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Adapting Remote Proceedings in the Post-Pandemic Era: Trials

By providing practitioners and judges with clear and uniform guidance, and developing a set of shared expectations across the country, the federal court system could better incorporate virtual bench trials in a manner that captures efficiencies and limits unwanted transaction costs.

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In this series, we have explored the future of remote proceedings in the post-pandemic era and the extent to which existing legal frameworks and party preferences might complicate their incorporation into the litigation process. We observed that when the litigation process leaves it in the hands of the parties to decide whether to conduct a proceeding in person or virtually, there are likely transaction costs in negotiating and resolving that issue that can undercut whatever efficiencies might be gained from increased reliance on remote alternatives.

In previous installments, we considered whether and how these transaction costs might manifest in the context of remote pretrial proceedings—where party choice is low—and remote depositions—where party choice is high. For this final installment, we turn to remote trials, which fall somewhere in the middle of the spectrum between the two.

During the pandemic, the path to a remote trial was similar to a remote deposition: parties were free to opt-in to a remote proceeding via stipulation and, failing that, one party could move the court to order a remote proceeding over the objection of an opponent. In theory, then, trials would seem to be another area ripe for disagreements about whether to proceed virtually or not. But generally that did not seem to happen.

Two factors seem responsible for this result. First, trials hold sacred status in the litigation process and

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are viewed as the quintessential in-person proceeding. Seasoned lawyers are predisposed to in-person trials, meaning that there is more likely to be agreement among adversaries about conducting trials in person. Second, even in situations where one party moved for a remote civil trial over the objections of another, federal courts proved reluctant to grant such a request. In other words, the default presumption—of parties and courts—already trended toward in-person proceedings, driven in part by concerns over the complexity of conducting a document intensive trial through videoconferencing technology, and the ability to have witnesses examined and evaluated face-to-face, with lawyers, judge, and jury all in the same room.

What does this all mean for the future of remote trials in the post-pandemic era? Likely not many virtual jury trials. Although virtual trials—like any remote proceeding—hold the promise of cost savings from witness and attorney travel, and other like expenses, and offer greater access for wit-

nesses, clients, and trial teams, those benefits are unlikely to outweigh attorney concerns about workability, efficacy and fairness.

It is possible, however, that virtual bench trials may occur more frequently than virtual jury trials. Bench trials are in many ways similar to other types of nontrial hearings—for example, injunctions or other pretrial hearings potentially having some evidentiary component—that both courts and practitioners appear comfortable continuing in virtual formats. Bench trials do not have the complexities of incorporating virtual juries, and may turn more on issues that parties are, in theory, more comfortable letting a judge decide remotely. But because virtual bench trials are, to date, subject to an opt-in regime, parties will not always agree on when to use them and, moreover, do not have clear guidance from the rules or case law about when they might be appropriate. Muddling through the existing framework could be distracting and time-consuming.

As with other procedures, if virtual bench trials are to continue in some form, federal courts need to develop clear guidance for when those trials will occur. At present, the provision of the Federal Rules of Civil Procedure most relevant to the use of virtual technologies at trial is Rule 43(a), which permits courts to order "contemporaneous transmission from a different location" "[f]or good cause in compelling circumstances with appropriate safeguards." But this offers little guidance to parties—and courts—on the use of virtual bench trials. Although some courts interpreted this rule to permit remote trials during the pandemic (see, e.g., *Argonaut Ins. v. Manetta Enters.*, No. 19-000482, 2020 WL 3104033, at *2-3 [E.D.N.Y. June 11, 2020]) (exercising court's discretion under Rule 43(a) over one party's objections to order that the entirety of a three-day bench trial be conducted via videoconference), the justifications for doing so in the post-pandemic era may dissipate. Moreover, because Rule 43(a) is grounded in the language of "compelling circumstances," it affords courts little guidance on when to order an objecting party to a virtual bench trial on grounds of convenience.

To address this challenge, it may be appropriate to amend Rule 43(a) to specify factors or guidance for when simultaneous transmission would be appropriate—not just for one witness, but for an entire bench proceeding. Those factors could include the complexity of the case, the number of witnesses to be called, the length of the trial, and whether any fact witnesses are particularly important to the resolution of the case. Such amendments might also recognize that remote bench trials need not be an all-or-nothing proposition, meaning that a court could conduct most aspects remotely, except for critical fact witnesses whose examinations would be done in person.

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