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## Civil Procedure: The Zooming of Federal Civil Litigation

Scott Dodson

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**Civil Procedure***The Zooming of Federal Civil Litigation*Scott Dodson<sup>1</sup>

The COVID-19 pandemic threw American legal practice into disarray almost overnight. Courtrooms and law offices were closed, hearings canceled or adjourned, and case schedules suspended. Subsequent months of social distancing and continued closures turned the business of civil litigation upside-down. The demands of litigation, however, did not abate. Instead, pandemic conditions spurred lawyers and judges to adapt quickly, especially by using videoconference technology.

This Chapter explores how reliance on videoconferencing during this pandemic will transform lawyers, courts, and the law going forward. Surveying some key pandemic-fueled developments of videoconferencing in federal civil litigation, it concludes that the pandemic's push toward the zooming of legal practice is likely to leave enduring marks. It identifies the most promising uses for videoconference technology, strikes cautionary notes for more pervasive implementation, and offers some suggestions for moving forward.

*Internal Meetings and Witness Interviews*

Some love videoconference meetings and some despise them, but the technology works, and the meetings can go on, often more easily arranged and less costly than before. No longer need hordes of attorneys, clients, experts, paralegals, and others—perhaps from distant time zones—cram into a conference room in a downtown skyscraper for every brainstorming, drafting, and strategy session.

In addition to saving the costs and hassle of travel to the meetings, videoconference meetings themselves are often crisper, shorter, and more focused than in-person meetings. And gone is the pressure to complete an agenda in a single, continuous

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<sup>1</sup> Excerpted and adapted from Scott Dodson, Hon. Lee H. Rosenthal, and Christopher L. Dodson, *The Zooming of Federal Civil Litigation*, 104:3 JUDICATURE 7 (2020).

meeting—a videoconference meeting can be broken out into several sessions with hours, or even days, in between. The technology makes meetings more flexible, more efficient, and, often, more effective.

Videoconferencing can also be used effectively for a lawyer's interviews of the client, the client's employees, and other friendly witnesses. Even important witnesses, such as experts or treating physicians, may be interviewed remotely if the witnesses are experienced with litigation and if the lawyer is familiar with the subject matter.

Videoconference technology provides an effective platform for a lawyer to learn about internal client affairs, such as a client's IT system, document-retention and destruction policies, and the identities of the key document custodians and the servers where the documents may be found. Client personnel can be summoned virtually at a moment's notice, wherever they happen to be, to answer questions or to share electronically stored information on their computer screens. Meanwhile, the attorney need not travel to a client's location and walk from office to office, looking for—and sometimes not finding—the person with knowledge.

#### *Conferences and Oral Arguments*

Some categories of adversarial events are likely to migrate permanently to online platforms. The days of multiple lawyers traveling cross-country—or even cross-town—for a conference with the judge are probably over. Almost every discovery or status conference before the court—even before judges who demand meaningful conversations with the lawyers about the issues, like what discovery may be needed, what motions are likely, and what schedule should be tailored to the case—can be held more easily via videoconference, with little sacrifice in the quality of the exchange. Because nearly all federal courts have conducted some proceedings during the pandemic via videoconference, the learning curve for lawyers and courts alike is now fairly flat.

Reliance on videoconference technology for these kinds of tasks benefits judges, lawyers, and clients. One benefit is the ease of scheduling. Especially for proceedings involving many participants, videoconferencing allows cases to proceed expeditiously and alleviates docket pressures. A related benefit is the ease of participation and the alleviation of the stress, hassle,

burden, and cost of travel. Imagine: no more air travel, car rental, and hotel room for a routine Rule 26(f) initial disclosure conference; no more traffic, courthouse parking, metal detectors, and thick briefcases for a status conference. Clients, lawyers, and judges are likely to press for permanent adoption of videoconferencing in these areas.

Oral hearings in district courts offer similar opportunities. The pandemic experience with videoconferencing has shown that lawyers can effectively argue their own contentions and point out problems in the opposition's arguments, while judges can effectively press the lawyers. Nonevidentiary hearings, particularly on matters that are not case-determinative, are particularly good candidates for routine remote argument. By contrast, dispositive or complex oral hearings, such as on a motion to dismiss, a *Daubert* motion, or a motion for summary judgment, may benefit from in-person advocacy, engagement, and sparring, though a videoconference option can still be a good alternative with consent of the parties or when the burdens of in-person argument are very large.

Videoconference appellate arguments have worked well and provide more widespread public access to cases of interest and import. Although videoconferencing can adversely affect judge-to-judge and judge-to-lawyer interactions, remote argument may nevertheless offer an attractive option if videoconferencing alleviates significant travel burdens, such as a judge who cannot travel because of medical reasons or advocates who must cross many time zones to attend in person.

#### *Depositions, Evidentiary Hearings, and Trials*

Depositions, evidence-intensive hearings, and trials present harder questions. Simple or uncontentious depositions likely can be conducted via videoconference for the same reasons that court conferences can. But more important and confrontational depositions and proceedings, as well as those that depend significantly on documentary evidence, present challenges.

Effective cross-examination of a hostile or evasive witness is more difficult by videoconference. A witness may be more likely to feel free to obfuscate, ignore, or be nonresponsive when testifying from the comfort and security of a home office or kitchen table. Further, virtual examination makes it hard for the

examiner to maintain control over pace and tone and to police the flow of information to the witness. Challenges exist for the lawyers on the other side of the “v.” as well: preparing for a major deposition remotely presents challenges, as does objecting and controlling a witness during the deposition. For significant depositions, the lawyers’ physical presence helps to ensure the integrity and efficiency of the deposition.

Testimonial hearings and bench trials present similar challenges. Although the judge may serve as a strong moderating presence against recalcitrant or bombastic witnesses, effective cross-examination may still be difficult and cumbersome remotely. The need for credibility assessments of fact or percipient lay witnesses, especially hostile witnesses, can present a strong case for in-person engagement. Our adversarial system is designed for in-person confrontation and challenge, which can be difficult to replicate via videoconference.

As a practical matter, document-intensive depositions, hearings, and trials are difficult to replace with current videoconference technology because it is still cumbersome to organize, present, and locate large volumes of documents—especially in adversarial circumstances when the participants may not know in advance which documents (or portions of documents) will need to be used. Some software platforms and hardware setups can enable remote viewing of both witnesses and documents effectively, but the setups and technology are not in widespread use at this time.

Jury trials present special challenges. The logistics and the effectiveness of remote voir dire and jury deliberations are two of the most severe obstacles to the migration of jury trials to videoconference. Lawyers forced into videoconference jury trials have had to make uncomfortable adjustments to their trial practices. All of the downsides of effective witness examination via videoconference apply to jury trials and are made more acute by the fact that a lay jury, rather than an experienced judge, must comprehend the evidence and make credibility determinations.

It is true that even these kinds of major, confrontational proceedings have seen some success using videoconference technology during the pandemic. Some judges report no meaningful reduction in effective witness presentation or examination. Lawyers and witnesses long ago accepted the option of videotaped depositions that they knew could be played at trial.

Videoconferenced depositions and trial testimony, though admittedly a step further, seem to be a step judges can make. Some advance practice and communication among the judge, lawyers, and testifying witnesses will help ensure smooth proceedings.

These successes should be applauded and further developed. But the question is not whether videoconference technology is good enough in the time of a pandemic. The question is whether videoconference technology is good enough to replace in-person proceedings as a matter of course in a post-pandemic world. For the kinds of contentious, credibility-driven, or document-intensive proceedings discussed in this section, the answer is complicated. Judges and lawyers will likely take a case-by-case, and perhaps even a witness-by-witness approach. Although most such proceedings are likely to revert to being in person in the immediate post-pandemic era, some of these proceedings will be conducted by videoconference when the balance of hardships favors it.

#### *Access, Transparency, and Decorum*

Although videoconferencing offers great promise for federal civil litigation, not every party can obtain access to the requisite technology. The digital divide is real. Many pro se parties and prisoners do not have a hardware device or appropriate software. Public libraries and detention facilities can help bridge this divide by installing compatible videoconferencing software on library and facility computers to allow remote participation by such litigants, but, even then, courts should take the access burdens of videoconferencing seriously.

Still, unless the judge is to hold no hearing at all, courts must weigh the burdens of videoconference appearances against the burdens of in-person appearances, which include the difficulties and costs to an indigent party to miss work or hire childcare, or to the costs to a detention center for escorting a prisoner to court. For routine conferences and hearings, that balance may tip in favor of videoconferencing.

Videoconferencing has additional implications for the courts. Court proceedings generally are guided by an open-courts norm

that has foundations in the First Amendment.<sup>2</sup> In normal times, publicly accessible court calendars display the daily schedule of hearings so that family members, friends, media representatives, and curious members of the public may come to the courthouse to watch in person.

Videoconference technology can improve transparency in civil courtrooms. Courts have put remote-viewing access links on their websites and have publicized access using social media. These efforts have the potential not just to preserve the federal open-courts norm but to expand it in a transformative way. Approximately half a million people listened live to the Supreme Court telephonic oral arguments held during the pandemic, and nearly 2 million have listened to the recordings online, vastly more than the physical seats allowed to be filled in person.

Although remote viewing of live court proceedings does present theoretical risks of unauthorized recording and distribution, those risks have not materializing during the pandemic. Video access is usually accompanied by a clear directive from the court that listening is to be via audio only, on mute, with no shared video, and conditioned on an agreement not to broadcast, record, or transmit. These admonitions can be repeated in the hearing. A judge may require participants who are not lawyers or clients to identify themselves, both orally on the record, and by naming their avatars not with a phone number or a cute name (or cat), but with their real names and affiliation. These safeguards have proven effective at curbing intentional abuses.

Other aspects of courtroom videoconferencing might adversely affect decorum. Physical courtrooms feature a judge in a robe, elevated on a bench, with flags, the court seal, and portraits of distinguished jurists, along with the formal cry opening court and the tradition of rising when the judge enters and leaves. These norms of solemnity and formality bring home the fact that even in the most mundane of hearings in the least complicated of cases, this third branch of government is the justice system at work.

Some simple steps can minimize the concern that videoconferencing will erode decorum. Each participant—judges included—should dress in courtroom attire. Each participant—

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<sup>2</sup> Scott Dodson, *Accountability and Transparency in U.S. Courts*, in ACCOUNTABILITY AND TRANSPARENCY IN CIVIL JUSTICE 273, 280 (Daniel Mitidiero ed. 2019).

judges included—should use a professional virtual background. Lawyers should name themselves with their real names, firms, and clients. Professionalizing videoconferencing can reinforce the formality and solemnity of the occasion.

*Post-Pandemic Practice*

Although some aspects of federal civil litigation are still most effective in person, efficacy has always been balanced against efficiency, cost, and convenience.<sup>3</sup> The pandemic has taught that videoconferencing can offer powerful cost savings and efficiency gains, with, in some circumstances, only marginal losses of efficacy. Permanent videoconference adaptations should be considered for witness interviews, low-value depositions, status conferences, routine court hearings, and the like, especially when those events would involve burdensome participant travel or difficult scheduling logistics. By contrast, adversarial events that depend on extensive documentary evidence, witness confrontation, witness-credibility assessments, or the participation of a lay jury may lose too much fidelity to live proceedings or present too many complicating factors to warrant routine videoconferencing post-pandemic. Federal civil litigation is not yet ready for wholesale virtual migration.

Discerning the line between videoconference-acceptable and in-person-preferred events will require time and testing. Lawyers and judges need both facility with videoconference technology and experience determining when the technology is inadequate for the adversarial task. Some guidance must come from attorneys, who best know the virtues and limits of videoconferencing for a specific case or proceeding. To minimize gamesmanship, however, courts should take the lead on setting rules for which hearings will or should be held by videoconference. The *Benchbook*,<sup>4</sup> for example, could be revised to add a section on using videoconference technology for pretrial conferences, oral arguments, evidentiary proceedings, and bench trials. It is crucial to nurture a working partnership among the bench, bar, and legal academy for implementing videoconferencing post-pandemic.

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<sup>3</sup> FED. R. CIV. P. 1.

<sup>4</sup> BENCHBOOK FOR U.S. DISTRICT COURT JUDGES, FED. JUD. CTR. (6th ed. 2013).

The line between videoconference-acceptable and in-person-preferred events is likely to shift gradually toward videoconference-acceptable over time. The pandemic has shown just how useful videoconferencing can be, even today. The pandemic has also forced widespread, rapid adoption of videoconferencing among the bench and bar. Meanwhile, innovators are modifying technology to deliver even more effective litigation support. The future holds great promise for far more pervasive and routine use of videoconferencing.

Facilitating those changes requires uniform (or at least universally compatible), widely accessible, relatively easy-to-learn, functional, and secure technology that is flexible enough to accommodate the diversity of litigation practices and cheap enough to make the game worth the candle. Such technology is not an idle daydream—not if email is any precedent. Indeed, there is reason for great optimism. Litigation technology has a long track record of success, and today’s videoconference technology offers a solid foundation for foreseeable progress. Videoconferencing could be particularly useful if partnered with software developed for managing and displaying documents effectively. The opportunities for creativity, and the benefits that can result, make it all worthwhile.

#### *Impact on the Law*

The current successes of remote technology, coupled with the prospect of greater successes in the future, leads to consideration of what impact these changes in federal civil litigation practice might have on legal doctrine. In short, videoconferencing should affect the application of laws that require consideration of the burdens of travel and scheduling. A few examples follow.

Most directly and immediately, the option of videoconferencing will affect the proportionality calculus of what is discoverable. Rule 26 allows discovery that is “proportional to the needs of the case,” considering, among other things, “whether the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>5</sup> Depositions of parties are usually proportional as a matter of course, but depositions of nonparties demand closer scrutiny of the benefits and burdens. Far-flung nonparty witnesses

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<sup>5</sup> FED. R. CIV. P. 26(b)(1).

create burdens and costs for parties who must travel to those witnesses for a deposition. The availability of videoconferencing ought to reduce burdens on both parties and on nonparty witnesses, thereby enabling more robust use of remote nonparty examination and testimony.

The availability of videoconferencing should also affect determinations of personal jurisdiction, venue transfer, and *forum non conveniens*. Personal jurisdiction, with its emphasis on the burdens on parties to litigate in far-away courts, should be influenced by the burden-mitigating effects of videoconferencing.<sup>6</sup> Similarly, the general venue statute authorizes ordinary venue transfer “[f]or the convenience of parties and witnesses, in the interest of justice.”<sup>7</sup> And the doctrine of *forum non conveniens* authorizes complete dismissal of an action out of federal court for refiling in an entirely different judicial system for, in part, the private convenience and costs of the litigants.<sup>8</sup> Each of these forum determinations is based, in part, on relative conveniences. Videoconferencing may not address all of the convenience considerations at stake in these determinations, but it should lessen the weight of those that are based on the difficulties and costs of travel.

### Conclusion

As pandemic-fueled technology use continues to dominate how judges and lawyers serve both individual litigants and the broader interests of justice, the conversations must continue. The lessons learned from using videoconferencing during this pandemic can have lasting improvements on the law and its practice.

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<sup>6</sup> For discussions of personal jurisdiction and its burdens in various contexts, see Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1463 (2019) (burdens on plaintiffs subject to involuntary venue transfer); William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205 (2018) (burdens on aliens).

<sup>7</sup> 28 U.S.C. § 1404(a).

<sup>8</sup> Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6 (1982).

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