



# How COVID Is Changing Litigation—Today and Tomorrow

Keeping the wheels of justice turning during the pandemic has required innovative practices, which may become routine.

**LIKE MANY AMERICANS**, courts and attorneys in 2020 found themselves having to take a crash course in how to use technology to work remotely during the COVID-19 crisis. For courts in particular, this has been an especially challenging period, as they have had to upend traditional practices and find innovative ways to keep the wheels of justice turning while ensuring the health and safety of everyone involved.

These changes have prompted many to wonder how much of “the new normal” will be remembered as a short-term response and how much will become permanent. If anything, the past year has shown how difficult it is to predict the future. But a look at three key areas—trials, hearings, and depositions—highlights how the pandemic has reshaped courtrooms and litigation and points to the ways in which some of these changes may well become embedded in how courts and counsel work.

## **Trials: Finding a way forward**

After COVID caused most courts to shut down their normal operations entirely, they typically adopted one of two approaches moving forward: shift to virtual trials, or try to resume live

trials with extensive safety precautions.

Not long ago, a virtual trial was simply unheard of. But in early May, the Collin County District Court in suburban Dallas held such a trial—reportedly the first in the country—which proved that it could be done, even if the process had many shortcomings. Needing to find a way to move cases forward, many courts also adopted the virtual model for civil jury trials and bench trials. These have run relatively well.

That’s not to say there haven’t been problems. Technical glitches have been common, and some courts have established “remote bailiffs” to provide technology support. But other issues have emerged. For example, judges have had to remind jurors to remove pets and other distractions from the room. As Crowell & Moring partner [Valerie Goo](#) notes, “How can

you adequately monitor juror conduct and control distractions?”

In an asbestos case in Alameda County Superior Court in California, the judge was removed after making comments about his own possible asbestos exposure while he was unmuted during a Zoom session. In another virtual asbestos trial, also in Alameda County, a jury awarded the plaintiff \$2.5 million. During the trial, the defendant made several motions for mistrial, saying that remote jurors were exercising, lying down, or using other computers during the proceedings and pointing to the fact that the plaintiff talked directly to jurors while the judge and attorneys were in a separate video chatroom. These motions were denied, but they highlighted the challenges of conducting virtual trials.

Perhaps more importantly, recent jury research indicates that remote jurors who are physically separated from one another are less likely to reach a verdict. And many observers have questioned the fairness of using remote jurors because this can result in excluding significant numbers of

## How COVID Is Changing Litigation—Today and Tomorrow

people who are not able to afford the technology needed to participate.

Courts that resumed live jury trials have run into their own challenges. To keep participants safe, some have relocated to larger venues, such as high school gymnasiums or fire stations, to enable social distancing. Some are bringing small groups of potential jurors into the courtroom in waves and using prescreening juror questionnaires to limit the amount of time people are gathered for jury selection. The pandemic has also required other changes to live jury trials such as requests to stipulate to a reduced

As courtroom safety measures continue into 2021, courts and counsel will need to weigh their effect on strategies and trials. With widely spaced, mask-wearing participants, says Goo, “it is harder for jurors and judges to read facial expressions and body language and for counsel to assess the attitudes of individual jurors. If witnesses are far from the jury, or even testifying remotely, can that be prejudicial? Should counsel consider challenging such practices?”

Many have speculated that the courts’ recent experience with technology will lead to the widespread use

she says. “They want to be ready to go the minute they can.”

### Virtual oral arguments: A new normal?

While virtual civil trials are likely to be rare post-pandemic, virtual oral arguments are another story. When the pandemic started, many courts had already been using telephonic hearings for oral arguments on motions to dismiss, summary judgments, and so forth to accommodate out-of-area litigants and lawyers. As courts closed, that practice spread—in May 2020, the U.S. Supreme Court began

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*Valerie Goo*



number of jurors, limiting the number of attorneys in the courtroom, and, of course, wearing masks.

It has also been difficult to find people willing to serve on juries during the pandemic. A recent study found that in September 2020, 71 percent of potential jury pool members said they would be likely to ignore a jury duty summons because of COVID, and the courts are seeing this trend as well. Research has suggested that those who are least inclined to serve include young people, low-wage earners, and ethnic minorities, potentially skewing the demographic makeup of juries. This problem will probably abate as infection rates decline, but until the pandemic is over, it is likely to remain a factor.

of virtual trials after the pandemic is over. But trial attorneys and courts generally don’t seem to share that view. “Most of the virtual trials have been smaller bench trials,” Goo says. “A handful have been smaller jury trials. But large, complex civil trials, whether bench or jury, have either gone forward in person with COVID restrictions or have been postponed. I don’t think we will see a shift to virtual trials as the new norm.”

Both the trial lawyers and the courts are eager to get back to in-person trials, says Goo. Even as courts have closed, reopened, and then reclosed, they have continued to schedule and reschedule in-person trials. “Courts are continuing to set trial dates and send out jury summons,”

hearing oral arguments via teleconference for the first time—and many courts soon turned to virtual video hearings. Some, such as the technologically advanced Ninth Circuit, were quick to make the shift, while others were slower to change. But within months, “most courts had moved hearings onto video platforms, and that became fairly standard,” says [Amanda Shafer Berman](#), a partner at Crowell & Moring.

Virtual hearings have played an important role in keeping proceedings moving forward while physical courts are closed, but they have also presented attorneys with something of a learning curve. “You are not in the courtroom, of course, and you’re sitting, rather than standing

## How COVID Is Changing Litigation—Today and Tomorrow

and moving around. So you have to adjust the performance element of your presentation,” says Berman. She also notes that she has seen attorneys “forget that the video format is still very much a hearing and you need to remain very formal. There is no reason to relax the consideration that you would normally give to the court,” she says. “And judges definitely don’t appreciate it when attorneys do so.

“It’s a different medium, and what works in person may not work in the virtual world,” Berman continues. To assess the difference, she says,

courts’ previous use of telephonic hearings reflects an openness to electronic interactions that has likely only increased as virtual hearings have become standard practice.

In addition, experience has made many courts more comfortable with the virtual setting. “Certainly, there are judges who were averse to using technology before all this happened,” Berman says. “But now that all judges have basically been forced by the pandemic to adopt virtual hearings, it may absolutely make sense to continue. Why have out-of-town counsel hop on a plane for five hours

says Berman. “So much of it is about establishing a connection with the panel through eye contact, reading the room to figure out which issues to follow up on, and assessing on the fly how each panel member is reacting. That is much tougher to do in a virtual setting, even when there is a video feed.” In addition, appeals court judges on a panel often interact with one another during hearings—something that is obviously more difficult, if not impossible, when they are in separate locations and interacting only on a computer screen.

More broadly, appeals court judg-

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***Amanda Shafer Berman***



companies “need to hold at least one video moot in advance of a video hearing. That gives arguing counsel a chance to interact with a virtual judge, even if it’s a fake one, and have other attorneys provide feedback about what works and what doesn’t in the virtual format.”

Such practices may continue to be important over the long term. Berman says that virtual hearings are expected to be the norm for at least the first half of 2021—and that they may well become permanent in many courts. “District courts in particular may be more open to virtual hearings after the pandemic is over,” she says. That will, of course, vary by court and the type of hearing, but many district

for a hearing that may not last long? Courts may be more willing to allow companies to forgo those costs, particularly for procedural matters and status conferences.”

The same may not be true with appeals courts, however. While they have made use of virtual hearings during the pandemic, most will likely return to holding in-person hearings as soon as they feel it is safe to do so. To a great extent, that’s because of the mechanics of how those courts work. “As an advocate, you’re trying to have a conversation with the judge where you are really locking in and figuring out what their concerns are, listening carefully, and responding to both explicit and implicit questions,”

es tend to view in-person arguments as a time-honored tradition. “It’s really seen as a key part of our appellate system,” Berman says. “If something is hotly debated in oral argument, that exchange of ideas plays a very important role and can shape the decision.”

### **Virtual depositions: How will they work in trials?**

Video depositions shot in legal offices with a host of witnesses have been available for a long time. COVID forced many courts and litigants to take things a step further and embrace fully remote depositions. In these depositions, all participants—the opposing and deposing counsel,

## How COVID Is Changing Litigation—Today and Tomorrow

court reporter, and witness—are all in separate locations. And the witness is left on their own to handle the technical details on their end.

Prior to the pandemic, these fully remote depositions were rare, largely because deponents had to be sworn in in person, deponents preferred to have their counsel present in person, and the other side did not want to be left out. As COVID emerged, a number of state and federal courts, state legislatures, and governors took steps to allow oaths to be administered remotely—and remote depositions were soon used across most courts.

poor sound, being backlit, or looking like a phantasm floating around?” asks Bualat. “How will that affect how judges and juries interpret the testimony?”

Nevertheless, the upside of using remote depositions has proven to be significant—so much so that courts are expected to continue using them in a post-COVID world, especially for minor, less critical witnesses. “The cost savings are pretty clear,” says Bualat. Attorneys on both sides don’t have to travel to do a deposition, which often means going across the state or the country. Corporate

equipment, and static backgrounds as well as instructions on using the equipment effectively. Companies can also prep their employees—who will not have their attorneys in the room with them during a deposition—about having the right mannerisms and behavior.

Such efforts will be more and more important as we go forward. “When COVID came on the scene, everyone understood that there would be challenges with remote depositions, because they were new,” Bualat says. “But over time, as more people get better at it, there will be less toler-

“When COVID came on the scene, everyone understood that there would be challenges with remote depositions. But over time, as more people get better at it, there will be less tolerance in courts for poor quality.”

*Nathaniel Bualat*



However, the use of fully remote video depositions is new. “There haven’t been many instances where we’ve seen how they play out in an actual trial,” says [Nathaniel Bualat](#), a partner at Crowell & Moring. And that leaves some open questions. “How will the layers of disconnect resulting from a lack of in-person interactions affect the way judges and juries assess the veracity and temperament of witnesses?” he asks.

With deponents having to manage their own video technology, some depositions are bound to be of better quality than others. “What will happen when judges and juries are seeing 10 different remote video depositions and four of them are especially bad, with people having

in-house counsel can avoid travel as well, and they can be easily included in key limited portions of depositions. “If outside counsel is doing a direct of a key witness, they can have their client appear for that portion just by clicking a link,” he says.

For companies that want to take advantage of this trend, making sure that videos are of high quality will be key to making points in court. “Companies should institute practices that help their personnel come off well in their remote depositions,” Bualat says. “If they are involved in regular litigations, it may be worthwhile to prepare ‘deposition packs’ that can be shipped out to witnesses.” These packs could include good cameras and microphones, tripods, lighting

ance in courts for poor quality.”

The past year has shown that remote depositions can work well, but that doesn’t mean that they are right for every situation. Ultimately, companies need to weigh the costs and convenience benefits against the question of effectiveness.

“With important witnesses in particular, companies have to consider how well they will come off on screen in court,” says Bualat. “This is especially true for a corporate defendant who is being compared to an individual plaintiff who is appearing in person in court.” Overall, he says, remote depositions should not be seen as an automatic default but rather as “one more tool in a litigation tool kit.”