

ALL PLUGGED INTO ONE WORLD NOW

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I. INTRODUCTION

In the spring of 2020, the question of whether any given civil dispute should proceed to trial or be continued for an indeterminate period of time was commonplace in the United States. In most cases, the answer was to order a continuance. The pandemic resulted in courthouse shutdowns

reason a judge might choose to forge ahead despite the health risks, applied to criminal, not civil cases.¹

unsure of what steps to take next.³ Some cases could be placed on hold

Some of the arguments made by counsel were make-weight, while others had more substance to them. Collectively, these disputes added more than an already-crippled system should have been expected to bear. In *Forescout Technologies v. Ferrari Group Holdings* finding that the trial could proceed via Zoom was met with a petition for leave to appeal which, under the circumstances, the trial court felt compelled to grant.⁷ ed both live and remote civil proceedings, though it encouraged virtual means whenever possible.⁸

process rights was unresolved.⁹ On one hand, the defendants raised due process concerns regarding the right to cross-examination a key witness in-person. On the other hand, requiring the witness to travel from California to Delaware to testify live would be a great burden given the COVID-19 health climate.¹⁰

Yet, *Forescout* is not remembered as the first civil case to be tried via Zoom because, as these layers of litigation cost added up, the parties recognized how difficult it was becoming to resolve a civil case during the pandemic. According to the court docket, they settled the day after the court entered this decision.¹¹

Other civil cases did proceed to trial online, however, with some even proceeding to trial by jury. That introduced a great many issues into the process which, in the usually slow and steady course of the common law, might not otherwise have ever been answered.¹²

7. No. 2020-0385-SG, 2020 WL 3971012, at *2-3 (Del. Ch. July 14, 2020).

8. *Id.* at *2.

9. *Id.* at *3.

10. *Id.*

11. *See* No. 2020-0385-

have conferred and determined to jointly request that the Court lift the TRO pursuant to paragraph -captioned action, including the Complaint and Counterclaims, with prejudice . . .

12. *See* *Montana v. Egelhoff*,

-Mart Store #2171, 57 A.3d 1121,

1124 (2013)

understanding of how the common law has progressed to this point. Or, as better stated by Justice

Holmes during his series of 000B90 0 612 792 reW* nB6 1A.0()-3(i)-3oer 5()j600187000F>30003110015>6001370015>600137000C>400

II. USE OF ONLINE JURY TRIALS IN CIVIL CASES DURING THE PANDEMIC

The first spike in the pandemic led to a series of urgent and unprecedented orders to stay proceedings, even in some cases that were

The courts had to consider three fundamental questions. Does a trial online ensure the litigants a jury drawn from a fair cross-section of the community? Is the right to confront witnesses unduly compromised, if it

otherwise reexamined in any Court of the United States, than according to²¹

This is not to say that there is no right to trial by jury in the state courts. Indeed, quite to the contrary, each state constitution has guaranteed at least some jury rights in civil trials since the post-Revolution era.²² In fact, at that time, state

²³ Today, the right to a jury trial in civil cases still finds its roots in the various state constitutions, most often in the Declaration of Rights.²⁴

Although the Seventh Amendment does not specifically apply in state court cases, states have adopted what amounts to roughly analogous law under their own Constitution or state statutes. Therefore, there are a number of specific protections which any civil jury system in the United States, whether it is conducted in person or online, should be expected to ensure. These include (a) either unanimity or a consensus vote which otherwise ensures that group dynamics play a significant role in the deliberative process;²⁵

21. *Gasperini v. Ctr. for Humans. Inc.*, 518 U.S. 415, deliberative

lower-income individuals and those who lack access to technology from
³⁴ But, so far anyway, these arguments have been made without supporting evidence, which may well be because the evidence does not support any such conclusion.

It is true that lower-income families in the United States have less access to smartphones, tablets, and desktop computers than do wealthier

household incomes below \$30,000 a year do not have access to any of these technologies at home, while only 1% of adults from households making

³⁵ At the same time, however, access to automobiles is a much more significant factor for lower-income

Expenditure Survey has shown that transportation is the second highest
³⁶

Adding in the statistical evidence which shows African Americans to be more likely to have experiences which lead them to mistrust the courts generally,³⁷ and it is not difficult to conclude that reasons other than COVID-19 may contribute to what we are seeing in these studies. African American jurors may simply prefer to participate via Zoom because going to court is both expensive and stressful. That possibility supports the conclusion, in turn, that allowing for jury trials to be conducted via Zoom will enhance rather than discourage minority participation and that would, in turn, lead to online juries being more clearly drawn from a fair cross-section of the community.

C. *Twoq'99at'Tgs wkt go gpv'vj cvVt kcn'Dg'Eqpf wevgf 'kp'õQr gp'Eqwtvö*

As the District Court in the Western District of Washington concluded in *Liu v. State Farm Mutual Auto. Insurance*, the requirement that trials be

34. *Arizona v. Story*, No. 1 CA-CR 20-0523, 2021 WL 3160854, at *3 (Ariz. Ct. App. July 27, 2021).

35. Emily A. Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, PEW RSCH. CTR. (June 22, 2021), <https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/>.

36. U.S. DEP T OF TRANSP. FED. HIGHWAY ADMIN., NAT L HOUSEHOLD TRAVEL SURV., MOBILITY CHALLENGES FOR HOUSEHOLDS IN POVERTY (2014); BUREAU OF LAB. STAT.: DEP T OF LABOR, CONSUMER EXPENDITURES - 2012 (2013).

37. See, e.g., Owen Bowcott, *Ethnic Minorities Get Tougher Sentences Due to Distrust in Courts*, THE GUARDIAN (March 27, 2017), <https://www.theguardian.com/law/2017/mar/28/ethnic-minorities-get-tougher-sentences-due-to-distrust-in-courts>.

interpreted.³⁸ The ability to conduct a jury trial through videoconferencing arises from Federal Rules of Civil

³⁹ Specifically,

⁴⁰ On its face, FRCP 77(b) appears to contemplate open court to consist of a traditional, in-person courtroom.⁴¹ Yet, this rule is flexible because it allows for online

⁴² In this case, the plaintiff had already waited five years for this trial and remote proceedings were possible with modern platforms.⁴³ Therefore, because the court could satisfy FRCP 77(b) through videoconferencing, it was unnecessary to delay the jury trial for even longer.⁴⁴

Allowing for the use of an online jury would thus appear to make sense, not only during a pandemic, but also whenever the circumstances make

Eastern District of Michigan concluded in *Gould Electronics v. Livingston County Road Commission*, Rule 43 provides similar flexibility for witness testimony:

[T]he tenor of Rule 77(b)

nevertheless take place in open court. To be sure, the advisory committee notes indicate a strong preference for live testimony . . . [b]ut many recent cases acknowledge .

constitutional muster and may be effectively utilized by both the state and federal courts even after the pandemic has finally passed.⁵⁵

IV. USING SUPPLEMENTAL JURY QUESTIONNAIRES TO POLL PROSPECTIVE JURORS BEFORE COMING TO COURT

One way to protect jurors from pandemic-related health issues while still ensuring access to justice for the parties is to proactively address juror concerns. The COVID-19 Judicial Task Force for the United States has specifically recommended that, even in cases in which the voir dire and trial are to be conducted in-person, a

determining who should be subject to challenge.⁵⁹ By implementing SJQs, jurors remain protected from contracting COVID while serving on a jury, and the parties are able to continue the proceeding and maintain a fair cross

selection procedures because it increased the size of the representative pool as prospective jurors were more willing and able to participate with these pandemic-related precautions.⁶⁵ Moreover, if potential jurors needed equipment to access the preliminary interviews, then this was given to them.⁶⁶

these procedures had been in place long before the pandemic and were thus completely irrelevant to whether virtual voir dire should be permitted:

Defendant fails to provide a persuasive reason why he was entitled to be present and represented during the process of statutory qualification, excusal, and deferral set in place long prior to the pandemic. Indeed, it is

⁸⁵ online trials allow for witnesses to attend who might have been previously considered unavailable. The cost and expense of traveling to court every day is eliminated and the lack of access to documents or other evidence is reduced. Prospective jurors from disadvantaged communities, who might otherwise be afraid of court, have trouble getting the time free, or lack the resources necessary to travel into court, can dial in through an application on their smartphones, which is a resource statistically more likely to be available than an automobile.

Additionally, voir dire can be effectively conducted, both remotely and among a more limited population, because the use of previously completed questionnaires

paid \$50 a day.⁸⁹