have motivated courts to reduce panel sizes and limit peremptory challenges in civil cases. Likewise, social distancing and efforts to limit the number of participants in the courtroom will potentially result in proceedings without live witnesses, parties, and counsel. In some cases, courts have found that the only viable solution is a virtual trial. Civil litigants must take steps to ensure that these short-term solutions do not deprive litigants of their right to a fair jury trial and that these changes do not become permanent.

Preserving the Right to a Full Jury

It is no secret that defendants—particularly corporate defendants—prefer to have a larger number of jurors. The research bears out longstanding defense preferences for large juries. In their essay in the summer 2020 issue of *Judicature*, “Better by the Dozen: Bringing Back the Twelve-Person Civil Jury,” authors Patrick Higginbotham, Lee Rosenthal, and Steven Gensler dispel the social science rationale that has historically supported efforts to shrink civil jury sizes over the last fifty years. They note that six-person juries disproportionately render outlier verdicts—extremely small and large verdicts. And as early as 2004, Nicole L. Waters, Ph.D., the Director of Research Services for the National Center for State Courts (NCSC), prepared a literature review report for the NCSC outlining many problems that other researchers had found with small juries—including wide variability in verdicts, reduced evidentiary recall, and psychological research showing the tendency of people in smaller groups to cede even obviously incorrect factual points to conform with a small number of other people. Larger jury sizes tend to ameliorate these problems.

But as courts try to resume trials, they are grappling with how to empanel enough jurors to accommodate caseloads. Health and safety concerns are front-of-mind for traditionally reliable jurors, such as retired persons. Abrupt interruptions to reliable childcare thwart working parents’ availability. And guidance from organizations such as the NCSC, implicitly recognizing the likely absenteeism, have encouraged courts to adopt lenient policies for excusing individuals from jury service. Further, with priority placed on criminal, juvenile, and probate matters, court systems have an incentive to try to preserve the scarce resource of jurors for high priority proceedings. Adding strain to the system, courthouses present logistical challenges for safely amassing enough potential jurors to conduct voir dire and trial. The result is pressure on civil litigants to cede their rights to a trial before a full jury in favor of smaller panels.

Wendy Lumish is the managing partner of the Miami, FL office of Bowman and Brooke LLP, and is the Practice Group Leader for the Firm’s Appellate and Advanced Motions Practice Group. **Amanda Heitz** is a partner in the Phoenix, AZ office. **Daniel A. Rock** is an appellate associate in the Miami office.

Courts' efforts to shrink the jury panel can occur through overt orders—emergency or otherwise—simply declaring that civil proceedings will occur before the smallest size jury permitted by the laws of the jurisdiction. Or jury-panel reduction can happen in a more roundabout way. For example, trial judges may urge parties to stipulate to a reduced jury size. Depending on the jurisdiction, there may not be much choice, but if there is, defending the right to the largest jury possible is a fight worth having. When reduced-sized juries are permissible only upon stipulation, pressure to acquiesce is likely to be great. The stakes are too high to just go along on this issue.

If rules and orders force a party to accept a small jury, civil litigants must raise formal objections at every opportunity in order to preserve these issues for appellate review. Object in open court. Raise it in a trial brief. Make the point during voir dire with specific arguments about the venire. Object to the panel before they are sworn and in post-trial motions.

Preserving the Right to Peremptory Strikes

In addition to attempts to limit the number of jurors seated in civil cases, some courts have also limited parties' peremptory strikes to preserve the jury pools. As part of their COVID-19-related orders, courts in Massachusetts, Idaho, and Arizona each reduced the number of permissible peremptory strikes from four to two per side or party. Other jurisdictions have altered their peremptory strike systems. For example, Washington's rules grant judges the discretion to allow parties an additional peremptory strike when alternate juries are empaneled; pandemic-related orders eliminated this discretion.

Because the importance of picking a fair jury is paramount, limitations on lawyers' ability to strike jurors obviously deserve attention. Perfunctory objections to temporary restrictions on the ability to exercise the full number of peremptory strikes are unlikely to yield results.

Rather, to protect these critical rights, counsel should tailor careful objections to limitations on the number of peremptory strikes to the context of the voir dire. If, for public health reasons, the court has limited the time for individual voir dire, conducted remote hardship screenings, or relied on jury questionnaires in lieu of voir dire questioning, the number of peremptory strikes may be of more pressing concern as the attorneys have been permitted little opportunity to evaluate potential jurors.

In addition to raising proper, case-specific objections and arguments, one of the best defenses against reduced peremptory strikes is strong voir dire strategy. Now more than ever, jury research is critical. If peremptory strikes are limited, counsel must rely more on strikes for cause to empanel a strong jury.

Preserving the Right to Have the Parties and their Attorneys Present at Trial

Before the pandemic, a court would rarely compel a civil litigant to go to trial without its choice of attorneys and corporate representatives present in the courtroom. Now, the risk that a party representative or attorney will be unable to attend trial is commonplace. There is a patchwork of COVID-19 travel restrictions imposed on the national, state, and local level, which complicates attendance for corporate representatives at trial. The issue is exacerbated for foreign witnesses. Persons who are at an increased risk of severe illness from COVID-19 will likewise be unable to travel—if not legally, as a matter of common sense.

The right of a party to be present at trial derives from the Fifth Amendment Due Process Clause, which protects the parties' rights both to be present in the courtroom and to meaningfully participate in the trial process. *Lane v. Tennessee*, 315 F.3d 680, 682 (6th Cir. 2003). This right is not absolute, but there is support for the proposition that if a court arbitrarily excludes a party who desires to be present, merely because counsel's presence is enough, such an exclusion would violate the Due Process Clause. *Helminski v. Ayerst Labs.*, 766 F.2d 208, 213 (6th Cir. 1985); *Preferred Props., Inc. v. Indian River Estates, Inc.*, 276 F.3d 790, 797-98 (6th Cir. 2002).

The right to be present is not a right that can be summarily cast aside for expediency because it protects the essential role that a party plays at trial. For a corporate defendant, the party representative often helps at trial by communicating with counsel and developing strategy in real time as testimony unfolds, rulings come from the bench, and the jurors react. This role can be particularly involved in complex cases in which the party

representative has relevant expertise and a unique perspective.

The right to have counsel of choice is also critical. Courts have long noted that our adversarial legal system depends on parties being represented by able and well-informed counsel. In light of this, a court's failure to grant a continuance in a trial when counsel of choice is absent due to sickness may be grounds for reversal on appeal. *Smith-Weik Mach. Corp. v. Murdock Mach. & Eng'g Co.*, 423 F.2d 842, 844 (5th Cir. 1970).

In sum, parties have the right to present a meaningful case; both the parties and the court should ensure that the critical team members on both sides are present.

Preserving the Right to Present Live Witnesses

Most trial lawyers believe that having their witnesses live in the courtroom is critical. And before the pandemic, most attorneys believed they had a right to present live witnesses and that the inability to do so would have warranted a continuance. That has changed since the pandemic began, as the right to appear for trial in person has been a frequent subject of dispute.

Under Federal Rule of Civil Procedure 43(a), witnesses must testify in open court, but there is an exception that permits contemporaneous transmission of testimony from a remote location "for good cause in compelling circumstances." Relatedly, Federal Rule of Civil Procedure 77(b) states that every trial must be conducted in open court "so far as convenient." Thus, the Rules appear to prefer in-person testimony in a normal courtroom, but also permit remote testimony in exceptional circumstances. Before the pandemic, cases were scarce where the "exceptional circumstance" requirement was met. Since the pandemic began, however, several courts have held that remote testimony is permissible, citing the "compelling circumstances" exception to Rule 43. *See, e.g., In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d 967, 971 (D. Minn. 2020); *Vitamins Online, Inc. v. HeartWise, Inc.*, No. 2:13-CV-00982-DAK, 2020 WL 3452872, at *9 (D. Utah June 24, 2020).

This is a troublesome trend. Despite the growing body of authority that permits remote testimony of witnesses during the pandemic, significant scientific evidence suggests that witness testimony is less clearly communicated through remote transmission. As one recent evidence-based study reveals, significant nonverbal communication may be lost on jurors during video transmission. Vincent Denault & Miles L. Patterson, *Justice and Nonverbal Communication in a Post-pandemic World: An Evidence-Based Commentary and Cautionary Statement for Lawyers and Judges*, J. OF NONVERBAL BEHAVIOR (Aug. 9, 2020). Nonverbal communication includes much more than just whether the witness has a "tell" or is lying. It includes (1) displaying affect, such as anxiety or happiness; (2) revealing attitudes, such as interest, prejudice, or intimacy; (3) managing impressions, such as by acting competent or brave; (4) revealing physical or mental conditions, such as pain or mental disorder; and (5) exerting interpersonal control by, for example, displaying dominance. *Id.* Nonverbal communication also helps directly with communication of ideas, such as by way of gesturing. *Id.*

Unfortunately, some courts have brushed aside concerns about the limitations on communication of ideas by remote testimony. *Gould Elecs. Inc. v. Livingston Cty. Rd. Comm'n*, 470 F. Supp. 3d 735, 743 (E.D. Mich. 2020). But it is reasonable to question whether judicial intuition about the effectiveness of remote communication should be preferred over the scientific evidence provided by experts.

So once again, while many courts seem intent on moving forward with remote testimony, it is important to object to proceeding forward without having critical witnesses present to testify.

Troubles with Virtual Trials

In some jurisdictions, courts have decided that it is impossible to proceed with an in-person trial, and they have concluded that a virtual trial is appropriate. Although there have been few virtual jury trials since the pandemic, the number is growing, and some courts are enthusiastic about pushing for more. [See As Pandemic Lingers, Courts Lean Into Virtual Technology | United States Courts \(uscourts.gov\)](#). But virtual trials have led to many concerns. These concerns are not limited to one aspect of trial—they permeate the proceedings from voir dire to jury deliberations. In addition to state-specific grounds to object to a virtual trial, (*see, e.g.,* N.Y. C.P.L.R. 4013 (requiring stipulation of the parties to hold a civil trial somewhere other than at the courthouse)), there are

a few big-picture observations worth keeping in mind.

In virtual proceedings, prospective jurors have been famously inattentive. During virtual voir dire, prospective jurors have often been seen working at their offices, talking with others in the room, exercising, doing other things on their smartphones, or even laying down. See *Honeywell Int'l Inc.'s Notice of Irregularities at Remote Jury Trial from July 27-29, 2020*, Case No. RG19041182, at p. 2 (Sup. Ct. Cal., July 29, 2020); Miami-Dade Virtual Voir Dire, [Jury Duty Panel 1 - YouTube](#) (jurors are seen distracted, talking to others off-screen, and working in the office). Notably absent is the sense of formality and decorum that would be required in a courtroom. But the parties are constitutionally entitled to a jury that carefully and thoughtfully considers the merits of the case; the duty to listen to the evidence and pay attention is foundational. See, e.g., *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 411, 650 P.2d 1171 (1982). Juror misconduct deserves serious consideration.

Technical issues have also been significant. While some virtual snafus can be comical, often the technical problems are quite significant. In one of the first virtual trials in California, the attorneys were muted and unable to object for a significant portion of voir dire. *Defendant Fryer-Knowles, Inc., A Washington Corporation's Motion for Mistrial*, Case No. RG19029791 (Sup. Ct. Cal., July 16, 2020). In another example from California, the court's livestream during trial proceedings was plagued with audio problems. *Honeywell Int'l Inc.'s Notice of Irregularities at Remote Jury Trial from July 27-29, 2020*, Case No. RG19041182, at p. 2 (Sup. Ct. Cal., July 29, 2020). In one asbestos trial, the presiding judge accidentally broadcasted about his own exposures to asbestos when he had changed the brakes in his cars. See [Judge To Zoom Trial Asbestos Jury: 'Pay Attention, Please' - Law360](#). And as noted above, even if the technology does not fail, there are significant substantive difficulties with nonverbal communication when people speak from a virtual platform. As one federal court persuasively noted:

Jury trials are innately human experiences. More is often communicated in a courtroom non-verbally than verbally. Such a human experience must allow for the look and feel of direct human interaction. Such factors as cadence, tone, inflection, delivery, and facial expression are as vital to due process as is the applicable statute or case law.

Infernal Tech., LLC, v. Sony Interactive Entertainment LLC, Order at D.E. 261, n.4, No. 2:19-CV-00248-JRG (E.D. Tex. Nov. 20, 2020) (finding that “the remote, sterile, and disjointed reality of virtual proceedings cannot at present replicate the totality of human experience embodied in and required by our Sixth and Seventh Amendments”). The technology used in virtual trials is still gestational, and there will no doubt be additional yet unforeseeable technical difficulties in the future.

Another significant concern is the potential that the sanctity of the jury-deliberation process will be disrupted. For an in-person trial, the jurors are sent to a room where they are isolated from the outside world so they can debate among themselves and consider the evidence. But in a virtual trial, the jurors are disaggregated. They are each at home or an office, and there is no reliable way to tell who is with them. Consider the unseen prejudice if a juror's family member is secretly watching the trial and offering opinions just off screen.

Additionally, the dynamics of the jury are significantly altered when the members of jury do not have the opportunity to interact as they do during an in-person trial. Those interactions are important as the jury decides, for example, who to select as a foreperson and how to go through the deliberative process. These essential interactions are missing in a virtual trial.

In short, virtual trials pose a significant threat to the litigants' right to a fair trial that is likely to erode faith in the justice system.

Conclusion

History will tell whether the changes triggered by COVID-19 will systemically benefit or harm the justice system. Over the next few years, public policy research—and more importantly, appellate courts—may find that some emergency rules that seemed necessary or appropriate during the pandemic and its immediate aftermath resulted in the deprivation of fundamental rights and were the source of mischief in jury verdicts. For that reason, it is especially important to be vigilant to protect these fundamental rights.