

Second Study Commission  
Civil Law and Procedure  
65<sup>th</sup> Annual Reunion of the IAJ – Tel Aviv, Israel  
Questionnaire 2022

RESPONSE OF THE UNITED STATES OF AMERICA

VIRTUAL TRIALS IN CIVIL PROCEEDINGS

**(1) Did your jurisdiction offer complete or partial virtual civil trials or hearings before the Pandemic? If yes, please describe what was offered and how often the offer was exercised.**

The First Amendment of the Constitution of the United States and the Federal Rules of Civil Procedure require that civil trials and hearings be conducted in person.<sup>1</sup> Prior to the pandemic, witnesses were required to provide their testimony in open court. However, “for good cause in compelling circumstances,” a witness could testify virtually.<sup>2</sup> Minor proceedings such as depositions could be conducted virtually if stipulated by the parties or ordered by the court.<sup>3</sup> Trials and hearings were primarily conducted in person to guarantee access to the press and public.

The right to an in-person trial is central to civil law in the United States, and so courts have promptly resumed in-person proceedings as the severity of the COVID-19 pandemic has waned. Different courts in the state and federal systems have reconvened in-person civil jury trials at different times, based on the prevalence of COVID-19 transmission in their respective localities.

**(2) Did your jurisdiction offer civil virtual trials or hearings during the Pandemic? If yes, was there a change in how, what and when it was offered? Were protocols published? Also, if yes, when were the virtual trials/hearings offered and what was the uptake?**

As part of The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), a \$2.2 trillion dollar stimulus bill signed into law on March 27 2020, Congress allocated funds to the federal court system to expand the use of video and audio conferencing.<sup>4</sup> The CARES Act authorized the Judicial Conference – the national policymaking body for the federal courts – to assess whether emergency conditions due to COVID-19 materially affected the functioning of the federal courts.<sup>5</sup> To that end, the CARES Act authorized chief judges of U.S. district courts covered by the Judicial Conference’s findings to issue administrative orders authorizing expanded access to virtual proceedings.<sup>6</sup>

---

<sup>1</sup> *Publiker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984); Fed. R. Civ. P. 77(b).

<sup>2</sup> Fed. R. Civ. P. 43(a).

<sup>3</sup> Fed. R. Civ. P. 30(b)(4).

<sup>4</sup> H.R. 748 § 15002(b).

<sup>5</sup> *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, U.S. COURTS (March 31, 2020) <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic>.

<sup>6</sup> E.D. Pa., *In Re: Video Teleconferencing and Telephone Conferencing for Criminal Proceedings under The CARES Act – Ninth Extension* (June 3, 2020), <https://www.justice.gov/usao-edpa/page/file/1510566/>.

Chief judges quickly moved to issue such orders pursuant to the CARES Act, and federal courthouses across the country began offering enhanced access to virtual civil proceedings, including for oral arguments and injunction hearings. On May 18, 2020, a summary jury proceeding<sup>7</sup> in a Texas state court marked the nation's first ever remote jury trial.<sup>8</sup> Some federal courts, including the Middle District of Florida, the Western District of Washington, and the District of Minnesota, also successfully organized fully remote civil jury trials.<sup>9</sup> Some districts also organized successful virtual *voir dire*, as some of the *voir dire* process could be completed on an ad hoc basis, with all efforts to maintain a fair cross section of the community as potential jurors. In many jurisdictions, the administrative orders have been continually reauthorized, as COVID-19 remains a national public health emergency<sup>10</sup>, and continues to pose challenges to court systems across the United States.<sup>11</sup> Protocols were only established for criminal proceedings, including criminal trials.<sup>12</sup>

Several provisions of the CARES Act provided financial assistance to state and local governments, and State courts have made use of these funds. One specific provision, the Coronavirus Relief Fund (CRF), provided a minimum \$1.25 billion in direct assistance to every state to cover necessary expenditures related to the COVID-19 emergency. Many states have used CRF funds to promote access to justice in the courts, enabling telework, online document assembly, and the installation of computer terminals in courthouses and other public facilities for *pro se* litigants and individuals without internet access.<sup>13</sup>

### **(3) Presuming that civil virtual trials were offered, were there any improvements made in the technology/software that the government provided? How were documents and exhibits managed?**

With the funding offered by the CARES Act, the federal judiciary acquired necessary virtual trial technology. The federal judiciary ensured the constitutional guarantee of public trials by making

---

<sup>7</sup> A summary jury proceeding is a one-day civil proceeding in which an advisory jury delivers a non-binding verdict. The proceeding allows litigants to test their arguments in front of a jury.

<sup>8</sup>Charles Scudder, *In a Test Case, Collin County Jury Renders Verdict on Zoom for the First Time; Too Risky for a Full Trial?* DALLAS MORNING NEWS ( May 22, 2020, 11:35 AM) <https://www.dallasnews.com/news/courts/2020/05/22/in-a-test-case-collin-county-jury-meets-on-zoom-for-the-first-time-but-some-lawyers-say-its-too-risky-for-real-trial/>; Jake Bleiberg, *Collin County Courthouse Holds First US Jury Trial via Videoconferencing*, 5NBCDFW (8:16 AM May 22, 2020) <https://www.nbcdfw.com/news/local/texas-court-holds-first-us-jury-trial-via-videoconferencing/2374556/>.

<sup>9</sup> Madison Alder, *More U.S. Courts Plan Virtual Jury Trials to Move Civil Cases*, BLOOMBERG LAW (Feb 10, 2021, 11:57 AM) [https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X2GV7NUC000000?bna\\_news\\_filter=us-law-week](https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X2GV7NUC000000?bna_news_filter=us-law-week).

<sup>10</sup> U.S. Dep't Health and Human Serv., *Renewal of Determination That A Public Health Emergency Exists*, <https://aspr.hhs.gov/legal/PHE/Pages/COVID19-12Apr2022.aspx>.

<sup>11</sup> E.D. Pa., *In Re: Video Teleconferencing and Telephone Conferencing for Criminal Proceedings under The CARES Act – Ninth Extension* (June 3, 2020) <https://www.justice.gov/usao-edpa/page/file/1510566/download>.

<sup>12</sup> In the Eastern District of Pennsylvania, one criminal trial was held per week. These trials were only conducted if they could reasonably be concluded within a week, and where no more than three witnesses were needed. For speedy trial purposes, the oldest cases were given priority.

<sup>13</sup> *CARES Act Funds Support Digital Access to Courts During the COVID-19 Pandemic*, THE JUSTICE IN GOVERNMENT PROJECT (Nov. 29, 2020) <https://legalaidresourcesdotorg.files.wordpress.com/2021/05/cares-act-case-study-11-29-20.pdf>.

call-in lines available to the press and public in almost all federal proceedings.<sup>14</sup> Since the onset of the COVID-19 pandemic, Courts have used Zoom, Cisco, and Microsoft Teams for virtual proceedings. Some courts use Youtube for public viewing. Courts occasionally have to boost capacity in the virtual courtroom to accommodate large numbers of listeners in high profile cases.<sup>15</sup>

In March 2020, The Judicial Conference of the United States authorized a three-year pilot program to livestream audio of hearings in district courts. Under the program's guidelines, audio of civil or bankruptcy proceedings involving a matter of public interest may be livestreamed on a court's YouTube channel if all parties to the proceeding consent and the presiding judge approves.<sup>16</sup>

In 2021, the Federal Judiciary undertook an initiative to modernize its Case Management Electronic Case Filing (CM/ECF) system, which allows the court to manage documents electronically. The system also powers PACER (Public Access to Court Electronic Records), the public access portal to federal court records. During the pandemic, all registered users of the court's electronic filing system were able to electronically file case-related documents through the electronic filing system, including complaints, amended complaints, and third-party complaints in civil cases.<sup>17</sup>

Aside from the electronic filing system, the management of documents and exhibits remains largely unchanged from before the pandemic. Before trial, parties exchange exhibits and provide the judge with the document and exhibit through either electronic transmission or hard copy, so that the judge can refer to the exhibits and documents during trial.

#### **(4) What does the future hold in your jurisdiction with respect to the continuation of virtual trials? What are the issues and or benefits that have arisen?**

Virtual trials and hearings reduced travel expenses and increased attendance during the pandemic. Given this, civil proceedings such as scheduling conferences, oral arguments and non-jury trials may continue to be conducted virtually.<sup>18</sup> Virtual proceedings also allow the business of the courts to continue as best as possible despite natural and medical emergencies, such as a pandemic. This allows any resulting backlog of cases and hearings to be addressed equitably, even if such backlogs might not be reduced substantially.

---

<sup>14</sup> *As Pandemic Lingers, Courts Lean into Virtual Technology*, U.S. COURTS, (Feb. 18, 2021) <https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology>.

<sup>15</sup> *Id.*

<sup>16</sup> *Audio Streaming Pilot*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/judicial-administration/audio-streaming-pilot>.

<sup>17</sup> E.D. Pa., *In Re: Second Extension of Adjustments to Court Operations Due to the Exigent Circumstances Created by COVID-19* (May 29, 2020), <https://www.paed.uscourts.gov/documents/standord/StandingOrder-2ExtAdjCtOpCOVID-19.pdf>.

<sup>18</sup> For example, Pennsylvania's state courts have proposed procedural rules that would permanently expand virtual civil proceedings but maintain in-person criminal proceedings to adhere to constitutional requirements. Aleeza Furman, *Most of Pa.'s Rules Committees Are Proposing Expanded Use of Technology in Courts*, THE LEGAL INTELLIGENCER (June 29, 2022), <https://www.law.com/thelegalintelligencer/2022/06/29/most-of-pa-s-rules-committees-are-proposing-expanded-use-of-technology-in-courts/>.

However, one issue that may persist is technical difficulties associated with attendance via videoconference or telephone.<sup>19</sup> Poor internet connection or power outages could impede equal access to proceedings. And, because the CARES Act is a one-time funding source, any other technical difficulties that arise could be compounded from a lack of funding sources.

**(5) Has or is research being done in your jurisdiction to help ameliorate some of the concerns that have arisen with virtual trials?**

A few courts conducted virtual civil jury trials. Social scientists have been researching whether jurors' ability to evaluate witness testimony will be affected, and whether the virtual setting might dehumanize parties. The National Center for State Courts commissioned a survey to evaluate the impact of the pandemic preventing potential jurors from accessing the courthouse and jurors' attitudes towards remote services.<sup>20</sup> The survey found that while there were universal concerns about the safety of reporting to a courthouse and obstacles related to the health of potential jurors and their families, the likelihood that these factors will impact an individual's willingness to report for jury service differs along demographic lines – particularly race, gender, and age, which were already significant factors in jury response rates prior to the pandemic.<sup>21</sup>

**(6) How did the digitally excluded people in your jurisdiction have access to justice and specifically to virtual trials during the pandemic?**

The federal court system has adopted measures to ensure that virtual civil proceedings are open, transparent, and accessible to members of the public and the press. Even for those without access to video software or wireless internet, United States courts have sought to ensure telephonic access to all virtual civil matters.<sup>22</sup> This effort reaches out not only to parties, counsel, and witnesses in any given case, but also to the public and the press.

Respectfully Submitted,

/s/ Cynthia M. Rufe, J.

Honorable Cynthia M. Rufe, J.  
Federal Judges Association  
Immediate Past-President

---

<sup>19</sup> Admin. Off. of Pa. Ct., *Remote Proceedings Task Force* (June, 2021) [https://www.dcba-pa.org/UserFiles/files/COVID/Remote%20Proceedings%20Task%20Force%20-%20Continued%20Use%20of%20Advanced%20%20%20Communication%20Technology%20\(ACT\)%20Following%20the%20Termination%20of%20Judicial%20%20%20Emergencies%20\(June%202021\).pdf](https://www.dcba-pa.org/UserFiles/files/COVID/Remote%20Proceedings%20Task%20Force%20-%20Continued%20Use%20of%20Advanced%20%20%20Communication%20Technology%20(ACT)%20Following%20the%20Termination%20of%20Judicial%20%20%20Emergencies%20(June%202021).pdf).

<sup>20</sup> *Jury Trials in a (Post) Pandemic World – National Survey Analysis*, NATIONAL CENTER FOR STATE COURTS (June 22, 2020) [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0006/41001/NCSC-Juries-Post-Pandemic-World-Survey-Analysis.pdf](https://www.ncsc.org/__data/assets/pdf_file/0006/41001/NCSC-Juries-Post-Pandemic-World-Survey-Analysis.pdf).

<sup>21</sup> The survey found that 55% of potential jurors face at least one obstacle that interferes with their ability to perform jury duty. 47% said that either they or someone in their household had an underlying medical condition that would make them more vulnerable if they contracted the virus. 14% identified themselves as the primary caregivers for an aging parent or other elderly family member. 19% of those with children could not leave their children without childcare and were unable to secure reliable childcare. While only 41% of men under age 50 face one of the three obstacles identified above, the number rises to 52% among women under 50, 57% among men over 50, and 65% among women over 50.

<sup>22</sup> *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, U.S. COURTS (Mar. 31, 2020) <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic>.