

Remote Proceedings Bring New Wrinkles For Court Records

By **Christopher Green and Sara Fish**

Though the manner and extent of the use of live videoconferencing in federal civil proceedings have been varied in the courts that have ventured into the live-video arena, parties and courts using remote videoconferencing should carefully consider how they will preserve a clear record of the proceedings.

Will the videoconference be recorded? If so, can only the court and its staff record the proceedings? Can the parties or the public record the proceedings? If the court staff records the proceedings, will it become part of the official record?

Each of these decisions must also be informed by the potential impact creating an official video record may have on opening the door to more probing appellate review.

Recording Trial Court Proceedings

The few federal district courts to address the question of recording videoconference-based proceedings appear to be adhering to a blanket prohibition on recording live video, mirroring the long-standing federal court ban on recording in-court proceedings.[1]

For example, the U.S. District Court for the Eastern District of Virginia held in *Centripetal Networks Inc. v. Cisco Systems Inc.*:

[The] general prohibition on televising, recording or photographing any civil or criminal court proceedings remains in effect for remote proceedings. ... The Court finds that the operation of any video or audio recording device by any lawyer, litigant, participant or observing member of the public or press is prohibited during remote proceedings. The Court will not presume that counsel or any witnesses will violate any separation or recording rules that it imposes.[2]

The U.S. District Court for the Middle District of North Carolina similarly ordered in *Bioventus LLC v. Trident Consulting International Inc.* that "video and audio taping of the live feed is strictly prohibited. The parties are to instruct all witnesses and clients of this prohibition." [3]

Similarly, the U.S. District Court for the Northern District of Georgia has issued a standing order relating to the use of remote technologies during the COVID-19 pandemic, reiterating, "Persons receiving remote access to proceedings are prohibited from photographing, recording, and rebroadcasting court proceedings, including proceedings held by video teleconferencing or telephone conferencing." [4]

Under these prohibitions, the rules clearly appear to forbid the observing public, lawyers and parties from creating recordings of live videoconference.

Setting aside a deep dive into whether policy reasons for the current prohibitions on recording in open federal court should — or, indeed, can practically — remain in place for



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these types of video proceedings, one important question still remains unanswered: Will the court itself create a video recording of the proceedings?

Current orders and rulings do not indicate that federal courts have actually considered whether court reporters should create video recordings of remote videoconference proceedings. Under the federal statute governing reporters, it appears court reporters could be permitted to make and rely on video recordings to produce the official written transcript, if approved by the local judges:

Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge.[5]

Before recording remote video proceedings, however, the court and the parties should consider (1) if creating a reliable video record is feasible depending on the circumstances, and (2) whether any video recording created will then become part of the official record.

Courts have been implementing videoconferencing in different ways, some using only remote witness testimony before an otherwise in-person proceeding in the courtroom, and others convening an entirely remote proceeding over a single videoconference meeting.[6]

In the latter situation, a video recording of the conference may prove very useful as it would easily capture all activity, statements and testimony of the full proceedings; however, in the former situation, a video recording of only the videoconferenced testimony would omit substantial context and substance of the testimony during the proceedings.

Accordingly, depending on the purpose of recording only the portions of the proceedings conducted over videoconference, such recording may be of limited help, for example, to a court reporter in creating an official record, but would likely be unhelpful standing alone, as well as potentially misleading or slanted when viewed out of context of the full proceeding, which may or may not be advantageous to your client depending on the witness and particular context.

Courts and parties may want to consider whether creating video records of particular remote video proceedings would prove feasible for their particular circumstances before agreeing to — or prohibiting — recording.

If a court-created recording of the videoconference proceedings is practicable and so ordered by the court, would that recording become part of the official record? Looking again at the federal statute regarding court reporters, Title 28 of the U.S. Code, Section 753(b), instructs:

No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record. The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

A court-authorized video recording would seem to qualify as "original notes or other original records," which then could be certified by the reporter as an official record of the proceedings.

Video Records and Appellate Review

Assuming video recording becomes part of the official record, what happens on appeal? If the current trend toward increased videoconferencing continues, will appellate courts come to require an official video record be submitted with the record on appeal? And, ultimately, will this trend lead appellate courts to undertake a less deferential review of fact finding, if a full video record of remote proceedings is available on appeal?

These questions are not mere springboards for hypotheticals. An oft-cited, primary reason appellate courts grant trial courts substantial deference as to factual findings and credibility assessments is that the trier of fact is best positioned to make these determinations because of their in-person view of the presentation of evidence.

As one exemplary 2006 opinion from the U.S. Court of Appeals for the Sixth Circuit in *Mayela v. Gonzales* explained:

Appellate review of credibility determinations is extremely limited and highly differential. In making those determinations the trier of fact has observed the witness' demeanor and all aspects of her testimony-factors that ordinarily would not be discernable by an appellate tribunal reviewing the written transcript.[7]

But should this occasionally reflexive rationale remain viable where full video records of proceedings, particularly where no one was present in person during presentation of evidence, become equally accessible to appellate courts?

Our collective experience with videoconferencing has exponentially grown, and that experience has taught that videoconferencing is not a perfect replacement for communicating face to face. However, many trial courts insist to the contrary: Videoconference technology is good enough to allow the trier of fact to make credibility determinations, just as if all were sitting in the courtroom together.

For example, in *Gould Electronics Inc. v. Livingston County Road Commission*, the U.S. District Court for the Eastern District of Michigan stated that "videoconferencing technology enables counsel to test witnesses through cross-examination and courts to observe witnesses' demeanor," and added:

[The] instantaneous transmission of video testimony permits the Court and counsel to view a witness live, "along with his hesitation, his doubts, his variations of language, his confidence or precipitancy, [and] his calmness or consideration." And although "[t]he very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling," ... these elements will not be sacrificed by conducting the proceedings by videoconference.[8]

In *Argonaut Insurance Co. v. Manetta Enterprises Inc.*, the U.S. District Court for the Eastern District of New York at least acknowledged the differences between video and in-person communication, stating, "Despite recognizing the ways in which 'trial by videoconference is certainly not the same as conducting a trial where witnesses testify in the same room as the factfinder,' ... '[still], advances in technology minimize these concerns'" regarding credibility determinations and effective cross-examinations.[9]

Whether trial courts continue hewing to these rationales will be interesting to observe, but more interesting still is whether appellate courts will accept and logically extend that same

rationale to their own review.

Placing a full video record of witness testimony before the appellate court effectively places the appellate court on level footing with the trial court in making credibility determinations. This would be especially true in proceedings with exclusively remote participation.

Would so removing the original trier of fact's advantage in forming credibility determinations then encourage a more probing appellate review of credibility? Unlikely, but it may remain important to consider this possibility when preparing for a remote video proceeding.

Material changes in appellate review standards are unlikely even if a full video recording of the proceedings is available because the trier of fact's advantage of direct observation is not the only policy reason supporting appellate deference on credibility determinations.

The U.S. Supreme Court explained in *Anderson v. City of Bessemer* that deference is important — for credibility determinations and other fact issues — not simply due to the trier of fact's vantage point, but also because a "trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." [10]

In addition to these policy considerations of experience and conserving judicial resources, appellate deference and restraint in reevaluating fact-specific dispute in appellate jurisprudence importantly serves to "lend ... a greater universality to the body of appellate decisions; fine-tuning the decisions of the trial court would lead to a diaspora of reasoning much more difficult to apply in predicting future rulings." [11]

Unlikely as it may be, being prepared for the possibility of probing appellate review of witness credibility certainly could not hurt. For example, counsel could request an express provision prohibiting even the court from recording the video proceedings in its orders regarding remote proceedings. Alternatively, counsel could simply work to ensure any witnesses' video presentation is as effective as possible to convey credibility in the event a recording is made and appellate review does dive deeper than usual into the video recording ocean.

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[1] See gen. Lawrence B. Hagel & Dale T. Ton, "Electronic Technology in the United States Court of Appeals for Veterans Claims," 68 *Syracuse L. Rev.* 347, 357 (2018) (providing a good general survey of history of video cameras in federal courts at 356-62, noting despite two pilot programs to test video recordings in federal district courts in civil matters, the federal Judicial Conference continues to recommend a ban on cameras in the courtroom).

[2] *Centripetal Networks Inc. v. Cisco Systems Inc.*, Civ. No. 2:18-CV-94, D.I. 406 at 3 (E.D. Va. April 23, 2020) (internal citations removed).

[3] Bioventus LLC v. Trident Consl. Intl. Inc., Case No. 1:18-CV-815, D.I. 71 at 4 (M.D.N.C. June 26, 2020).

[4] In the matter of Authorizing Media and Public Access to Video Conference and Telephone Conference Proceedings Under the Exigent Circumstances created by COVID-19, Admin. Order 20-03 (N.D. Ga. Apr. 16, 2020), available at http://www.gand.uscourts.gov/sites/default/files/NDGA_AdOrder20-03.pdf; see also R. Robin McDonald, "Northern District of Georgia Turns to Zoom as Proceedings Go Remote," The Daily Report at Law.com (May 6, 2020), available at <https://www.law.com/dailyreportonline/2020/05/06/northern-district-of-georgia-turns-to-zoom-as-proceedings-go-remote/#:~:text=Any%20recording%E2%80%94including%20audio%2C%20video,federal%20court%2C%E2%80%9D%20he%20said> ("Any recording — including audio, video, or still screen shots — of Zoom proceedings is prohibited, and anyone doing so is subject to sanctions, said Chief Judge Thomas Thrash. 'There is to be only one record of a proceedings in federal court,' he said. 'If you start letting people record and re-transmit bits and pieces of court proceedings, that will be a disaster.'").

[5] 28 U.S.C.A. § 753(b).

[6] For example, compare Centripetal Networks Inc. v. Cisco Systems Inc., Civ. No. 2:18-CV-94, D.I. 406 (E.D. Va. April 23, 2020) (court ordering fully remote bench trial held via Zoom over the parties' objections, held in June 2020) and Bioventus LLC v. Trident Consl. Intl. Inc., Case No. 1:18-CV-815, D.I. 71 (M.D.N.C. June 26, 2020) (ordering "everyone will be remote" for a bench trial the week of July 21, 2020) with Optis Wireless Tech LLC et al. v. Apple Inc., Civ. No. 2:19-cv-00066, D.I. 387 (Gilstrap, J.) (E.D. Tex. July 21, 2020) (ordering remote video testimony from selected Europe-based witnesses only for otherwise in person proceeding) and Sunoco Partners Marketing & Terminals LP v. Powder Springs Logistics LLC and Magellan Midstream Partners LP, Civ. No. 17-cv-1390, D.I. 583 (D. Del. July 2, 2020) (ordering an in-person trial with remote live video testimony).

[7] Mayela v. Gonzales, 200 F. App'x 582, 584 (6th Cir. 2006).

[8] Gould Elecs. Inc. v. Livingston Cty. Rd. Comm'n, No. 17-11130, 2020 WL 3717792 at *3 (E.D. Mich. June 30, 2020) (quoting In re: RFC & ResCap Liquidating Trust Action, -- F. Supp. 3d --, 2020 WL 1280931, at *2 (D. Minn. Mar. 13, 2020)) (internal citations removed); see also Optis Wireless Tech, LLC et al. v. Apple Inc., Civ. No. 2:19-cv-00066, D.I. 387 at 6 (July 21, 2020), ("[r]eal time live video testimony from these witnesses presented via monitors in the courtroom will enable the jury to make instantaneous deductions about each such witness and his testimony. ... as well as observe the non-verbal responses and body language that informs any jury in making its critical judgments as to credibility and believability.").

[9] Argonaut Ins. Co. v. Manetta Enterprises Inc., No. 19CV00482, 2020 WL 3104033 at *1 (E.D.N.Y. June 11, 2020) (quoting In re: RFC & ResCap Liquidating Trust Action, -- F. Supp. 3d --, 2020 WL 1280931, at *2 (D. Minn. Mar. 13, 2020)).

[10] Anderson v. City of Bessemer, N.C., 470 U.S. 564, 574–75 (1985).

[11] See Justice Adele Hedges & Robert Higgason, Videotaped Statements of Facts on Appeal: Parent of the Thirteenth Juror? 33 *Hous. Law.* 24, 27 (July/August 1995).