BEARING WITNESS TO, WELL, WITNESSES: AN EXAMINATION OF REMOTE TESTIMONY VERSUS IN-COURT TESTIMONY

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I. INTRODUCTION: ACCELERATED REMOTENESS

The COVID-19 pandemic required the world to quickly adapt countless in-person tasks to remote settings. In the courts, it also accelerated experimental approaches to remote courtroom practices across the United States, including the appearance of trial witnesses testifying live via remote video.[1] While some courts have sporadically incorporated this practice for years, the pandemic prompted many courts to examine this mode of testifying at a more expansive level when choosing among the four options of (1) suspending in-person trials altogether, (2) participating in socially distanced trials, (3) conducting remote trials, or (4) presiding over "hybrid" trials (combining some in-person elements with remote components).[2]

So, how has this quickening of approaches impacted witness testimony, and how have juries and trial attorneys reacted to these modes of testifying? This Essay addresses results from several recent (and, in the case of my

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1. *Trial by Zoom: Virtual Trials in the Time of COVID-19*, EVERSHEDS SUTHERLAND: LEGAL ALERTS (Feb. 11, 2021), https://us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts/239466/Trialby-Zoom-virtual-trials-in-the-time-of-COVID-19.

2. Norma C. Izzo, *How Litigators are Confronting COVID in the Courtroom*, ABA (Aug. 31, 2020), https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2020/covid-19-video-testimony-courtrooms/; Janna Adelstein, *Courts Continue to Adapt to COVID-19*, BRENNAN CTR. (Sept. 10, 2020), https://www.brennancenter.org/our-work/analysis-opinion/courts-continue-adapt-covid-19.

doctoral dissertation,[3] not so recent but, in parts, still relevant) sources. Throughout the pandemic, my colleagues and I have conducted simulations on behalf of the Online Courtroom Project and as advisors to the Maricopa County (Arizona) Jury Trial Innovation Task Force, including Dr. Jeff Frederick, who has also authored an article for this issue.[4] In addition, I have conducted post-trial interviews with actual jurors and attorneys involved in remote trials who offered their perspectives on remote witness testimony.[5] I have also analyzed national survey data on behalf of the Judicial Division of the American Bar Association regarding judges' and attorneys' experiences with and attitudes toward remote proceedings.[6]

As part of this research on remote proceedings, we have collected judges' and attorneys' forecasts about the future of remote witness testimony. The great majority predict many witnesses will testify remotely to some degree long after the pandemic is over, largely to enable witnesses to appear remotely by videoconference when health or distance would ordinarily preclude their involvement if they were only allowed to testify in the courtroom.[7] If this prognostication is true, we must better appreciate the jury experience with witnesses in the remote setting.

II. REACTIONS TO IN-PERSON VERSUS REMOTE WITNESS TESTIMONY

Few lack opinions about the advisability of live witness examination relegated to a square viewing screen. The idea that a witness's credibility could be evaluated as effectively by video in comparison to the courtroom setting pushes against logic for many trial attorneys and judges. How does one read nonverbal subtleties or first impressions as the witness enters the courtroom to take the stand? Some argue that such assessments fall into the category of "extralegal" and are potentially inappropriate measures.[8] Still, many jurisdictions' pattern jury instructions *encourage* the fact finder to

3. Karen Lisko, Juror Perceptions of Witness Credibility as a Function of Linguistic and Nonverbal Power (May 17, 1992) (Ph.D. dissertation, University of Kansas) (KU ScholarWorks).

4. Jeffrey T. Frederick, *Online Jury Selection: New Tools for Jury Trials*, 51 SW. L. REV. 40 (2021).

5. ONLINE COURTROOM PROJECT, ONLINE JURY TRIALS: SUMMARY AND RECOMMENDATIONS (2020), https://www.onlinecourtroom.org/demonstration-report.

6. *Judging During the Pandemic: What Judges and Lawyers (and Jurors) Think About Remote Proceedings and the Future of Court Operations*, ABA (May 20, 2021), https://www.americanbar.org/groups/judicial/events_cle/program-library/judging-during-the-pandemic/.

7. *Id.*

8. Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. Rev. 481, 484-85 (1987).

consider the demeanor of the witness when assessing credibility.[9] Logic can be correct, or reality can be counterintuitive. Therein lies the need to test logic rather than rely alone on opinions about the advisability of remote witness testimony.

A. Jurors' Reactions to In-Person v. Remote Witness Testimony

Immediately after the nationwide shutdown due to the COVID-19 pandemic, the Maricopa County, Arizona judiciary formed a task force led by Chief Civil Judge Pamela Gates to study options for conducting jury trials in a safe manner.[10] Jeff Frederick and I assisted in running simulations that tested the two modes of an in-person, socially distanced jury trial with a remote jury trial. We relied on jury-eligible participants to serve as mock jurors and tested the same civil fact pattern (a defamation case) with the same presenting attorneys and witnesses in both modes.

One of the witnesses needed to convey tearful emotion while testifying. She appeared in the two modes to two separate mock juries:

Fig. 1. Jury Views of Witness Testimony (2020).

9. Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. UNIV. L. REV. 1331, 1350 (2015).

10. Pamela Gates et al., *Virtual Juries: We Can, but Should We? And if So, How?*, LITIG., Summer 2021, at 12, 1; *See infra* Figure 1.

Importantly, the juries saw the witness in only one mode, meaning their reactions were not based on a comparison of the two. The in-person jurors felt they could generally assess her emotion even though she was masked or behind Plexiglas.[11] However, the remote jurors expressed a stronger consensus that they could readily see her emotion and assess her credibility because her image was so prominent on their screens.[12] By happenstance, some of those jurors had been actual jurors in trials before the pandemic; those jurors expressed a preference for remote testimony, citing the in-court distance between the jury box and the witness stand as sometimes problematic in reading the witness's expressions and demeanor.[13] As we noted in an article we published in *Litigation* earlier this year:

> In the virtual trial setting, witness examination was a paramount concern. How well would jurors be able to see and hear the witness? How well could they see the exhibits? How attentive and involved would jurors be in the process? Would the witness's emotion and credibility fall flat on screen? On almost all measures, jurors rated the witness experience at the top of the scale. Our online trial jurors said it was easy to attend to the proceedings and they felt involved in them. Jurors felt that it was easy to see the exhibits. Finally, almost all, and in most cases all, jurors felt that they could see and hear the witnesses' testimony and attorneys' presentations very well.[14]

In July 2020, the Online Courtroom Project also conducted a remote mock trial which included remote witness testimony.[15] Social scientist Valerie Hans summarized the results as follows:

> The Online Courtroom Project's demonstration mock jury discovered that the jurors had little difficulty viewing witness testimony and exhibits. Interestingly, "some jurors who had sat on previous juries felt it was easier to judge witness credibility because they had a closer view of the witness rather than looking across a courtroom." Likewise, some mock jurors who had served in person also reported that they could see the documents more clearly in the virtual demonstration trial.[16]

11. Gates et al., *supra* note 10, at 15.

12. *Id.* at 4-5.

13. ONLINE COURTROOM PROJECT, *supra* note 5, at 8.

14. Gates et al., *supra* note 10, at 16.

15. ONLINE COURTROOM PROJECT, *supra* note 5, at 15-16.

16. Valerie P. Hans, *Virtual Juries* 18 (Cornell L. Sch., Research Paper No. 21-16, 2021) (citation omitted), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3860165.

B. Attorneys' Reactions to In-Person Versus Remote Witness Testimony

In general, attorneys lag jurors in their enthusiasm for witnesses testifying remotely.[17] This sentiment is not surprising. Attorneys have been trained to draw upon the courtroom setting to make an important point during direct or cross-examination. Without question, some of that courtroom drama is mitigated in the remote setting. If technical "blips" occur using a videoconferencing platform, momentum toward a key point could be lost.

As the survey response below reveals, some attorneys have voiced concern that a witness who testifies remotely can "cheat offline,"[18] either by looking up information by computer or by having a "coaching conversation" with counsel (perhaps by text or instant message) while on the virtual stand.

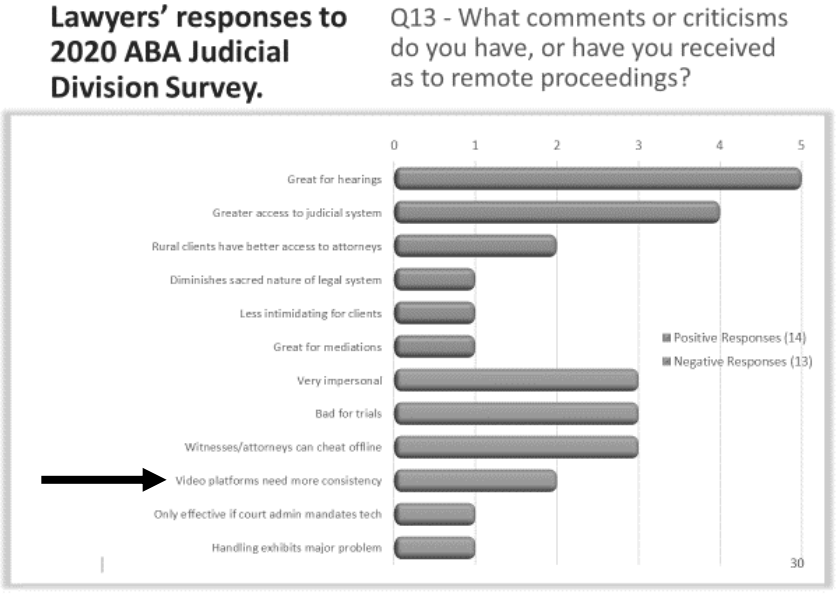

Fig. 2. Lawyer's Responses to Remote Proceedings (2020).

Moreover, with good reason, some discount the efficacy of remote witness testimony when jurors cannot pass around or see a physical exhibit as sharply on their video screens.[19] While documents and many demonstratives can be screen shared (often with greater legibility than in a

17. ONLINE COURTROOM PROJECT, *supra* note 5, at 63-64.

18. *See infra* Figure 2; *Judging During the Pandemic: What Judges and Lawyers (and Jurors) Think About Remote Proceedings and the Future of Court Operations*, *supra* note 6.

19. ONLINE COURTROOM PROJECT, *supra* note 5, at 64.

physical courtroom), as Judge Gates notes, "When the color of the sweater in evidence matters, remote juries suffer."[20] Without a doubt, courts and attorneys should discern among witnesses and circumstances to determine the advisability of having a given witness testify remotely.

III. IMPLICATIONS

Importantly, the jury research summarized here focused on jurors' *perceptions* of their abilities to assess a witness in different settings, not on their *accuracy* in judging credibility.[21] Arguably, this differential between perceptions and accuracy occurs during in-person court proceedings as well. While significant social science research finds that our credibility assessments are deeply affected by our biases,[22] this is exactly what defines the human experience of judgment in every setting.

In a recent article, Susan Bandes and Neal Feigenson discussed legitimate concerns about differences between remote (video) testimony and in-court (live appearance) testimony.

> Only one study has manipulated video vs. live appearance as an independent variable and measured empathy as a dependent variable; it found that mock jurors did not feel less empathy for a child witness who testified via CCTV vs. one testifying live. On the other hand, several studies measuring responses that could be construed as loose proxies for empathy (e.g., likeability) have found that persons are regarded more favorably when encountered live vs. via a screen.[23]

So, how does one reconcile our findings that jurors are enthused about remote trial proceedings and remote witness testimony with the findings cited by Bandes and Feigenson that remote trials have possible roadblocks? Is this a case where more than one thing can be true? Quite possibly. But reason for discernment exists. For example, they note:

> "Understanding the [nonverbal] language of eyes enables perceivers to attribute mental states to others," and it is easier for viewers to do this when the other person gazes directly at them. For instance, viewers have more difficulty rapidly identifying others' emotional expressions when those others avert their gaze. In face-to-face interactions, "the level of

20. Telephone Conversation with Judge Gates, Superior Ct. of Ariz. in Maricopa Cnty. (May 2020).

21. ONLINE COURTROOM PROJECT, *supra* note 5; Gates et al., *supra* note 10.

22. Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1287, 1290-91 (2020).

23. *Id.* at 1293 n.48 (citation omitted). For further understanding of how remote proceedings affect empathy, see Susan A. Bandes & Neal Feigenson, *Empathy and Remote Legal Proceedings*, 51 SW. L. REV. 20 (2021).

> emotionality in the encounter [can] be regulated by the amount of mutual gaze the participants permit[] each other," but if there is little mutual gaze to begin with or, more to the point, if no one can be sure when mutual gaze is occurring, people will struggle to deploy their emotional intelligence to assess the situation.[24]

This research aptly describes the problem when jurors encounter a witness who makes disconnected eye contact in a remote setting. Admittedly, this excerpt is one among many findings.[25] But the premise of concern here is indicative of one that is outdated, making the "more than one thing can be true" proposition real. Though difficulties may arise with a virtual jury, remote trials constantly adapt to remove these roadblocks and to better situate the jurors.

IV. CONCLUSION

Remote trials may remain a viable option for conducting proceedings because some jurors find that viewing a witness online strengthens their ability to view the witness's emotions and mannerisms. By having this close-up view, some jurors feel like they could better assess a witness's credibility. While there still may be difficulties with conducting a remote jury trial because the jurors are not physically present with the parties, certain issues have been resolved during the pandemic. For example, a well-set room for witness testimony delivered remotely fixes the issue of poor eye contact with the finder of fact. Moreover, a simple HUE camera[26] is now standard for connecting a witness to the fact finder. This camera is placed in front of a monitor and enables a witness to look directly at the screen and the questioning attorney while also making strong eye contact with the jury.

24. Bandes & Feigenson, *supra* note 22, at 1295.

25. *Id.*

26. *See infra* Figure 3; *HUE HD Camera*, HUE, https://huehd.com/products/hue-hd-camera/?ph=520e08a63daa08ffebfa06f6 (last visited Sept. 27, 2021).

Fig. 3. HUE Camera from Amazon.

As jury trials continue remotely due to COVID-19 restrictions, the point is this: though there are obstacles to remote witness testimony, there are remedies to effectuate remote proceedings.