COVID-19 and the Courts

Lessons from the Pandemic

NICHOLAS M. PACE, BETHANY SAUNDERS-MEDINA, JAMIE MORIKAWA, SANJANA MANJESHWAR, ANNE BLOOM

Supported by the American Association for Justice Robert L. Habush Endowment
As the 2019 coronavirus disease (COVID-19) rapidly spread throughout the United States during the spring of 2020, our system of civil justice was forced to restructure almost overnight as courts struggled to comply with the unprecedented restrictions necessitated by the pandemic. COVID-19 led to unique challenges for court administrators and judges, who tried to find ways to serve the continuing needs of litigants to have their disputes resolved in a fair, timely, and efficient manner while at the same time taking important steps to protect the health of court staff, attorneys, witnesses, and the public. Some courts shut down completely; others repeatedly postponed trials and all but the most crucial in-person proceedings while essentially every jurisdiction moved into an unfamiliar world where masks and social distancing became the new normal. The pandemic also resulted in a seismic shift to remote online activity, with virtual appearances and hearings becoming an increasingly common event, a development that would have been unthinkable in 2019. While some of these changes may be temporary, others could have long-lasting implications for the future of the civil justice system.

On October 1, 2020, the RAND Institute for Civil Justice (ICJ) and the University of California (UC) Berkeley’s Civil Justice Research Initiative (CJRI) brought together a distinguished group of jurists, practicing attorneys, and academics to discuss the implications of the COVID-19 pandemic on the courts. Supported by a generous grant from the American Association for Justice Robert L. Habush Endowment, the virtual conference consisted of four panels, each of which explored a different topic related to the impact of COVID-19. The first panel of the day examined how the pandemic has affected civil juries, the second panel considered challenges for pretrial case management, and the third panel addressed implications that the pandemic might have for federal and state civil rules. During the final panel, speakers discussed lessons from the pandemic that could be applied to the civil justice system even after circumstances eventually return to “normal.”

The RAND ICJ is dedicated to improving the civil justice system by supplying policymakers and the public with rigorous and nonpartisan research. Its studies identify trends in litigation and inform policy choices in the areas of liability, compensation, regulation, risk management, and insurance. ICJ research is supported by grants pooled from a variety of sources, including corporations, trade and professional associations, individuals, government agencies, and private foundations. ICJ publications are subject to peer review and disseminated widely to policymakers, practitioners in law and business, other researchers, and the public. The institute is part of the Justice Policy Program within RAND Social and Economic Well-Being. The program focuses on such topics as access to justice, court administration, policing, corrections, drug policy, and court system reform as well as other policy concerns pertaining to public safety and criminal and civil justice. For more information, email justicepolicy@rand.org.
The CJRI is a think tank at Berkeley Law and is chaired by Erwin Chemerinsky, dean of Berkeley Law School. CJRI’s mission is to systematically identify and produce highly credible, unbiased research on critical issues concerning the civil justice system, including expanding access to justice. Research focuses on the growing limits on access to the court system, including inadequate funding of state and federal courts; increased use of compulsory arbitration clauses; restrictions on class action lawsuits; and limits on punitive damages. The initiative also examines potential remedies to help level the judicial playing field for litigants. These efforts ensure that leaders, legislators, and courts have the factual research and data they need to set policy to ensure continued access to the courts.

Funding

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The RAND Institute for Civil Justice and the UC Berkeley Civil Justice Research Initiative would like to thank our distinguished panelists and moderators for their productive discussions.
Overview

As the 2019 coronavirus disease (COVID-19) rapidly spread throughout the United States during the spring of 2020, our system of civil justice was forced to restructure almost overnight as courts struggled to comply with the unprecedented restrictions necessitated by the pandemic. COVID-19 led to unique challenges for court administrators and judges, who tried to find ways to serve the continuing needs of litigants to have their disputes resolved in a fair, timely, and efficient manner while at the same time taking important steps to protect the health of court staff, attorneys, witnesses, and the public. Some courts shut down completely; others repeatedly postponed trials and all but the most crucial in-person proceedings while essentially every jurisdiction moved into an unfamiliar world where masks and social distancing became the new normal. The pandemic also resulted in a seismic shift to remote online activity, with virtual appearances and hearings becoming an increasingly common event, a development that would have been unthinkable in 2019. While some of these changes may be temporary, others could have long-lasting implications for the future of the civil justice system.

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A recurring theme throughout the conference was the effect of the pandemic on access to the civil justice system. In March 2020, COVID-19 essentially brought the entire legal system to a halt until it could determine how to adapt to the restrictions imposed by the pandemic. Panelists discussed how courts had to resort to creative solutions, including switching to virtual proceedings and holding trials in unusual locations such as convention centers and outdoor patios to continue operating at all. A number of panelists made the point that in some ways, the constraints generated by COVID-19 have expanded access to justice by inadvertently making the courts a more efficient dispute resolution mechanism for both litigants and lawyers. When trials and other court events are held remotely, litigants and witnesses do not have to spend as much time and effort physically traveling to court, which can be a difficult challenge for those with children, full-time jobs, or businesses to run. For self-represented litigants, particularly, virtual proceedings can seem less intimidating and less complex compared with in-person trials.
Transparency within the civil justice system, according to some panelists, has been substantially impacted by the pandemic as well. For example, the media and interested individuals can remotely view some live trials and other in-court events by using links posted on websites and social media. Yet COVID-19 has also obstructed public participation in the justice process, especially when it comes to jury trials. Increased hardships from economic disruptions have effectively eliminated certain groups of people (such as parents who must now remain at home to take care of children no longer attending school) who would otherwise contribute to a diverse jury pool under normal circumstances, leading to juries that may not accurately represent the demographics of a particular jurisdiction. Elderly people and those with health complications are reluctant to serve on in-person juries with the threat of infection while people without access to adequate technology are unable to serve on remote juries. When discussing jury diversity, some panelists observed that since the pandemic began, men, white people, and younger people were more likely to respond to jury summons compared with women, people of color, and older people. Panelists also mentioned that as in-person jury trials have been canceled or delayed, society risks losing the democratizing aspects of the civil jury, which normally serves an educational and informative function for people who are unfamiliar with the justice system.

Attorneys have been positively affected in several ways by the pandemic, said some panelists. They no longer have to fly across the country for meetings or depositions, and the rapid expansion of the use of virtual proceedings has helped save time for themselves and money for their clients. Panelists explained that it is easier to fit significantly more hearings and meetings into their schedules when proceedings are held over video conferencing applications, resulting in more flexibility in their calendars than in pre-pandemic times. On the flip side, the lack of in-person contact was said by some to reduce a sense of collegiality among opposing attorneys and to eliminate some opportunities for resolving matters amicably.

Virtual proceedings were said to impose limitations on aspects of both verbal and nonverbal communication, such as emotional expression and eye contact. Jurors may be more likely to lose concentration or interest during remote trials, which can seem less demanding of their attention than in-person trials. Panelists explained that these seemingly insignificant details can considerably affect jurors’ perceptions of the claims being made by the parties (particularly in regard to the injuries and suffering experienced by tort plaintiffs), ultimately impacting trial outcomes.

In addition, remote trials and meetings pose unique technological challenges, including difficulties sharing documents and evidence and the possibility of interruptions such as “Zoom-bombing” and slow Wi-Fi connections. Panelists regretted that they were no longer able to physically meet with clients and witnesses to prepare them for court events and depositions and expressed disappointment at the loss of spontaneous in-person workplace interactions. The transition to remote work has also blurred the boundaries between home and work life, negatively impacting attorneys and judges with young children and family responsibilities.
As a result of COVID-19, some panelists asserted that courthouses in many jurisdictions are operating on reduced hours and criminal trials have been prioritized over civil trials, which were delayed or rescheduled, sometimes indefinitely. Panelists discussed how this significant backlog overlaps with an impending surge in civil litigation related to the economic effects of the pandemic as eviction moratoriums expire and consumer debt rises. This could potentially cause further delays in providing access to justice for litigants who now may have to wait months or even years to have their day in court.

The effects of the pandemic on the courts were said to have led some practitioners and legal scholars to think about reforming the rules of civil procedure to make the litigation process more efficient and accessible. Various panelists proposed amending the rules to allow video or phone depositions, eliminating the requirement of in-person contact when unnecessary, and permitting the use of email to deliver documents. However, some concluded that federal and state rules of procedure were already designed to be flexible and accommodating, so it may not be as necessary to broadly adopt new rules to deal with this particular crisis (updating and modernizing other aspects of the civil justice system was said to be a more important need).

The pandemic will eventually end and circumstances will return to “normal,” but instead of advocating for courts to revert to functioning exactly as they did before the pandemic, some panelists noted that the crisis has provided a rare opportunity to reimagine certain aspects of the civil justice system. Many courts have historically resisted modernization and sometimes refused to adapt to technological advances, it was observed, leading the judicial system to look relatively similar to the way it did over 100 years ago. Panelists discussed the degree to which the restrictions required by COVID-19 have finally forced the courts into the twenty-first century, with some arguing that many court systems have changed and progressed more in the past six months than they have in the past three decades.

Some courts have continued to primarily rely on paper-based systems, but the transition to remote work and the need to operate more efficiently has highlighted the importance of investing in technology. While many courts are eager to continue embracing technological advances after COVID-19 is no longer a significant concern, cuts to funding and reduced budgets may make this difficult. A number of panelists explained that it is important to ensure that courts receive adequate funding and that it might be time to reimagine how the courts are funded.

The implications of COVID-19 for the future of remote work could also mean that virtual proceedings will be a long-term, widely accepted practice instead of simply a temporary adaptation. Some panelists hypothesized that although many people are eager to get back to in-person work, video proceedings and meetings will not disappear when the pandemic ends. Now that attorneys are aware of the practicality of a 10- to 15-minute meeting on a video conferencing application instead of physically traveling to an office, they may be reluctant to give up some of the benefits of remote work. Additionally, clients, self-represented litigants, witnesses, and jurors might find it more convenient to appear virtually even after the pandemic is over, but it is also
essential that the “digital divide” does not prevent anyone from fully participating in the justice system.

Perhaps the most common theme voiced by the participants in the four panels is that the disruption caused by the pandemic has demonstrated the importance of protecting and increasing transparency, efficiency, and accessibility within the civil justice system. Although this crisis has undoubtably led to considerable challenges, it also presents a unique opportunity for lasting change and progress, and courts can continue to implement these reforms and innovations to ensure and expand access to justice long after the pandemic has ended.

NOTE: The transcript that follows has been edited for readability and clarity. Any errors in interpretation are solely the responsibility of the RAND Corporation.
Introductory Remarks

Host Biographies

James M. Anderson: Director, Institute for Civil Justice, RAND Corporation

Mr. Anderson is director of the Institute for Civil Justice and the Justice Policy Program at RAND. He conducts empirical research on a wide variety of policy issues and has served as principal investigator on a variety of projects, ranging from the policy implications of autonomous vehicle technology to understanding the effects of indigent defense systems. He has been funded by the National Institute of Justice, the National Institutes of Health, the Bureau of Justice Statistics, the Commonwealth of Pennsylvania, the Institute for Civil Justice, the Robert Wood Johnson Foundation, the Department of Defense, and the National Science Foundation. His work has appeared in the Harvard Law Review, the Yale Law Journal, the Stanford Law Review, the University of Pennsylvania Law Review, the Journal of Law and Economics, Oxford University Press, and in numerous RAND publications.

In addition to leading research, he has served as a member of RAND’s Institutional Review Board to review research for human subjects protection issues. He is also a member of the American Law Institute. Before joining RAND, he clerked for the Honorable Morton Greenberg of the United States Court of Appeals for the Third Circuit and practiced law for ten years as an assistant federal public defender representing death-sentenced prisoners. He received a J.D. from Yale Law School and a B.A. in ethics, politics, and economics from Yale University.

Anne Bloom: Executive Director, Civil Justice Research Initiative, UC Berkeley School of Law

Dr. Bloom has a distinguished record of accomplishment in both academia and public interest law. Before becoming the executive director of the Civil Justice Research Initiative, she was the director of Public Programs for Equal Justice Works in Washington, D.C., and associate director of the Civil Justice Program at Loyola Law School in Los Angeles. Prior to that, she was associate dean for research and professor of law at McGeorge Law School where she taught courses in litigation, law and politics, and public interest law. Before becoming a professor, Dr. Bloom was a staff attorney at Public Justice in Washington, D.C. She holds both a J.D. and a Ph.D. in political science and has authored many articles on civil-justice-related subjects. Her most recent publication is a coedited volume with David M. Engel and Michael McCann, Injury and Injustice: The Cultural Politics of Harm and Redress (Cambridge University Press, 2018).
Erwin Chemerinsky: Dean, Jesse H. Choper Distinguished Professor of Law, UC Berkeley School of Law

Dean Chemerinsky is the chair of the Civil Justice Research Initiative and the dean of Berkeley Law where he is also the Jesse H. Choper Distinguished Professor of Law. Prior to assuming this position, from 2008 to 2017, Dean Chemerinsky was the founding dean and distinguished professor of law, and Raymond Pryke Professor of First Amendment Law, at University of California, Irvine School of Law, with a joint appointment in political science. Before that, he was the Alston and Bird Professor of Law and Political Science at Duke University from 2004 to 2008 and from 1983 to 2004 was a professor at the University of Southern California Law School, including as the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. He also has taught at DePaul College of Law and UCLA Law School.

He is the author of 11 books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction. His most recent books are *We the People: A Progressive Reading of the Constitution for the Twenty-First Century* (Picador Macmillan), published in November 2018, and two books published by Yale University Press in 2017, *Closing the Courthouse Doors: How Your Constitutional Rights Became Unenforceable* and *Free Speech on Campus* (with Howard Gillman). He also is the author of more than 200 law review articles. He writes a regular column for the *Sacramento Bee*, monthly columns for the *ABA Journal* and the *Daily Journal*, and frequent op-eds in newspapers across the country. He frequently argues appellate cases, including in the United States Supreme Court. In 2016, he was named a fellow of the American Academy of Arts and Sciences. In 2017, *National Jurist* magazine again named Dean Chemerinsky as the most influential person in legal education in the United States.

Mary-Christine (“M.C.”) Sungaila: Chair, Institute for Civil Justice Board of Advisors; Shareholder, Chair, Appellate Practice Group, Buchalter

Ms. Sungaila is the current chair of the Board of Advisors for the RAND Institute for Civil Justice and the leader of the Buchalter’s Appellate practice group and a shareholder in the Firm’s Orange County office. Ms. Sungaila is a highly regarded appellate attorney who has briefed and argued appeals raising cutting-edge and fundamental business issues for over two decades. Her work has helped shape undeveloped areas of the law in constitutional law, employment, franchisor liability, product liability, class actions, probate, immigration, Holocaust art recovery, and human rights.

Ms. Sungaila has been recognized for over a decade by the *Daily Journal* as one of California’s 100 Leading Women Lawyers and as one of the state’s Top Labor and Employment Lawyers. She is a recipient of two back-to-back California Lawyer of the Year (CLAY) awards, including one in 2015 from *California Lawyer* magazine for the precedent-setting franchisor
vicarious liability case she argued before the California Supreme Court, *Patterson v. Domino's Pizza*.

Ms. Sungaila is also frequently recognized for her sustained commitment to community service and pro bono work. In 2017, she was awarded the Ellis Island Medal of Honor for her combined professional achievements and humanitarian and pro bono work. She has also been recognized by groups such as California Women Lawyers, Alpha Phi International Fraternity, Orange County Women Lawyers, the Orange County Hispanic Bar Association, the Women Lawyers Association of Los Angeles, and Coastline Community College Foundation. Ms. Sungaila is regularly published and quoted in top industry publications, and her articles relating to effective amicus briefing, appellate brief writing, and gender issues are cited frequently and are required reading in law schools throughout North America. She has taught appellate law at University of California, Irvine, Loyola, and Whitter Law Schools.

**Discussion**

*Erwin Chemerinsky:*

Good morning. My name is Erwin Chemerinsky and I have the great pleasure of being the dean of the University of California, Berkeley School of Law. And it’s my pleasure to welcome you to this conference that deals with issues concerning the courts and operating in a pandemic. I know that no one comes to any conference, whether it’s online or in person, to hear the dean’s welcome. So, I promise to keep my remarks very short so we get to the substance of the program. But I’d be remiss if I didn’t extend some thanks to all who are making this possible. An enormous amount of planning and effort has gone into putting together a conference like this. I want to start by thanking RAND for sponsoring this with us and working together to put this on. Such an enormously important topic and bringing together the expertise of RAND with our Civil Justice Research Initiative is a wonderful collaboration. And I look forward to many such collaborations in the future.

I want to take a moment to thank all of our speakers and panelists today. Each are tremendously busy, and I’m grateful to them for taking time from their schedules to be part of this discussion. Most of all, though, I have to thank Anne Bloom, who’s the executive director of the Civil Justice Research Initiative [CJRI]. Anne has worked tirelessly on this program; tireless as she always does to make everything for the Civil Justice Research Initiative such a success. CJRI was created several years ago to be a university-based program that looks at access to justice in the United States. Our goal is to bring together judges, practitioners, and academics to look at the important cutting-edge issues. That’s exactly what we’re doing today. We’re bringing together eminent jurists, lawyers, and scholars to think together to guard the challenges that are facing the courts because of the pandemic.

There’re so many hard issues. How can courts, how should courts conduct their business in the midst of a pandemic? Can there be jury trials while COVID-19 is still spreading? How can
courts manage their caseload in light of COVID-19? When we think about civil justice, there is such a backlog developing with regard to criminal cases and the constitutional requirement for speedy trial, how will we ever be able to have civil trials and civil proceedings to go forward? We’re in the midst of the worst economic depression since the 1930s. This is going to create enormous issues in regard to access to justice. How do we manage these access to justice issues in the court? It’s all of this and so much more we will discuss in today’s program. So, I welcome you to the discussion. I thank all of you for attending, and I know we’ll learn so much from listening to the panelists and talking to them over the course of the day.

**James Anderson:**

Excellent, Erwin.

**Erwin Chemerinsky:**

Thank you.

**James Anderson:**

I’m James Anderson, the director of the RAND Institute for Civil Justice and the Justice Policy Program at RAND. I want to thank you and Anne for conceiving this program and reaching out to us. I also want to thank Nick Pace, Cat Cruz, and Bethany Saunders-Medina for all their hard work in organizing the conference. And I want to thank all of our panelists who devoted time today to sharing their insights. Finally, I want to thank Sue Steinman and the Habush Foundation for supporting this conference. Like Berkeley Law School, the RAND Institute for Civil Justice has a long history of conducting research that improves the civil justice system, and like CJRI we’re focused on improving access to justice issues, from our early research on jury verdicts to Deborah Hensler’s seminal work on claiming behavior to more recent work on access to justice.

We’ve really leaned on the wisdom and experience of our distinguished board of advisers who can also often observe what’s happening on the ground before the research community even becomes aware of it. So today I’m hopeful that our work will really accomplish three goals, and I urge folks participating to think about these goals over the next few hours. First, of course, I’m hopeful that it will help the courts cope with COVID today and [that it will help] the civil justice system cope with COVID and identify—if not best practices, given the circumstances, at least good enough practices so that the civil justice system continues to function as well as it can. Second, I hope that we can really identify practices that build resilience for the future even after COVID is a distant memory, as I think courts and the civil justice system will face a variety of challenges and disruptions from natural disasters and other causes.

And then finally, and this may be utopian, I’m optimistic that COVID can serve as a catalyst to improve the civil justice system more broadly and help us all as lawyers identify practices that perhaps we’ve clung to unnecessarily as lawyers and judges and identify things that we no longer
need, and then we can get rid of and improve the civil justice system and improve access to justice in that way. So finally, thank you. And with that, I’ll hand off the baton to M.C. Sungaila, the chair of the ICJ [Institute for Civil Justice] Board of Advisors to offer her welcome and thoughts. M.C.?

Mary-Christine (“M.C.”) Sungaila:

Thank you so much, James. As James mentioned, I am the board chair of RAND’s Institute for Civil Justice Board of Advisors. I’m also a chair of the Appellate Practice Group at Buchalter in California. So, on behalf of the board, welcome to this thought leadership event held jointly with Berkeley and its Civil Justice Research Initiative. We are grateful that all of you practicing lawyers, judges, policymakers, and members of the public are here with us today, [either] live or viewing the recordings of these panels in the future. In my decade-long tenure on the RAND board, RAND has partnered with several academic institutions, including Stanford Law School and UCLA, to analyze developing areas of the law and law practice from the globalization of litigation to class actions, litigation funding, state court budgeting, and even attorney wellness. We’re pleased to partner with Berkeley today on this equally timely and cutting-edge program focused on both the short- and long-term impacts from COVID and its reverberations.

Our program today, to my knowledge, is the most comprehensive examination of COVID-related court issues to date. Our panels of judges, lawyers, RAND researchers, and academics will identify and guide us through the developing issues incorporating RAND’s signature objective nonpartisan analysis. From jury trials, discovery, court dockets, and constitutional concerns to the potential longer-term impact on how we decide disputes, what court rules might need to be changed to facilitate this, remote hearings and trials and how access to justice concerns might factor into our approaches going forward.

So, it’s quite a comprehensive day. We will start with our first panel, which will begin in a moment, and we’ll focus on the implications for civil juries. So, sit back, lean forward, dive in, and enjoy the programs today.

James Anderson:

Thanks, M.C. I think our next panel will begin in just a moment with Richard Jolly taking over.
Panel One: Implications for Civil Juries

Panelist Biographies

Richard Loren Jolly, Associate, Buckley LLP; Fellow, Berkeley Law CJRI (Moderator)

Mr. Jolly is an associate at Buckley LLP in Los Angeles where he represents plaintiffs and defendants in all types of commercial litigation in federal courts, state courts, and arbitrations. He also serves as a fellow for the Civil Justice Research Initiative of the University of California, Berkeley. Mr. Jolly also worked as a research fellow for the Civil Jury Project of NYU [New York University] School of Law, and he clerked for Judge Deborah Cook of the United States Court of Appeals for the Sixth Circuit. He received his law degree from the University of Michigan Law School and is a graduate of the London School of Economics and the University of California, Berkeley.

Robert A. Clifford, Principal Partner, Clifford Law

Mr. Clifford is the founder of Clifford Law Offices in Chicago, an internationally recognized trial firm that concentrates in aviation, transportation, personal injury, medical negligence, product liability law, mass torts, and class actions. The National Law Journal awarded Mr. Clifford the Elite Trial Lawyers’ Award in 2014. Mr. Clifford has the distinction of being selected by Super Lawyers, a peer-review organization, as the number one lawyer in Illinois from 2009 to 2016 and has always been in the top three. He was named by Chicago Magazine as one of the 100 Most Powerful Chicagoans and was named the 2012 Chicago Lawyer Person of the Year based upon his trial accomplishments as well as his contributions to the legal community and to the Chicago area. The Seventh Circuit Court of Appeals gave him its Professionalism Award in 2014. The Chicago Bar Association gave him the Justice John Paul Stevens Award in 2017. Also in that year he received the Unity Award by the Diversity Scholarship Foundation. The National Trial Lawyers named Bob Clifford as the Class Action Trial Lawyer of 2018. In 2019, the Illinois Trial Lawyers’ Association honored Mr. Clifford with the Leonard Ring Lifetime Achievement Award, and he was also among those honored in that year by Public Justice’s prestigious Trial Lawyer of the Year Award. In 2020, the American Association of Justice honored Mr. Clifford with its Lifetime Achievement Award.

In addition to practicing law, Mr. Clifford is dedicated to the furtherance of the legal profession and has been actively involved in and held leadership roles with the American Bar Association (chair of the Section of Litigation and chair of the ABA [American Bar Association] Fund for Justice and Education), Chicago Bar Association (president), Chicago Inn of Court (president), [and] American College of Trial Lawyers and Illinois Trial Lawyers Association (president). He is also a member of the American Law Institute and the Inner Circle of
Advocates. For more than 25 years, he has sponsored the Annual Clifford Tort Symposium on Tort Law and Civil Justice at DePaul University College of Law. Mr. Clifford also served as chair of the Board of Trustees of the Naples Children and Education Foundation, a charitable organization and host of the Naples Winter Wine Festival, which benefits over 200,000 at-risk and underprivileged children in Southwest Florida.

Arturo J. González, Partner, Morrison Foerster LLP

Mr. González, partner at Morrison Foerster, is one of the nation’s top trial lawyers. One federal judge said his “trial advocacy skills were superior” while a federal magistrate described his trial skills as “phenomenal.” Mr. González is also a fellow with the American College of Trial Lawyers and the International Academy of Trial Lawyers and an associate with the American Board of Trial Advocates. As chair of Morrison Foerster’s Commercial Litigation and Trial Practice Group, he has served as the firm’s lead trial counsel in a number of significant matters. In 2019, he was honored by the American Bar Association for his dedication to providing free legal services to the poor. He was named to Legal 500’s Trial Lawyers Hall of Fame in 2017, has nine consecutive selections to the Daily Journal’s Top 100 Lawyers in California, is recommended by Chambers USA as a top commercial litigator, and has been selected annually since 2010 as one of the country’s top 30 trial lawyers by Legal 500 US. In 2009, the National Law Journal recognized him as one of the top 10 trial lawyers in the country in their “Winning” Special Report. Earlier in his career, he was selected by the National Law Journal as one of the nation’s top 40 lawyers under the age of 40 and one of the “50 Most Influential Minority Lawyers in America.” He also served as the 2010 president of the Bar Association of San Francisco.

Valerie P. Hans, Charles F. Rechlin Professor of Law, Cornell Law School

Professor Hans is the Charles F. Rechlin Professor of Law at Cornell Law, conducts empirical studies of law and the courts, and is one of the nation’s leading authorities on the jury system. Trained as a social scientist, she has carried out extensive research and lectured around the globe on juries and jury reforms as well as the uses of social science in law.

She is the author or editor of nine books and over 150 research articles. Current projects on the American jury include developing a new theory of damage awards, analyzing how jury service promotes civic engagement, and examining the impact of race in tort decisions. Professor Hans is also studying the diverse forms of citizen participation in legal decisionmaking in other countries.

editor of the *Annual Review of Law and Social Science*, and past president of the Law and Society Association.

**Judge Carolyn B. Kuhl, Los Angeles County Superior Court**

Judge Kuhl has served on the Superior Court of the State of California since 1995. She has served in the Court’s Complex Civil Litigation Program for more than ten years as presiding and assistant presiding judge of the Los Angeles Superior Court from 2013 through 2016 and as the supervising judge of the Civil Departments of the Los Angeles Superior Court from 2003 through 2004.

Judge Kuhl was a member of the California Judicial Council from 2006 through 2009, [was a member] a member of the statewide Advisory Committee on Civil Jury Instructions from 2001 through 2003, and has served on the Judicial Council’s Trial Court Presiding Judges Advisory Committee and on its Commission on the Future of California’s Court System. Judge Kuhl has a part-time appointment as a lecturer in law at UCLA [University of California, Los Angeles] Law School. She teaches frequently in judicial education programs, including in the Bolch Judicial Studies Institute Master’s Program. She has developed a curriculum to train judges in complex litigation case management. She is also a member of the American Law Institute and serves on its executive committee and on its council. She was appointed by the Chief Justice of the United States Supreme Court to serve on the federal Committee on Rules of Practice and Procedure. She serves on the board of advisors for the RAND Corporation’s Institute for Civil Justice and on the Council of the American Bar Association Center for Innovation.

Prior to taking the bench, Judge Kuhl was a partner in the law firm of Munger, Tolles & Olson. From 1981 through 1986, she served in the United States Department of Justice as special assistant to the attorney general, deputy assistant attorney general (Civil Division), and principal deputy solicitor general, preparing and arguing cases before the United States Supreme Court. She was a law clerk to the Honorable Anthony M. Kennedy when he sat as a judge of the United States Court of Appeals for the Ninth Circuit. Judge Kuhl graduated with distinction from Duke Law School, was an editor of the Duke Law Journal, and received an A.B. degree, cum laude, from Princeton University.

**Discussion**

**Richard Jolly:**

Good morning. I’m so thrilled to be here with everyone. We’re going to be getting started a little bit early, so a few of our panelists might be jumping in still. In addition, I know that there’s been some Zoom problems, so hopefully our audience will be coming in as well. But first, as I said, my name is Richard Jolly. I am an associate at Susman Godfrey in Los Angeles and a research fellow for the Civil Justice Research Initiative of UC Berkeley. I’m really thrilled that the RAND Corporation and the CJRI have organized this fantastic conference and specifically
this conversation on the impact of COVID-19 on the court’s ability to conduct jury trials. This is an issue that is close to my heart both as a practitioner and as a scholar, and I know it is one that is close to the hearts of our panelists.

And so I’m very pleased to introduce and to moderate the discussion amongst the three panelists who we have with us right now. Arturo J. Gonzales is a partner at Morrison Foerster in San Francisco. We also have Professor Valerie Hans, who’s the Charles F. Rechlin Professor of Law at Cornell Law School in New York. And we have Judge Carolyn Kuhl who sits on the Los Angeles County Superior Court. We are also expecting Robert Clifford, who is the founder and senior partner of Clifford Law Offices (hopefully he’ll be able to join us shortly).

Our conversation on the importance of the civil jury will really proceed in three parts. First, we want to discuss and introduce why are we talking about something like civil juries in the middle of a global health crisis as a public health crisis. Why is it important that we talk about the civil jury now, perhaps more than ever?

Second, we’re going to talk about how exactly the court’s ability to conduct jury trials has been impacted by COVID-19 and the steps that courts have taken to address the practical and logistical problems posed by the pandemic. And finally, we’re going to talk about what we can look to toward the future—talk about ways we can look at the civil jury perhaps differently or how COVID-19 might change things more permanently. Throughout the conversation I invite the audience to submit questions through the Q&A [question and answer] feature at the bottom of the Zoom. We will also be leaving time for questions at the end. So, with that, I’m happy to get going, and so to start, I’ll start with the first question that I posed. Why should we be concerned about the civil jury during a pandemic? Valerie, could you speak to that?

*Valerie P. Hans:*

Well, trial by jury is an important democratic institution, and we are losing a lot by pausing jury trials. First of all, we’re losing the work that juries do, and juries spend time throughout the nation resolving disputes, big and small, and applying the law and contemporary ideas of justice in their decisionmaking. So we’re definitely losing that, but we’re also losing the impact on juries. One of the things that research has shown is that participating on a jury is, for most people, a largely pretty positive experience. People are involved in actually doing justice instead of just sitting back and watching TV shows about other people doing justice, and that direct experience with other citizens and the resolution of societal disputes leads jurors to come away with more investment in society and also a more positive view about the courts and law itself. So we’re losing that impact as well.

And pointedly, one of the things we’re losing is what is now been shown to be a democratizing effect of participating on the jury. Researchers, including myself, have looked at participating on a jury and how it affects subsequent actions on the part of jurors. And one of the things we’ve learned is how that increases people’s willingness to participate in other social activities and political activities like voting. So it’s a democratizing institution. We’re losing its work, we’re
losing this positive impact in a time in the pandemic where all of us are isolated. This is one of the institutions that has helped bind us together as a society. So that’s what we’re losing. I think it’s a lot.

Richard Jolly:

Some might say the civil jury is . . . it’s very unique to the United States at this point. We’re one of the few countries that still use the civil juries to resolve the majority of its private disputes that aren’t settled or parts of arbitration, et cetera. But legally we can resolve our disputes through the use of the civil jury. Other states, other nations around the world that used to use the civil jury, including England and Great Britain who [were] sort of the great well of our jurisprudence, have largely abandoned the civil jury. What would you say to people who think, “Well, maybe this is just the time. This is the end of the civil jury here in the United States. Other countries have abandoned it. Maybe it’s time for the United States to do the same.”

Valerie P. Hans:

Well, so you’re absolutely right. There’s been actually a tremendous decline over the decades in the proportion of civil disputes that are resolved by the civil jury. And I think later on in our subsequent panels, we’ll be talking about those kinds of issues that have forced things into alternative resolution approaches as opposed to the civil jury. But I still think the jury has a chance to reach very significant decisions in other cases that it decides. If you think about it, civil cases involve not only the application of the law but also the application—really the infusion—of societal views, some of which are changing. We have different views today about the responsibility of ourselves and the responsibility of businesses toward people who use products or indeed [toward] employees. We have a new kind of understanding about how discrimination can occur in a whole variety of locations and juries bring this new understanding to the resolution of, for example, employment discrimination disputes.

And so, when you think about what civil juries do, again, in some very significant cases, in some pretty ordinary cases, juries give us a chance to update people’s views about what constitutes appropriate and responsible behavior as citizens. So that’s why I think it remains important. It can also serve as a signal, a benchmark if you will, for all those other cases that are resolved through other means.

Judge Carolyn Kuhl:

So, just to jump in for a minute, I am a trial court judge sitting on the Superior Court of California in Los Angeles, and I’m happy to be on the Board of Advisors for the Institute for Civil Justice for RAND. And one of the great gifts I think at this conference is to bring together, as Dean Chemerinsky said, judges and lawyers together with the academy because we can reinforce one another in many ways. And what Valerie had said about the empirical work so well fits with what we believe we observe here in the courtroom. As everyone knows, Los Angeles is
a very diverse city and that diversity is reflected in our juries. And one of the great gifts of being a judge in Los Angeles is to see that diverse venire come together and work together on a jury of 12 people and to really see people put aside, in many ways, their backgrounds and come together as a group and be very serious, in my judgment, about the jury instructions and the law and try to do their duty, according to what they’re told.

The other thing I would add is that with respect to fact-finding by juries, in my judgment, again, as you know, over 20 to 25 years of watching juries work, I think they’re better (the 12 of them) than any one judge would be in terms of assessing credibility and assimilating facts. When lawyers talk to them afterwards and report back to us, it’s quite amazing the detail that they see because each of them is looking individually at the evidence and then coming back together again in the deliberations to bring their individual observations together. So, it is indeed a wonderful institution to be preserved.

Valerie P. Hans:
That’s so interesting, Judge. One of the things that you said about L.A. [Los Angeles] being a diverse society, a diverse community, one of the things that we have learned through doing research is that a jury that represents a broad range of views is actually a very strong fact finder, in part because people who don’t share the same assumptions as you test you when you make claims that might not be able to be supported. And so, I guess here is another example in which your observations do reinforce some of the research on what makes the jury such a sound decisionmaker, even though it’s often confronted with pretty complicated litigation.

Judge Carolyn Kuhl:
And your observation about the impact of the service on the future for those jurors is also very interesting because our experience is that people who have served on juries have a very positive attitude toward jury service most of the time, and as compared to people who, for example, maybe are called to jury service, but for whatever reason, sit in the jury room for a day and go home or participate in voir dire and are not selected. And that looks like a waste of time to them. But those people who serve mostly report back that they valued the experience.

Richard Jolly:
Arturo, as a practitioner and as someone who has tried jury trials, what do you think is at stake here if we risked losing the civil jury?

Arturo J. González:
Well, actually I want to back up just one little baby step and make this point, and it is in response to your question. I think it’s very important for the audience to understand how critical this is to our democracy and where it comes from. If you ask high school students, college
students, maybe even law students and lawyers, many of them don’t know that the right to civil jury trial is in our Constitution. It’s in our Bill of Rights. And I want to give you just a minute or so about why it’s there and how critical it is. When we were having our disputes with the King [George III] way back when, and particularly involving taxes, we had juries. The colonies had juries. And those juries began to rule against the King in cases involving taxes, in particular.

And the King got very upset and said, “Fine, we’re not going to have juries anymore. We’re going to have bench trials,” and guess who appointed the judges? It was the King. And that was a significant part of the dispute that arose between the colonists and the King. When we wrote our Constitution originally, the Bill of Rights that was drafted did not have a right to jury trial because some people were concerned—wait a minute, the juries are going to nullify the laws just the way we did when we tried to nullify the tax laws. And so, some didn’t want there to be a right to jury trial, but the anti-Federalists insisted on including the right to civil jury trial in the Bill of Rights, and so ultimately James Madison drafted it and it was in fact in our Constitution. So that’s where it comes from. It’s part of our Constitution.

And to put it into context in terms of how I use it, I mean, largely my work involves representing one big company against another one. But I’ve tried 12 civil rights cases. Section 1983 cases is a federal statute. And here’s what I say to juries that I think is directly responsive to your question. I explain to them a little bit about the history of the Bill of Rights, how we had a Constitutional Convention and came up with the three branches of government. Then we had another [convention] to determine what rights the people would have. And we call that the Bill of Rights, in my view, the most important document in this nation’s history. And I talk to them usually about the Fourth Amendment because in excessive force cases, it’s the Fourth Amendment that matters. But what I say to them is, “What do you do when law enforcement does something and your citizen claims that it violated his or her constitutional rights? You don’t file a grievance with the president or with your governor.” You have to go to federal court and you file a lawsuit. And then who ultimately decides whether or not the officer’s conduct was proper? Again, it’s not the president, it’s not the governor, it’s not the judge in this case wearing the robe. Who decides whether this is acceptable conduct? It’s you. And I look right at them. I said, “It’s you. You’re going to decide on behalf of our society whether it’s appropriate for an officer to put his knee on someone’s neck for eight minutes. You’re going to decide that. You’re going to decide whether that was excessive force because that is in our Constitution.” That is what’s at stake here. That is what is so important. I cannot think of a better way to arbitrate the issue that I just mentioned or others like it.

I don’t like bench trials—with respect to the judge and every other judge in America, they do a great job. I prefer juries. I don’t want any one person resolving a dispute that I’m involved in. I prefer to have a group of people get together, listen to the evidence, listen to the law, and then make a decision. And that is what is at stake here because that is what is now being jeopardized by COVID.
Valerie P. Hans:

I really like Arturo Gonzáles. I really like what you’re doing with juries and telling them about the history of trial by jury. It’s really fascinating. And it underscores actually another value of the jury trial, which is [that] it has an educational function. Even if not everybody gives a brief history of trial by jury, still you’re educating people about what actually does go on in courtrooms. Many of us—I know I personally—love courtroom dramas and TV shows and movies that depict courtrooms, but obviously they’re somewhat unrealistic. And it’s often very eye-opening to go to an actual courtroom and see real judges and real lawyers and real witnesses and real scientific evidence and other kinds of things that are in typical disputes and get a chance to see justice in action and actually be a part of it. So the educational function and the way it really allows us to learn more about key democratic institutions can’t be underestimated.

Richard Jolly:

Well that, it really seems like, the question is precisely backwards. It’s not do we need civil jury trials during a pandemic instead of during a time of public health crisis and social unrest. That’s precisely when we need civil jury trials, and that’s right now what’s so important and what is at stake. With that said, the pandemic obviously poses logistical and severe public health issues with inviting people from the community as we are trying to maintain social distance and to ensure the health of our communities.

So I wanted to shift gears and start talking about how has the civil jury been impacted by the pandemic, talking about those logistical and practical problems? And Judge, you’re on the ground. So perhaps you could speak to what you’ve been seeing and how courts in Los Angeles are . . . how is jury selection being impacted? How has the crisis affected the “jury yield,” the type of people who are reporting on those types of issues?

Judge Carolyn Kuhl:

So we’re just beginning to understand these things because in our court only in July did we start sending summonses out and only about three or four weeks ago did we start the first criminal trial. There are restrictions on what we can do that are inherent in trying to operate during these times. The most severe of which is that our courtrooms are only the size that they are, and with social distancing, there [are] only so many people that can come into that courtroom. And so, for example, I have one of the larger courtrooms in our 38 courthouse County. We are the largest trial court in the country, and we have 38 courthouses and 550 judges. So, it’s massive in one sense, but I can only fit four people in my jury box.

Therefore, you’re going to have to do something else. We’ll talk in a little bit about what some of the creative judges around the state have done and what their experiences have been. But I think just at the outset, it’s important to say there’s a restriction with regard to physical space. Then there are material resources restrictions in terms of, for example, how the federal
court in San Diego supplied clear masks to the jurors. Where are resources to do something like that? The federal court also fed the jurors at lunchtime so that they didn’t have to go through the doors of the courthouse again, mix with other people, go out on the street. We don’t have the resources to do those sorts of things. Just at the outset I think it’s important to say what those constraints are. Different courts have had different experiences with jury yield, and in our court in Los Angeles, our jury yield in terms of how many summonses we sent out versus how many people respond at all, we usually have a yield rate of only 30 percent. It’s now down to 11 percent.

Richard Jolly:

Wow.

Judge Carolyn Kuhl:

Yes. Wow. But we’re working against a restriction, if you will, that already exists. If you want to, we can talk a little bit about what our usual methodologies are for enforcing jury summonses. But we have been doing a lot on our court website marketing, even; we have a marketing tag which is called Here for You, Safe for You. We spend a lot of time on the website and also in the online jury orientation explaining to people the safety measures that they’ll experience when they come into court. Again, in each of the diverse experiences with trials that I’ll talk about a little bit later, the judges reported that the people who did come in were very happy to serve—they were enthusiastic indeed.

Richard Jolly:

One of the remarkable things I think with the number that you just mentioned—that the regular yield is as low as 30 percent and that it’s falling down to 11 percent—is that this is indicative of [how] COVID-19 is just putting pressure on the types of problems that we’re already seeing in our jury system—the idea that many people aren’t responding to summons, many people aren’t reporting. There are many problems with that, but one of them is how much that affects juror diversity. Professor Hans, perhaps you could speak a little bit to that. We’ve touched on the importance of diversity, but when the court can’t bring people in, what are the effects?

Valerie P. Hans:

Well, so the strongest juries are the ones that represent the community at large, the broadest range from the community. Again, that really helps in the accuracy of fact-finding. Some jurors we might test and ask for further explanations of individuals who’ve made assumptions about the evidence that they’re hearing. We actually have some interesting information about the challenges of assembling diverse juries from a National Center of State Courts project. They commissioned, back in June, an interesting national survey where they explored some of the
issues that we’re talking about in terms of people’s willingness to serve, people’s willingness to come to the courthouse, and actually also people’s willingness to participate in virtual jury trials, which we’ll talk about shortly. It won’t surprise you that people’s willingness to come to the courthouse really did depend, in part, on some of their personal situations and personal characteristics.

The least surprising finding is people who themselves had health issues or were living with people with serious health issues that could be affected if they became infected with COVID-19 were the most reluctant. There were also some differences in terms of the things we worry about, diversity grounds, the men versus women, older versus younger people, and race and ethnicity so that whites as opposed to racial ethnic minorities, men as opposed to women, and younger people as opposed to older people were all more likely to say, anyway, that they would respond. I don’t know if you’ve gotten a chance, Judge, to look at that 11 percent, but do you have a sense about whether or not you’re able to get this same range of diversity in your jury pool now compared to the 30 percent yield that you were talking about before?

**Judge Carolyn Kuhl:**

Well, we just don’t have a lot of experience as yet, especially in my court. I spent some time talking with the federal court judge in San Diego who led the Ninth Circuit’s COVID task force and his experience in his first trial and talking to a judge in Alameda County, [a] very fine practitioner (now judge) who conducted a civil trial there, a preference case, meaning that the plaintiff was within six months of dying, and then with our supervising judge of our criminal courts in Los Angeles, all of whom conducted trials. They each said that, looking out at the people who appeared and who served on their jury, they did not see any difference now in terms of diversity. Now I have to say in Los Angeles, the diversity of any individual jury, by my observation, differs significantly from one case to another. For reasons that I don’t completely understand, but even in a normal time, you can get quite a bit of difference.

You don’t get the randomness in every particular jury, although we believe in our very fine CEO [chief executive officer], who’s the jury commissioner of the court, who believes that our processes do reach out at least to a diverse group and bring in a group that is overall representative of our community. But the other thing was that in each of those different situations, the judges said once people came in, they did not see that there was any particular group that had hardships such that it was affecting the diversity of the people that actually served on the jury. Indeed, one of the judges said that the only people who were trying to get out of jury duty in the *voir dire* process were Caucasian males, for whatever reason.

**Richard Jolly:**

Bob Clifford, I’m so glad we’re able to have you here with us today. I want to turn to you to ask your opinion on what you’ve been seeing in the courts right now as a result of the pandemic. How has your practice been impacted by COVID-19?
Robert A. Clifford:

Well, greetings to all from the Windy City. Our practice has been impacted dramatically. If you look at our practice on multiple fronts, the first is in a case of the crash of Ethiopian Airlines Flight 302 (I have the privilege of serving as lead counsel on that case). It’s pending in the Northern District of Illinois where currently the courthouse itself is closed, but we have terrific access to our judges and they’ve made themselves very available to us. But the “however” is that there are no jury trials and the court has developed a plan where they’ve taken over the ceremonial courtroom that they are jury rigging, if you will, so that folks would sit socially distanced and the like. One of the very hot topics for us that I brought up to counsel for Boeing just this past week was I want to make a motion to the court to get into the trial queue. Because what we see happening is that there’s limited availability to the facility.

We don’t anticipate a trial in that case before, at the earliest, the fall of next year, if not into the spring of 2022, but I want to get us into the queue because there’s going to be a demand for that. That’s part one. At a lesser level—I mean, my office—we have 25 lawyers and we’re a tort law practice. We have medical malpractice, product liability, auto crash cases, and the like. There is, in the state court system here in Illinois and in some of the smaller counties, an effort being made to use literally a high school gym in one instance to set up a jury room.

There’s all that kind of tweaking going on. We just agreed to participate with State Farm in a pilot program to try some auto cases where the claim is below $50,000 in a virtual trial. But the elephant in the room from my perspective is the jury pool itself. For an example, anecdotally here in Cook County, Illinois, there was a call for grand jurors. They’ve sent out 400 subpoenas; 40 people showed up. That’s the number one problem. Number two, when you go to the virtual program, well, the pool, the diverse pool that we’re used to in an area like Chicago, many of these folks don’t have access to computers. They don’t have the bandwidth or Wi-Fi. Well that really skews the jury pool and doesn’t make it reflective of the community, and there are great concerns about that.

COVID is impacting things greatly. Then finally I’ll say, from the settlement negotiation perspective, I actually have had claims guys tell me and my colleagues, “Well, Bob, that’s a fine demand for settlement. Let’s talk about it. By the way, how much of a COVID discount do you want to give us?” That’s going on in the real world in the trenches.

Arturo J. González:

Yup.

Richard Jolly:

Arturo, yeah, please.
Arturo J. González:

Yeah. Let me follow up on that, Richard. I really appreciate hearing Robert’s experience. I think we need to lay the groundwork for the participants in this program to understand what’s going on nationally because that was a great example of what’s happening in Illinois. It’s happening everywhere. I mean, to put this in context in a normal year pre-COVID, you can walk into almost any courthouse anywhere in America. If you would just walk in courtroom to courtroom, ultimately you will run into a jury trial, a criminal trial, maybe a civil trial. That all stopped at the end of March. Not everybody stopped at the same time, but at the end of March, it all came to a halt. We just couldn’t have jury trials anymore. In many cases, we haven’t had jury trials for many months.

I’ll give you a couple of quick examples of how different parts of the country are dealing just with whether or not they can even have jury trials. In Atlanta, the federal court announced on Tuesday they will not have any civil jury trials for the rest of the year. That’s not to say that they’re going to start in January. That’s to say we know we can’t start any sooner than January. Other jurisdictions in Pittsburgh, they’re going to be starting on October 19. They’re going to try to pick juries in the large convention center that they have—that’s their plan. We’ll see how that works out. It starts on October 19. In Texas, the Western District of Texas, they’re going to have their first civil jury trial since this all started back in March, at some point this month. It’s going to be a patent trial.

We’ll see how that works. We’ll talk later about what protections people are putting into place. In Alameda County, Northern California and Oakland, we had three asbestos trials in July. One case settled, one was a defense verdict, the other one I think may still be ongoing. But there are very, very few civil jury trials that are actually getting out, and there are issues that have come up in all of them that we’ll discuss down the road. But that’s what everyone needs to understand is that we have been in a holding pattern for at least six months, and we’re slowly starting to get out of it, but we’re encountering challenges along the way. I’ll just mention one just to give you an example. Many of our courthouses are in multifloor buildings. The federal court in San Francisco—what is it? Nineteen floors? Well, you can only have two people in an elevator. Things like that are slowing down the reopening of the courthouses, the challenges that the courts are working through as we speak.

Valerie P. Hans:

I have a question that I don’t know the answer to. I mean, I like Bob Clifford’s idea of getting in line for the ceremonial courtroom because I think it preserves the amazing and beauty of the courthouses. Are we losing things by some of these admittedly creative solutions, like moving to convention centers or other large public places? Because the courthouse really does have this symbolic value as a place that is a government building. Historically, this is the place where people came to have their cases heard and to be respected and treated with dignity and
treated with equality. The architecture of the buildings in a way suggests a grandeur and a kind of sober approach and an approach infused with law. I do wonder. . . . I like people looking for solutions so that actually we can get back to the business of running jury trials, but I do worry a bit about whether we are losing something by moving outside the courtroom spaces.

Robert A. Clifford:

Well, let me respond to that. I certainly agree with you about that comment, but candidly, my clients are interested in resolution. I get it that the idea of standing in a courtroom and even the well of the courtroom and making your arguments and all the advocacy that both sides advance—that’s very valuable. But the fact remains, certainly in most of the litigation I do, that having a trial date matters. Ask any judge and they will tell you that the single most important way to get lawyers to get real about their cases—they say, “Guess what? On Monday, we’re putting a jury in the box and I don’t care what you all are doing.” I hear you. I mean, one of my partners wants to take over McCormick Place. During the height of the pandemic here, the Army Corps of Engineers set up a 3,000-bed temporary hospital in McCormick Place.

The notion is we can do the same thing over there with a courtroom. The real problem becomes the mechanics as Arturo was saying a moment ago. The mechanics of getting people to the facility, number one, managing their coming and going into the facility. Then my point that I tried to make early on is the diversity of the pool itself and what you’re going to get. You know, the fact is there’s a social-economic component of access to the internet and the access to transportation and all these different things come into play. Those impact whether or not you’re getting a jury pool that’s reflective of the real community. I think for one, you’re really not going to get that. It’s a real problem for us all.

Richard Jolly:

I’m going to jump in and go back to a point that Bob made just a moment ago that I think would be helpful for our audience to understand the effects of this six-month delay that we’re experiencing. Bob, you mentioned a COVID discount very briefly. Perhaps you can speak to what you mean by that. In addition, to open up the conversation, just how are you responding to the notion that maybe there isn’t [a trial date set]? You say it’s very important that we have a trial date, but you may not be getting one. How is that affecting you? Are you seeing changes in the private dispute resolution field? Is ADR sort of capitalizing on this, on this situation?

Robert A. Clifford:

Well, I’ll give you a real example. Just yesterday, I have a case that’s scheduled for mediation on Monday and Tuesday, virtual mediation, and [it] involves a big insurer. I won’t name the insurer, but it’s one of the largest in the country. It involves a catastrophic injury to eight individuals that the demand is in excess of $100 million and the remark that was made to me yesterday by the lead claims guy is, “By the way, Bob, how much of a COVID discount are
you thinking about? Because, you know as well as I do, that you’re a least a year away from a jury trial.” That is a real time example. That has an impact, part one.

Part two, the mediation industry, the cottage industry. I was at a program at Harvard many years ago, and this was at the front end of ADR [alternative dispute resolution]. Someone said, “Well, what do you think about ADR?” I said, “Well, it’s a euphemism for taking less money.” You know what, that’s kind of true still today. However, that said, I am surprised that mediation has become a very effective tool, at least in our community, for resolving some cases. We’ve settled the medical malpractice claims, auto claims, some contract disputes. I just had the privilege of working with Ken Feinberg and Judge Lane Philips who are the designated mediators in the Purdue bankruptcy mediation that Judge [Robert] Drain has ordered, and it was very successful there in terms of the process of mediating all the claims in the Purdue bankruptcy. Yes, that is an industry that’s on the march, and I think it’s going to be for some time to come, but we still need jury trials. In the absence of those, [it] benefits the payer more than it does those who would be collecting.

Judge Carolyn Kuhl:
Let me just say. . . .

Robert A. Clifford:
Richard, I hope that answered your question.

Richard Jolly:
It did, it did. Judge, please. Yes.

Judge Carolyn Kuhl:
I was just going to say, I have been worried for some time about the impact of the private justice economy on the courts, particularly in the business sector, and whether the courts are becoming places not [of] a first resort but of last resort, such that the public justice economy becomes something like what people feared the public schools would become some years ago where those who could perhaps would take their children into a private school. And then where’s the support for public schools? We worry about that in terms of the ability to provide cost-effective dispute resolution by way of court decisionmaking, including jury decisionmaking. Certainly, what I’ve heard from friends who are in the private justice economy, who are at the various ADR providers, they’re advertising strongly, and part of their advertising right now is you can’t count on the courts. The courts are not there for you.

It’s very painful and it may take further a trend that, that already had started and kind of to come back to Valerie’s point about what are we losing in terms of using our courts in different ways. Just from my personal perspective, we have to do whatever it takes; whatever is necessary to keep justice moving forward. We experienced on our court a very severe recession. In about
2013, we had to reduce our staff size by a quarter. And we said to our judges, if you have to take pen and pencil in order to record your rulings in order to move forward adjudicating cases, that’s what we’re all going to do together. I think that very much should be and, hopefully it is, the attitude of the courts towards this pandemic. But everywhere we turn, we’re in [a] box.

I don’t want to get away from our discussion about ADR, but previously there was a reference to using large public facilities, convention centers, and so forth. Our CEO sent out a request to see what public buildings we could use just wherever we could, but then we hit the other side of the box, which is we’ve got to have some level of security and our sheriff’s department, which provides security for us, said, “We’re not doing that.” The constraints are so severe.

Valerie P. Hans:

Well, I guess I’m getting the answer to the question, which is the symbols of the courthouse are nice, but we’ve got to face the reality right before us, which is what do we need to be able to move cases forward, especially jury trials, with all their specific needs and requirements like the security issues you have raised, Judge.

Richard Jolly:

This brings up, as we’ve kind of been talking about, how do we use the courthouses that we have and how do we use them in a way to address this as a practical solution? We have a PowerPoint that I’m hoping we can put up that Arturo put together that collected some images from various courthouses. Hopefully you can see some of these practical solutions to using the courthouses we do have. Arturo, if you could walk us through sort of what we’re seeing here, and we can all comment on what we see.

Arturo J. González:

Sure. First of all, I want to give a plug to DecisionQuest. They actually took these photos and let me borrow them for this program because I wanted to give you just an illustration of some of the things that are being done in some courtrooms to try to make things safe. In this photo of the Los Angeles Superior Court, you’ll see, first of all, you can see the judge (Figure 1). You can’t see the other lawyer. Everybody has a mask. That’s one thing for sure. I know that politically, we don’t all agree on whether or not it should be wearing a mask. In the courts, everybody in every jurisdiction that I’ve seen thus far has every participant, including employees, wearing masks.

Well, there’ll be some better pictures later, but on the floor here, you can see some pink squares and some green squares. They’ve taken the time to go through and put green squares where you can sit in the audience. As you know, in many trials, you bring the jurors in and you pack them in like sardines. You can have eight people sitting in a bench. Here, you’ve got at least three empty seats in between people, even in the audience. You can only have two people at counsel table, and there are glass partitions that have been put up in front of the court clerk and
in front of the witness. You can see them here on the left and on the right—again, to try to create distance between participants and to try to make the courtroom safe.

I want to add a footnote here, Richard, real quick, before we go to the other pictures. The reason why this is so important—we’re not going to be able to reopen unless we persuade people that it’s safe to go to the courtroom. I’ll give you a quick example. Judge [James] Donato in the Northern District of California, a federal judge, had a trial going on when the pandemic happened and the courtroom shut down. He was right in the middle of a trial. He tried in July to restart the trial by bringing the jurors and everyone back. And there was a lot of concern about that—have jurors forgotten what they heard? Well, it became a moot issue because at least two jurors said to the judge, “Respectfully, I’m not coming back.” They just didn’t feel safe. And that’s why this is so important. You got to make people feel safe so that we get that 11 percent number higher. And I think there’ll be other photos that will show some of what’s been done in some courtrooms.

**Valerie P. Hans:**

Yeah. If I could just jump in, in that same National Center for State Courts survey, the vast majority of people who responded said they would feel more comfortable coming in if everybody was masked and if everybody did social distancing. So no matter what we think about mask wearing and social distancing outside the courthouse environment, in the courthouse environment it seems essential.
Arturo J. González:

This was interesting. This is a [clear] mask that some judges are starting to wear (Figure 2). You know, one of the many issues that has arisen that we need to deal with is whether jurors have to make a decision about what they think about the credibility of the witness. And if the witness in the box is wearing a mask, it makes it a little bit harder. So this is one solution, potentially, which is to have a mask where you can see part of the person’s face—at least their mouth. And some judges are starting to use those in some jurisdictions.

Figure 2. [Clear Masks]

Judge Harold Kahn, San Francisco Superior Court

SOURCE: DecisionQuest. Used with permission.

And I want to point something else out on this slide (Figure 3). You see the numbers there. You can see a number five, and you can see a couple of numbers in the jury box. You see a one and a three in the wall. This [is] the way some courts are having jury trials. They’re spreading the jurors out so that they’re even sitting in the gallery because you can’t have [people sitting next to each other]—the tradition is that you have 12 jurors in a state court case in California. If you’re in federal court, you might have eight, but they’re always sitting together, and we can’t have that. So, you [can] see here [where] some of the numbers in the wall and where judges are trying to be creative and spreading jurors out so that people will be safe.
And if you go back one more picture—I want to flag, here you go (Figure 4)—this is the photo I wanted to show you about the floor. This is Los Angeles. You can see what they’ve done here, where if you’re in the audience, you can only sit in one of the green spots and the bailiff has been instructed to enforce that. And thus far, it hasn’t been a problem because not that many people are all that eager to go to court, even to watch a trial right now. But that’s what they’re doing to try to make things safe.

Richard Jolly:
Judge, I couldn’t help but notice you’ve got a mask there.

Judge Carolyn Kuhl:
I do. I just put my clear mask on, and you know, this is one of the reasons why we need to have programs like this so that we can share information. I found out about these masks from Judge Tony Battaglia in the federal court in San Diego. We had not heard about them. And this is, as I understand it, FDA approved. You can see it comes toward the face at the side. This is foam rubber at the bottom, foam rubber at the top here. This is the best thing I’ve found yet. Even the court reporters are so grateful because it’s so much easier for them when they can see the judge’s lips moving and see the expression on the judge’s face and know who’s talking. This is new to us, but we’ll get to it in a little bit that the federal district court had the money to buy
these for all of the jurors and all of the witnesses in the trial, but that the criminal trial was conducted in San Diego.

Richard Jolly:
Hmm. One of the questions from the audience that just came in asks—those clear masks, can they be cleaned or are they disposable, single use? And I think this sort of implicates both the importance of the masks but also the resources constraints that courts are facing. Is this something that the courts plan to reuse? Personal protective equipment is expensive; I think that’s part of that question as well.

Judge Carolyn Kuhl:
So I went online and bought this with my own money. They cost about three dollars apiece. You can only buy them in bulk. The Southern District of California provided them. My understanding is that they gave jurors one for the entire time of the trial. I may be mistaken. The website did not specifically say whether it was single use or not. I’ve been using it more than once, but I don’t have any health authorities’ say-so on that. As you can see it, it doesn’t fog up, which is pretty remarkable, but you can clean the inside of it with hand sanitizer or some other product.
Arturo J. González:

But I doubt, Richard, that you reuse it—meaning use it with another juror or another trial. You give it to a juror, and that’s it. Nobody else is going to use that mask is my guess.

Judge Carolyn Kuhl:

Oh, for sure. No, you can’t wash it that way and give it to somebody else. The question in my mind is whether it’s appropriate to use for more than one day. But I have done it so far.

Richard Jolly:

Do we want to go to the next slide?

Arturo J. González:

And here you go, another example of social distancing (Figure 5). This is one thing you could do with your jury. You can, instead of putting your jurors in the box, you put your jurors in the audience. And those numbers correspond to the juror number. The red numbers, I think, either are alternate or they’re where audience members are allowed to sit or members of the courtroom team.

Figure 5. [An Alternate Approach to Jury Seating]
**Richard Jolly:**

Yes, thank you so much for getting those pictures for us. I think it’s really helpful for people to be able to see what practical solutions we’re seeing the courts implement to maintain the social distancing and to ensure some level of safety. In addition to these types of practical solutions, we can also talk about what have actually happened as far as how the trials have been conducted. Judge, I understand that you’ve put together an outline, and if we can have that loaded as well, I think that this will be illuminating for our audience.

**Judge Carolyn Kuhl:**

Okay. That looks good. Let me just say, as an introduction, knowing that this program was coming up, I made some efforts to reach out to judges that I know and that I knew were conducting trials. These are just three examples (Figure 6). And of course, Valerie, I want to be apologetic here because nobody’s suggesting that this is statistically significant in any way, but there were three very different approaches. I thought that it was very interesting. So just by way of introduction, Judge Tony Battaglia in the federal district court in the Southern District of California conducted a criminal trial. He did what he called “flipping the courtroom” so that the lawyers faced the galleries. So, there were enough spaces in the gallery for the jurors to sit—not enough to conduct *voir dire*, but enough spaces for the jurors to sit during trial. He had the lawyers face the gallery and face the jurors. He had the podium turned around so that the witness testified from the podium with a high chair there so the witness could sit. He told the jurors, don’t worry about me. Your backs are to the judge, but he [has] a camera situated in the courtroom such that it was projecting the image of the witness and the lawyers. That went to an iPad on the judge’s bench so he could monitor the proceedings in that way.

The left column has to do with that trial. The middle column is a criminal trial, the first criminal trial on the L.A. Superior Court, which essentially was done with. We’ll describe the *voir dire* in a minute. But the jurors [were] sitting in the gallery and in the witness box because that was the only way to have enough seats in that courtroom. Then on the right is a civil trial and an asbestos case conducted in the Alameda Superior Court with the jurors on Zoom and ultimately the presentation of evidence on Zoom.

Let me just say by way of introduction that in California, if a plaintiff dies before judgment is entered in a trial, they lose their ability to collect for pain and suffering. That is our substantive law. It places a great deal of pressure on courts to get those kinds of cases where a plaintiff is expected to die within six months, to get those cases to trial. Because if you can’t get a verdict, that plaintiff is going to lose a substantial amount of damages.

So, with that as background, I put several topic areas here, just by way of comparison. In the middle column, we already talked about the L.A. Superior Courts and a usual yield of 30 percent in summoning jurors. And it was 10 percent, or later I think I clarified that that was 11 percent, the yield we’re getting. In the left column, the Southern District of California federal court
<table>
<thead>
<tr>
<th>S.D.Cal. Federal Court</th>
<th>LA Superior Court</th>
<th>Alameda Superior Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal trial</td>
<td>Criminal trial</td>
<td>Civil trial (asbestos - 4 wks)</td>
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**Summoning Jurors - Yield**

- S.D.Cal. Federal Court: 50% (usually 60%)
- LA Superior Court: 10% (usually 30%)
- Alameda Superior Court: Higher than usual

**Diversity of Jury Venire Who Appeared**

- S.D.Cal. Federal Court: Seemed normal
- LA Superior Court: Normal, except fewer > age 65 (new automatic excuse for > age 65)
- Alameda Superior Court: Seemed normal

**How Voir Dire Was Conducted**

- S.D.Cal. Federal Court: In jury assembly room (large with outdoor patio). Started with venire of 60. All participants wore clear masks.
- LA Superior Court: In courtroom. 15 prospective jurors at a time. All participants wore opaque masks. Voir dire took 3 times longer than normal.
- Alameda Superior Court: Written questionnaires in jury assembly room; hardship and ability to access technology at home. 4 of 65 said no access. For those with access, voir dire continued via Zoom. Although jurors had opportunity to complete questionnaires online, few did (but may have been software glitch).

**Reaction of Venire During Voir Dire**

- S.D.Cal. Federal Court: Those with COVID hardship symptoms were asked to call in before appearing. Few asked to be excused during voir dire.
- LA Superior Court: Judge did not perceive that anyone was trying to “get out of” jury duty with responses. All jurors said they felt safe. Three jurors had COVID hardships (out of 65).
- Alameda Superior Court: Prospective jurors did not try to avoid service. They appeared to appreciate not having to commute in order to serve.

**Presentation of Evidence**

- S.D.Cal. Federal Court: In courtroom facing the jurors, who sat in the gallery. All participants wore clear masks provided by the court.
- LA Superior Court: In courtroom, with jurors seated both in jury box and in gallery. All participants wore opaque masks and no counsel objected.
- Alameda Superior Court: Started with jury on Zoom and lawyers/witnesses in courtroom. Interface problems led to lawyers and witnesses also participating via Zoom. One court staff person assigned to watch the jurors to be sure they paid attention.

**Special Arrangements in Courthouse**

- S.D.Cal. Federal Court: Jurors were sequestered from 9am-9pm and lunch/snacks were provided by the court ($ from AOC). Judges limited number of trials in courthouse to preserve social distancing.
- LA Superior Court: Breaks were longer so that facilities could be used with social distancing. Jurors complained about delays with elevators given limited capacity (19 story building).
- Alameda Superior Court: None after initial voir dire in courthouse - but some issues regarding juror attention (“Objection: Juror No. 3 has a cat on her lap.”)

**Jury Deliberations**

- LA Superior Court: Deliberations in locked courtroom.
- Alameda Superior Court: Deliberations in dedicated “room” on Zoom; copies of exhibits and jury instructions were delivered to jurors’ homes. Foreperson to send smartphone picture of verdict form.

**Public Access**

- LA Superior Court: 2 seats set aside for media and public.
- Alameda Superior Court: Audio broadcast from the court website for all hearings and trial. Access to Zoom was by invitation and password only.
usually gets a 60-percent response rate. And they are now getting 50 percent. I didn’t have a characterization for the Alameda Superior Court, but they said their yield was actually higher than usual.

With respect to the diversity of the jury venire, we talked about [it] in each instance; it seemed normal to the judge who was observing, with the exception of L.A. Superior Court in the middle. We now have an automatic excuse for jurors aged over 65. So the judge did observe that there were fewer, as he put it, elderly people on the jury. I’m not sure over 65 is elderly to me anymore.

Okay. How was voir dire conducted—voir dire meaning you bring in a large group of people? You can’t just start with 12 folks; because of peremptory and cause challenges and hardships, your venire has to be much larger than that. So, in San Diego, on the left side, they used a large jury assembly room that had an outdoor patio and started with 60 people, socially distanced. And as we mentioned, all of the participants wore the clear masks that were provided by the court. So, all 60 had the clear masks on from start.

In the middle column in L.A., what we are doing is the jury commissioner is ordering jurors to appear in a particular courtroom rather than a jury assembly room. The reason for that is we hope to be conducting enough trials such that there would not be enough jury assembly rooms available to conduct voir dire.

For that trial, 15 prospective jurors would come in at a time. All of the participants wore opaque masks. The jurors were required to have masks to come into the courthouse. Everyone is required to have an opaque mask to come into the courthouse unless there is some excuse for health reasons for that particular juror. The voir dire took three times the normal length of time because of only being able to bring in 15 at a time. You can only get 15 in that courtroom because it’s one of our larger courtrooms. Some of our courtrooms are just absolutely out of business; most of our courtrooms, frankly, are out of business in terms of being able to conduct jury trials because you don’t have seats for 12 [and] 14 usually with alternates.

On the right, the Zoom trial. They brought them in, in Alameda County into a jury assembly room. They had very brief questionnaires with regard to hardship and the ability of the prospective juror to access technology at home. Of the 69 that were brought in the jury venire, only four said they had no access. Now I said, well this is Silicon Valley, right? But no, this is Alameda County. So that is something noteworthy again, Valerie; this is something we should be looking at here. How many people do have technology? So, for those with access to technology at home, they were told that voir dire would continue via Zoom. The judge noted that the court had provided prospective jurors with the opportunity to complete a questionnaire online before they came in. But very few people did. But then they found out there was a software issue that you had to have a very recent upgrade of your OS [operating system] to be able to access it.

So, I mentioned earlier, and I’ll just say very briefly, in all three cases, the judges felt that the reaction of the jury venire during voir dire was very positive. In particular, the jurors in Los Angeles were asked, did they feel safe after all the COVID restrictions and protections were
explained to them? They said that they did feel safe. In Los Angeles, there were only three jurors who said they had a COVID hardship, so to speak, perhaps one at home who was vulnerable out of the 55.

Valerie P. Hans:
Can we maybe talk about the pretrial questionnaire at this moment? I’m very interested in this use of questionnaires. I think it’s really valuable, and maybe this is an innovation that even more courts will use in the future. So maybe a silver lining that might come out of this experiment—the idea of offering jurors, the large venire, the opportunity to fill out questionnaires—often reveals that people might have connections to the individuals in the case or otherwise have very specific biases and others have hardships maybe now more than ever. Maybe courts should be expanding their use of these pretrial questionnaires to avoid having to bring everybody into the courtroom at one time. I can appreciate lawyers wanting to actually see jurors up close before they exercise peremptory challenges and maybe even challenges for cause, some of them. So, what about widespread use of questionnaires online followed by a smaller group coming to the courthouse?

Judge Carolyn Kuhl:
Yes. I think that’s certainly one way to do it. You do have to take into account the level of participation that the lawyers have in the process of determining hardship. But we frequently, even in normal times, we use questionnaires in various ways to try to get to the core questions about either hardship or excusal for cause very early in the voir dire process.

In the case of Alameda, what they did was they just had a very, very short questionnaire intended to determine whether somebody was going to claim a COVID hardship on the one hand or whether they had the technology on the other hand. So that was a real sort of rifle shot use of the questionnaire. And we use them frequently in our complex civil litigation courts. We almost always use them for trial where you get a very extensive questionnaire. But then for an extensive questionnaire, you’ve got to have places for jurors to sit and be able to spend time. The Alameda County desire was to get them in, figure out who could appear remotely, and then let those people start appearing remotely.

Robert A. Clifford:
Judge, one of the things that I think will change in the future and maybe a real positive contribution that the organizers and sponsors of programs like this could do is to develop and promote a uniform—subject to tweaking here and there—questionnaire. We’re seeing questionnaires on the rise, at least in Illinois and the federal court here and the state court and by agreement. You talk about the changes that are going to occur in a COVID era—I think questionnaires are going to become the norm as opposed to the exception. I’ve looked at a lot
of different questionnaires from around the country to develop some for use in given cases over the last 12 months. There is some uniformity, maybe at the 60 percentile, 70 percentile. But then there’s differences. You’ll get a good idea from Arizona and you’ll get a good idea from Texas and California and Illinois. Maybe that’s something this group could, could sponsor.

Valerie P. Hans:

Yeah, I think that’s a great idea. We’ll have to talk about that. One of the questions I have, though, about a standard questionnaire is: Wouldn’t you want sets of questions for particular kinds of cases, towards cases, I don’t know, products cases or contracts cases? But that could also be part of a standard set of options for individuals. But I do like hearing that questionnaires are on the rise because you can see in this difficult moment where we want to try to avoid bringing lots of people into the courtroom, being able to have people fill out questionnaires in their own homes or perhaps via some online mechanism would really help cut down the number of people who have to show up at the courthouse.

Arturo J. González:

Say, Valerie, can I jump in here just for one second on this questionnaire point? I think it’s an excellent point. I’m agreeing here that I think it’s something that’s going to stick with us. I don’t think we’re going to see the same type of cattle calls that we are accustomed to seeing where 150 people show up. The value of a questionnaire—and it doesn’t have to be long; I’m with Bob, we can get this to one page—the value of a questionnaire is that it helps you identify a number of people who cannot possibly serve on a jury. And there’s no reason for them to come, drive an hour or half an hour or whatever it is. Find a place to park, get into the jury room, wait around half a day, and then finally get called into a courtroom and then have to explain to a judge this issue that they could have put in a questionnaire.

There are tons of examples. You can take somebody, maybe a working parent has three children as the only breadwinner. If I don’t work, I can’t pay the rent. That person’s not going to sit on a jury and we don’t need that person to go through all of these logistics to get to that point. We can do that by questionnaire. And I also think that you can have a spot for the court to add a couple of questions that are particular to that case. If you’re representing an HMO, you may want to put a question in there. Do you have any strong feelings about HMOs? And if somebody says, well yeah, they’ve killed my parents because they didn’t give them the medical care [my parents] needed and they couldn’t pay, that person’s probably not going to serve. You don’t need to bring that person in.

So, I do think that’s one of the permanent changes that’s going to happen is that in order to prevent 150 people from coming in—we’ve got to get to the point where we can communicate with people electronically. I know we have people’s addresses. The problem is we don’t have people’s emails. We have to figure out a way to get these questionnaires to people as efficiently
as possible. Electronic would be best. Then that would eliminate, I think, the need for many of them to come into the court.

Judge Carolyn Kuhl:

So just to move ahead here so that we can have kind of an overall discussion. So, I mentioned the presentation of evidence methodology and the Southern District of California where they flip the courtroom. I would encourage anybody who’s interested in this because I thought it was fascinating to look on the website for the Federal Bar Association for the Southern District of California. They have a demonstration video of how this worked, how they flip the courtroom, and how the presentation of evidence works. So, in the middle column, in Los Angeles, everybody wore opaque masks (Figure 6). No counsel objected to testimony by witnesses with opaque masks, and the jurors also wore opaque masks. Jurors were seated both in the jury box and in the gallery.

On the right-hand column, in the Zoom trial, their initial concept was that the presentation of evidence would be in the courtroom with the jury on Zoom. They had some technical problems, so they went to presentations completely. Everybody was appearing via Zoom. They assigned one court staff person to do nothing but watch the jurors to make sure that they paid attention.

With respect to arrangements in the courthouse, those trials where the jurors were in the courthouse in federal court, they sequestered the jurors from nine to five and fed them lunch and snacks and coffee. The judges, in order to maintain social distancing in the hallways, limited the number of trials that they were doing to—I forget whether it was one or two per floor. In Los Angeles, they didn’t have the wherewithal to feed the jurors. So, the jurors came and went. It is a 19-story building. The jurors complained about delays with the elevators. By definition, you’re going to have to give people longer breaks to use the facilities because they can’t be crowded.

Then on the Zoom trial, they didn’t need special arrangements in the courthouse after the initial voir dire. They did have some issues about jurors’ attention. And the judge said his favorite objection was: “Objection, juror number three has a cat on her lap.” So, things can happen.

So, let me just quickly mention jury deliberations. This is actually one of the most challenging aspects with regard to facilities. Think of what a jury room looks like if you’ve ever seen one. It has a conference table in it for 12 people. That does not work. And so, both in San Diego and in Los Angeles, the only solution worked out was to dedicate an entire courtroom to the jury deliberations and close that courtroom to all other business during the time of jury deliberations. And I will tell you, we thought and thought, and we have not been able to find any other way to deal with that. So an entire courtroom is devoted to jury deliberations during that time. On Zoom, the deliberations were in a dedicated room on [the] Zoom [platform]. They delivered copies of the exhibits, the jury instructions, and the verdict form in hard copy to the homes of the deliberating jurors.
And then public access. This is another very important, but very difficult point. What are you going to do with public access? In federal court in San Diego, they made another courtroom available full-time for the press and public and had a video feed into that courtroom. And again, you’ve got to have the facilities and the ability to set up video in that way. In L.A., what we’ve done is set aside two seats, one for media and the public in courtrooms. So again, that diminishes the number of courtrooms that are able to have jury trials. And then with respect to the Alameda trial, they had an audio broadcast from the court website, and they have that for all their hearings and for trial, just as an audio broadcast. I guess they could—if there was a press person—they could have granted the right to access to Zoom by invitation and password.

So anyway, those were the points I thought that were important and interesting by way of comparison with those three experiences.

Richard Jolly:

It’s incredibly informative and I’m so happy that we can use these examples to launch the discussion into the use of technology and particularly Zoom and these ideas of virtual trials, either partial through conducting some level of voir dire through virtual means or perhaps full jury trials. I’m curious to hear from Arturo and Bob first, just from a practical point of view: Would you ever agree to conduct a trial via Zoom? Perhaps down the line after we have more experiments or more data on this, but just right now, if your client came to you and said, “Look, I want to bring this thing to trial. It’s going to be a year and a half. I don’t want to pay. I don’t want a COVID discount. I want to go to trial,” and you say, “All right, we’ll do it virtually.” Would you guys do that?

Robert A. Clifford:

We’ve talked about that. And the answer for me at the moment is no. We think the best strategy for our clients at the moment is to allow a little experimentation to go on here. We’ve looked at a variety of different ideas. We’re talking more about bench trials, we’re talking about binding mediation, we’re talking about three panel mediators with a recommendation that’s not binding. So we’re trying to find a lot of ways to skin the cat, if you will—not the cat that’s sitting on that lady’s lap—but it’s going to be a little bit down the line for us because I really appreciated hearing what Judge Kuhl presented by way of the diversity that they experienced and the percentage of folks that showed up. That’s just not the experience that we think is taking place in Chicago at the moment. So maybe it’s regional specific or city specific, but right now, we explained to our clients, these are words that we’ve used over the last two weeks with clients: “Listen, you need to stick around for the long haul. This is a process, not an event. Let this unfold, let the court catch up.”

With Chicago, Cook County is one of the largest court systems in America. People are afraid here; both courts and offices are closed, and yet we have terrific judges who are begging for work. And that’s where one of the concepts that’s being thrown around right now is: Okay, give
us three judges out of the law division, and let’s take an experiment here. Let’s have a nonbinding trial in front of those folks. And I say nonbinding because you’re giving up the right to trial by jury, and that’s an important right. But maybe we could all get a little comfortable with that. And we’ll see. So I am sorry for the long-winded answer, but that is how we feel.

**Valerie P. Hans:**

So, Bob Clifford, you mentioned earlier that you’re doing a pilot experiment with State Farm for lower dollar value auto cases. Is that going to be with judges and nonbinding?

**Robert A. Clifford:**

No, it’s going to be with a judge—Lorna Propes, Judge Propes, well known to many of you, I think. And it’s going to be a virtual trial with a jury, and it’s going to be a jury trial.

**Valerie P. Hans:**

Oh, it will be a jury trial? Well, I urge you to study it systematically. That sounds like it could be not only important for you and your practice but also really important for people across the country to understand what happens in a virtual jury trial. So, kudos to you for your willingness to do that.

**Arturo J. González:**

So, Richard, your question is quite timely. I have a matter that’s set for trial starting Monday after Thanksgiving. And the judge has told us that if we want to keep that trial date, it has to be a bench trial. So, we need to make a decision: Do we want a bench trial, or do [we] want to lose our date? In another case, a judge has told us that we have a trial set at the very end of the year, but if it goes, it’s going to have to be a virtual trial. And so, the exact question you’re asking is the exact question that we’re currently contemplating. We haven’t answered either one of those, but I want to just mention very briefly two very real and practical examples of the sorts of things that can happen that we need to learn from.

Everybody I think knows that in a real jury trial, you’re not allowed to talk to the jurors. Even if you see them in the hall, you’re not allowed to say, “How’s your morning going?” You’re supposed to keep your distance. We don’t want there to be any appearance of impropriety. I have a rule for my trial teams: If a juror goes into an elevator, we wait for the next elevator, for that reason. What happened in the Alameda trial was the judge was talking to the lawyers for some reason on some issue. And the jurors remained on the screen with the plaintiff. They were all on the screen. And as you can see my background, I have a virtual background, and the plaintiff noticed that some of the jurors had virtual backgrounds and asked them about it. And they started talking about virtual backgrounds, and how do I do it? And the jurors taught the plaintiff how to do it. Now, that may sound innocent enough, but obviously completely
inappropriate. So, we need to figure out a way to make sure that jurors can never communicate, obviously, with anyone. There’s got to be a way to mute everybody out.

Second thing I want to mention, again in terms of practical issues that have come up, we had a three-day hearing on a motion for preliminary injunction. And during the second day of that hearing, we got Zoom-bombed. Look, I’d never heard of Zoom before the end of March. And I certainly had not heard of Zoom-bombing. But on the second day of this hearing in federal court, all of a sudden, pornography, the Nazi swastika, and some Arabic writing appear on the screen—boom! And it sat there for five minutes until the clerk could figure out how to remove it. And then what happened for the rest of the trial—because it was a trial with witnesses testifying—is that the court no longer allowed anyone to control what appeared on the screen except for the court clerk. That complicated things because if you want to put an exhibit up, now you had to tell the clerk to put the exhibit up while you [originally] had prepared with your own techie to do it.

So anyway, I cite those two practical examples of the sort of thing we need to work on. There will be glitches, there will be issues, but we need to figure this out.

Richard Jolly:

As we try to move forward and test the Zoom trials and how fair they are, Valerie, you noted how important it is that we start collecting this data. We have experiments going on around the country. And one of the questions from our audience was: Are there objective tests going on? Are there studies happening right now? And the question specifically was: What would we need to know, what type of data would we want? And I think this implicates everybody in the discussion. What information would you want to know about these experiments? So, Professor Hans, maybe you could speak to whether you have seen anything going on? Is there anybody who’s leading this charge?

Valerie P. Hans:

I think there are some projects getting started right now. It is actually scientifically a really challenging issue. The kind of pilot that Bob Clifford was talking about with real juries is going to be very informative and very valuable. We could also study these kinds of questions in the research laboratory using experiments where half of the people participate in some version of a real event and the other half some version of a videotaped virtual event. So those are some of the techniques that might be able to be used—real world experiences around the country as different jurisdictions are trying out virtual trials and in-person trials, kind of like [the Pound Civil Justice Institute’s] The Judges’ Forum, right? That contrasted the different sorts of things. So, we get that information and some experimentation. I think that’s the way to go.

The things that I would want to look at, one thing you probably will study best in the real world cases, is how it affects who shows up for jury trial and whether or not the digital divide limits the participation of some people in a way that is more egregious or less egregious than what happens right now in terms of who will show up for jury duty. But there’s another issue
too. And that’s the impact of the testimony on fact finders, and some experiments in other domains have suggested that, when you see things virtually, they may not have quite a strong and emotional impact as when you see them in person. And Zoom experiences are especially intriguing in this regard because one of the ways that we might feel the emotion somebody else is reporting or the pain and injury from an accident, for example, is by having eye contact with [that person]. And that doesn’t really happen on Zoom. There’s a lot of asymmetry. So, I’d want to look at how the testimony comes across to people and whether or not that affects their decisionmaking and all.

**Richard Jolly:**

Would the other panelists agree that it’s not just the technological shortcomings that might be involved with Zoom, but that—and this kind of goes back to something we were talking about at the beginning—the grandeur of the courtroom, when you lose out on that, when you lose out on eye contact, when you lose out on that personal field, perhaps even deliberations taking place virtually aren’t going to have the same impact or the same level of contentiousness or consensus building. However, we want to describe that process, [and] if we think that it’s possible over Zoom, is [this] something critical that we [would] need to be looking at before everyone here would say, “Yes, let’s start using Zoom trials; perhaps even after the pandemic is better?”

**Robert A. Clifford:**

Well, I think you need to recognize what you’re giving up. Look, and I think it was Valerie who talked about this, putting aside the grandeur of the courtroom if you will, one of the things that I was reflecting on as she was talking is that I can point to the instances—and I’m sure Arturo could as well—where you’re sitting in the courtroom and you see a juror walk into the jury box from the audience into the box and you notice something about them, whether it’s a tattoo, or a limp, or something or another, they smile at your opponent, whatever, it doesn’t matter. You’re losing that, and you’re never going to recapture that. And that matters. And you’re never going to get it back. So you just have to recognize that, yes, we might be accommodating the case going forward, but you are giving some things up when you do that.

**Arturo J. González:**

Yeah, you definitely are. I’ll give you another example in addition to what Bob mentioned. I’m always interested in books. Jurors will frequently come to the courtrooms with books because they know there’s going to be a lot of waiting time. I’m always interested in, what is that juror reading? That tells me something about the juror, and you do lose that. Look, I don’t think there’s anything better than being live and in person. One other thing I’ll mention that’s a little bit of a concern to me, it’s hard enough to keep the jurors attentive and awake when they’re in the courtroom. I’ve seen more than one juror doze off. It’s hard enough when they’re in the courtroom, but when they’re at home, I don’t know if people caught this, but the jury trial that
was in Oakland, in Alameda County, that was on the Judge’s chart, the jurors were never in the courtroom; they were at home. And so, they’re at home, watching the trial, and who knows what distractions are going around.

I love the cat story. That’s exactly my point. You’ve got pets, you’ve got children, maybe somebody is watching TV at the same time, who knows? So I want to make sure that we have the attention of the jurors, and I think the jury is still out on whether or not you actually get their attention when they’re at home; this concerned me a little bit.

**Richard Jolly:**

Judge, maybe you could speak to this. Are courts going to, as we keep experimenting with these types of virtual trials, not just technological issues of Zoom and making sure everybody can get access, but maybe not making sure there aren’t cats on the lap, but sort of procedures maybe for us to try to at least address some of those problems.

**Judge Carolyn Kuhl:**

So, with respect to virtual testimony, a lot is really happening in the deposition sphere. In my complex litigation cases, pretty much all of the depositions are being conducted by a remote platform. And the first question was: Well, what are the ground rules going to be for this? And very quickly, ground rules have been created; everybody’s gotten used to them. And when I say ground rules, one of them for example is that the lawyer representing the witness cannot communicate with the witness while the witness is testifying and has to wait until there’s a break. And then they set up whether that communication can take place by phone or text or what can happen.

The ability of the witness to see the entirety of a document and not just what the lawyer is putting up on the screen—that has been overcome. I’ve witnessed some of these depositions because we offer to lawyers in complex litigation—if they’re having problems, ordinarily in ordinary times, I would get on the phone and try and help them. Now I just Zoom in and it takes a bit longer and counsel is going to be—Arturo and Robert are going to be able to tell us—it takes a bit longer to do those depositions, but I’ve been very impressed with that process and people were getting used to it, no question about it.

**Richard Jolly:**

One of the intriguing questions we just received—and I want to encourage the audience again as we’re reaching the end of our discussion to be submitting questions—this is a rather intriguing question, so I’m curious to hear everyone’s thoughts on this. Arturo and Bob, you both mentioned your reliance on certain pieces of information to help decide whether or not you want to keep a juror or strike a juror, and you noted perhaps a limp, or a tattoo, or a book. And some might argue that those are the types of factors that are perhaps irrelevant and perhaps not having that information allows us to not maybe draw upon implicit bias and maybe create an even better
jury. This is the question that’s been posed. So, do some on this panel think that yes, robbing ourselves of certain pieces of information might create a better body? Of course, you might note that we’re given new pieces of information about them. We might see the fact that they have something in their background in their Zoom, or perhaps we can tell something by the technological divide again.

So what are people’s thoughts on the type of information we lose out on and the type of information we maybe gain on the jurors through the virtual jury trial and virtual jury selection?

**Robert A. Clifford:**

Well, I certainly have a view, but I’ll wait for others to weigh in.

**Arturo J. González:**

Bob, let me just say this briefly because I know we’re running short on time. I believe in getting as much information as possible about jurors. Let’s face it, experienced trial lawyers have teams of people who go out on social media to try to get information about jurors that’s publicly available, only publicly available information. So, I want to know as much as possible about the jury. If I’m in a civil rights case, and somebody [has] a book that says, “Police Officers’ Bill of Rights,” okay, I’m interested in that. So I get the question, it’s a fair question, but I want to get as much information as I can about these jurors.

**Robert A. Clifford:**

Well said. Nothing to add.

**Richard Jolly:**

Well, as we keep talking about this type of information, I’ve got another great question from the audience. There are so many experiments going on with these remote trials and so much that can go wrong. I don’t know if a cat on the lap could be used for a motion for a mistrial, but we can imagine situations that might be. I’m curious . . . is part of the agreement to enter into this waiving certain rights for claims of mistrial? What type of discussions are we saying the parties [should] enter into prior to engaging in these experiments? And out of curiosity, what do you guys think would be grounds for saying a mistrial? And what do you think are just sort of par for the course as we muddle through these experiments?

**Robert A. Clifford:**

Well, let me go to the one case that we’ve been talking about, the State Farm matter. Those are real questions. Here just yesterday, I’m on a Zoom call, and one of the lawyers on the call—next thing I know, her daughter is sitting on her lap, her son was running around [in] the background, and the husband walked past. Now, we’re all talking about stuff that’s privileged. So, juxtaposition that to a jury trial. These things are going to happen.
And the analogy I draw is to—and I’m sure the judges on the program today and listening have had this—where something happens with the jury afterwards, maybe a juror didn’t answer a question correctly or didn’t say, “Oh, by the way, I forgot that that guy’s law firm represented my uncle, or my brother, or my husband at one time.” Those kinds of things. And where you bring the juror into chambers with all counsel and the judge inquires about bias and prejudice and the like and then ultimately makes a decision about whether or not that can attack the jury verdict. Those kinds of things are going to happen and we have to recognize that we’re in a brave new world. Goose–gander rule; it’s going to happen to me one day where I’m in trouble about it, and it’s going to happen to Arturo one day that he’s got a problem about it.

Arturo J. González:
Yeah. And I think Richard, the trial in Alameda County, the defendant objected to the procedure and the process. So it’s a very good question. It’d be great if you get the parties to agree on a set of ground rules. And I think that is something very important going forward, is we’ve got to try to come up with ground rules that we can recommend [and that] the parties can agree to. But currently there isn’t a set of ground rules that everybody’s agreed to, and I think people are preserving their rights to see how this plays out.

Valerie P. Hans:
We’ve been talking about some of the problems with virtual trials and trials that are available for viewing and everything. There’s an interesting result of Texas’s decision to place many of its trials on YouTube, and one of the things that’s happened is thousands of people are following these trials. It’s a real fascinating moment, if you think about [it], our grand courtrooms are actually only available to people in very small regional areas for the most part. And one of the benefits of moving at least some of our litigation to the virtual world is greater accessibility. So, I’ll end on that.

Richard Jolly:
I really can’t thank everybody enough here. We are running out of time, and I just want to thank everybody for this fascinating and illuminating discussion. I want to thank the audience for submitting such fantastic questions. I really think that we learned a lot today. I have a lot of questions that I’m excited to go forth and look at, and hopefully we can do some research and figure out what is working, what isn’t working, so that we can make sure that civil jury trials continue. Judge Kuhl, Arturo González, Professor Hans, and Bob Clifford, I really want to thank you again.
Panel Two: Implications for Pretrial Case Management

Panelist Biographies

Judge Jeremy Fogel, Executive Director, Berkeley Judicial Institute (Moderator)


Judge Fogel has served as a faculty member for the Federal Judicial Center since 2002 and was a lecturer at Stanford Law School from 2003 until his relocation to Washington. He taught for the California Continuing Judicial Studies Program and California Judicial College from 1987 to 2010 and has served as a faculty member for legal exchanges in more than a dozen foreign countries. He has received numerous accolades, including the President’s Award for Outstanding Service to the California Judiciary from the California Judges Association, the Vanguard Award for notable contributions to intellectual property law from the State Bar of California, and special recognition from the Santa Clara County Bar Association for exemplifying the highest standards of professionalism in the judiciary. He received his B.A. from Stanford University in 1971 and his J.D. from Harvard Law School in 1974.

Janet Gilligan Abaray, Managing Shareholder, Ohio Office, Burg Simpson

Ms. Abaray acts as managing shareholder for the Cincinnati office of Burg Simpson Eldredge Hersh & Jardine, P.C. She received her Bachelor of Arts degree in English Literature from the University of Cincinnati, graduating Phi Beta Kappa and summa cum laude. She graduated Order of the Coif from the University of Cincinnati School of Law where she was business manager of the Law Review. She is admitted to practice before the United States Supreme Court; Supreme Court of Ohio; United States Courts of Appeals for the Third, Sixth, Tenth and Eleventh Circuits; and the United States District Courts for the Northern and Southern Districts of Ohio and the Southern District of Illinois.

Ms. Abaray has litigated extensively in the area of pharmaceutical products liability, beginning her career as defense counsel for Merrell Dow Pharmaceuticals, Inc. Since 1987 she has represented plaintiffs in many over-the-counter and prescription drug cases, often
serving as lead or colead trial counsel in class action litigation or as liaison counsel, colead counsel, or as member of plaintiffs’ coordinating committee in federal multidistrict litigation. Other areas involving mass actions include insurance and contract disputes, HMO litigation, and employment discrimination.

From 2012 through 2018, Ms. Abaray served as a member of the Ohio Constitutional Modernization Commission and chaired the committee on the Judicial Branch and Administration of Justice. Ms. Abaray was also appointed in 2018 to the Legal Affairs Committee of the American Association of Justice. She has served as a faculty member of the National Institute of Trial Advocacy and lectures frequently in the areas of products liability litigation, trial techniques, and epidemiology. She has published articles in journals of the American Bar Association, the Ohio Academy of Trial Lawyers, and the American Association for Justice as well as in the University of Cincinnati Law Review and the University of Dayton Law Review. Ms. Abaray has achieved the highest rating from her peers for the quality of legal work, professionalism, and ethics by receiving an “AV” rating by Martindale-Hubbell. Cincinnati Magazine has recognized her as one of the Cincinnati Area’s Top 25 Women Lawyers and top Cincinnati attorneys. She has been named an Ohio Super Lawyer, 2005–2021, and was the featured attorney in Ohio and Kentucky Super Lawyers for 2017. Ms. Abaray has also met the standard of excellence for selection as one of the National Trial Lawyer’s Top 100 Lawyers. In 2014, Ms. Abaray received recognition as the Judge Carl B. Rubin Legal Society Lawyer of the Year. In 2018, she received a Top 15 Business Woman in Ohio award by the National Diversity Council. The University of Cincinnati College of Arts and Sciences recognized Ms. Abaray as its Distinguished Alumni for the 2018–2019 academic year.

Scott Dodson, James Edgar Hervey Chair in Litigation and Geoffrey C. Hazard Jr. Distinguished Professor of Law, UC Hastings College of the Law


His scholarly writings have been cited in more than 25 court opinions, including by the Alabama, Nebraska, Pennsylvania, Texas, and Wisconsin Supreme Courts, and the Second, Third, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits. His works have been downloaded more than 45,000 times, and he was listed as the ninth (tied) most-cited civil
Charles C. Lifland, Partner, O’Melveny & Myers LLP

Mr. Lifland, a partner in O’Melveny & Myers’s Los Angeles office, focuses on class action and appellate work in the fields of mass torts, antitrust and unfair business practices, securities and consumer fraud, and punitive damages. With over more than 30 years of practice, he has litigated complex business cases in trial and appellate courts across the country. In 2008, the Los Angeles and San Francisco Daily Journal named Mr. Lifland one of the Top 100 Lawyers in California, and the Los Angeles Daily Journal ran a front-page profile of him entitled “Appellate Specialist Hits Vioxx Daily Double” after he won pharmaceutical product liability appeals in New Jersey and Texas on the same day. In 2009, California Lawyer Magazine named him a California Lawyer Attorney of the Year in the field of appellate law for his work on the Exxon Valdez punitive damages litigation.

In 2011, Mr. Lifland helped secure a defense victory in a six-month antitrust trial the San Francisco Daily Journal hailed as one of the Top Defense Verdicts of 2011. In 2012, Law360 named him a national MVP in the field of products liability law. He is a member of the Los Angeles County Bar Association’s (LACBA’s) State Appellate Justice Evaluation Committee and was 2003–2004 Chair of LACBA’s Antitrust and Unfair Business Practices Section. From 2008 to 2014, Mr. Lifland was an Adjunct Professor at UCLA Law School where he taught a pro bono federal appellate practice clinic. Mr. Lifland is also a longtime board member and 2014–2015 president of the Western Justice Center Foundation. Mr. Lifland earned his J.D., magna cum laude, from Harvard University, and his B.A., magna cum laude with Distinction in Economics, from Yale University.

Judge Sandra Perlman, Seventeenth Judicial Circuit, Broward County, Florida

Judge Perlman has been a circuit judge for the 17th Judicial Circuit Court of Florida since January 2011. Judge Perlman is presently assigned to the Civil Division where she presides over a General Circuit Civil Division. She has previously served in the Criminal Division and the Foreclosure Division. Prior to being elected a circuit court judge, Perlman served in the Broward County Public Defender’s office from 1985 to 1988. She then practiced law in San Francisco, California, with the law firm of Topel and Goodman, specializing in white-collar crimes and complex civil litigation in both the state courts and federal courts. After Topel and Goodman, Perlman spent four years prosecuting in the Santa Clara District Attorney’s office and then returned to the Broward County Public Defender’s office in 1994, where she ultimately became Death Qualified and specialized in death penalty litigation.
A native of South Florida, she received both her Bachelor of Science degree in broadcasting and her Juris Doctor degree from the University of Florida College of Law where she was an editor on the *University of Florida Law Review*. During college she worked as a news reporter for ABC’s Weekend Edition of *Dateline News* in Gainesville, Florida. During law school, Judge Perlman served as a law clerk to Commissioner Mimi W. Dawson at the Federal Communication Commission in Washington, D.C., and she interned as a judicial law clerk to the Honorable Daniel S. Pearson of Florida’s Third District Court of Appeal. She is admitted to practice in Florida (1985) and is a member of the Federal Bar, admitted to practice in the United States District Court for the Southern District of Florida (1985), and also admitted in California (1988).

Discussion

*Judge Jeremy Fogel:*

Hello. Greetings and welcome to the session on pretrial proceedings in the age of COVID. My name is Jeremy Fogel. I am a retired judge at both the state and federal courts. Currently I am the director of the Judicial Institute at Berkeley, which is one of the cosponsors of this program. And for seven years and immediately prior to coming to Berkeley, I was the director of the Federal Judicial Center, which is the research and education agency for the federal courts. I’m pleased to be joined by a panel of people who span the range of interests in pretrial matters. And we have two very distinguished advocates, one who primarily does plaintiff’s work and another who primarily does defense work. We have a judge who presides over a high volume of civil cases and a state court docket. And we have a law professor who’s done a great deal of research and theoretical thinking about civil justice. And without further ado, I’d like them to introduce themselves. So, let me start with Janet Abaray.

*Janet Abaray:*

Good afternoon. I’m Janet Abaray with the law firm of Burg Simpson. I’m in the Cincinnati, Ohio, office. And my practice area is primarily products liability and complex litigation. And we practice really around the country—obviously cases here in Cincinnati and Hamilton County, but also in federal court particularly, [and] also some state courts throughout the country.

*Judge Jeremy Fogel:*

And, if I understand correctly, you’ve done a fair bit of MDL [multidistrict litigation] work and are familiar with complex litigation as well as individual cases?

*Janet Abaray:*

I’ve been the counsel on some MDLs involving medical products and devices and prescription drugs.
Judge Jeremy Fogel:

Great. Thank you. Next I’d like to introduce Judge Sandra Perlman from Fort Lauderdale, Florida. Judge, you want to tell us a little bit about what you do in this space?

Judge Sandra Perlman:

Good morning everybody, or good afternoon here in Florida. My name is Sandra Perlman. I’m a circuit court judge in Broward County, Florida, also known as Fort Lauderdale. For those of you who haven’t been here, it’s halfway between Miami Beach or South Beach and Palm Beach. I’m a circuit court judge. I do general circuit, so civil cases. I took the bench in 2011. Before I took the bench, I was an assistant public defender for almost 20 years. And in the end of my career, I started specializing in death penalty litigation. In the meantime, or in between that, I took the California Bar and moved out to San Francisco and started with a small firm, but then I missed the courtroom. So I started a job with the Santa Clara District Attorney’s office. I consider myself an honorary San Franciscan because I was in San Francisco during the 1988 earthquake. And I was actually at what we now call the Earthquake World Series. So it’s nice to be back in the Bay area. Thank you for having me.

Judge Jeremy Fogel:

Thank you. And your docket right now is exclusively civil, correct?

Judge Sandra Perlman:

Exclusively civil. I have about 2,500 cases.

Judge Jeremy Fogel:

Great. So I think we’re ready to go with Mr. Lifland. So, Charles, why don’t you tell us a little bit about your practice?

Charles Lifland:

Thank you. My name is Charlie Lifland. I’m a partner with O’Melveny & Myers. I’m based in Los Angeles, but like so many others, I’m working almost exclusively out of my house. And I’ve been doing that for the last six and a half months in Pasadena, relying on Zoom and telephone and the like. I’ve been at O’Melveny for 37 years, which I guess qualifies me as an old timer. I’ve also been privileged to be on the RAND ICJ board for the last 15 years or so. My practice is complex litigation typically on the defense side. I’ve covered a lot of areas over the years, including antitrust, securities, class action, and appellate. But my major focus over the last 25 years has been mass torts of various stripes. Most of that work has been in pharmaceutical cases or environmental cases. For the last couple of years, the case taking most of my time is the national opioid litigation where I’m the lead national counsel for Johnson & Johnson.
Obviously, that’s not a typical case. There are 3,000 cases brought mostly by state and local governments against the large number of defendants really across the entire industry. You have pharmaceutical manufacturers like J&J [Johnson & Johnson], you have distributors, you have pharmacy chains. The federal cases are all MDL in Ohio, though some have been farmed out as bellwethers for pretrial elsewhere, including one in San Francisco for Judge [Charles] Breyer. There’s also active litigation and many MDLs in more than a dozen states in other individual state cases. So it’s very challenging and not at all typical, but it does provide a fairly broad window into pretrial practice under COVID since the lockdown. Since six months ago, we’ve had no trials, but we’ve had ongoing depositions, document productions, status conferences, motion hearings, settlement conferences, interlocutory appeals, you name it, in lots of different jurisdictions. So I’m looking forward to our time today, Judge.

**Judge Jeremy Fogel:**

Thank you. And you just provided a great laundry list of some of the things we’re going to talk about. So, thanks for that. And finally, Professor Scott Dodson from UC Hastings. Scott, you want to tell us a little bit about your interest in this topic?

**Scott Dodson:**

Thanks, Judge. As you said, I’m Scott Dodson, a law professor at UC Hastings College of Law in downtown San Francisco where I research and write on federal jurisdiction and civil procedure. I haven’t been directly involved in any litigation during the pandemic, but I recently coauthored a paper with Judge Lee Rosenthal and a litigation partner in Houston called the “Zooming of Federal Civil Litigation,” which will be published in *Judicature* later this fall. So I’m very much looking forward to being on this panel and having this discussion.

**Judge Jeremy Fogel:**

Great—thank you. So we’ve got various perspectives to bring to bear, and the way we’re going to organize this session is we’re going to talk for a little bit about some of the positive things that have happened from the perspective of the panelists as a result of the adaptations the courts have had to make to COVID. We’ll talk also about some of the negative things (from their perspective) that have happened. And then we’ll try to draw those threads together at the end and talk about what we’ve learned and how we might use what we’ve been experiencing during this period to make the courts better going forward, things that are worth keeping as permanent transformations of our system. And as Charlie cataloged, there’s a lot of aspects to pretrial proceedings. The three that I thought we might want to talk about, and in no particular order of consequence, are discovery, various interactions with the court—it could be case management hearings or status conferences or motion hearings—and the whole process of settlement as it exists in this particular era.
So let me start with Janet. You’re a plaintiff’s lawyer primarily, and you’ve done big cases. You’ve done little cases. How has the pandemic impacted your work in ways that you consider positive, things that have been actual improvements over what existed before?

Janet Abaray:

I would say the biggest positive outcome so far is we’re much more efficient. We’ve cut down on travel costs significantly—obviously I haven’t been anywhere since February. And before that I was constantly at airports [with] a million miles on Delta. We travel all the time for hearings and depositions. So, the fact that we aren’t doing that traveling is saving time and money. And for the most part, I feel in this phase of litigation it hasn’t been detrimental to the case. [What] the earlier panel was talking about [were] trials themselves, which is a whole different ball game. But for what we’ve been doing, we’ve had a lot of arguments with the court on discovery matters or motion practice. That’s gone very smoothly. I will say for the most part it’s just been by telephone; we haven’t had a lot of these Zoom procedures. I had one case where there were Zoom hearings and Zoom participation in a bankruptcy proceeding in Texas.

But I actually had one day where we were taking a deposition in a conference room. I’m in Cincinnati, the witness was in California, the defense counsel was in Chicago. The other questioner was in New York. As we were doing that deposition, I walked down the hall, went into another conference room, attended a pretrial conference with the judge in New York, hung up from that and got on another call with a committee that was out of Texas. So, I did all that in an hour, when normally it would have been days.

The other thing where it was a big advantage is [that] we did have some emergency motions come up with a defendant that was filing bankruptcy. And at the time all that was going on, I should have been flying to a hearing across the country, which was switched to being a phone hearing. And by virtue of that, I was able to be on the spot to work on the other issue. So we’ve seen a lot of efficiencies from doing things—as I said, mostly it’s been by phone.

Judge Jeremy Fogel:

I don’t know whether this would go in the positive or the negative category, but how has this affected your relationship with opposing counsel?

Janet Abaray:

That’s a really good question. And one thing I’ve been thinking of is the first case that I was talking about that was in New York, we had our initial hearing in person. It was a year or so ago. I got to meet the judge; I got to meet opposing counsel. They met me; we had a chance to have a dialogue. So now when I get on the phone with that person or with that judge, we all know who each other is. We’ve had that acquaintance. I think it’s going to be a lot harder, and I did find it a lot harder with this case in Texas where the judge knew a couple of local attorneys but didn’t know everybody else. And I do think that’s a really big issue. Now in that case, the Zoom helped
a little bit, but I think there’s a problem and a negative when you haven’t had that chance to have a personal interaction.

_Judge Jeremy Fogel:_

So the thing that made it work in the first example you gave was that you had a preexisting relationship.

_Janet Abaray:_

That’s right.

_Judge Jeremy Fogel:_

Is it any different in the MDLs where you have management committees and steering committees and things like that? I mean, is this medium helpful in that regard?

_Janet Abaray:_

When we do MDLs, one of my cocounsel used to joke that we were like the British Empire—the sun never set on our committee because we were spread all over the country. So that’s always been done by telephone and remotely, but most of the time you would have monthly or bimonthly in-person conferences with the court. And at those opportunities you get together and you do get to see your cocounsel and you do have sit-downs and in person with the opposing counsel. So, I do think that, that informality and that familiarity, that lack of that interaction is going to take a toll.

_Judge Jeremy Fogel:_

We’ll come back to that. Thank you. And there’s one other thing I wanted to ask you about before moving on to Charlie. And that is to the extent you’ve done settlement, you’ve done mediations or settlement conferences or anything of that sort during these six months, would you say that that’s on the positive or the negative side?

_Janet Abaray:_

The biggest negative is nobody wants to talk about settlement because they don’t have a trial date. So the whole COVID thing, first of all, just pushed everything back by months. And then it’s just been, I don’t want to say an excuse for delay, because I’m sure from the defense’s perspective it caused delay, but we can’t get into look at the documents and we can’t do a search and so-and-so can’t get through their computer. So everything is stretched out. It’s prevented [us] really moving forward on settlement. And I have a case where the defendants did contact about doing a mediation of a class action with several hundred plaintiffs. We were going to do it in person. And everybody talked about it. We agreed on the location. And I basically said, “Look,
I’m willing to travel, but I’m not willing to fly.” So, we’re going to accommodate a location where the defendants already are. I can drive there, and the other people are going to fly in. So people have cooperated.

**Judge Jeremy Fogel:**

From what you’ve said so far is that the biggest positive has been the efficiency, even if you’re able to use your time more effectively.

**Janet Abaray:**

Yes, and expense.

**Judge Jeremy Fogel:**

And expense, which helps the clients too.

**Janet Abaray:**

Yes. It sure does.

**Judge Jeremy Fogel:**

Charlie, same set of questions for you. What have you liked best about this period of time, assuming that there is something?

**Charles Lifland:**

I have to echo a lot of what Janet just said from my perspective. I mean that a huge difference for me is less travel. And that’s a good thing generally. I hasten to say, no travel is a bad thing, but less travel overall has been a positive. I think, given the nature of the opioid case, I was literally on the road for six months out of the last 12 months in 2019. And so less travel means less wear and tear, less dead time, less expense for the clients. Of course, less time away from family. Those are all good things. We certainly lose something by not having the in-person ability to interact with people on some important things. But I found that a lot of what we do, especially in pretrial—[for] trial I think there’s a different can of worms—but in pretrial a lot of what we do can be done efficiently, remotely.

I agree that it really helps to have preexisting relationships with the judge, with the opposing counsel, with the co-defense counsel, with the witnesses—if you’re working with witnesses—and it would be much, much harder I think without that. In my case, the benefit of all that travel is I have those relationships. And so, it’s been easier for me to do what I need to do remotely. But I think a lot of these things are here to stay. And certain some of them are improvements. I found that court arguments for the most part are fine remotely. Sometimes you can even see the judges better and see their reactions, if they’re not too small on screen. Working with documents
on a small screen is awkward. If you need to do that, that’s a negative. And I think if it’s an appellate court, the judges tend to lose their own interaction with each other, which I think it gets in the way of communication.

But overall, the arguments, I think, have worked well. We’ve had remote depositions, a lot of them. There’re definitely some problems. It’s hard to prepare witnesses. It’s harder, I should say, to prepare a witness, particularly an inexperienced one, if you’re not in the room with them or there to sit down and go through the important documents with them. It’s harder to protect a witness from an abusive or bullying questioner if you’re not in the room with them during the deposition. If you’re taking the deposition, you can’t always be sure what the witness has in front of them, whether they’re getting texts or things like that. There’s potential for abuse. I think all of those things can be addressed through deposition protocols.

And one of the things I’ve noticed is that an incredible amount of time is going into negotiating those because people are feeling their way through—they’re new problems. And they’re figuring out what they like and what they don’t like. I think eventually there will be best practices that are developed that are fair to both sides and that may eventually get adapted into real changes. It’s a fact these kinds of depositions are here to stay. It’s just economically much easier on the client, particularly in cases with a lot of lawyers, to have a good amount of remote participation. And whether you can justify the expense of traveling across the country for a deposition becomes a different question.

**Judge Jeremy Fogel:**

It’s interesting. And I’m curious—I would have asked Janet this question too. So, if you do depositions by Zoom, it’s very easy to record them. You don’t have to arrange to videotape the deposition or anything like that. You really could have almost like a standard practice of having video records of depositions. And my recollection is that not every deposition has been recorded in the pre-COVID era. You think that’s something that could emerge from this?

**Charles Lifland:**

Potentially, with the right technology. I don’t know what the editing capabilities are with Zoom recording. But certainly, it’s commonplace to record depositions now, and this could be a lower cost way of doing it. Again, I think you need to address the safeguards and the rules, and this might be an area where the rules would be adapted, like they were for ESI [electronically stored information] when ESI came along. But there’s a lot of cost savings from remote depositions that our people are going to have to reckon with.

**Judge Jeremy Fogel:**

Great. Thank you. So let’s turn to Judge Perlman.
Janet Abaray:
Can I just weigh in on that record?

Judge Jeremy Fogel:
Go ahead.

Janet Abaray:
We had the opposite situation come up where we were representing some women whose images had been stolen; they were professional models. We had a settlement conference scheduled by Zoom. Well, they didn’t want to participate. And we ended up talking with the client and figured out they didn’t want to be recorded in the sessions and have their images stolen again. So, we actually went to the judge about it and got a court order that no one could record the Zoom meeting, which was the settlement meeting, because that was really the whole crux of the case. So I just wanted to throw that in, that it cuts both ways.

Judge Jeremy Fogel:
There are situations where it wouldn’t be appropriate. So we’ll come back to this. Judge Perlman, so you’re presiding over a lot of civil cases and you’re doing a lot of pretrial proceedings. What about the Zoom era has been a positive from your perspective—the Zoom era, the COVID era?

Judge Sandra Perlman:
Well, one of the things that I really love about Zoom is that I think it really humanizes the profession and the attorneys. I mean, if you think about it, we are entering people’s homes; their living rooms, their kitchens. It looks like you’re in your office, and here at Florida, or specifically south Florida, I think it’s only recently that people have gone back to their offices. But we started Zoom, I would say, mid-March. And so we were entering people’s living rooms, their kitchens. We were coming into their homes. I was coming into their home; they were coming into my home. And if you think about it, that automatically breaks down some barriers. So what I started doing, for example, if Charlie had appeared in front of me on a case, I would say, “Mr. Lifland, have you read all those books?”

I talk about people’s backgrounds. I mean, I know it sounds—I don’t want to say—silly, but if you take a moment and you pause, if you think about every time an attorney came into a courtroom for a five-minute hearing, and they say their motion, they leave, you get a ruling, and that’s it. But here, because we’re going to people’s homes, you have artwork behind them. Sometimes I ask them about their pictures. Sometimes their kids show up, they sit on their laps, and I say, who’s your new cocounsel, so they have your kids’ artwork. So I really think that it’s become a little bit more personal, a little bit more humanizing. I also echo Charlie and Janet’s
[comments] about the efficient use of time. Because we don’t have any trials—I mean, you could land a 747 as far as on my calendar about hearings.

You want an hour-long hearing. You want a three-day hearing, you want a five-day nonjury trial, whatever it is you want. We have all that time. Before when we had jury trials, I would have three weeks of jury trials and then only like a week or two of our long hearings or 30-minute hearings or whatever. So, if you didn’t get in that period, you had to go to the next month. Now if you want a hearing next week, I can squeeze you in Monday through Friday—it’s great. It’s a lot more efficient that way. And it’s certainly a lot easier to get the attorneys to appear on Zoom. If you can see the emails going back and forth or fighting about as you all discuss discovery or pretrial matters or whatever it is, I’ll just ask my assistant to say, “Hey, have him pop on Zoom tomorrow morning.” And let’s talk about it. Let’s have a status, let’s have a case management [call]. So that part has been very efficient.

**Judge Jeremy Fogel:**

So, you can use the additional time that you have to be a more active, more hands-on case manager?

**Judge Sandra Perlman:**

Yes. Insofar as what the other panelists have discussed only gets us so far because we all know there’s nothing like a trial date to move a case. So yes, only up to so far, but yes.

**Judge Jeremy Fogel:**

Goes to the point that Janet made: If you don’t have a trial date, it’s hard to get to the end of the process. We’ll talk about that in a minute when we talk about negatives, but that certainly is one of the ones that’s looming over this whole conversation.

**Charles Lifland:**

Can I make a quick comment on what the judge has said?

**Judge Jeremy Fogel:**

Please, go ahead.

**Charles Lifland:**

First, I have to say that when I argued before Judge Breyer last month, he asked exactly that question. Have I read all of those books in back of me? And the answer is [that] I’d be lying if I said yes, but a good number of them. The other thing is just going to your other comments. We have magistrate judges who have ordered that all meetings can first be done by Zoom, or rather than by telephone. And one of my partners commented to me that that really does, in her view, make them more productive. People are more inclined to be reasonable if they’re looking at each
other on the screen and the home factor as well, she says. She has a six-year-old daughter who occasionally disrupts things. And when you see that happening to opposing counsel, there’s a human connection there. “It’s an opportunity to be civil” was the way she put it. And I think you’re exactly right on that.

**Judge Jeremy Fogel:**

Great. So, Scott, you’re looking at this as an academic and you’re looking at civil litigation writ large. What do you think? What have been some of the positives from your perspective?

**Scott Dodson:**

Let me make four quick points. Not having to travel I think is a huge one. I agree with Janet and Charlie—travel is costly. It’s burdensome in terms of time; it exerts a mental toll. As one lawyer told me with a very wistful sigh, imagine no more air travel, car rental, possible hotel room for a routine client meeting or a 26(f) conference, no more traffic or house parking, metal detectors, thick briefcases for a status conference. So I think that’s a big deal for practitioners. Travel can also make scheduling difficult. So, sort of in line with what Judge Perlman just said. Judge Rosenthal told me that scheduling status conferences is way, way easier when Zoom is available. So, I think travel benefits are huge. They’re especially so in large with cases with an international dimension. You still have to worry about time zones, but at least you don’t have jet lag.

Two: I think virtual meetings, especially strategy meetings and client meetings, can be way more efficient. They can be crisper, shorter, more focused than in-person meetings. I know this firsthand with faculty meetings, and gone is the pressure I think to complete the task in a single continuous meeting because you can break it out into several sessions with hours or even days in between. So I think remote technology really makes meetings flexible, more efficient, and often more effective.

In terms of flexibility—so a third point, I think, is how flexible it is. So, say a lawyer is on a client call talking about discoverable documents, and the client wants to show the lawyer just how complicated it might be to find certain emails. Well, the client can share the screen and actually show the lawyer her email folders, or say in a strategy meeting the team suddenly realizes that paralegal Bob and client IT [information technology] director Jane have useful information to share when you can just patch them in from wherever they happen to be.

A fourth point, I think, is court access. And I think this is a really important one that often gets overlooked. The open courts norm that we have is usually an in-person norm, which comes with significant limitations, but video conferencing technology for courtroom proceedings can expand public and media access to proceedings greatly. Courts can put remote viewing access links on their websites and have publicized remote access using social media. And these kinds of efforts have the potential not just to preserve the open courts norm in a state of a pandemic but to expand it in a transformative way.
Approximately half a million people listened live in the Supreme Court telephonic oral arguments held last spring. And nearly two million have listened to the recordings online. That’s vastly more than the physical seats allowed to be filled in person. So I think the video conferencing option has a lot to recommend it. And I think it will be increasingly demanded by clients, lawyers, and judges, especially when the cost saving opportunities are high and the efficacy of the interaction can be maintained.

_Judge Jeremy Fogel:_

So, there’s a transparency piece to this, which is not so much about the interest of the folks on this call, but it’s a public interest that it’s in seeing what the courts are doing. And something else I’ve heard, we can talk about this in a little bit. But for clients, particularly clients who have modest means, the availability of video participation actually can make a big difference. And there’s some data—and maybe Judge Perlman can comment on this—in the smaller cases like eviction cases, debt collection cases, like that. What so far we have found is that more people show up because they don’t have to take the time and spend the money getting to court to defend their case. So it’s been a significant decrease in the number of defaults. And that goes to the same issue of public access that you were talking about.

Well, so I want to say two things before we move on to the next topic. We had a couple of questions really going more to trials. And I think we’ll pass on those because this panel is not about trials. I think there’s some good questions pending about trials. We’re talking about pretrial here, but I will also point out we’re going to have a Q&A period at the end. So, if we don’t get to your questions now, we’ll get to them before we’re done with the panel. There is a question that we can add, and it’s from Judge Kuhl in Los Angeles. And the next topic we were going to talk generally is: What are some of the negatives about this particular period in time and how has it impacted the courts? And Judge Kuhl’s question really goes to the relationships between counsel and [the] feeling on the part of some judges that counsel may not be getting along as well, not only because of the remote process but also because of the stresses of the time, just that people are having a hard time getting by in the times we live in.

So, we can weave that question into the comments that each of you have. But I’m curious: What would you call out as being the major negatives of litigating in this era? And we’ll go back to Janet.

_Janet Abaray:_

The biggest negative that we are seeing is the ability to meet with our client and prep them and to be with them in the depositions. And since we do represent individuals, mostly products liability or other kinds of personal injury cases, the people aren’t necessarily sophisticated in terms of using technology. Some of them don’t even really have access to it. So we have people who have flip phones; we can’t even do FaceTime on an iPhone—they don’t have them. So we’re really grappling with how are we going to prep these people, especially if they’re not local,
because some of our clients are from all over the country. And we’ve been concerned about it. And we’ve had a variety of fact patterns developed. We had one where a local plaintiff was ready to be deposed. The defense counsel said they wanted to do it in person. And we said, “Well, if you’re going to do it in person, we can do it here in our office, but everyone has to wear a mask.” So then they said, “Well, never mind, then we’ll do it by Zoom.”

So we ended up having the clients come to our office, only the client had no mask and everyone else had on the mask and it was done through Zoom. So that worked out fine. We have another case where the defendants wanted to take the deposition. And we said, “Okay, well, let’s set it up by Zoom,” and [they said] oh no, it has to be in person. And they insisted on it. And with COVID and everything, we were like, look, this just isn’t safe. Because they weren’t even requiring masks. We filed a motion for protective order with the court, and we lost. So, we have to go forward with the depo of a plaintiff and we’re trying to grapple with how are we going to do this and do it safely when it’s in a place where masks aren’t even required. But on the flip side too, then we have these clients that we need to prep. So, we’re now looking at, do we need to fly to these locations? How are we going to get the clients deposed?

And so we’re looking into finding court reporter services that have the technology available. And that’s really the biggest thing that I’m trying to do is to not have the clients dealing with the technology. So, I need to get them in a situation where there’s somebody there who can handle opening the exhibits for them. And I don’t let them deal with all that. They need to focus on a depo. So that’s really the biggest challenge or negative that we’ve been dealing with right now.

**Judge Jeremy Fogel:**

Just not being able to be with your clients and provide the support and guidance that you would normally provide.

**Janet Abaray:**

And then putting them in the position that they have to be experts on technology when they’re not.

**Judge Jeremy Fogel:**

That’s not just clients who have to deal with that. I mean, that’s all of us to some degree.

**Janet Abaray:**

I know my weaknesses.

**Judge Jeremy Fogel:**

Charlie, what about you?
Charles Lifland:

Again, I agree with everything Janet said. I mean [with] no ability to travel, we lose the ability to interact with people in person, which is so important in so many ways—getting to know your judge, your adversaries and lawyers for the defendants, your witnesses, preparing your witnesses. I agree with that. Obviously, it helps if you already know them, but if you don’t, that’s a real challenge. You also lose a lot with the in-person factor. I mean, in my experience a lot of important stuff happens in the hallway at a mediation where you really get down to it, you buttonhole somebody or they buttonhole you, and the same thing in the hearings and in trials. So that’s something that you really can’t replicate. You can pick up the phone and call people, but those kinds of spontaneous interactions that sometimes really get to the heart of something and help get something done don’t occur that way.

I also think a big negative for us is not being able to work in the office. We’re a little different. Generally, most of us have a big office, but we’re working at home mostly. You can go in if you need, for example, a more sophisticated video setup for a court argument or something like that. But for the most part, people are at home, and that really has some costs, training, and mentoring. You have to work much harder at it. You don’t have the opportunity to go out for coffee with your colleagues and talk about things other than your cases or help associates with cases that you might not personally be working on. Those are all things you have to work hard on—maintaining the camaraderie, avoiding the negative effects of isolation, but to work hard on those things. I’m lucky in that my children are all grown and I have an office where I can come and work productively.

That’s not for everybody, particularly people with small children and no help. They are undergoing a lot of strains. So there’s a lot that you need to address, I think, continuously. And of course, clients as well, it’s keeping up with your clients, developing new clients. Again, requires a lot more focus because you don’t have the ability to just go and visit them like you want to.

Judge Jeremy Fogel:

One of the questions that we have that we won’t get through directly because it has to do with trial, but it had to do with the idea of confrontation that in a certain ethic, if we’re talking about criminal cases, which is not really the focus of this panel, there were some significant issues there. But let me ask both you and Janet, in terms of when you have an adversary process like the deposition, have you noticed a difference in terms of your experience of the quality of that between keep doing it in person and doing it remotely?

Janet Abaray:

I’ll go ahead. I’ve actually done a fair amount of remote depositions prior to COVID. We found particularly with taking expert depositions; I figured they’ve all been deposed a million
times—I look him in the eye isn’t going to make any difference. So, we’d done a lot of expert depositions remotely already, and we’re dealing with that. So, I don’t know that it’s made a big impact in that regard to me.

**Charles Lifland:**

I agree. I think it really depends on the nature of the witness and the nature of the proceeding. I agree on experts. It’s probably less critical to do it in person. We had a *Frye* [expert evidence] hearing in New York. So, a combination *Frye/Daubert* hearing in the opioids cases where there were six experts examined and it was every permutation for them were done remotely. Two of them were live. We had—the plaintiff’s lawyers who were local—were all in the courtroom with masks. And the judge was in the courtroom. Some of the examining lawyers who were not local [were] examined remotely. In one case, one of them went into examine a witness live; he was there live. And overall there were some glitches. Like I said before, putting documents on the screen makes things difficult, but overall the parties were able to create the record that the judge needed on the experts and the judge was able to see the experts.

So I thought it went fine. There are definitely some advantages to being live here in a true cross-examination situation. There are things you can do in a courtroom to control attention that you just can’t do over the video. But for a lot of things, I don’t know that it makes that much difference in terms of quality. And of course you get the benefits of the lower cost and avoiding putting yourself at risk.

**Judge Jeremy Fogel:**

So, I want to switch to Judge Perlman. I actually have several questions [that] flow directly out of this. If you’re seeing lawyers in a virtual forum rather than in the courtroom, has it made a difference to you, do you feel like you’re missing things, you’re not getting the same quality of advocacy or you’re not picking up some of the nuances of the advocacy?

**Judge Sandra Perlman:**

As a presiding judge the general answer is no because a hearing is a hearing, a motion is a motion. And I take it just as seriously as if you were here in person or on the screen. But as everyone has been saying, one of the disadvantages is that we are sitting here staring at a screen. That’s what we’re doing. So, it seems it could be a little dull; at some time it can have a flat aspect. I’m old-school trial attorney. My career, I grew up in the courtroom. I was a public defender; I was a fighter at the death penalty litigation. I was a deputy district attorney. I was in there fighting for the people. And so, for the old-school trial attorneys, I think it’s more difficult for them to just sit in a chair and argue their motion. They’d like to use their hands. They like to get up. They like to walk around. They like to be expressive, have compassion, have emotion. And I think you lose some of that on Zoom.
I think the newer attorneys, or the younger attorneys, are having an easier time because you just come in, they do their motion, that’s it, they’re done. So, I think that there’s a difference between how the attorneys are perceiving it. And I think that everyone’s getting used to this platform because as Judge Kuhl said—and I wrote this down because she’s exactly correct—we need to do whatever we need to do to keep the wheels of justice moving. And I have to say that the civil side of our circuit, we haven’t missed a beat. We started doing Zoom in the middle of March and it has been nonstop. And so I’m proud to say that we have helped provide access to the courts and continuation. But another thing is the technical difficulties. We talked about that. That’s a downside. I mean, anything from bad signals down here in Florida [where] we have like almost torrential hurricane weather.

I lost [my] Zoom connection twice yesterday in the middle of hearings. And so, it’s a little bit difficult. Sometimes it’s a little bit frustrating, but we’re all getting used to it. Also, and this goes back to your question, Judge Fogel—and I think this is what you were referring to—is decorum. There’s no decorum anymore. I mean this is our courtroom, and so—not that I need people to rise when I stand into a courtroom, I’m not talking about that—I’m talking about the decorum, about how attorneys speak to each other, and this goes back to Judge Kuhl’s comment about whether people are civil to each other. For example, my motion calendar, I could have probably 20 attorneys every morning. So instead of having people yell, I tell them listen, you’re yelling across the courtroom. When you talk in open Zoom, you’re yelling across the courtroom.

But every morning used to be, “Hi I’m here on this case or I’m here on this case. Oh hey, I’m here on this case. How you doing? I’m the court reporter.” So I started having everybody check in like how you have the Zoom chat. I started having people checking in on chat. So it’s as if they’re walking to the courtroom, checking in with the clerk, both parties are present. The court reporter is here, and then I call the case. But I’m trying, I’m trying to put in a little decorum. It’s very challenging having attorneys try something new. But I just want to comment also, Judge Kuhl, I have seen a lot of what you are referring to. I think the inflexibility of the attorneys with regard to deadlines has been tough; people are not considerate with each other. They’re not taking into consideration other people’s circumstances. And we don’t know what other people’s circumstances are.

Like we said, we started Zoom in the middle of March. We haven’t missed a beat, but you don’t know what’s going on in other people’s lives. Down here in Florida, parents are trying to determine whether or not to send their kids to school. They’re opening up the schools. They have kids who are [in] grade school. They’re working from home, both parents. They don’t have the bandwidth; they don’t have enough computers. I mean, there’s so much going on, and plus, oh yeah, we’re also practicing law. And I have a major, major case going on. I mean, somebody’s got to give, there’s got to be consideration between everybody. And so, when the attorneys come to me, and I just had this yesterday, they canceled an examination for a plaintiff, and they didn’t cancel within the 48 hours. And the plaintiff’s attorney said, “Judge, she’s pregnant. She didn’t get clearance from her doctor.”
And I turned to the defense—I’m like: “Come on. I’m not forcing someone to go get a medical examination when they don’t get clearance from their doctor.” I’m certainly not going to charge them or make them pay the $900 cancellation fee. I said, “This is something you all can resolve yourself. You do not need me to do this.”

**Judge Jeremy Fogel:**

You’re making really a couple of points here, I think. And one is that, ordinarily that’s the kind of stuff, not that those kinds of things don’t happen between counsel anyway. They certainly did before there ever was anything like COVID, but at least the chance to be with the other person physically gave an opportunity to interact, to develop a relationship. And you’re going to see this person again, you’re going to be litigating with them over a period of time. So, there is the thing that a number of you’ve talked about, you don’t have the benefits of the personal relationship. And then the other thing you’ve mentioned, which really I think goes to the core of the question that Judge Kuhl asked [which] is, people have lives that are intruding on their practice in ways that they never did before this, that they’re really trying to do several things at once.

And there was a comment earlier [where] you said it was actually interesting to have the kids in the room when you were doing a status conference and opened up some opportunities for informality. But the other side of that is if there’s a serious argument to be had, and someone’s distracted, or someone’s home circumstances are such that it’s just really hard for them to put all their attention there, for the bandwidth issue you just mentioned. That’s a real challenge. And that’s not something that’s about to go away anytime soon. So, you don’t have the building blocks of good collegial relationships between counsel and you have more things going on that can cause problems is what I’m hearing. And one other question for you as a judge: Do you see a lot of self-represented litigants on your calendar and how are they dealing with this new reality?

**Judge Sandra Perlman:**

I don’t see a lot of *pro se*, but I think they’re enjoying it. They’re coming on screen like they’re a star. They’re able to talk, and some of them appear by phone. Some of them appear with video. Some of them I’ve had hearings where they’ve been in their car. And I’ve said listen, I hope you’re not driving. Or please don’t drive and Zoom at the same time. But I think I don’t want to say they’re enjoying it because I think that’s the wrong word. But I think as far as access to courts, of course, for those who have the ability and the technology, again I think they are enjoying being on Zoom. But also, I have found that I’ve had to cancel a lot of hearings because what the attorneys are not including [is] the telephone information on the notice of hearing.

And I’m explaining to them that: “Look, everybody doesn’t have a computer. Everybody doesn’t have access to Zoom via the computer. You have to include the telephone information so that if they don’t have that, they can use their phones.” So most people obviously have a phone. But I don’t see a big difference in that other than obviously it’s easier for them to appear.
Judge Jeremy Fogel:

One thing I’ve heard is that, and you touched on it, is that they like the idea that everybody’s box is the same size. And instead of being in a courtroom where the judge is up above them and the whole architecture of the courtroom is somewhat intimidating that in a Zoom hearing that everybody’s on equal footing, at least in terms of the size of their window. Scott, what do you think of all of this in terms of the negatives that people have talked about?

Scott Dodson:

I’ll just mention three cons that are going to echo a lot of what some of the other folks have said. The reports I get, and I think it makes sense theoretically, is that in an adversarial setting, document presentation, credibility assessments, and witness confrontation can be hard, not always, but I think it can be hard. A recalcitrant witness can be emboldened by the comfort and security of their kitchen table and a virtual examination can make it hard for the examiner to maintain control of her pace and tone and to police the flow of information to the witness. So, I agree with Charlie that things depend on the witness, but outside of repeat experts, I think it can be hard to know what kind of witness you’re getting until you’re in it. And as Janet and Charlie said, I think preparing for a major deposition remotely presents challenges as does objecting and controlling a witness during the deposition.

So for contentious and important depositions, maybe the lawyer’s physical presence is really important to the integrity and efficiency of the deposition. I also think that document intensive proceedings are difficult to replace with current remote technology because I think it’s still pretty cumbersome to organize and present large volumes of documents, especially in adversarial circumstances where the participants may not know in advance which documents or portions of them will need to be used. I’m pretty optimistic that some software platforms and hardware setups can pretty quickly evolve to enable remote viewing of both witnesses and documents effectively. But I think the setups in technology aren’t in widespread use at the time.

Another con I think is the possible adverse effect on decorum. And Judge Perlman mentioned this it’s sort of the flip side of the humanizing informality that she noted earlier—physical courtrooms feature a judge in a robe elevated on a bench with flags, the court seal, portraits of former jurists. Even a formal cry opening the court, the tradition of rising when the court enters and leaves or when the judge does. And I think these traditions of solemnity and formality are important. But I do think some simple steps can minimize the concern. So, each participant I think, judges included, should make sure to dress in proper courtroom attire. Each participant, and again, judges included, should use a professional background like Judge Perlman’s. Lawyers, I think, should name their virtual presence using real names, their firms and their client even. And these kinds of norms can be written into the judges’ individual rules or developed district-wide by local rules. So, I think professionalizing remote participation can reinforce the formality and solemnity of the occasion.
And the third con, I think, is the digital divide as Judge Fogel just hinted. I think not every party can obtain access to the requisite technology. And not every party or lawyer has the same resources to devote to learning the use of technology effectively. So the digital divide I think is real. Many pro se parties and prisoners do not have hardware devices or remote technology software or access to that kind of stuff. Unsophisticated litigants and attorneys may not be facile with it to their disadvantage against some more sophisticated opponent. So I think judges should take the access burdens of remote technology seriously too.

Judge Jeremy Fogel:

Great. Well, thank you. So, what I’d like to do next is go back to the panel one more time and ask this question. At some point the pandemic is going to end; we don’t know when. There’s much to be said about that, but this is not a panel on epidemiology. And so, when it ends, what should we look at from this experience that is something that we ought to build into the system going forward? How can we learn from this and actually make the courts more responsive to their users and provide better justice on the civil side going forward? Janet?

Janet Abaray:

Well, I definitely think having really close management on discovery—and I’ve had a couple of cases where that has continued and it’s all been done remotely—has been very helpful to the case. It’s moved the case forward. It’s been easy for the parties. Nobody had to travel to get to the courthouse. I think it was easier for the court, although maybe I could be corrected on that, but I had the impression that it’s quicker for the court to do all this, in this case, by telephone. And so the management has been very helpful and more cost-effective. So I think that is the number one issue that I see that could really benefit going forward.

Judge Jeremy Fogel:

Using this video technology to deal with things like discovery, disputes, just case management issues generally?

Janet Abaray:

Yes. In video or just telephone calls, instead of always having everybody go in person. And again, maybe you do it [where] every fourth time you come in person. I mean, there might be ways to do a little bit of both because you are again losing all those interconnections, but the cost and the time savings, I think, are very significant.

Judge Jeremy Fogel:

I know Judge Perlman may have some thoughts about this too, but I know when I was presiding over civil cases that the lawyers would come in and they would tell me what had happened
somet}emelw else. And of course, it was night and day, I mean, and I spent an awful lot of time trying to figure out what was true. And in a way it would’ve been really easy to just have here, here’s the question, here’s what happened. Take a look at it, Judge. It would have been pretty easy, and I think it might have changed the way the lawyers were interacting too. If they knew that everything was going to be transparent in that way. So that is certainly my thought about what you just said is that it could really help particularly in the area of discovery. Charlie?

*Charles Lifland:*

I think generally Janet’s right. I think we’re going to take the best of what we’ve learned from being forced to use this technology, which does enable a lot of efficiencies and continue it forward. And I think the technology will get better. I mean, I can only imagine what it would have been like if COVID had hit when I started practicing in the eighties and there wasn’t even an internet; everything would have ground to a halt. And my guess is if it’s happened 20 years from now, we’d all be talking about how “can you believe that we were able to keep going with Zoom?” But I think remote proceedings, video proceedings that are able to be done on a laptop, are going to be used a lot more because the clients and the litigants will not want to incur the expenses of travel and the inefficiencies that have made litigation so expensive so far.

*Judge Jeremy Fogel:*

Do you agree with Janet that there ought to be built into that occasional opportunities for counsel to get together?

*Charles Lifland:*

Oh, yes. I think you’ll have more efficiency replacing some of the travel. I mean, who wants to travel across the country for a status conference that turns out to be 15 minutes? On the other hand, for an important joint defense meeting, you get a lot more done in person. So there’s a balance to be struck. And I think we’ll still get moving towards what is more efficient while trying to preserve what’s really essential in the in-person action.

*Judge Jeremy Fogel:*

Judge Perlman, what do you think? How do you see these system changes going forward?

*Judge Sandra Perlman:*

Well, I agree with what everybody else has said. I think remote technology or remote court is here to stay. I know that I will continue to use Zoom. I have a uniform motion counter every morning, and those are for five- to 10-minute matters or for quick discovery matters and other type of motions, motions to compel, motion to produce. And so, in Broward County, we have a lot of people who commute, they call it the Tri-County area, almost like the Bay area, except we
don’t have BART [Bay Area Rapid Transit]. We have no mass transportation here. It’s called I-95. And so, people drive from Miami all the way up to Palm Beach. They go to Fort Lauderdale, they go back and forth; in the end, before COVID or before Zoom, I’d get a call every morning saying there was an accident on I-95. I mean, duh, of course there’s an accident on I-95. We have a train; [the Brightline high-speed rail has] started. But anyway, my point is that I think that this is definitely going to help.

I think people who live in Miami are not going to travel to Palm Beach anymore to attend a five-minute or 10-minute matter. I plan on having Zoom for that purpose. And I agree, I think it was Janet that said that it’s a lot easier to just get the attorneys together on a status on Zoom instead of everybody coming in, especially if there’s attorneys that travel or clients who need to travel. No more motions to have the corporate rep or someone not have to appear at a mediation because they have to come in from out of town; that cost is gone. They can attend by Zoom or remotely. And I also think that we have to start thinking out of the box. I know that this panel isn’t necessarily about trial, but I listened to the last panel. And I think that everybody’s in agreement that we need to start thinking out of the box about how to continue the constitutional right to a jury trial. So that also remains to be seen.

Judge Jeremy Fogel:

Let me ask you in terms of motions, I mean, status conferences, I think there’s a pretty broad consensus that if it’s a five- or 10-minutes status conference or a case management conference that virtual technologies really are pretty positive. What if it’s a summary judgment motion or a meaningful motion to dismiss or something like that where the case could be ended, or it could be substantially affected substantively by what you do? Thoughts about that as a judge . . . would you want those in person? Are you okay with them being virtual? I mean, how do you break that down?

Judge Sandra Perlman:

That’s a great question, Judge, because my brother is a practicing attorney in the area of bankruptcy. And I can tell you for a judge, it makes no difference. I mean, I take it as seriously as if we were in the courtroom. But as a practitioner, because I got this question from my brother, he’s like, “I have a very important summary judgment. I’m supposed to do that by Zoom?” And it was interesting because from a practitioner’s point of view, I think maybe they see it as a less important forum. I think Scott was talking about the decorum and the professionalism and you lose that. But I mean, as a judge, I don’t take it any less seriously. I reread everything ahead of time. I’m prepared for the hearing. It’s the same as if I was in the courtroom. But I think the practitioners, I think the lawyers look at it differently, and they may feel that it’s not taken as seriously or as important as if they were in the courtroom.
Judge Jeremy Fogel:

Let me double back to our lawyers. What about that? I mean, if you had a major motion, substantive motion, in one of your cases, how would you feel about it being heard virtually as opposed to in person? Janet?

Charles Lifland:

I can comment on that. I was going to say I’ve noticed a trend in the federal courts, even for summary judgment, and some big motions that courts are often deciding on the papers and not holding argument. If the alternative to that is Zoom, I’ll take the Zoom. And I think for important motions, it’s nice to be able to really address any nuances, have an opportunity to see if the judge is really getting what you were trying to do, or if you’ve overlooked something, if there’s something that needs to be addressed. I think that’s the function of oral argument on motions. And you lose something by not having it. I’d prefer it to be in person generally on an important motion because you have an extra ability to communicate with the judge. But I think Zoom is better than nothing.

Judge Jeremy Fogel:

And you’re right. There certainly is a trend in a lot of courts to either not have oral argument at all or have it be very limited. So maybe it’s a middle ground. Janet, as a plaintiff’s lawyer, what do you think?

Janet Abaray:

I agree. I think I might even be tempted to set up some kind of a podium so I could be standing up when I address the court, just because that’s how I’m trained to do it. And I think I would feel more as if I was making a formal argument if I was in the right posture to do it. Whereas when I’m sitting in my chair, I’m starting to lean back and getting a little too casual, so I would probably invest in something to make me feel more official.

Judge Jeremy Fogel:

It goes back to the norm is that we were talking about a little bit ago, about if you’re going to make this permanent, you might want to have some rules. Scott mentioned a couple of things about the way you present yourself and dress codes and backgrounds and things like that. That would create a heightened sense of dignity; it’d be less haphazard.

Judge Sandra Perlman:

Can I just comment on that? I mean, and it’s funny because I’m sitting now, but I usually stand during motion calendar because, well, for other reasons, it’s sitting too much. But I’ve had attorneys who actually want to do their arguments standing up because they feel more comfortable.
And also, this goes back to what Scott was saying too about decorum and how things are different remotely, when COVID first started—again we don’t know what’s going on in people’s lives—I didn’t really care what people wore. You just come on Zoom. It doesn’t matter. I mean again, we were trying to do business as usual so that we can continue with the justice system.

I don’t usually wear makeup on Zoom, I mean, I’m wearing makeup now, but I remember talking to the female attorneys about it and they would say that it makes them feel better. If they’re dressed, it makes them feel like they’re going to the courtroom. It’s makes them feel better. I mean, now I think we’re all used to it, but I think this goes back to what Janet was saying about making your argument—they were standing up, they wanted to make their argument like they were in the courtroom. And I think that makes them feel like they’re in the courtroom.

**Judge Jeremy Fogel:**

So maybe some protocol that would get you as close to an in-person experience as possible would help narrow the gap between the two. I will say that the appellate judges I’ve talked to who are doing nothing but hearing arguments like it. I don’t know too many appellate judges who object to Zoom except for the ones who aren’t comfortable with the technology. I mean, their main complaint is that they don’t get to see their colleagues and they don’t get to see their law clerks. And so that was that comment that Charlie made about mentoring and those kinds of relationships, but the actual arguments—they are, in general, pretty content with them. Scott, what do you think about this from the overarching perspective?

**Scott Dodson:**

So, I think litigation rules and practices have always balanced cost efficiency and justice. And I think the pandemic has fueled innovation and experience and familiarity that I think will shift that balance towards video conferencing in more situations than we’re used to pre-pandemic, especially when the stakes are low. I think to continue to shift that balance, a few other things need to happen. First, I think we need to foster a working partnership among the bench, the bar, and the legal academy to develop rules and standards for a post-pandemic adoption of routine use of video conferencing technology and what that would look like. So, thank you to the organizers of this conference for kicking that off. Second, I think we need a uniform or at least universally compatible, widely accessible, relatively easy-to-learn, functional, and secure technology. A technology that’s also, I think, flexible enough to accommodate the diversity of litigation practice and cheap enough to make the game worth the candle.

So, I think that sounds like a tall order. I think there’s reason for great optimism here. I agree with Charlie that the technology will get better and we’ve adapted to video conferencing extremely well during the pandemic. Again, I haven’t done litigation using it, but I’ve been teaching using it, and there’ve been great strides made the last several months even there. And third, I think we need more experience with remote technology to normalize it among a much
broader swath of litigation culture and more training to make sure that its usefulness is maximized while mistakes are minimized.

**Judge Jeremy Fogel:**

I’ll just add a piece here. I remember when this all started, back in March, that I think a lot of us thought it was going to last a couple of months and then it was going to get better and maybe we would have a second wave in the fall, but I don’t think that the conventional wisdom back then was that we were looking at anything near as long-lasting as we’re facing now. I remember the federal response was the Administrative Office of the United States Courts issued a couple of orders that suspended certain rules and allowed the use of virtual technology. But it was very clear this was temporary. And as soon as the emergency is over, we’re going to go back to business as usual. And so, the notion that it was anything more than a temporary accommodation to get us through a short period of inconvenience—that’s the way it was framed then.

And I think now it’s pretty clear that we’re maybe not even halfway through it and that there may be some longer-term results that would need the kind of very careful and thorough thought process that Scott was just describing. This is going to be part of our culture. And so, we need to take it seriously. We need to make it as good as we make everything else or try to make everything else. And it isn’t going to be haphazard, and you’re not going to have hundreds of different ways of doing it. You’re going to have some norms and some regularity and really try to make it as much of a quality experience for everybody as you can. And I don’t think we’re there yet. I mean, I think we’re still in this sort of transitional period where it just keeps evolving and we keep seeing that this may actually end up going on for a long time and the world may look very different afterwards.

And that requires a serious focus to process that we haven’t really been able to put on it yet because we’re still just trying to deal with the crisis. So, with that observation, I just ask if anyone else, before we turn to questions, whether anyone else has any thoughts along those lines; more global observations about where we are. Anyone on the panel?

**Janet Abaray:**

I would just add that some of the court reporting services have already come out with some very good products to have the deposition exhibits put into a dedicated Dropbox that works with your transcript, and it’s all confidential. And so, some of the technology is coming on pretty quickly.

**Judge Jeremy Fogel:**

There is an interesting thing we haven’t really talked about it, and it’s not really germane to our overall topic, but the whole idea of court reporting. When you have virtual recording or virtual presentation of hearings, and what happens to that and what happens to court reporters when you do that, when you have a video record? So it’s another one of those things. It’s a
system issue that’s going to have to get resolved. Other comments or thoughts? Anne, you have questions for us?

**Anne Bloom:**

Hi, just coming on here. Can you see and hear me?

**Judge Jeremy Fogel:**

Yup.

**Anne Bloom:**

Great. We have one question. Has anyone had virtual court experiences with self-represented litigants?

**Judge Jeremy Fogel:**

We’ll go to Judge Perlman.

**Judge Sandra Perlman:**

Yes. I’ve had pro se litigants as I was saying earlier, and I think, Judge Fogel, you brought this point up as well, they feel like they’re on equal footing. And I think it’s like they’re up close and personal with me because if you think about it, when you’re in the courtroom, you’re up on the platform and the litigants are down there. They’re right there on the screen right next to you, and they’re able to talk to you. In fact, I had a pro se this morning, there’s been some difficulty getting her to agree to a hearing day for some rejudgment. So, I asked her to come on to Zoom. I put her and the other side in a breakout room and told them to discuss and give me some dates and then came back on, and we set a date and I said, “Miss X, I just want to make sure that this is a good date for you. I want to make sure that you’re able to appear and that you don’t have any conflicts and I want to make it convenient for you.” I mean, I always try to make them feel at home. So, it’s working out well.

**Judge Jeremy Fogel:**

The data from some of the states that have studied this—Michigan comes to mind and maybe Texas is another one—shows actually quite positive feedback from self-represented litigants and people who are interested in that topic that this medium actually is less intimidating and more amenable. So just something else to think about. Anything else, Anne, from the group?

**Anne Bloom:**

Some questions about whether some of the distractions and other things that are going on are grounds for a mistrial. I don’t know if there’s more to say about that.
Judge Jeremy Fogel:

Well, so we’re not talking about trials necessarily, but I guess maybe what we could do is put the question this way: Has the informality that we’ve talked about already caused any problems? Has it resulted in any awkwardness or even concerns about fairness, because we don’t have the usual decorum? Janet?

Janet Abaray:

Well, I’ve had the experience when we were working at home in March and April, being at home, and someone starts ringing my doorbell. I’m in the middle of a conference with a federal judge. And you’re like, what do you do? It’s echoing—you’d go to the door with your laptop or what; same things when someone starts cutting the grass. So that can be distracting to you; you lose concentration. And so that’s one of the one issue that, I mean, it’s obviously a minor thing, but again, we all have to adapt because we can’t control all of those interruptions or my phone starts ringing every 45 minutes. It’s just very difficult because I can’t just turn off every single phone. So that’s been a bit of an inconvenience.

Judge Jeremy Fogel:

Anyone else want to weigh in on that question?

Judge Sandra Perlman:

I could, Judge Fogel. I mean, if you think about it, like Janet said, this thing threw us for a loop. Unless you have a dedicated office in your home, unless you have a separate room set up with the desk, the chair, the lamp, the internet, everything, everybody’s trying to make do. They’re in their living room, they’re in their bedroom, they’re in their kitchen. I mean, I can’t tell you how many attorneys I see with their laptop at their kitchen counter. You could see their whole kitchen behind them. I mean, so everybody’s doing the best they can, but we have life distractions. The lawnmower, I mean, it’s embarrassing. I shouldn’t say it because as a judge, they’re mowing the lawn outside. I mean I’ve got windows. I try to mute myself when I’m not speaking, but life is happening around us while we are at home doing our Zoom hearings.

And everybody just has to be a little bit more relaxed, but then that of course goes against the whole decorum and protocol and we’re not in the courtroom. There’s pros and cons.

Judge Jeremy Fogel:

I’m not hearing anybody saying that there’s been a real loss of fundamental fairness. It’s kind of constantly something that has to be balanced.

Go ahead, Charlie.
Charles Lifland:
I agree with that. I mean I’ve found that barking dogs are pretty ubiquitous on some conference calls, but everybody’s very understanding about it. And just treat the conversations professionally as you can, and it works fine.

Judge Jeremy Fogel:
Scott?

Scott Dodson:
I’ll just add the same, although I do think that jury trial would present special circumstances.

Judge Jeremy Fogel:
I think everybody on the panel agrees and I know that others who have presented before and who were in the audience feel pretty strongly about jury trials being different. And certainly, if you’re talking about criminal jury trials, they’re constitutionally different. But even in civil jury trials, I think the expectations are different than what we’ve been talking about here. And one of the real background facts that we can’t ignore when we’re talking about COVID and pretrial is that if there aren’t any trials or if trials are very hard to pull off because of public health concerns, that changes the nature of the pretrial process pretty substantially and what you’re able to accomplish and so on.

So, we’re almost out of time. Let me just ask if anyone has any last thoughts they want to share with the group. We’ll just go around one more time. Janet?

Janet Abaray:
I think the main thing I would want to emphasize is that I don’t want to lose that opportunity to get to meet the court and the cocounsel. And if, especially at the initial pretrial conference, if we could have an opportunity either do it by Zoom rather than conference call or do it in person to the extent that’s possible, if it’s local people, you can wear a mask, I think there’s a lot of value to that. And it helps set the stage then going forward that you might feel more comfortable with just phone calls or the remote access.

Judge Jeremy Fogel:
There is still something about the interpersonal contact that we don’t want to just totally forget about in the interest of convenience. Charlie?

Charles Lifland:
I think that’s true. I think people need to be creative about finding ways to maintain relationships so that they can do what’s needed to be done to resolve cases. And it’s clearly harder in this environment, but it just takes more of this.
Judge Jeremy Fogel:
Got to work at it a little bit harder. Judge Perlman?

Judge Sandra Perlman:
Well, I think that we can only take these cases—when I say “we,” I mean, I don’t mean me as a judge (obviously I’m just presiding over them). But the attorneys can only take these cases so far pretrial and at some point, like at the other panel said and some of our panelists here said, “You’re going to need a trial date. It’s going to move a case more than not having a trial date.” And like we heard at the last panel, there are litigants who are saying, “I’m not going to move the case because you’re not going to get a trial for another year or a year and a half maybe.” And then we also have the problem that when the courthouses do open, I think as Judge Fogel was saying, the criminal cases are going to have to go first because those have the constitutional issues. There are people in custody. And so, what’s that going to mean for the civil cases?

Judge Jeremy Fogel:
So at some point civil cases will start to move again. And at some point, that will change the dynamics of pretrial proceedings and then all the points people are making will be there, but the content of pretrial proceedings is going to be different if you have the dynamic of a meaningful trial date. Scott?

Scott Dodson:
I’ll just add that I think that maybe we’ll see mediators and arbitrators really pushing the envelope here. I think there’s been a lot of successes using video conferencing for mediations very effectively. And arbitration strikes me as the first frontier for use of it during trials because of its informality. And I think maybe arbitrators might be using it in, I don’t know, often in the future.

Judge Jeremy Fogel:
What I’ve heard from the private adjudication people is that their business is actually pretty robust right now. Because people who need to resolve their cases are going to them and they’re getting resolutions and they’re getting them effectively enough with virtual. It doesn’t change the cost benefit that people go through. If for whatever reason they don’t want to go to trial and they know that the absence of trial dates is their friend, then that could affect the decisions people make. And also, the urgency people have about getting to trial. I know there was a problem in California that cases that are entitled statutory priority, elderly plaintiffs and other folks who were entitled to statutory priority. I mean, they’re not getting their trials in most of the counties, and that’s a significant problem.

I’d like to thank my colleagues for having such insightful contributions. So, everybody stay safe and stay healthy.
Panel Three: Implications for Federal and State Civil Rules

Panelist Biographies

Joselyn D. Larkin, Executive Director, Impact Fund (Moderator)

Ms. Larkin is the executive director of the Impact Fund, a legal foundation in Berkeley, California, that provides funding, training, and representation in support of social justice impact litigation. Her practice focuses on complex employment discrimination and class action practice on behalf of plaintiffs.

Ms. Larkin has served as class counsel in many major class actions, including Dukes v. Wal-Mart Stores, Ellis v. Costco Wholesale Corp., Parra v. Bashas’ Inc., Williams v. City of Antioch, Vandell v. Chevron Corporation, and Stender v. Lucky Stores. She co-represented the California respondents in Amchem Products v. Windsor before the United States Supreme Court. Ms. Larkin has twice received the California Lawyer Attorney of the Year (CLAY) Award for her work in employment law. She was named a fellow in the College of Labor and Employment Lawyers in November 2013. She is a frequent speaker on class actions, employment law, ethics, and civil rights issues and has published many articles on employment and class action practice. She is the coeditor of Class Action Strategy and Practice Guide, published by the ABA.

Ms. Larkin is a graduate of the University of California, San Diego, and the UCLA School of Law. Following law school, Ms. Larkin had a one-year fellowship with the Los Angeles–based Center for Law in the Public Interest before joining San Francisco’s Heller, Ehrman, White & McAuliffe. In 1987, Ms. Larkin became associated with Farnsworth, Saperstein and Seligman and was elevated to named shareholder in 1990. She served as the firm’s managing director from 1991 to 1992 until she left to found the Oakland-based law firm, Ryu, Dickey & Larkin. Ms. Larkin joined the Impact Fund in 2000. For many years, Ms. Larkin spearheaded the Impact Fund’s complex litigation training program, including the development of its Class Action Training Institute and its annual Class Action Conference. She was elevated to executive director of the Impact Fund in 2010.

Ms. Larkin is the past cochair of the ABA Litigation Section’s Class Actions and Derivative Suits Committee and currently serves on the ABA Federal Practice Task Force. Ms. Larkin served as a lawyer representative for the Northern District of California and the Ninth Circuit from 2012 to 2015. In addition, Ms. Larkin formerly served as a member of the National Governing Board of Common Cause, a grassroots citizens’ lobby committed to open democracy, and as the chair of California Common Cause.
Andrew Bradt, Professor of Law, UC Berkeley School of Law

Professor Bradt is a professor of law at UC Berkeley School of Law. His primary scholarly interests are in the areas of civil procedure, conflict of laws, and remedies. His current research focuses on the adaptation of procedural and choice-of-law systems to large-scale multijurisdictional litigation, with a particular interest in federal multidistrict litigation. In 2019, he received Berkeley Law’s Rutter Award for Teaching Distinction.

Professor Bradt’s scholarship has been published in numerous law journals and has been cited by both courts and prominent legal treatises. He is a coauthor with Geoffrey C. Hazard, William A. Fletcher, and Stephen McG. Bundy of Pleading and Procedure—Cases and Materials (12th ed., Foundation Press, 2020), and a coauthor with Edward Sherman, Richard Marcus, and Howard Ericson of the forthcoming Complex Litigation—Cases and Materials on Advanced Civil Procedure (7th ed., West Academic). In 2018, he was appointed by the Counselor to the Chief Justice of the United States to the Supreme Court Fellows Program’s Academic Advisory Board. In 2019, he was elected to the membership of the American Law Institute, and he serves on the Members Consultative Groups for the Restatement (Third), Conflict of Laws, and the Restatement (Third), Torts: Remedies.

Immediately prior to joining the Berkeley Law faculty, Professor Bradt was a Climenko Fellow and Lecturer on Law at Harvard Law School. Before entering academia, he worked as a litigator in the Issues and Appeals Group at Jones Day in New York City, and at Ropes & Gray in Boston. He also served as a law clerk to the Honorable Robert A. Katzmann of the United States Court of Appeals for the Second Circuit and the Honorable Patti B. Saris of the United States District Court for the District of Massachusetts. He is a member of the state bars of Massachusetts and New York. He graduated magna cum laude from Harvard Law School where he received the Joseph H. Beale Prize for Conflict of Laws and summa cum laude from Harvard College where he concentrated in social studies.

Robert J. Giuffra, Jr., Partner, Sullivan & Cromwell LLP

Mr. Giuffra is a partner at Sullivan & Cromwell and serves on the firm’s Management Committee, with overall responsibility for its litigation practice. A fellow of the American College of Trial Lawyers, Mr. Giuffra currently represents Volkswagen and Fiat Chrysler in their diesel emissions cases and Goldman Sachs and UBS in financial crisis litigation.

A graduate of Princeton University and Yale Law School, he has served in all three branches of the U.S. government. He was a law clerk to Chief Justice William Rehnquist and Judge Ralph Winter of the U.S. Court of Appeals for the Second Circuit. From 1995 to 1996, he was chief counsel to the U.S. Senate Banking Committee. Previously, he served in the White House under President Ronald Reagan. In 2017, Chief Justice Roberts appointed him to the Standing Committee on Rules and Practice and Procedure of the U.S. Courts.

A native New Yorker, he has served on New York’s Permanent Commission on Access to Justice, the State Commission on Public Integrity, the State Ethics Commission, the State-
Richard Marcus, Distinguished Professor of Law and Horace O. Coil Chair in Litigation, UC Hastings College of the Law

Professor Marcus holds the Coil Chair in Litigation at UC Hastings College of the Law where he has taught since 1988. He is lead author of the leading casebooks *Civil Procedure: A Modern Approach* (7th ed., West, 2018) and *Complex Litigation* (6th ed., West, 2015), and the author of four volumes of the Federal Practice & Procedure treatise (“Wright & Miller”), including all the discovery volumes. Since 1996, he has served as associate reporter of the U.S. Judicial Conference Advisory Committee on Civil Rules, in which capacity he has worked on all amendments to the Federal Rules of Civil Procedure over the last quarter century regarding discovery and class actions. In 2020 he spent considerable energy on the advisory committee’s consideration (pursuant to directions from Congress) of adopting a special emergency rule to cope with emergency conditions. That study has also begun to focus on the possibility that the pandemic lockdown may produce long-term changes in practice that could call for revision of some rules without regard to emergency conditions.

Professor Marcus has also been involved in international academic activities. He was elected a member of the International Association on Procedural Law (IAPL) in 1998, and now serves as the Vice President of the IAPL for North America. He has also served as an adviser to the European Law Institute project on drafting procedural rules for the EU [European Union]. In addition, he has received honors such as election to Honorary Membership of the Japan Association of the Law of Civil Procedure (the first American so honored), and selection as Onorari Corrispondenti of the Associazione Italiana fra gli Studiosi del Processo Civile.

Tara Sutton, Partner, Robins Kaplan

Ms. Sutton, partner at Robins Kaplan, has repeatedly achieved victories that create a path to recovery for thousands injured by drugs and medical devices. Chair of the firm’s Mass Tort Group and a member of the executive board, Ms. Sutton has assumed the role of lead trial counsel in a number of nine- and ten-figure mass tort cases. She currently serves as colead counsel on behalf of the state of Minnesota in its suit against JUUL Labs. Sutton also serves in leadership on behalf of hundreds of tribal governments in the opioid multidistrict litigation. In recent years, she has served as lead trial counsel in bellwether cases concerning the drugs Abilify, Chantix, and Mirapex and spearheaded the negotiation of a $1.4 billion global settlement program resolving Stryker Rejuvenate/ABGII modular hip implant litigation and a $358 million settlement of the Benicar hypertension litigation. She is a past president of the public interest law firm Public Justice.
Discussion

Jocelyn Larkin:

Hello, everyone. Good afternoon. My name’s Jocelyn Larkin, and this is a panel on the implications of COVID-19 for federal and state civil rules. I am the executive director of the Impact Fund here in Berkeley. We are a legal nonprofit, and we focus on supporting lawyers who are doing impact litigation. And I’m also a member of the CJRI Advisory Board.

We have an excellent panel today, and I’d like to introduce them before we get started. First, we have Rick Marcus. He is a distinguished professor at UC Hastings School of Law. His scholarship focuses on litigation and civil procedure. Importantly, for our purposes today, he’s the associate reporter to the Advisory Committee on Civil Rules of the Judicial Conference in the U.S. and has played a principal role in drafting amendments to the Federal Rules of Civil Procedure over the last 20 years, including class actions, discovery, some very important things.

Next, we have Tara Sutton. Tara is a partner at Robins Kaplan and the chair of their National Mass Torts Group. Her practice focuses on representing individuals harmed by the pharmaceutical and medical device industry. Welcome, Tara.

Bob Giuffra is a partner at Sullivan & Cromwell. Mr. Giuffra is currently the national coordinating counsel for Volkswagen in its recent diesel-related matters and is lead counsel to Fiat Chrysler in its emission issues. He’s currently serving on the Standing Committee on the Rules of Practice and Procedure and also has been involved with an effort in New York to take a look at the state rules and practices in light of the current emergency that we’re in.

Finally, we have Andrew Bradt. Andrew is a professor of law at Berkeley. He too focuses on civil procedure, conflicts, and remedies, and he has a particular focus on multidistrict litigation.

To get us started, let me just give us just a little bit of background here on the rules. The Coronavirus Aid, Relief, and Economic Security Act, which we all know as the CARES Act, was signed to law on March 27, 2020. And most of us think of it as a multitrillion-dollar bill trying to keep our country, our economy, and individuals and businesses afloat. But section 15002(b)(6) requires that the judicial council and the Supreme Court consider rule amendments that address emergency measures that may be taken by the federal courts when the President declares a national emergency.

Professor Marcus, obviously, you’ve been intimately involved in this work. Why don’t you start us off by explaining what’s been happening?

Richard Marcus:

Okay. Well, I’m going to do that with a little bit of a blast from the past, partly doing that for those of you who attended this morning’s session. The occasion came up in connection with some technology-related discovery amendments that started 20 years ago. The basic issue for rule makers in view of what Congress said has been, for the last six months, thinking about something that I’ll say a bit about, but I think probably is not a prime interest to those
participating here today. And that is a possible rule that authorizes flexibility or deviations from the ordinary rules during times of emergency.

Now, Bob Giuffra and Judge Carolyn Kuhl, who were on the first panel, are both members of the standing committee. They’ll hear plenty about this at the standing committee meeting in January. I’ll say a bit about it here. And anybody who’s interested could look at the agenda book for the advisory committee meeting that is two weeks from tomorrow, which you can find on the Administrative Office of the U.S. Courts website. But I think, if you’re interested in seeing what that looks like, the thing to do is wait until August and see if a preliminary draft is published for public comment then. I’ll say a few words about the issues presented there.

But my main focus is going to be on what happens afterward, whether or not there’s an emergency—What is the new normal? That was one of the big topics this morning. What Congress did in the CARES Act, besides this directive that the rule makers consider an emergency rule, is it had a whole bunch of things about criminal cases that authorized non-in-person events for detention hearings and initial appearance, preliminary hearings, plea changes, and a lot of other things.

And one of the points I’ll return to in a moment is. . . . Actually, it seems that for those, if there are any, who handle criminal cases as well, the criminal rules are a lot less flexible than the civil rules. Those who have been in civil cases in federal court have probably seen things operating very differently since mid-March. But none of that required Congress to do anything, and it isn’t apparent that any of it required the rule makers to do anything.

What we have, then, is—and I’ll just run through the issues so that I can switch to where I think our focus should be—what we have is an intercommittee negotiation among bankruptcy rules, criminal rules, and civil rules, concerning what such emergency rules in these various sets should look like. Probably nobody’s in favor of saying what Congress said, a presidential declaration of national emergency [is required] because that doesn’t seem to deal with local emergencies, that doesn’t seem to be a suitable trigger. There’s one of them that’s been in effect since 1979, which is sanctions against Iran.

Who should be able to call [a national emergency]? What are the criteria if it’s not a presidential declaration? Who should be able to declare such an emergency? Should it be that any rule can be avoided or overlooked, even the right to jury trial? Should it last for an open-ended period? Ninety days is a current idea. Should it be renewable? And if so, how? And what do you do if it ends and you’re in the middle of doing something that was undertaken under an emergency provision that no longer applies as of the time you’re getting finished or you go to trial or whatever we’re talking about?

Those are all interesting issues. Between now and next August, probably, they will get worked out. But it seems to me, from hearing about what’s happened around the country, not only in federal courts but in state courts, that the courts have largely been quite creative, been quite flexible. And what’s really happened is that people have learned a lot they didn’t know before. And they’ve learned about different ways of doing things, which may mean that, after
this is behind us, we’re going to need to go look at some of the rules that we do have and ask whether they should be changed just as a general matter. I want to say a few things about that, and then I will stop talking.

That’s a blast from the past. One of the speakers this morning [Charles Lifland] said, regarding depositions, “If we could only have rules. They’re going to have work up what exactly should be the way of handling remote depositions.” And that’s the same kind of thing, Lifland said, that happened with e-discovery. Well, I was there at the beginning in e-discovery. I’m the guy who wrote those rules. And I’m here to tell you that in January 1997, a lot of lawyers told us, “You got to do something about e-discovery.” Well, actually with just discovery of email then. Nobody had thought of social media or Facebook or a lot of other things.

The question we had for them was: “Okay, what?” “Well, we don’t know. Just do something” was the response. It took almost ten years to figure out what to do, so I think there’s a learning curve ahead. And where will that learning curve focus? To my mind, number one, and this was mentioned several times this morning, is remote depositions. What’s the appropriate way to handle those? Should there be a rule that says what that is? Mr. Lifland, I think, said, “Well, it takes so long to negotiate the protocol.” Maybe with experience, we can determine what that should be and put it in a rule. We certainly do not have that experience now.

Second—remote trials. Rule 43A says that maybe sometimes, a witness can testify in open court by remote means, but only really, really rarely. Maybe that should be changed. That’s a major question open for consideration, at least in court trials. In some places in this country, already there have been court trials by Zoom, and people have seemed fairly satisfied with that.

Third, many or all of you have probably attended hearings via Zoom. Where was the judge? There is a rule, Rule 77B, that says, “No hearing may be conducted outside the district in which the judge is assigned.” One hypothetical is: How about a District of Columbia judge who handles a hearing via Zoom from her study in her home in Maryland? I betcha things like that have happened. Do we need to change the rules? Not clear.

After Katrina, Congress did act; 28 U.S.C., §141, says you can have proceedings outside the district under certain circumstances. I don’t think anybody’s done anything formal about that, and maybe nothing needs to be done. The reality presently is something that my students—again, who I’m teaching via Zoom—satisfy their go-to-court requirement that I have for them by Zoom. They’re beginning to learn what the practicing bar has been dealing with, and maybe the rest of us can learn from that once the pandemic pressure is off. What should we be doing differently on a long-term basis? I’m all ears to hear what the others have to say. Thanks for listening.

Jocelyn Larkin:

Rick, I just have a couple questions. The civil rules, I think, are correctly lauded for their flexibility, and I know you’ve played a big role in ensuring that they are very flexible. Given that, where do you come down on having a general emergency rule versus potentially just specific changes to specific rules or between any change and no change?
Richard Marcus:

I guess the first thing I’d say, because I see Bob Giuffra here listening in, is I just work there. These decisions are made by people who are at a higher level than me. I suppose what one can take from experience so far is that there’s no comparison to criminal rules where Congress had to act. There’s no huge need for a civil rule change. The other thing I was saying is whether or not there’s a need to change as an ongoing matter—in the rules I mentioned, in view of an actual change in behavior—is separate to me.

The other question you asked is what we sometimes describe as a negative versus a positive emergency rule. A negative emergency rule says, “You can change anything you want, except the following.” Rule 38 on jury trial, Rule 23 on class action, and some others. Maybe the service rule. You can’t just skip service of process under Rule 4. A positive rule says, “If the judicial conference or somebody says it’s necessary, you can change the following rules,” and if you look at our draft, that actually says, “in the following ways.” Frankly, the pressure point for emergency is not civil cases. It’s criminal cases.

Jocelyn Larkin:

Obviously, the other element of the civil rules process is that it is deliberative, and it is careful, and it is slow. I think many of us feel very strongly that that’s a very good thing. But what does that mean in the context of having to respond as we are? If we can think about protocols for remote depositions and other things, what would the timing be? I think it would be helpful for people to understand what a rule process timing would be and what mechanisms might there be to do things maybe by standing order or something more quickly, given that we are on the ground trying to deal with these issues.

Richard Marcus:

First, I forgot to mention in terms of lickety-split action, that “if there is an emergency rule, it will speed into effect, no sooner than December 1, 2023.” We all hope that this lockdown situation will be behind us then.

The California legislature, I believe, actually has adopted changes to the California civil procedure code to address some things about remote depositions that might be a learning opportunity for the federal rule makers going forward after things settle down. The need for such an arrangement is unclear on that particular point. Rule 30(b)(4) says the court can order—already now, even over a party’s objection—can order such depositions.

We received a number of suggestions that the requirement for an order should be removed, and if you remember the videotape deposition dispute of 25 years ago, and a party can simply pick which way it wants to take the deposition. But that might leave open some questions about, should we provide some guardrails for doing that? I, frankly, don’t know what those guardrails should be, but it would be important to get a pretty clear fix on that. All of this really deliberately takes time, and that’s why the e-discovery rules took almost a decade.
Jocelyn Larkin:

I remember. Bob, can I ask you now to talk to us a little bit about what’s happening on the ground in your practice? And also, what’s going on in New York State?

Robert J. Giuffra, Jr.:

Sure. I think it’s important for everyone to remember that we’re pretty much in the middle of the crisis, the pandemic. The world has survived since March. At least the legal process has worked pretty well based on my sense of it. And those flexible rules have really done well. I practice law in New York City, and we’ve been through crises before—9/11, then we had [Hurricane] Sandy. And those crises have been dealt with in a good way. As far as I can tell from where I’m sitting, this will end, and I don’t think we’re going to go to a world of remote trials, for example, once the pandemic is over, once there’s a vaccine.

As a practicing lawyer, I don’t like the idea of doing oral arguments by Zoom. I can’t tell how the judge is reacting. Really, it’s hard for me to even tell what the opposition is doing. So I don’t really favor that. I think that the status conference that I would fly across the country for, that was a 15-minute or a 20-minute status conference, that may be a thing of the past, and that’s a good thing.

I think the one area where I actually think the pandemic could have a long-lasting effect, and it’s been discussed already by Rick, is on depositions. We’ve started to do remote depositions, and again, it makes the process faster and cheaper. People don’t need to travel. Now, there are issues that get raised, and one of the big ones that we’ve come up with is [that] if I’m defending a deposition, I like to be with my witness and be close to the witness so I can sense how the witness is doing. I can have breaks. It’s one thing to talk to someone over the phone. There’s another thing to have that human interaction.

And we’ve had situations so far where we’ve wanted to maybe be present and defend the deposition. And the way the rule has worked out has been one where everybody’s remote. Now, once there’s no reason why people can’t be in the same location because it’s not an issue of contagion, one issue that will come up is what if the person who’s defending the deposition wants to be in a conference room with the witness, and then the taker is in California or in Texas or some other place? That’s an issue that I think could come up.

Now, I’ve been involved with the law in the course of my life. I was a law clerk at Springport, and then I worked in the Senate, and now I’m involved on the Rules Committee. The Supreme Court is the highest law of the land, but that’s one where decisions and cases, they’re made relatively quickly. Sometimes weeks, sometimes days, an opinion can be changed. The law of the land, it could happen in a constitutional case, and there’s not a process for people to really . . . the outside world really can’t get involved other than through the formal process of briefing and oral argument, and then the justices obviously talk amongst themselves. The Senate is a more open process, in that people can lobby and it’s pretty much the Wild, Wild West.

The rules process, as I’ve learned now in a little under three years, is a very deliberate process that takes time. It doesn’t happen overnight, and I think that’s a good thing. These rules
are really carefully done, and people like Rick have devoted their lives to the rules, and the rules are very flexible. And I would be loath to make significant changes to the rules in light of something that hopefully will end. We are not going to be living in a COVID world for the next five years. All we’ll be doing is looking back at this period and saying, “What were some of the good things that happened that maybe we want to continue?”

And like I said before, I think the conference that you fly across the country, that will probably become a thing of the past. I also think that there’ll be remote depositions, and I think people will work more from home. Do I think there needs to be wholesale changes to the rules? Probably not.

Now, I think it’s also important, when you think about rule changes, to consider local rules versus a national rule. And even in New York, which was the center of the pandemic in April, and the state was really shut down. As the state opened up, first the opening happened upstate and in the suburbs, and now in the city. That makes sense, because given the nature of the pandemic, you obviously deal with things in different ways.

Now, at the state level in New York, our Chief Judge Janet DiFiore. . . . There’s a saying, “Try to take advantage of the crisis to do something good.” She has created a commission to reimagine the future of New York State courts. And she’s appointed a number of lawyers and a lot of judges, including judges on the New York Court of Appeals, which is our highest court. And the goal of that commission is to: “Research, analyze, and make innovative proposals for the justice system of the future. And to consider regulatory and structural innovations, enhance use of technology and online platforms, and to come up with ways to more effectively and efficiently adjudicate cases.” And this is an important issue: “Improve the accessibility and affordability and equality of civil legal services for all New Yorkers.”

I think what could come out of all of this is an enhanced appreciation of technology. Now, we were heading in that direction anyway. And one of the things in New York we’re doing—I’m cochairing a subcommittee on trial practice, and we’re looking at changes that might be made in the rules, for example, Rules of Evidence, to deal with evidence that’s being generated through enhanced use of technology, how you run a trial with greater use of technology. I think the rules, actually, both New York and federally, really are sufficiently flexible to deal with a lot of these issues, such that I don’t think there’s a need for any kind of wholesale change in the rule.

For example, I don’t think we’ll be coming to the point where—well, maybe we will in 200 years when we’re all gone—where we have computers decide small-claims court disputes. That’s theoretically possible. I remember when I was a young lawyer, and we would have to rush to get the brief done at five o’clock and literally get it filed at the courthouse physically, and now everything is done by computer. That’s great. Good for the environment, it’s faster, the process is a more efficient one.

When I try cases now, no one really bothers with all the different rules you learned in law school. And I went to Yale Law School, so they didn’t teach us much law, but a little bit. But how to get evidence admitted. That’s all pretty much done in advance of a trial. Things are much
faster. And I always tell people, when I do a trial now, the person who’s the technician in the courtroom is probably one of the most important people in the whole thing, because if something goes wrong, the whole trial stops. But everything is really done with computers remotely, a lot less paper. And probably we’ll move further and further in that direction.

My bottom line is, I think we’ll all learn from this experience. Just as my law firm, we learned from Sandy, we learned from 9/11. And one of the reasons we were able to function. . . . It’s incredible, but our firm is just as active, if not more so, than before the pandemic because we have fairly sophisticated technology that we put in place after 9/11, after the Sandy storm. And I think what will come out of this will be that it will end. I don’t think there’s a need for wholesale. It’s hard to even think of many changes you’d make in the rules.

And Rick is right. The criminal rules are the ones that people have been most focused on because those are the rules that are harder to change. But I think that it could be things like I said—the court appearance that’s for a very short period of time and things like depositions. That kind of thing makes sense for remote process, but I’m not sure you really need to change the rules to deal with it, and to what extent we need to change the rules until we get a vaccine, that’s probably, depending on who you talk to, three to six months away. The rules process itself is one that takes two years. Rick can write a great rule, but by the time it gets to the Civil Rules Advisory Committee and then gets to the Standing Rules Committee, which only meets twice a year, and then gets to the Supreme Court, I don’t think that’s probably the best way to get a rule put in place.

And my impression from on the ground has been, local courts, whether it’s the Southern District in New York or San Francisco, judges are able to develop bespoke rules to deal with the crisis. And I don’t think there’s a need for a national rule, particularly since the crisis is one that impacts different jurisdictions differently at different moments in time. Bottom line, I think we’ll come out of this with some changes to our way of litigation that will be a positive, but I don’t think we really need to make any wholesale changes.

**Jocelyn Larkin:**

Bob, I agree with you that technology has enhanced the way we litigate in so many ways, particularly since I started. But I think we always need to keep in mind. . . .

**Robert J. Giuffra, Jr.:**

I remember carrying the boxes to court when we were trying a case. And I did that once in Boston in the snow in January, and it was pretty rough.

**Jocelyn Larkin:**

Well, at least you didn’t have to wear high heels.

**Robert J. Giuffra, Jr.:**

Much harder.
**Jocelyn Larkin:**

Yeah. And a skirt. But I do think that, whenever we’re thinking about these issues, it’s important to remember that there’s complex litigation and firms that are capable of dealing with it, but the vast majority of the litigation that’s in both federal court and state court are small cases, a lot of *in pro per* cases, and we continue to deal with the digital divide. For some litigants, people with disabilities, the technology actually is helpful, but for others, it can create a distance between them and the court system, which is theirs. What are your thoughts about how we continue to think about ensuring that whatever changes we make are ones that work for everybody in the system? And then also, avoiding what I think is easy for some of us to deal with but much harder for others to deal with, which is a lot of variation between courts.

**Robert J. Giuffra, Jr.:**

Number one, I think you’re absolutely right. Technology is expensive. Big law firms and government agencies can afford cameras on people’s computers and mainframe computers and all the different things we need. In New York State, one of the things that we’re focused on is we have a commission for equal access for justice that I’ve been on for a number of years, and we’re very concerned about what’s the justice gap. And Helaine Barnett, who used to run the Legal Services Corporation, is the chair of this commission.

My practice is, I recognize, is a pretty rarefied practice involving sometimes multibillion-dollar claims where money is no object, and it’s really about just getting the best possible resolution. But if you look into New York State Court, 95 percent of the cases are, maybe even more, small-claims court cases. People who have disputes over credit, landlord-tenant disputes, family disputes. And they’re important cases to the people who are litigating them.

One of the things that I think the Chief Judge DiFiore wants her commission to do, and as I read the charter, is to see how we can use technology to make the courts work better for people and make it work better for the smaller-dollar cases. The cases involving a landlord-tenant dispute, the case involving a family law issue. And trying to, for example, develop forms where people can go on a computer, which people I think are increasingly. . . . Not just younger people, but everybody is much more facile with technology.

When you think about the Federal Rules of Civil Procedure, those are rules that really set up for big cases, to be blunt. You have jurisdictional limitations and the like. No one is going into federal court litigating over a landlord-tenant dispute or a domestic dispute or a small-dollar case. We often forget that the vast bulk of the lawsuits in America are these small-dollar cases. And I think we’re just scratching the surface in terms of how technology can be used to more efficiently and fairly, and at a lower cost, resolve those cases.

One of the problems we’ve had in New York has been that the judges are almost overwhelmed because you have, for example, domestic dispute cases. We have fairly good legal services there, but there’s obviously not a right to a lawyer in a civil case, so you have a lot of unrepresented
people who are in the court system, and the court system and the rules are really complicated. I think one of the things that could be done is greater rule simplification in certain types of cases, and greater use of technology, including standard forms, checklists, more alternative dispute resolution-type devices that could be done on a computer.

And just the sheer process of someone having to go down to court [is difficult], getting out of work or not being able to take care of your kids; if you’re someone who’s got financial constraints. For example, if you had a dispute against your landlord, maybe you could envision a system whereby . . . you’d have the judge. Maybe you have a lot of it dealt with by computers and you narrow the issues to the real issue, and then you could have the hearing by computer, and no one would have to go to court. You wouldn’t need a lawyer. And maybe you could even have people who are full-time literally sitting in court or the lawyers maybe paid for by the government to assist tenants in those cases. I suspect the landlords might well pay for it.

One of the things we’ve learned in the New York Commission has been the business community actually wants unrepresented people in civil disputes to have lawyers because it becomes almost more expensive to deal with someone who’s unrepresented. I think we can use technology in that regard.

**Jocelyn Larkin:**

We got a comment from the audience, which I think is also important in this conversation, which is that . . . I think there are a lot of really good ideas. But one of the realities, which very much came home to me listening to Judge Kuhl this morning, was how limited the state budgets are. The innovations that I think really could make a difference for so many people have to deal with the reality of the courts’ budgets right now.

She was saying this morning that they literally didn’t have the money to pay for lunch for the jurors so they didn’t have to all go out, down the elevator, in the middle of the trial. In a sense, we are pairing the set of safety and public health concerns with the reality of a recession, which has really tightened state court budgets dramatically.

**Robert J. Giuffra, Jr.:**

In New York State, there’s a huge cut that’s coming to the state court budget, including—there’s a program in New York whereby judges can serve from [age] 70 to I think 76, and they’re going to be cutting out all those judges. And that, obviously, will create even more problems. One could argue that the amount of money we spend on the state courts is a lot, but there’s a tremendous amount of litigation. And I do think that there is, as I said before, a bias in conferences like this. In rule-making processes, people focus more on my kinds of cases. But the big multibillion-dollar cases are not the raison d’être of most courts.

I think what smart people like the people on this Zoom call could do is think about how we can use technology to make the system more efficient. And maybe, again, you can do things.
Maybe in small-dollar cases, you can do trials remotely, and maybe it’s a better way to do it. It just depends. One size does not fit all.

**Jocelyn Larkin:**

Yeah. Thank you, Bob. Tara, can I turn it over to you to give us your perspective on what’s going on in the courts?

**Tara Sutton:**

Sure. Good afternoon from Minneapolis. Or actually, good afternoon from my home, just outside of Minneapolis. Like all of us, we’re working from home these days. As you probably picked up from my bio, I primarily represent plaintiffs and personal injury and products liability actions, with a focus on mass torts and multidistrict litigation.

I think I’m here to give you some perspective from the plaintiff side as to how the rules are impacting the management of civil cases during this time of pandemic. I’m not on any rules committee, but to give my thoughts about what changes might be beneficial to consider if, God forbid, we’re ever in this situation again.

But I thought, before I got into the rules, it might be helpful to provide some background on what I’ve been seeing happening in the multidistrict litigation front over the past six to seven months since COVID hit. As people know, MDLs are some of the most sprawling and complex cases on the federal docket, and they’re generally handled by some of the most sophisticated and experienced judges we have.

MDLs also have a plethora of counsel. There’re tons of lawyers on each side. And to your point, Jocelyn, sometimes on the plaintiff side, the law firms can be smaller in size and not have all the technological advantages that maybe my firm has. They’re very contentious cases, and they’re hard-fought. They really need the rules of civil procedure and careful case management to keep them from going off the rails.

Interestingly, since COVID ramped up in the spring of 2020, I have not observed really widespread extension of scheduling orders or court deadlines. Except there was a case, a big MDL where a bellwether trial was scheduled in May. That was the Zofran MDL in the district of Massachusetts, and Judge [F. Dennis] Saylor had to reschedule that trial. Actually, he’s postponed it and hasn’t found a date. And interestingly, one of the problems that the court is facing is, in order to ensure safety, there’s no room in that courthouse that’s big enough to conduct that trial. They’re looking at alternative venues outside the courthouse, which implicates potential rules issues.

But really, from what I’ve seen, the courts have been pretty quick to shift to video conferences for hearings. The parties have been able to work out depositions that sometimes they’re in person, but it seems like more often than not, they’re being held remotely by video. While remote hearings are the norm for now, there are instances where courts seem to be requiring in-person hearings, even witnesses in person.
I was involved in an opioid case, which was brought by the New York Attorney General in Suffolk County. And then, the justice there ordered that the Frye hearings, which are the hearings concerning admissibility of expert testimony, be conducted in person. And those hearings happened in August and September. He set aside nine days. He only had one witness per day. He placed limits on the number of attorneys who could be present in person. But he did allow counsel an opportunity to participate by video. He did the same thing for the public and the press. He allowed physical exhibits to be exchanged. There are hearings with witnesses that are happening, and that’s the type of hearing where you want to see in person. I agree with Bob.

And then, if you look at the opioid MDL before Judge [Dan] Polster in Ohio, which people have characterized as probably the most complicated piece of civil litigation ever, he had a bellwether trial set for November of this year, and he is going to proceed with it. He has said he will seek a jury in November in Cleveland, Ohio. We haven’t seen the detailed plans for what that’s going to look like.

And I have a PowerPoint. If you go put that up and go to slide two, I have a feeling that it’s probably going to look a lot like this. This is what the courthouse in Minnesota looks like (Figure 7). They’re going to start trials shortly in Minnesota, and they put up plexiglass. Interestingly, in one of the cases that’s been remanded in the opioid litigation to West Virginia, both sides have agreed that the case, which focuses on a nuisance count, is going to be a bench trial, so obviating the need for all the procedures we’re going to have to do to deal with juries and jurors’ safety.

**Figure 7. [Plexiglass in a Minnesota Courthouse]**
If we can move to slide three, [I] just want to build on what others have said before me to the extent there are going to be changes in the federal rules, and it sounds like that’s still up in the air in their differing views on that (Figure 8). I think there are a number of principles that should guide the advisory committees as they consider changes to the rules for times of emergency. And I totally agree that there’s a tremendous amount of flexibility already in the rules, and we’ve seen that at work, in how the courts have been operating and continuing to prosecute cases over the past seven months.

**Figure 8. [Recommended Principles]**

**General Principles re: Changes to FRCP**

- Clarifications to:
  - Eliminate requirement of in-person contact where it may be unnecessary
  - Encourage use of technology
  - Decrease need for travel
  - Provide for comfortable, safe jury service


I really do agree with Rick and Bob that there should be caution exercised with respect to any changes because the flexibility in the rules really allow the courts to conform the procedures in their case and the management of their cases to what’s really going on the ground in the communities where these courts are located. As we know, there’s vast differences across the country, and there’s also vast differences in executive orders that have been entered by governors that courts have to contend with. It’s been an ongoing issue that there are no national standards in this crisis.

But if there are going to be clarifications, I do think there are some that would be helpful. I think one would be clarifying or making changes that eliminated requirements of in-person contact where it’s unnecessary or unsafe in times of an emergency. I think we all are seeing the benefits of technology, so changes that encourage the use of technology, changes that would decrease the need for travel. I think also, as the rules are being looked at, how can we provide for comfortable and safe jury service?
At the same time, too, I was thinking the same thing that Rick had said earlier to the extent we are going to make changes or an emergency rule. I think we need to consider how maybe some of these changes. . . . Look at how COVID has changed the practice of law. Have some of those changes actually made it better, not just safer? And are some of the processes the courts are implementing making litigation less costly, more efficient, and are they driving cases towards resolution? If they are, then I think we should be considering maybe making some of these changes, if they’re to be made, permanent.

And just to go quickly through some of the particular rules that I’ve been thinking about and I think the committee has gotten suggestions about. Rule 4, this doesn’t seem very controversial to me, but a simple amendment to permit service of process and a summons and complaint by electronic mail (Figure 9). This type of change would protect process servers in the U.S. Marshals Service. It seems like it could be something that would streamline litigation, both in emergencies and going forward.

**Figure 9. [Service of Process]**

- **Service of Process**
  - Rule 4: permit electronic mail or other means that are “reliable” for service of process

Next slide. Here’s the thing that I worry about the most is whether this pandemic or a future emergency is going to delay discovery or the resolution of a case (Figure 10). I would think of the maxim that “justice delayed is justice denied.” In my types of cases, delay disproportionately can impact the plaintiff. Documents can go missing during delay, memories can fade, employees leave. In the meantime, clients in mass tort cases are typically sick, and if there’s delay, they can grow sicker, and sometimes they’ll pass away before the case is done.
My experience to date is I have had some cases where the defendants are saying that they can’t review documents or produce documents, and depositions can’t occur because of COVID. The facts don’t bear that out. We all know that. Documents are stored electronically; they can be reviewed remotely. Depositions can be conducted remotely.

But anyway, in terms of the rules, things that might help avoid delays from pandemics, I think the rules should take into consideration situations where it’s going to be a safety issue to be in person, either for testimony or inspecting documents. I hope that the committee is considering whether the in-person requirements of rules, for example, 28, 30, 34, 35, and 45, have to be updated.

I think another thing that would be really helpful if there are going to [be] changes is that the committee comments really encourage, in situations like this, that counsel engage and meet and confer in conferences. I think similar language about the value of meeting and conferring is making into the advisory comments for 30(b)(6). I really think a civil dialogue is very important, especially when some of our clients, their offices are closed, courts are closed. Any encouragement of meeting and conferring to stay on deadline I think is helpful.

I’m really worried about some blanket change to extend deadlines that are set forth, or timelines that are set forth, and then it’s civil rules. I don’t think that’s really necessary. Most of the work that lawyers need to do to meet deadlines can be done remotely. I think Rule 16 is really a friend in this whole situation. It’s a wonderful tool for the courts to manage discovery during emergencies. I think it’s the way courts can make sure Rule 1 is satisfied. One possibility

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**Avoiding Delays in Discovery**

- Update in-person requirements of Rules 28, 30, 34, 35 and 45 for example
- No automatic extensions of deadlines
- Rule 16 – mandate more frequent discovery reports to ensure discovery remains on track and Rule 1 is not frustrated
  - Urging courts to permit discovery disputes to occur telephonically or by video conferencing
would be whether or not a Rule 16 conference should occur if there’s a declaration of an
emergency to discuss court-scheduling orders or whether we need to have more Rule 16
conferences. That’s something that parties can make a request as well.

I have seen that video conferences with the courts, they’re not the best, they’re not ideal, but
they work. I think they’re really important for discovery conference and discovery disputes. One
thing that I think we’ve all seen is that the pandemic really taxes all aspects of our lives. It seems
like everything is more difficult. I think any attempt to encourage courts to permit more informal
processes for dealing with discovery disputes would be great, rather than formal motion practice.

I have a case in Minnesota state court involving. . . . It’s a big products liability case. And
the judge has an order where she just allows us to schedule a telephone conference and letters,
and then she mediates the dispute and we get it all resolved very quickly. And I can tell you,
that process in COVID has just made everyone’s lives, the courts’ lives, the parties’ lives,
tremendously easier.

The next slide, remote depositions (Figure 11). I think I agree with Bob. They’re probably
not going away. I think attorneys have been doing them for years, but there’s a lot of us who are
just learning how to do them effectively. I think there has been talk about whether or not Rule
30(b)(4) needs to be changed to provide a default that depositions can be held remotely rather
than getting into motion practice.

Figure 11. [Remote Depositions]

Remote Depositions

- Rule 30(b)(4) – make specific reference to video conference and that
default during an emergency is oral depositions should be by telephone or
video.
- Rules 30(b)(5)(A) & 28 - requires that a deposition be taken “before” an
appointed person who administers an oath and takes testimony. Clarify that
“before” doesn’t require same physical location as witness.
- Witness Coaching and Rule 30(c)(1)
  - Depositions should proceed as they would at trial under Rules of
  Evidence
  - Witness sign a declaration at conclusion of deposition
  - Court Reporter confirm that chat function disabled
There’re some issues under 30(b)(5) and 28 about court reporters because a court reporter is not physically located where the witness is. I think that is a rule that actually does need to be looked at, because under Rule 32, it provides that you can object to an oath if it’s not properly administered. If the court reporter’s not in the room with the witness, you may think it’s a Rule 32 objection. I think that one does take some serious consideration.

Witness coaching. I do like to be in the room with my witness to help defend them, and vice versa when I’m taking the deposition. But one of the concerns I think all of us have when we’re taking depositions is this issue of witness coaching. This isn’t so much asking for a rule change, but I just think there are provisions in the rules that could help on this front. Rule 30, I would remind people to keep in mind, requires that depositions proceed as they would at trial. And at trial, of course, a lawyer can’t sit beside his or her witness, and there is case law out there that if a witness is texted during a deposition, that violates Rule 30, and that text isn’t privileged. That just shows the flexibility of the rules.

I think another potential solution for the witness coaching that doesn’t require any rules changes is [that] recently, in the Western District of Texas, a court dealt with this issue by requiring the court reporter to disable chat features on video conferences. Also, the judge entered an order where a witness has to sign a declaration at the end of the deposition where they say under oath that they haven’t been coached. There are ways to deal with this problem that does exist with remote depositions. I don’t think it would require rule changes, but just more practice instruction and guidance from the bench and the bar.

**Jocelyn Larkin:**

Okay. Tara, I have a question. I agree with you. I don’t think that we want to write rules just to deal with the people who don’t want to follow them. But I wonder whether technology also might provide a solution because if there was a camera that was essentially trained on a witness and his or her lawyer, you could just potentially have a record to see whether or not they’re passing notes, chatting, doing the foot-under-the-table, all that.

**Tara Sutton:**

When it’s remote depositions, it’s probably a little trickier than just a camera, because you can have. . . . Right now, I have my phone under the desk, and you can’t see it, and I could be texting a witness. I thought that the solution of the declaration that came out of this Western District Texas case from April was an interesting thought.

Another thing, too, is a lawyer could handle it by, at the close of the deposition, asking a series of questions to the witness, asking whether or not they received any information during the course of their deposition from their attorney or some other person who was assisting them in their testimony. Perhaps figuring it out that way or getting your record. Of course, you have to believe that they take that oath seriously and they’re not lying. But it is certainly an issue that I think all of us worry about, particularly in some of the high-stakes cases we’re involved in.
Then just the last topic really is about getting back to work, getting back to trials, and how do we protect juries (Figure 12). We’ve seen that courts are starting to restart trials, and there are a lot of guidance documents that are floating around. Judicial working groups have put documents together, ABOTA [American Board of Trial Advocates] has put documents together. I really think that all lawyers, plaintiff lawyers, defense lawyers, have a lot of concerns about whether a completely virtual trial can provide a fair outcome.

Figure 12. [Protecting Juries & Conducting Trials]

**Getting Back to Work: Protecting Juries & Conducting Trials**

- Provide for remote appearances
  - Rule 43(a): testimony be taken in open court except upon “good cause in compelling circumstances and with appropriate safeguards”
  - Rule 45(c)(1): subpoena power to command a person’s attendance at trial, hearing or deposition should permit witness to appear by video conference for “good cause” shown during an emergency
  - Rule 77(b): "open court" & “regular court room”
- Provision of Public Access to the Courts
  - First Amendment rights implicated
  - Provide remote public access to proceedings

I think they tried one in California. There were security and technical problems. It’s really difficult for counsel to read body language and other important credibility markers if it’s remote. Juries lose the group dynamic, all the bonding and trust that comes from deliberating as a group. Not to mention you’re going to be potentially excluding jurors from a panel because they have poor internet. They’re not going to be able to participate as jurors.

That said, are there rules that could be considered for tweaking to allow more flexibility in trials? And I think, in particular, Rule 43, it says testimony should be in open court, except upon good cause and compelling circumstances. I think that rule probably is written in a way that would cover a COVID situation. Could it be clearer or more explicit? Perhaps.

I think Rule 45, which is about the subpoena power of a court to command a witness’s attendance—I think that one is one that we should consider, whether or not it should be amended to permit witnesses to appear by video if good cause is shown, and appropriate circumstances. I’m not sure if that one’s on the plate of the committee, but I think it’s one that could be looked at.
And then I think about Rule 77(b), which talks about the trials are in open court and in a regular courtroom. Well, open court. If your courthouse is shut down, which many of our courthouses were shut down, it’s not an open court. It’s not a court that the public or the press can get into, which they have a First Amendment right to.

And then, like the situation in Zofran, it has to be a regular courtroom. What does that mean? Does that need some more explanation in times of emergency, or does it not? The situation in Zofran, where the judge is going to have to pull that file outside of the courthouse. I don’t know if it’s going to be a hotel or where it’s going to be. Is that going to be an issue? Is that too granular? But anyway, those are just some of my thoughts. If rule changes are considered, I think some of these are potentially fair game and would help facilitate more efficient justice in this time of lockdown.

**Jocelyn Larkin:**

Tara, I have two questions for you, and I’d love Bob’s thoughts about these too. This morning, we heard from one of the state court judges about the fact that, because she is not doing trials, she has a whole lot more time and is much more available to counsel to deal with discovery disputes, status issues, and feels like she can be a much more active case manager because she all of a sudden has much more free time on her hands.

My question is, are you observing that as well? In other words, the judges literally have more time on their hands to get you decisions more quickly, to respond to problems as they’re arising. And then, Tara, you were mentioning the need for additional collegiality, and I’m curious if your experience has been that COVID has brought out the best or the worst or some of each in your opposing counsel.

**Tara Sutton:**

All right. My experience has been, I do think that judges are more accessible. I can’t ever get away from Zoom. I have more meetings now than I’ve ever had. And for some reason, because we’re not traveling and we’re not in our cars, we’re not commuting, we have more time. And I think that applies to courts as well.

My experience has been, it is easier to get on a court’s calendar, and that’s why I think embracing more informality. . . . Zoom itself is a little more informal, and you get the dog in the background. I think that could translate into how we resolve disputes as well and save our clients money as well. If we do things more informally, we don’t have travel, we could have lesser time put into briefs. It could be more in the way of letters, which I have thought that judges seem to be more receptive to now. And things get decided more quickly.

In terms of civility, that just depends on the case. I’m seeing it both ways. I think at first, it was maybe a little more generous. People were still in shock of what was happening. But I think as time has worn on, we’re getting more entrenched in our old ways.
**Jocelyn Larkin:**
Bob, what about you?

**Robert J. Giuffra, Jr.:**

I think courts have really stepped it up in terms of getting decisions. I was always worried about whether the courts would actually shut down. I’ve been surprised that it’s moved at the normal pace in terms of the issuance of decisions. There are obviously less hearings. I really do believe that it’s not in the interest of the justice system to have everything remote, for example.

I’ve had situations recently where we were talking on just a telephone, for example, and you’re talking to a judge. You really can’t read the situation very well at all. And I’ve sensed that judges are a little frustrated by not being able to have people in the courtroom, particularly if it’s something that is important. I haven’t really seen any difference in terms of speed of decision or anything like that. Maybe even a little slower, to be blunt.

In terms of civility, there’s been . . . Particularly the first three or four months of this, we really dialed back the depositions because we thought, “Oh, why do we want to do depositions remotely?” That part of it has slowed down. Now, it’s starting to pick up, and we’re going to try to do things remotely.

If anything, there’s been less interaction with the other side. When you see people face-to-face, whether it’s in a courtroom or in a deposition room, there’s more interaction. The people who behave civilly you’re with, and the people who are always uncivil, you’re just dealing with them by email or by letter.

Again, I’ll go back to what I said before. I think that it’s a mistake to focus too much on the COVID situation, but we need to focus on what things will look when we get on the other side of the tunnel. And I do think there’ll be more remote depositions. I will say that if someone wants to take a deposition and they’re located in California and my witness is in New York, and I want to be in a conference room with my witness in New York, and maybe a court reporter is with my witness in New York, I should have a right to be with that person. If the other side is concerned about gamesmanship, I think Tara’s suggestion of questions is perfectly fair game.

**Jocelyn Larkin:**

Andrew, you obviously spend a lot of time thinking about the civil rules. Could you share with us your thinking about all of this?

**Andrew Bradt:**

Sure. Thank you. I think it’s appropriate that our panel be the one that’s in the middle of the day, since I think, inevitably, we’re covering matters to some degree that were discussed this morning. And we’re also talking about the extent to which changes that are brought into effect, whether formally in the rules or even culturally as a matter of the way that we do litigation, will
survive into the post-pandemic world. And perhaps one of the perils of being the last person to speak on this panel is that I’ll agree with a lot of what has been said already, but I’ll do my best not to be too repetitive.

I’m in a slightly different position from my fellow panelists, because unlike Rick, I’m not involved in the rule-making process, and unlike Tara and Bob, I’m not a full-time litigator. But what I am in the middle of is teaching first-year civil procedure to 120 one Ls on Zoom, which I think does give me some insight into the challenges of the virtual world that we find ourselves in.

One of the things I’ve been trying to do as we go through the first-year procedure course, so some of the classics of first-year procedure, is think about how COVID has forced us to change the way we think about some of those core concepts. I told my fellow panelists when we signed on before we got started today, I’m currently teaching the *Erie* doctrine, and perhaps thankfully, COVID has not caused us to have to rethink that. But who knows? The state procedural changes may vary from what ultimately happens in the federal system.

I think, in my short remarks, I’m going to make two points, and some of it will be in reaction to what other folks on the panel have said. But the first one is that I think COVID and a lot of the work-arounds that we are coming up with in procedure, and what’s been proposed over the course of the last hour or so, force us not just to rethink the minutiae of the rules but some of our core concepts of the adversary system and the ideal day in court. And if those changes become permanent, there’ll be significant ripple effects on the norms of our litigation system.

The second thing I want to say, I think drawing on some of Tara’s comments, is to draw an analogy to MDL. And how multidistrict litigation, which was also a response to a perceived crisis, albeit a crisis very different and far less severe and tragic than the one that we’re currently enduring, is one that I think does nevertheless have some parallels to the way that we’re handling things now.

First, with respect to COVID and its effect on procedure generally and potentially going forward, I agree with the view that, I think in Professor Marcus’s words, that the civil rules have borne up remarkably well during the pandemic. I think the credit for this goes, perhaps, to the Rules Committee and their predecessors, perhaps all the way back to the 1930s, in the sense that the rules were built to have a kind of open texture to them and a kind of flexibility to them that would respond to various circumstances.

And indeed, the transsubstantive nature of the rules, to some degree, gives them the kind of DNA that makes them sufficient to cope with unusual circumstances. And also gives discretion and power to judges and lawyers, indeed the new hortatory language in Rule 1 that judges, lawyers, and parties are supposed to work together to achieve a just, speedy, and inexpensive litigation. I think it’s something that’s built into the rules.

But I do think that what the crisis is doing is making us more comfortable with doing things ever more virtually. We’ve heard people talk about status conferences, motion hearings. The Judicial Panel on Multidistrict Litigation did their hearing remotely last Thursday. But also, things like depositions, settlement negotiations, mediations, and perhaps even jury trial. I think
one of the things that we’ve learned is that this flexibility does obviate the need for a knee-jerk emergency Rule 87 that Rick got us started off. But that doesn’t mean that without such rule changes it’s going to change the way we think of the real-life interactions of litigation.

Within this world of virtual interactions, one of the things that I’ve picked up from teaching my students. . . . And indeed, I’ve got this group of 120 students at Berkeley who are being acculturated to life as a lawyer through virtual remote interaction. That is, they’re not coming into the profession in a face-to-face world. And oddly, I think it was borne out by the law schools. Many of us thought that we would have smaller one L classes this fall because students would prefer not to take the first year of law school virtually, perhaps in part because their other options were few but also because they’re just comfortable with virtual interaction, they’ve come in droves to law school this fall. They’re entering the profession in a world that’s very different from what all of us have experienced.

When I’ve taught a lot of the stuff that’s the bread and butter of the first-year course, I’ve tried to think about, how has it changed? What is reasonably calculated to provide actual notice under Mullane in a world that is primarily virtual? Is there anything left to inconvenience-based rationales for limiting personal jurisdiction, for instance? What do we need to do in virtual depositions to ensure that they are able to present the ability to interact with one another, not just clients but also opposing counsel, when we’re doing it in this sort of setting? And maybe even more generally, what does it mean to a system that purports to care so much about a day in court, if your day in court is on Zoom? Does that satisfy the dignitary purposes of many of our procedural rules?

I think the conversation that was going on between Jocelyn and Tara and Bob and folks in the audience is really a useful one. To what degree does technology level the playing field between parties of different resources? Will COVID create an economy of scale of virtual interaction in such a way that it reduces the imbalances that parties may have in terms of resources? Or could it exacerbate those problems? And does that change depending on whether we’re talking about aggregate mega-litigation or the litigation that we see often result, actually, in default at the state court level, particularly in contract actions?

And perhaps separately, and maybe this is something that’s a little bit separate from the rule-change piece of this—perhaps I’m talking mostly to the academics in the room—but some of us are in this business because we’re introverts. But none of us are so introverted that we really want a world that’s devoid of human interaction entirely, even if that human interaction arises in the context of a dispute. I wonder what it means generally for the collegiality of the bar that we’re not having the extracurricular interactions in the hallways and the hotels and that sort of thing, that we’re not having in a world where we sign on and off of Zoom ten times seriatim over the course of the day.

Those are all things that are in the background here, but I think that these kinds of rule changes that facilitate additional virtual interaction are something that are inevitable in the post-COVID world. That doesn’t necessarily mean that we need to have a lot of rule changes, but
there’s something that I perceive will be considered very comfortable to our up-and-coming generation of lawyers, all of whom will have experienced a lot of their legal education in this format.

All right. That also brings me to my second point. And that’s this question about how notions of a crisis can lead to permanent changes that persist after the crisis abates and spread beyond the confines of what the original crisis actually was. And picking up on Tara’s points, and some of Bob’s points about his particular practice, I thought I’d talk a little about aggregate litigation and multidistrict litigation in particular.

MDL, and to a much lesser degree, although somewhat, the 1966 amendments to the class action rules were born out of a crisis. That crisis is not, in myriad ways, at all like the one we’re currently dealing with, but it was, nevertheless, a crisis in the courts. And that was the mass of litigation involving price-fixing throughout the electrical equipment industry. It was in response to that unprecedented litigation that Chief Justice [Earl] Warren created an ad hoc committee to deal with the crisis, the Coordinating Committee on Multiple Litigation.

That committee was not chosen by accident. It was composed entirely of judges who were enthusiastic about novel ideas about case management, or then somewhat novel ideas about case management, at least among the federal bench. And that litigation spawned, without any changes to the Federal Rules of Civil Procedure, many of the innovations that we now considered de rigueur in aggregate litigation. Stuff like coordinated discovery, steering committees of counsel on both sides of the litigation, tracking of cases, judicial involvement in settlement negotiations, case management orders and regular status conferences and supervision, and more.

The crisis also begat, as our current conversation does, a somewhat growing consensus that the electrical equipment [antitrust] mess would not be a one-off. I think one of the things underlying the provision of the CARES Act that directs the judicial conference to think about these things is that perhaps these kinds of crises are not going to be one-offs. We may have crises related to natural disasters. We may have crises that aren’t related to future pandemics but are nevertheless reasons why the court system’s general way of doing business will be challenged.

The view in the sixties was that, like today, this may be only the tip of the iceberg. Now, the concern in the sixties very much was that we were going to get a litigation explosion. And the terminology “litigation explosion” was used by those at the time who really were demanding that the federal courts get with the program and develop machinery to handle the next wave of litigation that was going to inevitably come. That we were going to have an interconnected economy, we were going to have many more new causes of action created by the Congress and created by changes that were happening in the 1960s, and that law was going to facilitate those things. The litigation explosion, as a crisis in the sixties, was a call to action to figure out ways to efficiently handle litigation, and not, as it’s often used today, as a call to make that litigation go away in the name of not overloading the courts.

But anyway, what we got out of this crisis was not only the MDL statute, which came in 1968, but also a lot of other reforms that are less formal. We get the Manual for Complex and
Multidistrict Litigation, whose first edition comes out at the end of the 1960s and was written by all of the same folks who were involved in electrical equipment [antitrust litigation]. And the Manual for Complex Litigation may be more of a useful model of thinking about the way COVID is going to affect future litigation than changes in the civil rules because it’s the manual itself, and practices by judges borne out of their experiences as litigation proceeds, that have changed the way that litigation is practiced.

And indeed, the Manual for Complex Litigation, in the sense that it changed the way that we think about big cases, that’s very much filtered down to the way we do small cases. That is to say, the approach to case management, engendered by thinking about the so-called big case in the forties, that became complex litigation in the sixties is really the way that we think about regular old litigation in 2020. When Bob talks about bespoke rules and local rules and Tara invokes Rule 16, those are all ways in which we might start to see a filtering from COVID into the way that we think about litigation more generally.

COVID, of course, is a crisis on a wholly different order than antitrust litigation, but some of the dynamics are the same. In part, in relation to the way that courts are innovating and the way the federal rules and the multidistrict litigation statute facilitate innovation, we’re seeing replayed now alongside what I think of as a broader cultural rethinking of the way that we’re practicing law and practicing litigation that we’re seeing starting for our very newest lawyers already in law school.

I think if there’s one thing that this discussion, at least on this panel, has borne out is that, while we may not see very much in the nature of rethinking the federal rules, not only is that consistent with our federal rules system on the civil side more generally, it’s also consistent with the way that litigation has simply evolved over the course of the last 82 years since the federal rules came into being in the first place. I will stop there and thank you for allowing me to be a part of this.

**Jocelyn Larkin:**

Andrew, thank you so much. I am not an MDL lawyer, but I have heard about some of the things that have always seemed just remarkable. I’m wondering whether we will see the end of these things. What I understand is, in circumstances where they’re trying to decide whether or where a case should go, there can be literally hundreds of lawyers who fly to one courtroom, each of whom is given a minute or less to make their pitch about where a case should go. And then once a case is assigned, you have that same process when people are competing to be on a steering committee where there are literally hundreds of lawyers flying in to each speak for less than a minute or a minute.

**Robert J. Giuffra, Jr.:**

It happened at Volkswagen where we had, I think, 200 plaintiffs’ lawyers make presentations to Judge Breyer. It was literally everyone from David Boies to John Edwards, all looking to get a piece of the case. Quite amazing.
**Jocelyn Larkin:**
Yes. Will that continue?

**Andrew Bradt:**
I don’t know. My guess, I think along the lines of many here, is that probably not, perhaps because it’s just so expensive to do that. And particularly, you think about the Judicial Panel on Multidistrict Litigation, oral argument is typically limited to one minute. I called into the JPML [Judicial Panel on Multidistrict Litigation] hearing last Thursday morning, and it was remarkable, certainly, how that went without being in the room. And I was also there, thanks to my local proximity, at the Volkswagen beauty contest, where there seemed to be an endless line of lawyers coming in to try to take their couple of minutes to convince Judge Breyer that they should be at the apex of these cases.

I think maybe these things could go away, and maybe it’s a good thing. Maybe they’ll go away simply as a matter of the fact that it’s just not worth the candle in a world where we could do it on Zoom. But I also think there are costs to that. I’ve heard anecdotally that these meetings of the JPML, for instance, are opportunities for the bar to gather and do a lot of extracurricular work when they’re in person with one another. That stretches far beyond and has greater utility than the one-minute oral argument that you get before the panel, which may or may not turn out to be dispositive of whether they decide to create an MDL or to whom they choose to transfer the cases.

There is a cost there to losing the extracurricular interactions, negotiations, even the collegiality of getting together and being together in one room. Maybe for law faculties, that’s an unmitigated good, but for lawyers, I think it’s got costs and benefits.

**Richard Marcus:**
Can I offer a current events comparison in the Zantac case?

**Jocelyn Larkin:**
Yes.

**Richard Marcus:**
Which is pending before Judge Robin Rosenberg in the Southern District of Florida, and she’s also a member of the MDL subcommittee, or the advisory committee. I don’t know what to say about the camaraderie that Andrew mentions, but she had 63 applicants for leadership positions in that litigation. And after considerable effort, but interpersonal actions via Zoom, I believe, with all of them, seems to have been quite satisfied with the review of those candidates. And coupled it with something we’re looking at now called a census, getting an initial feel for what the cases look like, including those on what’s called a registry. That was all handled online. Maybe things are different, but it’s at least possible that things are working better.
**Jocelyn Larkin:**

Tara, are you going to miss the schmooze-athon?

**Tara Sutton:**

The beauty contest at the beginning of the case, I agree, it’s extremely expensive for everybody and oftentimes can be just a circus sideshow, a waste of time. I’ve even seen it get to the point, not only do you bring everybody in, and they do their little pitch. I know of one MDL judge who even hired a special master to help her go through the candidates on top of it, which just seems like yet another unnecessary layer with something that could be simply done on papers.

If that goes our way, that’s not a bad thing. But I do think that, in terms of hearings after leadership is picked, because the leadership typically is all around the country, it’s a good chance to be collegial and to brainstorm and be creative about how to move the case. And sometimes, there are cocktail parties with defense counsel and even the judges there. You miss out on building those trust relationships that come from that.

**Jocelyn Larkin:**

Just to bring it back, taking us out of the rarefied era of MDLs. We had a question from the audience about how self-represented litigants can weigh in in the design and development of the emergency rules to the extent there are any. Rick, did you want to address that?

**Richard Marcus:**

In the first place, not exactly on that point, but if you go to the www.uscourts.gov website and look for rules comments or suggestions, you will see there’s, I would say by now ten, urging that, in light of the emergency, the permission criteria for *pro se* litigants to use CM/ECF [Case Management/Electronic Case Files] online filing be changed. More generally, I think Tara mentioned the Rule 30(b)(6) change that pretty certainly is going into effect two months from now.

**Robert J. Giuffra, Jr.:**

A pretty minor change when you think about it.

**Richard Marcus:**

I agree. That leads directly to where I’m going, which is with the discovery changes in 2000, with the class action changes in 2003, with the expert discovery changes in 2010, we would get about 300 comments. You know how many comments we got on . . . maybe, Bob, you remember how many comments we got on the Rule 30(b)(6) change. 1,782. Yes, we do hear from you.
Robert J. Giuffra, Jr.:
For a very minor change.

Richard Marcus:
Yes.

Robert J. Giuffra, Jr.:
I think the question that was just asked is an excellent one. And I do think there, again, is a bias in favor of big litigation, expensive litigation, MDL litigation, which makes sense. The federal rules are certainly not designed to deal with self-represented people. You need to be pretty skillful to even understand the federal rules that operate under them.

There certainly are groups, probably the Legal Aid Society and groups like that, that probably need to lobby. And most of the cases that we’re talking about are not in federal court. And make sure that the technology is used to make the legal system more efficient and friendly for the average person because it’s not right now.

Jocelyn Larkin:
Okay, we’ve come to the end of our time. Does anyone want to make any last comments? Any last questions?
Okay. Then we will conclude. Thank you so much to the panel.
Panel Four: Implications for Civil Litigation and the Courts in a Post-Pandemic World

Panelist Biographies

Nicholas M. Pace, Senior Social Scientist, RAND Corporation (Moderator)

Mr. Pace (J.D.) is a senior social scientist at the RAND Corporation. He has contributed his expertise in justice-system-organization-related research methodologies to numerous projects involving the law, the courts, and judicial decisionmaking, often involving large-scale, groundbreaking qualitative and quantitative data collections. He recently led studies that have included an examination of the process by which petitions for presidential pardons are evaluated by the Department of Justice, the setting of maximum caseload limits for publicly funded defense counsel in state courts, an analysis of attorney time expenditures for federal public defenders, an examination of issues related to the use of alternative compensation systems following a catastrophe, and a review of compensation and liability issues related to COVID-19 vaccination side effects.

Other work has included exploring ways to reduce costs associated with pretrial discovery of digital information, helping to conduct a national survey of organizations providing services to victims of crime, describing the dynamics of class action litigation, exploring transparency issues related to class action settlements, examining the impact of statutory reforms on costs and outcomes in medical malpractice cases, and leading a comprehensive study of the workers’ compensation courts in California. He has also helped to accomplish an in-depth evaluation of the Civil Justice Reform Act of 1990 and its effects on judicial case management, cost, and delay in federal district courts; analyzed jury verdict outcomes; and helped develop national standards related to the electronic filing of pleadings and other legal documents in courts of law. Currently he is leading work related to setting caseload limits for public defenders in additional state courts, a national survey of corporate counsel regarding the use of business-to-business arbitration agreements, and a major survey of adult Americans to better understand how the civil justice system is utilized in the immediate aftermath of injuries and illnesses.

Paula L. Hannaford-Agor, Director, Center for Jury Studies, National Center for State Courts

Ms. Hannaford-Agor is a staff attorney and principal court research consultant with the Research Division of the NCSC [National Center for State Courts], having joined the National Center in May 1993. Her areas of expertise include civil litigation including civil case-flow management and complex litigation, access to justice, jury system management and trial
procedure, management of complex litigation, legal and judicial ethics and discipline, state-federal jurisdiction, and probate and guardianship procedure. She directs the NCSC Civil Justice Initiative and is the author of numerous evaluations of the impact of civil justice reform efforts. Ms. Hannaford-Agor received her law degree from William & Mary Law School and her master’s degree in public policy from the Thomas Jefferson Program in Public Policy of the College of William and Mary.

**Stephen J. Herman, Partner, Herman & Katz, New Orleans**

Mr. Herman is a Partner with Herman Herman & Katz and practices in New Orleans, Louisiana. The author of *America and the Law: Challenges for the 21st Century*, Mr. Herman teaches an advanced torts seminar on class actions at Loyola Law School and an advanced civil procedure course in complex litigation at Tulane University. He is the current president of the Pound Civil Justice Institute, a past president of the Louisiana Association for Justice, and a fellow of both the International Academy of Trial Lawyers and the Litigation Counsel of America. Mr. Herman served for six years as a lawyer chair for one of the Louisiana Disciplinary Board Hearing Committees and currently serves on the LSBA’s [Louisiana State Bar Association’s] standing Rules of Professional Conduct Committee. For the past ten years, he has served as co-liaison and colead class counsel for plaintiffs in the Deepwater Horizon Oil Spill litigation.

**Chief Justice Bridget Mary McCormack, Supreme Court of Michigan**

Chief Justice McCormack joined the Michigan Supreme Court in January 2013 and became the chief justice in January 2019. An NYU Law graduate, she started her legal career in New York City. In 1996 she joined the Yale Law School faculty. She then joined the University of Michigan Law School faculty in 1998 where she taught criminal law, legal ethics, and various clinics. She was named Associate Dean for Clinical Affairs in 2002.

Chief Justice McCormack was elected to the American Law Institute in 2013. The U.S. Department of Justice and the U.S. Department of Commerce’s National Institute of Standards and Technology appointed her to the National Commission on Forensic Science in 2014. She serves as an editor on the ABA’s preeminent journal, *Litigation*. In 2019, Governor Gretchen Whitmer appointed her as cochair of the Michigan Joint Task Force on Jail and Pretrial Incarceration. In 2020, she was appointed as board member of the Kids Kicking Cancer nonprofit organization and board member of the American Bar Association Legal Education Council. Chief Justice McCormack continues to teach at the University of Michigan each year as well as publish in professional journals and law media. Chief Justice McCormack is married to Steven Croley, a partner at Latham and Watkins. They have four children.

**Donna Melby, Partner, Litigation and Employment Law Departments, Paul Hastings LLP**

Ms. Melby, partner at Paul Hastings and a member of the firm’s Employment Law and Litigation departments, is a fellow of the American College of Trial Lawyers, the American
Listed annually in Best Lawyers in America and every year since 2002 by the Los Angeles and San Francisco Daily Journal as one of the Top Women Lawyers in California, she is regularly included in the Top 100 Lawyers in California and Top Labor and Employment Lawyers in California by the Los Angeles and San Francisco Daily Journal. The National Law Journal featured Donna as one of the Most Influential Lawyers in the United States, and Lawdragon included her among its list of 500 Leading Lawyers in America. As lead trial counsel, Ms. Melby has served in the defense of 23 nationwide cases in seven different federal judicial districts, opposite no less than ten law firms in seven different states; these cases involved claims of race discrimination, hostile work environment, conspiracy, contract, and other claims. She has served as cochair of the Paul Hastings Employment Law practice in Los Angeles, as chair of the firm’s Women’s Initiative, and as chair of Global Diversity. She recently completed a three-year term as a member of the California Judicial Council, the policymaking body of the California Judiciary. She served as the only lawyer on the California Judicial Council’s Executive and Planning Committee, Litigation Management Committee, Policy Coordination and Liaison Committee (PCLC), and other committees. She also served as a member of the board of directors of the National Center for State Courts for six years (followed by three years as cochair of the National Lawyers Committee for the NCSC); was appointed by the Conference of Chief Justices to serve on the Civil Justice Initiative Project; and the national president (the first woman elected to serve), national vice president, and national president-elect of the American Board of Trial Advocates (ABOTA). She is a past trustee of the ABOTA Foundation and the first female president, vice president, and president-elect of the Los Angeles Chapter of ABOTA. She is also the recipient of the Warren Burger Award, the highest honor bestowed by the National Center for State Courts in recognition of individuals who have volunteered their time, talent, and support to the improvement of the administration of justice in the state courts of the United States through extraordinary contributions of service and support to the NCSC. In 2018 Paul Hastings honored Ms. Melby with the Leonard Janofsky award for legal excellence in employment law.

Discussion

Nicholas M. Pace:

Good afternoon and good evening on the East Coast. Welcome to what must be the world’s least interesting virtual Zoom background. I’m Nick Pace, and I’m a researcher here at the
In artificial alphabetical order, Paula Hannaford is director of the National Center for State Courts Civil Justice Initiative as well as its director for the Center for Jury Studies. The Honorable Bridget Mary McCormack is Chief Justice of the Supreme Court of the beautiful state of Michigan. Donna Melby is partner at Paul Hastings in Los Angeles, and her practice concentrates on a very wide variety of complex business litigation. Perhaps joining us as soon as his plane lands at DFW [Dallas/Fort Worth International Airport], or wherever he was headed to, will be Steve Herman, who is a partner at Herman & Katz in New Orleans. His practice, also like Donna’s, concentrates on class actions and commercial litigation.

Up to this point in this conference, you’ve listened to other panelists talk about the challenges that have been faced by courts and litigants in the COVID-19 era in attempting to navigate the pretrial process, empanel juries, and actually hold trials. We then heard about the state and federal rules, how they have and perhaps will change to make it easier for those same courts and litigants to deal with pandemic-related court closures, restrictions on gatherings, restrictions on travel, and other disruptive events we’ve faced since March.

All of those earlier discussions were focused on the here and now, really about the current pandemic, and either about what people are doing at the moment to deal with it or the steps that will be taken soon or have been taken to make this process work as well as it can in this COVID pandemic that we’re all in the middle of right now in these extraordinary times.

This panel is going to look at this in a very different way. We’re going to assume that at some point, hopefully next year, maybe a year and a half from now, a group of vaccines or very effective treatment regimens will be put into place and become widely available to the point where COVID-19 becomes more on the par of seasonal flu in terms of how it affects us in society. We’ll take steps to not catch it, we’ll take steps not to spread it, maybe we’ll continue to wear masks in a lot of different situations. but we’re going to get to the point where Americans feel comfortable enough to go back to work, to attend sporting events, to go eat at local restaurants, to get on an airplane, and basically do all the other traditional aspects of close interpersonal relationships. In that world, we’re going to assume that citizens aren’t going to balk at the idea of sitting on a jury panel, at least no more than they did back in 2019.

We’re going to assume that judges aren’t going to shy away from sitting on the bench and managing cases before them in open court, with litigants in the room and the public in the room and marshals and court clerks and et cetera, sitting around them. We’re going to assume that attorneys aren’t going to be hesitant to sit down with opposing counsel if they can think that there’s a way to settle a case before them.

And if that’s true, then of course if we really wanted to operate in a manner that’s pretty similar to the way [it] was back in 2019, it wouldn’t be impossible to do so. So the great big question before this particular panel is whether we actually will return back to business as usual in that ideal post-pandemic world, or whether we’re going to start facing challenges we’ve never
considered in these current chaotic times, or whether we’re going to use this crisis as a sort of means to reboot the civil justice system in some way and make changes that would never have been possible to do in the past.

So, to answer those questions, we’re going to be drawing upon this panel, which includes representatives of the judiciary, the experienced trial bar and litigation bar, and the justice-related research community. I’m going to first try to figure out what is that post-pandemic civil caseload going to look like. So, my first questions are for Chief Justice McCormick and Paul Hannaford. To the both of you, and either one of you can pick up an answer first, the story we’ve heard since March is that courts have been moving at glacial speed in regard to the majority of civil cases on their docket. And for the most part, they’ve only been addressing the most compelling issues in the cases with the highest priority. So, do you have a sense of how big the reservoir of cases is out there as they’ve been essentially frozen since March, and they’re just sitting there and waiting for somebody to start moving them through the court resolution process?

Chief Justice Bridget Mary McCormack:

I can go first because Paula probably can clean up for me and might have better information nationally. I have some information about what’s happening in other states because I am cochairing the National Center for State Court’s post-pandemic planning technology committee—that’s what it’s called, something like that, Paula. It’s the technology committee for what happens after all this. And I have a lot of colleagues from other states who sit on my subcommittees and I’m in touch with them regularly. And I’m also in touch with the chief justices from my surrounding states weekly.

I think the answer is it’s incredibly variable. It’s variable from state to state and it’s variable within each state. Let me give you an example of what I mean by that in Michigan. In Michigan, we have a number of judges who are completely current with their dockets, absolutely current. Michigan passed one million hours of Zoom hearings three weeks ago. We were sort of uniquely well set up to move everything we do in the state courts online because our judges already had Zoom licenses and the hardware to be able to do a lot of what we do online.

We started doing jury trials again a couple of months ago. Obviously, they look different. We have some judges picking their juries on Zoom, and then when they get down to 12 or 14, they can have them show up in a courthouse. Some are picking them in high school auditoriums, in one county in a ballroom, in one county in a field house. But they’re figuring it out. And so there are judges who are current on their dockets in Michigan. There are also judges who keep thinking it’s about over and hoping that things will just get back to normal.

That’s probably not true anymore, but that was certainly true for a while. I think that was actually true for all of us. We had a lot of cognitive dissonance about what we were heading into, and we all kind of hoped it would be over a lot sooner than it has turned out to be. But I think it’s incredibly variable across the country from what I understand. And so, there are places where there is a significant backlog in dockets, civil and criminal. And of course, the in-custody
criminal [cases] are taking priority and taking up a lot of the precious court time that we do have. So, the answer is, some places lots, some places none.

Nicholas M. Pace:
Paula, do you have anything to add to that?

Paula Hannaford-Agor:
The Chief has that exactly right. Just in the state court system, there’s tremendous variability all across the country. I think there’s probably some characteristics that we have seen that kind of predicted which courts are doing better and which courts are really struggling with backlog. Those court systems that had actually invested considerably in their technology infrastructure before the pandemic hit—e-filing, e-scheduling more sophisticated case management systems—as the Chief mentioned, they were actually investing in video conferencing platforms that would allow for a lot more of the hearings, and online dispute resolution, for example, to take place. And those courts have actually transitioned really well to this pandemic place that we’re at. We’re seeing clearance rates, they’re not at 100 percent but they’re in the high 90s, which is not quibble.
However, the courts that were still really wedded to a paper-based system, and so that the only way that you could actually get a case to move and to get events scheduled is to actually walk into a courthouse with a motion, to set a case for hearing, or to do something like that; when the courthouses are closed to the public that just was not happening. And so those courts are actually having a much greater problem with backlog now because they could not make the transition just because their rules and their lack of infrastructure didn’t allow them to be as flexible as the ones that had already made that investment.

Nicholas M. Pace:
And in a sense of these forward-thinking sort of e-court jurisdictions versus the ones that are still—I don’t want to say they’re still using three by five cards—but the ones less posed to adapt quickly. What’s the balance in the United States on that? Are the e-courts the exception and the paper folks are the majority or what?

Paula Hannaford-Agor:
I couldn’t give you a proportion. I think probably a better way to think about some of those [issues is in relation to] the statewide funding. I think those courts that were more centralized have done a better job than those courts that are more fractional, just because with a lot of the local funding you just get less ability to coordinate, less IT expertise to bring to the table.
Nicholas M. Pace:

Donna, you practice in Los Angeles. I know you have a national practice, but you have a caseload that involves the ones in the County of Los Angeles, ongoing cases in L.A.

Donna Melby:

Yes, having a national practice has allowed me to compare and contrast the impact on the different courts, the different ways in which different jurists take creative approaches to the challenges that they definitely all have faced. My home base, as you will note, is Los Angeles, and I think that in Los Angeles, the problems—at least in the state court for sure—are unique because it is the largest court system and because it literally closed for three months and because we can’t hold jury trials in the majority of our courtrooms and still be safe.

And to me one thing that hasn’t yet been mentioned, and I’d be interested in the views of others on this, in a place where it is as challenging to catch up as it is in the Los Angeles Superior Court—or even other California state courts up and down the state that are larger—it depends in some large degree on the jurist’s willingness and skill and ability to manage his or her docket. I’m finding that that makes a huge difference. And you’re seeing a much greater (even) difference than we did before when you look at the really hardworking, dedicated jurists and the ones that maybe don’t work quite as hard and don’t take quite as much ownership of the docket. To me, in these times, that has never been more important. I’d like to hear if others have that same view, but definitely that’s mine.

Nicholas M. Pace:

There’s been some assertions, Donna, that I’ve heard from folks that once the courts get back to full operations—we’re going to see a movement in these cases; a flood of litigation’s going to come in from cases that could have been filed in April, in May, in June, and the like that perhaps weren’t, partly because law offices just shut down just like everything else. But maybe even [this] extended out this period of attorneys not filing cases that they had on their desk for whatever reason.

We’re not talking about cases that are the novel COVID-19 theories about business interruption insurance. I’m talking about ordinary litigation that you would have expected to see filed in the courts routinely week after week in the spring and summer. What I’ve heard is that cases weren’t being filed. And from your perspective—as a litigator on the defense side, I know you would have a sense of what your incoming workload is—have you seen a drop-off during the pandemic of new cases that you had to defend?

Donna Melby:

I expected to, but that has not been my experience. I think it depends upon the practice area. In my case, a lot of my practice involves complex business litigation—but a lot of nationwide
employment litigation, class actions, things like that. And I’ve seen a tremendous uptick. Of course, COVID presents a whole host of problems for employers. So, I’ve, to my surprise, been busier than ever.

[But], there are more challenges in dealing with that kind of busy-ness right now, many more, both on the side of having to deal with the courts on the one hand and things as inane as depositions. And I think these problems are going to continue post-pandemic because I see it as almost like recovering from an illness. It takes time. And I think post-pandemic, we are all going to see bench officers and members of the bar and law professors, all of us are going to see almost a healing process because a number of things will have changed. A number of things will stay different because of COVID, some things will change to be done differently post-COVID, whenever that is.

But in my view, that’s at least another year away, but it’s going to be a process. And it can actually be a really difficult process. It doesn’t have to be, but it will because in some jurisdictions, like the one that I often practice in, in Los Angeles, we’re so far behind that we have to start back up with criminal cases and that’s not till later. So civil trial dates that are on calendar now, everyone knows that they aren’t real dates.

And in terms of how things are going to work, there’s no case law, for example, on how to do these remote depositions that the panelists before us were speaking about. And there will be case law because there’s a lot of things that happen during remote depositions that create problems, serious problems. And we’re without guidance.

It’s just that we know that we have to do things remotely if we want to get them done and that no judge is going to tell us that we have to have an in-person deposition, for example. But there’s a lot of problems. And at least in California, in many courts, we can’t get those addressed. There are some state court judges who will address those issues on a dime, but there are many who won’t address them for six months.

_Nicholas M. Pace:_

So, it’s a story that varies depending where you are, who’s managing the case.

_Stephen J. Herman:_

I think it depends a lot on the venue and, as Donna was saying, the willingness and the ability of the judge to press forward. In federal court, pretty much all of the motion practice continued. They didn’t have and they still aren’t having jury trials, but they’ve had a few bench trials. In state court it’s very much by venue. Some venues were affected a lot more than others, and they
have different—I’ll say political outlooks and philosophies—about whether and how urgently and aggressively to press on.

But then within places like New Orleans—I wouldn’t say they’ve come to a grinding halt—but they’re really only doing what’s necessary. All the couple of jury trials I was involved in have all been continued until at least 2021, but there’s still motion practice. People are still doing expert reports, people are still taking depositions. It’s definitely slowed down, but there’s still some progress.

_Nicholas M. Pace:_

Paula, I saw your hand raised up. Did you want to chime in here?

_Paula Hannaford-Agor:_

I was just going to mention that we have been getting anecdotal reports from a lot of states about what their civil filings are looking like starting in March and April and May. And we certainly saw a huge drop-off in filings, new filings across the entire country. We were getting reports from vendors like Tyler [Technologies], for example, that has a lot of the case management systems for many of the state courts, that filings were down by a third, or even as much as a half in some areas of the country.

As Donna mentioned, though, I think it’s a lot to do with what the case type is. Landlord-tenant, for example—there was a national moratorium on for both statewide and federal, through mid-June. We now have a new CDC [Centers for Disease Control and Prevention] order that goes to the end of the year. And so, landlord-tenant cases are roughly about 20 percent of state civil caseloads. That takes a whole big chunk out. But as Donna said, if you’re working with employers that are dealing with wage and employment discrimination-type cases related to COVID, those have continued at a pretty heightened rate actually for right now.

_Nicholas M. Pace:_

That’s my next question to the entire panel. Anybody can jump in on this, and of course throughout this session anybody can jump in on anything, I’m just throwing out to one person at the beginning, but this one I’m going to address to everybody.

The way I look at it, there are two types of pandemic-related litigation. There’s one that involves litigation that at least partly arises from the economic and the social aspects of it. So, we’re talking about debt collections and bankruptcies and tenant evictions and mortgage foreclosures and maybe even family law matters like dissolution and child custody, things like that. That’s the social side.

And then you have the ones that are really related to the virus. Not as a side effect of the virus, but related to it—for example, business interruption insurance disputes; negligent exposure to the virus in a workplace setting or even as a consumer going into Home Depot or somewhere
else; medical malpractice, perhaps arising out of COVID treatments. You probably have other examples there.

So we’re going to see, and we’re already seeing a big jump in those kinds of cases. Are we seeing an uptick in the number of mortgage foreclosures, an uptick in the number of debt collection and all these other examples? And that question is open to anybody.

Stephen J. Herman:

I’ll talk about the COVID stuff for a minute. I think on the business interruption side you may see a huge swell of cases. I think people are waiting, the clients wanted to wait and see if and to what extent there was going to be federal relief and then additional federal relief. Now that seems to be running out and they’re having problems negotiating a second bill. People may feel more pressure to actually start those cases.

Secondly, there were some MDL petitions that were filed and are still to some extent pending before the panel. And I think people were waiting to see how that was going to shake out. And then, thirdly, I think people are waiting to see if there will be coverage. I’m obviously on the plaintiff’s side and think that there should be coverage, but it’s not a slam dunk. It’s not like a hurricane case or something like that where there’s coverage. I think there’s arguments on both sides, and I think people are waiting to see how some of the early decisions shake out.

And so I think you could see a huge swarm or avalanche or whatever it is of business interruption cases, but you might not necessarily on some of the other cases like medical malpractice relating to COVID. In a lot of the states you have laws that raise a standard where there are these civil orders. So, it raises the standard from negligence to gross negligence, or maybe even higher, or maybe there’s complete immunities. So I don’t foresee, at least in those states, a lot of litigation arising out of COVID exposures in terms of malpractice type suits.

Some people may want to litigate other types of exposure cases—assuming that there’s no immunity passed; I understand that that’s a big holdup with the [relief] bill, that the Republicans want a complete immunity. The Democrats don’t want to agree to that, but assuming that there is no immunity, I think there’s still some pretty decent causation issues that might deter people from litigating a lot of those cases. We’ll kind of have to see how that shakes out, but as far as I know, there’s been very few personal-injury-exposure-type cases filed, at least as of this point.

Nicholas M. Pace:

Chief Justice, I saw you raising your hand.

Chief Justice Bridget Mary McCormack:

I think there is absolutely no doubt that we’re going to see a lot of cases related to debt evictions, mortgage foreclosures, other debt collection cases, other consumer debt cases so much so that a lot of us are working on creative ways to handle those dockets because they’re going to be overwhelming. Michigan put the entire state into an eviction diversion program; we got the
legislature to give us $60,000 of CARES [Act] money to connect tenants and landlords to that funding to try and settle a lot of those cases.

But we’re going to see the same for mortgage foreclosures. We’re going to see the same for other consumer debt cases. And we’re looking at whether we should do the same for some of those dockets. These are of course already dockets that are full. The eviction docket in Detroit before we had a pandemic was one of the busiest we have in the state [and] also the one of the ones with the fewest litigants represented by counsel, which is obviously hard for courts and court staff. And so, I think we all are going to have to figure out what we’re going to do about those dockets.

Paula Hannaford-Agor:

I would add, Nick, that in terms of overall caseloads, just keep in mind that at least in state court that really about 80 percent of state court caseloads are actually relatively high-volume civil cases—your landlord-tenant, consumer debt, small claims, foreclosure. So it’s a relatively small slice of the cases than, for example, the ones Donna and Steve are practicing in, that have attorneys on both sides with more complex contract and/or tort issues.

What we’ve seen in previous recessions, just in terms of the economic impact after 2008 and also after the 2001, 2003 recessions, civil filings definitely went up, sometimes by 10 to 15 percent across the country, and then kind of trickled down again. So we’re certainly anticipating that. But I’m not sure, as you look at the overall composition, that we’re going to see a huge increase in new business cases as a proportion of the overall caseload.

Nicholas M. Pace:

Even cases that do not require a lot of staff time, if there are a flood of them, they’re just as likely to impact the courts as even a relatively few number of business interruption insurance cases and the like.

So let me ask both you and the Chief Justice—and correct me if I’m wrong, this is not an area that I know much about—but it seems to me that court funding for the last six months of the pandemic has been relatively untouched because that money was for the most part allocated back in 2019, and so it’s not like the funding has dropped immediately.

But what about next year and beyond? Are you expecting significant funding cuts for the courts as a result of reduced state and local governmental revenues? And are you expecting increased competition for the few dollars that are available for state and local agencies such as the courts because of increased competition? Things such as competing demands from state public health agencies and social welfare offices that are having to deal with other aspects of COVID-19? In other words, are we looking at a court system in this country that has reduced capacity to deal with what sounds like, in some aspects, an increase in demand upon its resources for next year and going forward?
Chief Justice Bridget Mary McCormack:

It’s definitely not irrelevant. State budgets have taken a significant hit. I don’t think it’s only in this next year, at least in Q3 and Q4 of the last fiscal year; we all were asked to tighten our belts and sometimes more give back. We have a negative supplemental here in Michigan, and that was true in a lot of places. We were able to make ends meet because as soon as COVID hit we announced [a] hiring freeze, spending freeze; everybody tightened their belts significantly.

And so we were able to give the legislature a little bit of funding back, but the problems continue. The programming that we were hoping to get new funding for, we will not, and the budget will take a hit this year. And I don’t think it’s only going to be this year. I expect—in fact, I understand from my friends in the legislature—that next year might be even worse because the economic recovery isn’t going to happen overnight.

So it is a significant issue. I say this in lots of audiences. I think though it’s giving us a chance to rethink what we do and how we do it; the combination of all of these factors and this moment where we’re all having to do things differently, forced to do things differently. We have an opportunity to really think about the ways in which we could be more efficient and at the same time more effective.

Michigan happened to have just completed a bipartisan state and county process looking at our county jail populations, which have tripled over the last 30 years like many states’ county jail populations, even though crime is at a 50-year low and we have made 18 consensus recommendations to dramatically reduce those jail populations. Saving money wasn’t what motivated us. It was actually a better justice system and safer communities.

But it turns out it does save a lot of money if you significantly decrease the number of people in your county jails and instead have them paying their bills, going to work, paying their child support, and et cetera. So it’s actually giving us opportunity. The answer to your budget question is yes, we’re going to have a few lean years for sure, but that’s just more motivation to figure out how we can do what we do more efficiently and I think also more effectively.

Nicholas M. Pace:

All right, we’re going to return to that subject later today. Paula, is this your take on a more national basis? Are you hearing from other folks across the country, a story that’s similar to the Chief Justice’s where we’re talking about a couple of lean years for the course going forward?

Paula Hannaford-Agor:

And I think it will go on for a couple of years. Certainly, it did after 2008, and in 2000, 2001, 2002, it did continue. We do have courts that are talking about some pretty significant drop in terms of service—either closing courthouses for certain hours, reducing the number of hours that courts are available to the public, furloughing employees. But as I mentioned earlier, the number of states that made serious investments in their technology, a lot of them did that after 2008.
Because they realized that you’ve got less resources, so instead of working harder because we don’t have the resources, the money or the staff to do that, we have to work smarter and we have to make those investments. And so, as the Chief Justice said, I think we will probably see an additional push in that direction to actually become much more [efficient] in the way that we operate our courts. And a lot of the senior management that have been involved in envisioning what post-pandemic court systems will look like are actually very excited about some of the innovations that may come down the road.

_Nicholas M. Pace:_

Well, it sounds like you and the Chief Justice have done some of the low-hanging fruit in terms of trying to save money right now. So if we’re talking about a continuing spiral downward in terms of funding for next year, are we in for a real problem? More than we have seen even this year for the courts?

Is it possible that since you’re going to have to give priority to the criminal side—and that’s what we hear anecdotally, that the civil backlog was going to have to take a back seat to the criminal and family court and unlawful detainer, whatever else has higher priority—are we looking at a perfect storm of problems in 2021, 22, 23? One that we might not have seen before, with this giant increase or a significant increase in new work for the courts to do and including cleanup, what they haven’t done for the last few months in some jurisdictions, and reduction in funding to pay the people to do it?

_Chair Justice Bridget Mary McCormack:_

I see only opportunity.

_Nicholas M. Pace:_

That’s good. Make that lemonade out of those lemons. Good for you. That’s good. Well, let me switch, we’ll come back to that in a minute, but let me switch to the two litigators here. Donna, from what I know about you, I know that before the pandemic, the old days—I think that were going to have to come up with a new term for everything before March 2020, but I haven’t figured out what it is—but I know that you’ve traveled extensively in your practice. You’re flying across the country and racking up all these frequent-flyer miles. And you met with opposing counsel and your clients and everything else. Given the fact that we’ve had a taste of this Zoom world, are we going to go return from that later when things get a little better, or is Zoom the new normal for a litigator like yourself that has a national practice?

_Donna Melby:_

I have to say that I am so happy that I had the opportunity to practice most of my career pre-pandemic. Let me just start there because what has made my career rich, among many things, are
the relationships and the wonderful people, opposing counsel, bench bar, really fine professionals that I have had the opportunity to spend time with in person. I think post-pandemic that much of that will be gone, although I do think some of us will crave some kind of personal interaction and people will be excited to see each other, but I do think that the practice of law has been forever changed.

And I do think that the new young lawyers who are coming in now are going to expect to work remotely. They’re going to expect to make court appearances remotely. Their employers are going to save money on office space. It’s going to be a completely different experience that, at least in my mind, can’t help but change the experience of being a new lawyer in our great profession.

And so there’s a part of me that feels sad for the newer lawyers who aren’t going to get to experience what we have been so privileged to experience. The flip side of that is that it’s a new generation. This is the way they’re used to doing business. They’ll like it much better. It may be more efficient in many ways, if we can work out some of the kinks of Zoom depositions and the technology glitches that some of the courts are experiencing. It may be a more efficient world. Will it be as civil and professional? I have a question mark about that.

Nicholas M. Pace:

Steve, I have a feeling you have the dinosaur’s perspective on this. What you think about the fact that we’re moving to a Zoom world, rather than you going out for cocktails with the opposing counsel and writing down the numbers on the back of a napkin? How do you do that in Zoom?

Stephen J. Herman:

I personally agree with Donna 100 percent. I’m not sure that I’m necessarily in the majority, though, or that we’re in the majority. I would break this down between we have plaintiff counsel and defense counsel interactions. And then we have interactions among plaintiff counsel who are co-counseling cases, and they’re working on cases together. On the adversarial side, for lack of a better word, Donna can speak to this better than I can, but I would expect that there would be a lot of pressure on defense attorneys by their clients.

Insurance companies and others are probably going to say—Wait a second, you did this for two years during COVID. Why do I need to pay for you to fly around the country and meet with people and take depositions when you can do all of this remotely? Why am I paying all these travel costs, et cetera? On the plaintiff side as well, if they’re [defense attorneys] not going to do it then there’s no reason for the plaintiffs [attorneys] to meet them anywhere.

Then among plaintiff lawyers, we control our own pocketbooks. And so, I think you’ll have some dinosaurs like me that will crave and want the personal interaction because I do think it’s very important and I also think that it’s been very rewarding for me. But you have other lawyers, plaintiff lawyers, whatever generation they are, who are kind of waking up and saying, what have I been doing all these years?
I like practicing law, but at the end of the day it’s a paycheck. I’d much rather spend time with my family, and I don’t need to be flying all over the country staying in hotels and going to dinner and doing all this stuff. I’d rather just get on a Zoom call for two hours and take the deposition. So you have the road warriors that like being road warriors and the congeniality, and you have others that resent it.

I do think, this is both; it’s a sad day for some of us but I think it also creates opportunities and efficiencies. At the end of the day, it’s probably going to save money. Is that the great thing at the end of the day? It depends on your perspective at least. But I do think it’s going to be different. We went through something like this in New Orleans and the surrounding area in 2005 with Hurricane Katrina.

And the practice really did change a lot, not necessarily in this way, but I think a lot of people woke up. There were no courts. We were all over the South and around the country and we woke up and we said, I don’t have to live in New Orleans to practice in New Orleans. As long as I have an internet connection and I can get to an airport, I can live and practice remotely. And a lot of people who are still New Orleans lawyers have essentially practiced remotely for the last 15 years. So I see that happening even more now, people are just waking up and saying, I didn’t have to do all this stuff. Some of us will miss some of it, but it is going to be good for some. And it’s certainly going to save money, for better or worse.

Nicholas M. Pace:

Let me keep the focus on the two litigators here. So, the two of you, this question is not about your law firms specifically, so you don’t have to give away any secrets here, but I want to talk about what you know about the litigation bar in general. Do you have a sense of how the pandemic has adversely affected law firms in terms of staff size or internal policies or practices—for example, cutting out all travel and the like—that is going to continue to persist in the next few years?

Let’s assume COVID goes away and, for example, you’ve reduced the size of your office staff significantly. Is that likely to be maintained in the future even if business picks up? You just talked about, Steve, working remotely, if now you’re probably not going to go back to making the drive on the freeway to go downtown anymore. Anything else you’ve seen in your practices that had been triggered by COVID that you think is going to be true about your firm and the like down the line two years from now, three years from now? Either one of you.

Stephen J. Herman:

Donna?

Donna Melby:

I would say, and my background is a large international law firm, that the trend will be for sure, much more work away from the workplace, much more remote work. I think the offices
have been getting smaller and smaller every year, the workspace is smaller and smaller. And I think that’s going to continue. There is still a great need for a lot of support staff, but they can also, by and large, work remotely.

So I think that major law firms will probably be losing some real estate. In other words, why pay for all that space when it’s not really getting used? And I think that the acceptance of having people not be in the office every day or even most days is going to be very much the norm and very receptive as long as people keep up their productivity. Now, there are challenges when you have young lawyers; they need mentorship, they need to be checked in on, they need to have communication with more senior lawyers. And it’s the partner’s responsibility to make sure that that happens.

And I’m guessing that some people are probably better at that than other people, but there will be those kinds of challenges, at least in large firms, and I think in midsize firms too. But again, I think the amount of work in firms, at least in my firm, has been really high and still very demanding. I think that’s not always the case, though. I think it depends on the practice area. So I think we’re seeing some firms that are downsizing or losing some people, but there are others that are hiring. I have a nephew who’s a third-year lawyer who’s coming from Washington, D.C., to California. And he. . .

*Nicholas M. Pace:*

Got a job?

*Donna Melby:*

He is in the process of interviewing during COVID. People are still hiring, but other people are laying off. So it’s interesting.

*Nicholas M. Pace:*

It’s always this mixed bag. Let me ask the two of you one more question before I move on to another subject here. We just talked about something that’s not so nice, which is reduced staff size. Maybe in the long run that’s better [for efficiency], but it hurts to let people go, in my opinion. But are there positive aspects of the effects of COVID-19 on the world that you’d want to see continue in the future?

I’ll give an example—that you found that the bench and the bar are lot more collegial, that they’re more understanding or they’re more eager to compromise and they’ve probably seen all the commercials on TV how we have to love each other and love our neighbor and all this other COVID-related stuff. Is this something you’ve experienced and you would like to see it continue, or is it just business as usual and everybody’s out for themselves? Or is there anything else that’s happened that you’d like to see continued because you think it’s been good now and will be good later?
**Stephen J. Herman:**

Well, I’ll start with that. Internally, I think it’s been eye-opening for some of the partners and some of the older guys and ladies to be a little bit more understanding of the staff and that they can work remotely. And in our office, I think for the foreseeable future, we’re going to continue to let people work remotely as long as they can get their work done. And it’s just so much more flexible for them, dealing with kids, et cetera. And so I think that’s probably been positive.

On the professional side, I think it’s a little early to tell. One of the things that Donna talked about, and I think maybe we might be talking about this a little bit more later on in the hour, is that a lot of the camaraderie that’s built in my experience among adversaries, among the plaintiff’s counsel and the defense counsel, is during all of the downtime and the off time and the interstitial time that [camaraderie] doesn’t really exist in the Zoom world.

You log on, you have your conference, and you log off. There’s no sitting around in the hall for a half an hour before and after where you can talk, or driving to the deposition together from the airport, or having dinner together after you’ve taken the deposition. All of those types of things I think might get lost a little bit, but on the other hand and on a positive side, for example, in New Orleans, almost immediately, we had the managing partners of probably the 30 or 40 biggest law firms or major law firms on conference calls every week.

And on email listservs, plaintiff lawyers, defense lawyers, everyone sharing ideas, sharing impressions, sharing strategies about how to deal with COVID. And so it has brought some collegiality. But I just fear, over the long term, as you get into these higher pressure situations, when we start having trials and the pressure’s really on, and you haven’t had that time to really become a friend with the person that’s sitting on the other side of the aisle from you—I’m not sure how well that’s going to work out. We’ll just have to see and hope for the best.

**Nicholas M. Pace:**

Donna, your experience?

**Donna Melby:**

I don’t disagree with anything that Steve has said. For me, there are some question marks because I don’t know what’s going to happen with civility and professionalism when all of your contact is via Zoom, especially if they are not lawyers that you’ve had already time with to get to know, that worries me. I don’t think that it really is a worry on the criminal side, but on the civil side, I think all, all the judges who I’ve had the opportunity to talk with, all tell me that criminal lawyers are much more civil to each other to begin with than civil lawyers seem to be.

I’m not sure why that is; maybe because it’s a smaller community or whatever, but assuming that to be true, and assuming that the civility and professionalism is still a challenge in our profession, which I think it is an important one, very important to our continuing profession and to our reputations in the larger community, outside the practice of law. I don’t know what this
whole electronic interaction is going to do to that. I would love people’s thoughts about it, but to me, there’s still a big question mark.

Nicholas M. Pace:

Well, unless someone has someone to follow up on here, I was going to suggest that we switch gears a little bit and let’s talk about maybe rethinking the civil justice system. I’m going to, first of all, talk about basically the digital revolution in terms of the courts.

I think it’s fair to say that most courts have been relatively slow to embrace the digital revolution in the same way that private businesses and governments to some extent have been in terms of the storage and transfer of information, transmission of information, allowing remote access to court records, and the like. Unless I’m wrong, my sense is that electronic filing is far from universal. As for online dockets—thankfully, a lot of courts are beginning to have them—but often they’re very crude, they’re just a few words about something that occurred.

You don’t really get a sense of what actually happened in the court that day or what document has actually been filed, and the ability to view and download papers and pleadings is still pretty uncommon. Paula and the Chief Justice can correct me, but I can’t think of any state court that matches the federal PACER [Public Access to Court Electronic Records] system in terms of a one-stop shopping center or a window on the activities of a court system.

So, is there a sense now that the movement to the digital courtroom—that I think everybody agrees is a good idea—has been accelerated by the pandemic, or is this something that is such a disruptive time that it’s been difficult for courts to take that next step? And in terms of the uncertainty and funding and new demands and fewer people in the building and more difficult to find vendors and the like, are we actually slowing down from that progress? Let me pose that question first to the Chief Justice.

Chief Justice Bridget Mary McCormack:

I think we are speeding up. We’ve seen more change in the last six months in the state court system than in the last three decades. There’s no doubt about it. And not only change in what we specifically do in our courtrooms but change in the way we think about what we do. I couldn’t agree with you more that for a long time judges in courts were really successful at resisting that tech revolution that came for every other industry.

If you look at courtrooms right now, they look a lot like they did in 1918. We’ve just been able to like stave it off. I think only education might be competing with us for how successfully we have, like, resisted coming into the modern world and then all of a sudden that changed, and everybody has had to figure out how to do business. Courts can’t close, they can’t just close. So we all had to figure out how to do business for the last six months. And in addition to trying all new ways of doing it, we tried and failed at lots of things and had to try again.

We all have been acting like entrepreneurs for the first time. We’re all trained. There are lots of reasons why we resist change, and I think a lot of them are really good reasons. They’re
cultural, they’re normative, they’re legal, we’re a profession based on the past, we are guided by past decisions. So we’re the opposite of entrepreneurs. In fact, we’re usually the bummer in the entrepreneur’s conference room. Usually the entrepreneur is like: “Do we have to keep her in here for this part because she’s going to be a bummer.” But all of a sudden, we have all in state courts have been like, “I don’t know, let’s try that and see how that works.”

We threw up online dispute resolution statewide in Michigan in two months! We have an online dispute resolution platform that is free, and every Michigan resident can use it for any small-dollar case. Remember, the state trial courts adjudicate between three and four million cases a year. Three and four million cases a year is a staggering number of cases that have to be adjudicated, even in a pandemic. So we had to try things, fail, try again, tweak them, try again. I think we have accelerated both the pace of change and our approach to change.

And all of that is going to benefit the public who use our courts, most of whom don’t have the benefit of the awesome lawyers that join me on this panel right now. Most people use courts without lawyers because they can’t afford them. In Michigan, eight out of ten people can’t afford lawyers for their civil legal needs. And we’re going to be able to better serve all of them as a result of this accelerated change.

Nicholas M. Pace:

Paula, I see you’re nodding your head in agreement.

Paula Hannaford-Agor:

Yes. I think part of the dynamic here for a lot of the judges, especially [those] that were very resistant to technology generally, [is the idea] I have to have the people in court because I have to be able to control and I have to be able to see them. And when they were forced to go to video conferences, and particularly as the Chief mentioned with high-volume dockets that have lots of self-represented litigants, we started hearing two things—this is also the anecdotal right now but it’s widespread anecdotal—two things that we were hearing from the judges and court staff.

Typically, on those high-volume dockets, upwards of 80 percent or more are uncontested default judgments, just failure to appear one side or the other, so they’re either dismissed or default judgment out of hand. And so you’re only working—out of every 50 cases that might be scheduled for this nine o’clock hour—you’ve only got really eight or ten cases, that at most that you would actually have to have a three- to five-minute hearing on.

All of a sudden when they went to video conferencing, that flipped. And you had 80 and 90 percent of the people actually appearing on the telephone in the video conference from their cell phone. And it just sort of dawned on people what these technologies mean when you actually reduce the time and the costs and the logistics of arranging for childcare and taking the day off from work and finding parking, so you actually get to an in-person hearing. When you come in and you wait for an hour and a half, and it’s a really tumultuous, chaotic environment, and people are sort of yelling and moving around in the back of the courtroom.
But this was actually a really normatively good thing for access to justice. So I think that just really flipped on a whole bunch of lights about the possibilities for actually improving access and improving outcomes for people who really could engage in the civil justice system. So, [I] think that was a big one. The other one that I think is probably driving a lot of this—and the Chief mentioned this as well—is that these are cases, at least in state courts probably less than federal courts, that you do have a lot of self-represented litigants.

And so the lawyers in these high-level cases that are very complex are not the primary constituent anymore. And so, courts, sort of like being in the emergency room in a hospital, you can’t actually turn anyone away. And all of these cases actually need to be dealt with in a fair way. And so it’s really incentivizing courts to think about how do we streamline and rethink not how we build courts and court rules and business processes for the most complex cases—as we heard in the previous session, a lot of the federal rules are actually built around how to manage multidistrict litigation, which is this tiny, tiny little sliver of cases even in the federal court—but how do you actually put together a court system that works for most of the cases that are actually being filed so that you are addressing those in a fair and reasonable and timely and cost-effective way? By doing that, you free up the resources and get the needs to work for those cases, but you also free up resources for the sliver of cases that actually do need more judicial attention.

Nicholas M. Pace:

Well, Chief Justice, do you have any sense that these pro se litigants, when they do appear on a video courtroom, is it just about the difficulties of finding the childcare and paying the ridiculous parking that you folks charge at courthouses across the country? Or is there something about the fact that it’s a one-on-one? It’s a video with you, video with them, nobody else in the room, not that giant august, impressive marble and deep dark wood kind of thing. Is there something about that, that makes it more attractive to pro se litigants?

Chief Justice Bridget Mary McCormack:

I can’t wait to understand what it is. And I’m not sure how to disaggregate all the pieces of it. I think for some of the—.

Nicholas M. Pace:

You could hire the RAND Corporation to study it.

Chief Justice Bridget Mary McCormack:

Great. I think for some people, finding childcare, parking, taking time off from work is really complicated. I can’t tell you how many judges say that they have litigants who will appear on their phone in a break room. And they’re so grateful to the judge that they were able to appear in court without having to take a day off of work because they didn’t have the kind of job where they could take a day off from work. But we’ve also anecdotally heard from lots of judges that
there are certain litigants, self-represented in particular and kids in particular, who are just far more comfortable in this format.

And I guess it makes sense—like, courtrooms are scary. They’re even scary for lawyers sometimes; imagine how scary they would be for kids. I have judges with child welfare cases that say, I’ve had this young girl on my docket for a year and a half. I’ve never gotten her to say a thing. Now, all of a sudden, she can talk to her phone and she wants to show me her homework in her room. And she’s giving me all this information. There’s something far more comfortable for litigants and perhaps people who don’t have a lawyer next to them in particular in navigating a virtual courtroom.

We’ve also heard anecdotally that the fact that the Zoom boxes are all the same size makes everybody feel like they’re on equal footing. It’s like an equalizing force, the same size Zoom boxes, but I don’t know. There’s a great paper there if we had any data on this, it’s a really interesting paper. I sometimes want to just be an academic. I have to be a judge, but I want to be an academic.

Nicholas M. Pace:

This headlong march into the electronic world, I know the courts need to pay for this. So I have seen, in my experience, court after court putting up, I don’t know if you would call it a paywall, but it’s a pay to play. They want to make the money back for the infrastructure they’re sticking in there. And you wind up—it’s not that much to me, but it might be a lot of money to somebody who’s a litigant, unless maybe you’re waiving it for them.

But you’re moving away to a technology-based access to the court. And if you put up paywalls, if you make it so that you have to have the latest technology to connect, is there any danger of [reduced access to justice] happening? That maybe we’re baking in the inequalities that existed for 200 years of American jurisprudence by having an increasingly heavy reliance on technology?

Chief Justice Bridget Mary McCormack:

Paula, you want to start?

Paula Hannaford-Agor:

I actually think a lot of those concerns about the pay to play, and how do you actually fund your court system, [are valid]. A lot of the court fees and fines and bail practices [from the criminal side] started churning out and basically caused [the protests in] Ferguson. When you actually look at the Justice Department’s Civil Rights Division’s report on Ferguson of what was going on was that local court fees were being used to basically prop up the municipal courts there.

So the state courts have really looked very long and hard at some of [the fees]. I think there’s been a real turnaround over the last six or eight years to say: No, we cannot fund ourselves through litigant fees. Whether it’s on the civil side or the criminal side, that this is fundamentally unfair.

We are public courts, and we need to be accessible. And so whether it’s a matter of revising the practices for [litigants], can you afford to pay and looking at fee-waiver-type programs—both
on the civil and the criminal side but also on the filing fees—or just saying, oh, we’re just not going to increase our fees, we’re going to decrease our fees. I think we’ve been ahead of that. And I don’t see that changing because of the pandemic and because of the need for technology.

_Nicholas M. Pace:_

Before the pandemic, if I can remember that long ago, I know that both state and federal courts were at least experimenting with a lot of different kinds of civil justice reform efforts. I’m not talking about tort reform. We’re talking about reimagining certain aspects of civil procedure; the idea of reducing costs and delay and improved access to justice. Has the pandemic sidelined those initiatives and set us back at all in moving forward to try to think about new ways of imagining the court systems? This is to you, Paula.

_Paula Hannaford-Agor:_

No, actually I think it’s accelerated it. Actually, Donna and I worked together very closely for a number of years on the Conference of Chief Justices’ Civil Justice Improvements Committee that came out with recommendations in 2016 for comprehensively revising and reimagining the civil justice system. And it was kind of ironic that there’s been some pushback from the bar to try and implement some of those recommendations.

Mostly because those recommendations were squarely around the court taking control of case management in a really serious and consistent way that I think made a lot of the practicing bar kind of nervous because it eliminates a lot of opportunities for gamesmanship that can sometimes work to their advantage. The courts that have actually put in place pilot projects have found them to be remarkably successful.

And as courts that have backlogs and are looking at significant increases in civil filings coming over the next year or two and reduced budgets to deal with them, a lot of the courts are saying no, we need to ramp these up now because we will not be able to judge our way out of these backlogs. We can only manage our way out of these backlogs, and here’s the toolkit—let’s go.

_Nicholas M. Pace:_

That’s good. And what about your civil justice initiative? Have you seen it getting much traction in the time of COVID? Or are you happy with the way it’s moving forward in this sort of environment?

_Paula Hannaford-Agor:_

These are the ones that I think are accelerating right now. The courts are embracing them wholeheartedly and looking at here are the rules or here are the business practices that we can put in place now.
Nicholas M. Pace:

Chief Justice, let’s get back to your lemonade that you’re making out of these lemons here. Is there some way we can pave it and use this crisis to improve the course of the civil justice system? Can we rethink about how to resolve the vast majority of disputes out there so that the resolution is done faster and fairer and with less transaction costs, both for the litigants and in terms of court resources?

Chief Justice Bridget Mary McCormack:

Absolutely. And there are a lot of energetic, creative, innovative people working on that right now. The National Center for State Courts has a number of us working on exactly what this all should look like when we come through this emergency period. And in our states, we are too, at least, I know a lot of us are. In Michigan, I have a task force set up to figure out what rule changes, what legislation we need to put in place; permanent new processes that we’ve learned we can pull off and that we know increase access, increase transparency, and increase efficiency.

I think the most important thing is that everybody understands—and it seems like everybody does—we’re not going back. So let’s work together, the bench and the bar, to figure out how the next version of this civil justice system, Civil Justice 2.0, is just better for the public who relies on us. We have a real opportunity here, and it’s exhausting, but I think it’s so well worth it because I really think we can come through this serving the public better than we have ever been able to before. Our access to [the] justice problem has a real opportunity now to get solved.

Nicholas M. Pace:

That’s wonderful news. Any final thoughts from our panel here? I don’t want Steve to get a cramp in his hand by holding that phone up there for too much longer. And I see Dean Chemerinsky coming online. So, Donna, Chief Justice, Paula, and Steve, do you have anything you want to add at this point about what we’re going to see down the line when thanks to God and good scientists we get to the point where COVID-19 is just a blur in our memory? Any final thoughts?

Donna Melby:

Well, I have to wholeheartedly second what the Chief just said. I do agree that we have a huge opportunity here, and it’s ours to embrace—though exhausting as she mentioned—or not. And I’d like to be able to say that we’ve seen consensus on it all, but I think Paula will be able to confirm that we don’t have total consensus.

But I am encouraged, as I hope others are who are on the panel and outside the panel, that we have seen a number of jurists and members of the bar embrace these innovative, creative, and (I believe) absolutely necessary changes to the better administration of cases from the landlord-tenant and the debtor kinds of cases all the way through the complex litigation matters that we were talking about earlier.
Nicholas M. Pace:
Steve, final thoughts?

Stephen J. Herman:
No, I agree with all that. I guess my one caveat would be, and I completely agree with the recommendations, that it’s a problem when you are subjecting a lot of these small-dollar cases with pro bono or self-represented pro se litigants to rules that are designed for full on adversarial litigation between lawyers.

But at the same time, when we’re moving into the twenty-first century and we’re providing better access and better justice to that 80 percent of the litigants, we should also be careful not to convert those 20 percent of adversarial cases into what I’ll call more administrative cases because it’s very important for people to get access to justice for all types of things, as we all are aware, but at the same time the cases that are fully litigated have reached beyond just those parties.

Those are the cases that result in hopefully safer products and different business practices and not just case law being developed, but also those types of changes that go beyond just resolving the dispute between and among the two parties that are actually before the court. So that would be my pitch.

Nicholas M. Pace:
Paula, you’re it.

Paula Hannaford-Agor:
Nothing to add, Nick.

Nicholas M. Pace:
We said it all. I want to thank my panelists—wonderful discussion. Especially given the late hour on the East Coast. This is a lot more interesting than watching some baseball game play-off or NBA [National Basketball Association] final; this is far more important. So thanks for being with us today.

We’re going to hear some quick concluding remarks for the day from Berkeley Law Dean Erwin Chemerinsky. Dean, it’s all yours.
Final Thoughts

Erwin Chemerinsky:

I know it’s been a long day, and I know it’s late, especially for those on the East Coast. So I’ll keep my concluding remarks brief.

Preserving the integrity of the legal system and access to justice in these times is enormously important. I often like to think back to January 1, 2020, and we couldn’t have possibly imagined where we would be on October 1, 2020. That’s true for us as an educational institution, and it’s true for the courts and their vital mission. And that’s why it was so important to have this discussion today about access to justice in the courts in a time of pandemic.

I must again thank the Habush Endowment providing support for today’s program. It highlighted so many of these challenges and also showed us how we can be nimble and creative in finding solutions to them. I’m grateful to RAND for cosponsoring this with us and being such a wonderful partner and collaborator and grateful to all of the speakers and panelists who made this such a terrific day.

And most of all, I’m grateful to my colleague, Anne Bloom—as the executive director of the Civil Justice Research Initiative—who put this on. And I’d be remiss if I also didn’t thank Thembi Anne Jackson and the events staff who coordinated all of the logistics behind this. Today we heard so much that’s important, and that should give us a basis for planning and thinking about the future.

We heard in the panel about juries, that especially during times of crisis, juries are more important than ever for democracy. We heard about some of the challenges of conducting jury trials in the midst of a pandemic. It was also troubling to hear that the effect of COVID-19 on the diversity of jury pools. That there’s anecdotal and other evidence that suggests that COVID jury trials had panels that are significantly more white. We need to think about this.

I’d like to look at something Judge Kuhl said this morning in terms of the importance of court as being there for people during times like this and how important it is that we both have courts available and convey the message that courts are available right now to people. In the second panel, Judge Fogel led an important discussion about pretrial case management and what can be done. One of the things that we learned about is the problem with lack of access to courts, just in terms of trial dates. Not having trial dates is a real problem for litigants.

They try to move forward without the push of a looming trial. I worry in many courts where it’s a combined civil and criminal docket that the delay in having criminal trials will make it ever harder to have civil trials. One of the things that was striking on the plus side was how much the panelists talked about—I think the phrase was the humanizing informality that virtual pretrial court proceedings have brought and the sense of pride that there is in people doing their very best to adapt.
I certainly see this in classes, administrative meetings, where children come onto the screen or dogs bark and it shows how much we’re all in this together. The panelists were uniformly convinced that some of the changes, such as remote hearings, are going to be with us to stay and we may need new rules to accomplish that. In the first panel of the afternoon, there was a discussion of post-pandemic changes to the civil rules. I’m grateful to the member of the Civil Rules Committee who described the work of the Advisory Committee during the last few months, including the agenda, proposed changes, and civil rules being considered.

One of the more interesting discussions and important ones was whether there’s a need for an emergency rule or whether the existing rules are flexible enough to deal with the current situation. And I especially enjoyed the last panel and also the expression of optimism for the future that many of the panelists expressed. They were discussing the impact for the long term. And can we use the lessons from COVID-19 to expand access to justice.

Although these are extremely challenging times, I would say that they’re the most challenging times of my life. Many of our panelists [were] so hopeful that we could use this moment as an opportunity for lasting constructive change. If this moment can be time for expanding access to justice, if those reforms for access to justice are truly lasting, then something good will have come out of what in so many ways is a tragedy.

I can’t think of any time in my life when courts have been faced with such extraordinary challenges in attempting to create access to justice. And I was encouraged as I listened to the last panel as I heard what’s being done, how it’s improving access to justice. Now indeed these may be reforms for the long term. So I want to end on that hopeful note, and as I began now, and as I began this morning, by expressing my enormous thanks to all of you who made this such a wonderful day and such a great conference. And from here we go forward. Thank you.