

VIDEOCONFERENCING AND LEGAL DOCTRINE

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INTRODUCTION

and minor oral arguments and depositions.⁴ Even for dispositive hearings, crucial depositions, and trials, videoconferencing will be at least an option.⁵

Enduring post-pandemic reliance on, and normalization of, videoconferencing in federal civil litigation and throughout society and commerce ought to have downstream effects on legal doctrines that depend upon contacts, burdens, and conveniences. Videoconferencing facilitates interstate contacts while mitigating burdens and costs associated with litigation in distant or otherwise geographically inconvenient forums. It is a technology that should broaden the reach of personal jurisdiction and influence venue transfer. The use of videoconferencing also should make certain discovery, like nonparty depositions, easier, quicker, cheaper, and more convenient—and therefore less objectionable.

In this Essay, I consider the impact of videoconferencing on these legal doctrines. I begin by setting the stage for the pandemic legal landscape of videoconferencing technology in commercial, social, and consumer contexts, and I forecast its persistence post-pandemic. I then turn to the legal doctrines based on burdens and conveniences—including substituted depositions, personal jurisdiction, and venue transfer—and I argue that videoconferencing will change the way these doctrines should be applied to post-pandemic civil litigation.

I. THE NORMALIZATION OF VIDEOCONFERENCING

Although videoconferencing is already established in the legal landscape post-pandemic, its acceptability and integration have become far more prominent during the pandemic. To set the stage for the legal landscape that exists in the new normal, this Part de

2021]

VIDEOCONFERENCING AND LEGAL DOCTRINE

status or a long-term work assignment. Even in-person weddings are likely to have a virtual component for important guests who are unable to travel but still wish to participate in the ceremony.¹³

Other social events are likely to have similar post-pandemic reliance on videoconferencing. School reunions and graduation ceremonies,¹⁴ Netflix parties, casts-4(en)0.54 TmowETQq0.000018242 0 612 792 reW* nBT/F1 6.96 Tf1 0 0 1 431.59 622.58E

pandemic-era litigation has now inculcated judges and attorneys with videoconferencing familiarity and technical knowledge. The temporary adaptations of pandemic litigation will lead, in some areas, to permanent evolution.

Videoconferencing is an effective alternative, even a preferred substitute, for many litigation events.¹⁹ Particularly in multi-party and interstate cases, travel and schedule coordination can impose hurdles and burdens on in-person events.²⁰ Those burdens and costs encompass planning and logistics, reservations, time (some of it wasted), lodging, transportation, parking, jetlag, travel disruptions, and mental stress. Coordination, too, can create difficulties; an attorney may visit a remote client's workplace only to discover that a critical employee witness is on a business trip somewhere else. Attorneys feel these burdens in the first instance and then pass some of them on, in the form of costs and fees, to their clients.

Videoconferencing has the potential to reduce the burdens and costs dramatically. The alleviation of travel burdens and costs is itself a significant benefit. In addition, multi-party videoconference events can be scheduled more easily because participants need not consider how travel logistics might constrain their availability. If an event runs long or if some other demands require the event to be cut short, videoconferencing can be stopped and then picked back up again when convenient without the hassle of arranging for successive travel trips.²¹ The cost savings of videoconference events are compelling.

Videoconferencing also has the potential to retain high fidelity to its in-person analogs. In many instances, such as for friendly interviews and strategy sessions, a videoconference meeting may even be more effective than an in-person meeting.²² It is far easier to patch in client personnel or a junior associate on the legal team than to have to go find them (or have them travel from a satellite office). And even more adversarial events—like oral hearings, appellate arguments, depositions, and even trials—have shown great efficacy through videoconference technology.

All that is not to say that the litigation community is ready to go 100% virtual. Videoconferencing presents its own difficulties, especially in controlling or pressing witnesses in contentious proceedings, or where the

19. Dodson et al., *supra* note 3, at 13.

20. *See id.* at 13, 15.

21. *Id.* at 14 (“[G]one is the pressure to complete the task in a single, continuous meeting—a videoconference meeting can be broken out into several sessions with hours, or even days, in between.”).

22. *Id.* (“The technology makes meetings more flexible, more efficient, and, often, more effective.”).

primary conduct²⁸ and that the defendant be protected from the burdens of litigating in a faraway state.²⁹

Videoconferencing influences both of these requirements. With potential defendants more likely to be making virtual contacts with forum states in their primary conduct, the “minimum contacts” test may be more easily satisfied. And the litigation burdens to defend in those states, even if on the other side of the country, are lessened by the prevalence of videoconferencing technology in civil litigation. That is not to say that videoconferencing means the end of personal jurisdiction, but it is likely to make the lawful exercise of specific personal jurisdiction more frequent.

A recent example is *Broumand v. Joseph*, in which the Southern District of New York considered its personal jurisdiction over nonparties residing in California and Virginia who were subpoenaed for testimony in an arbitration hearing in New York.³⁰ In considering the burden on the nonparties to submit testimony in New York, the court reasoned:

While the subpoenas themselves require respondents to testify in-person at an evidentiary hearing in New York, the arbitrator has since ruled that the arbitration will proceed remotely. Given that there will be no in-person evidentiary hearing, the subpoena functionally calls for an appearance at a remote hearing. Even if, as Joseph suggests, interstate travel during a pandemic is so unreasonable as to defeat an otherwise proper exercise of personal jurisdiction, the Court holds that it is not unreasonable to require respondents to appear by videoconference at an evidentiary hearing in New York. Therefore, the Court holds that respondents have failed to demonstrate that it would be unreasonable for the Court to exercise personal jurisdiction over them.³¹

As *Broumand* illustrates, videoconferencing can change the analysis of personal jurisdiction.

28. See *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1025 (2021) (“A defendant can thus ‘structure [its] primary conduct’ to lessen or avoid exposure to a given State’s courts.” (alteration in original) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980))). For commentary on *Ford Motor Co.*, see Scott Dodson, *Personal Jurisdiction, Comparativism, and Ford*, STETSON L. REV. (forthcoming 2021).

29. *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1780 (2017) (stating that “the ‘primary concern’ is ‘the burden on the defendant’,” and “[a]ssessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum” (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980))). For discussions of personal jurisdiction burdens on certain parties, see, e.g., Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1463 (2019) (personal jurisdiction burdens on plaintiffs subject to involuntary venue transfer) and William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205 (2018) (personal jurisdiction burdens on aliens).

30. No. 20-CV-9137, 2021 WL 771387 (S.D.N.Y. Feb. 27, 2021).

31. *Id.* at *8.

B. Venue Transfer

Videoconferencing should also affect venue transfer and *forum non conveniens*. Under the general venue statute, a court in one district may transfer a case to a court in a different district “[f]or the convenience of parties and witnesses, in the interest of justice

of travel—favor MDL consolidation. Even assuming videoconferencing renders the forums of equivalent convenience based on geography, the MDL transferee court offers a significant advantage over the transferor court: consolidation and aggregation.³⁸ Further, because plaintiffs in MDL proceedings can often rely on a steering committee to manage the litigation

Procedure.⁴² Rule 1 necessarily contemplates the use of available technological innovations as a way to increase justice while decreasing costs.

Litigation videoconferencing helps balance these values in discovery,

of videoconferencing's ability to lessen burdens are context dependent and must be assessed under all the circumstances.

Still, the pandemic has proved that videoconferencing can offer substantial benefits in many contexts. As videoconferencing becomes a prevalent part of life and litigation, the law must account for it. Where the law requires considerations of contacts or burdens—such as personal