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FEDERAL RULES TO CONSIDER IN VIRTUAL TRIALS

F. R. Crim. P. 23. Jury or Nonjury Trial:
(a) JURY TRIAL. If the defendant is entitled to a jury trial, the trial must be by jury unless:
(1) the defendant waives a jury trial in writing;
(2) the government consents; and
(3) the court approves.

F. R. Civ. P. 43. Taking Testimony:
(a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

Fed. R. Civ. P. 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment:
(b) PLACE FOR TRIAL AND OTHER PROCEEDINGS. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom.

Trials: Court Orders Videoconference Bench Trial, Despite Objections by Both Parties

Gould Electronics, Inc. v. Livingston County Road Commission, no. 17-11130 (E.D. Mi. June 30, 2020).

Citing the likelihood that due to a backlog of criminal cases that will take precedence, civil trials will face substantial further delays even after courts

reopen, a federal judge orders a virtual civil trial over the objections of both parties.

The bench trial in this case--a 10-year old dispute about how costs of remediation must be shared between the parties under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Michigan's Natural Resources and Environmental Protection Act (NREPA)-- was originally scheduled for in-court proceedings in March 2020 and adjourned to May 2020. However, as the depth and breadth of the pandemic became more apparent, leading to the complete closure of all the courthouses throughout Michigan's Eastern District, in June the court entered an order indicating its inclination to proceed with a videoconference bench trial. Both parties objected.

As in various other cases in today's grouping, the Michigan court reviewed the bases for its authority:

> Rule 77(b) provides, in relevant part, that "[e]very trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom." Rule 77(b) does not define the terms "in open court," or "in a regular courtroom." The Court is unaware of any authority defining those terms in the context of Rule 77(b), and the parties have supplied none. **But the tenor of Rule 77(b)—as evidenced by the phrase "so far as convenient"—is the allowance for flexibility in conducting trials in non-traditional ways when exigencies make traditional procedures impracticable. Without that flexibility, the federal judiciary would be paralyzed from utilizing an essential tool in dispensing justice to civil litigants.**
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> This same flexibility is found in Rule 43(a). It provides that "[a]t trial, witnesses' testimony must be taken in open court," yet also states that "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Like Rule 77(b), Rule 43(a) does not define the term "open court." But the drafting history shows that the purpose of requiring testimony to be taken in open court was a matter of functionality rather than physicality.

Having reviewed the Rules 77(b) and 43(a), as well as Black's Law Dictionary and caselaw, the court was persuaded that conducting a bench trials by videoconference is consistent with the requirement that such proceedings take place in "open court." What remained was a determination as to whether the conditions in this particular case constituted the "compelling circumstances" required by Rule 43.

The court easily found that the Covid-19 exigencies clearly indicated that proceedings could not occur "in a regular courtroom" and that conducting the entire bench trial via videoconference was justified by "compelling circumstances:"

> Since March 25, 2020, the courthouse has remained closed to the public in response to the COVID-19 pandemic. . . . It remains uncertain when the

> courthouse will reopen to staff members, let alone resume public proceedings. In light of the grave and unprecedented public health concerns at issue, it is unlikely that an in-person bench trial could safely and realistically occur in a courtroom in the foreseeable future.

The need to move this civil proceeding along was amplified because of the major backlog courts will experience when they again open, with criminal actions necessarily taking precedence:

> **Given the number of criminal trials that must be given priority—including a death penalty case and a human trafficking case that will each take several months to complete—the best prediction the Court could make at this time is that a civil bench trial might not be conducted for many months, and likely more than a year from now.** Holding the trial via videoconference, by contrast, will ensure that resolution of this matter will be achieved in the immediate future. Consequently, proceeding with a bench trial by way of videoconference is preferable to the uncertainty of awaiting the reopening of the courthouse to the public.

One objection raised by the plaintiff was that conducting the bench trial by videoconference would violate its due process right to a meaningful opportunity to confront and cross-examine witnesses. In *Goldberg v. Kelly*, 397 U.S. 254, 268-269 (1970) (concerning termination of welfare benefits) the Supreme Court held that a meaningful opportunity to be heard required that individuals be afforded an opportunity to appear personally, to present evidence, and to confront or cross-examine adverse witnesses. But as the Michigan court noted, *Goldberg* did not address the mode by which confrontation or cross-examination must take place. And the Federal Rules themselves undercut the plaintiff's argument: Rule 43(a) expressly authorizes courts to permit witnesses to testify via contemporaneous transmission for good cause and in compelling circumstances. "It is unreasonable to suggest that these accepted methods of presenting evidence somehow violate due process." That rationale was even stronger in this case, where one witness was resident in Toronto, and would face significant headwinds crossing international borders.

The court doubted that the parties' ability to cross-examine witnesses, and its own ability to effectively evaluate witnesses' credibility, would be impaired by conducting the proceedings via videoconference. It said **"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[.]'"** Furthermore, the proceedings would be accessible to public viewing, satisfying the "public setting" requirement.

The plaintiff's final objection--the possibility that the proceedings might be plagued by technical "glitches"--was also unavailing: "During trial, the court's IT department will be available to assist with any technical difficulties that may arise."

Trials: Defendant's Request for Bench Trial Granted Based on COVID Factors, Despite Government's Refusal to Consent

United States v. Cohn, No. 19-CR-097 (E.D.N.Y. Aug. 26, 2020).

Citing the considerable Covid-related risks posed to a health-impaired criminal defendant if he appeared in person at a jury trial, a district court moves ahead with a bench trial despite the Government's refusal to agree as required by F. R. Crim. P. 23.

In February 2019, Michael Cohn (Cohn), a former SEC employee, was arrested by the FBI and charged with obstruction of justice and unauthorized disclosure of confidential information. Cohn had left the SEC to join GPB Capital Holdings, LLC, a private equity group, as its Managing Director and Chief Compliance Officer, purportedly taking with him information about an investigation into GPB he improperly retrieved from an SEC computer. A trial was initially scheduled for June 2020, before the Covid pandemic struck. In April 2020, Cohn's counsel asked for adjournment to September 2020, "to protect the health and safety of the parties, potential jurors, and this Court," noting that Cohn "suffers from certain health conditions that put him at a greater risk for complications from the virus." In July, the court proposed that the parties consider a bench trial.

The Government declined to give consent, typically required to forego a jury trial under F.R. Crim. P. 23, whereas Cohn's counsel responded that "In light of the extraordinary circumstances presented by the COVID-19 pandemic and Mr. Cohn's desire to have a speedy trial pursuant to his rights under the Sixth Amendment to the United States Constitution, Mr. Cohn has decided to waive his right to a jury trial and consent to a bench trial in the format offered by the Court."

The court, noting that it had not held a jury trial since March 2020, granted Cohn's request despite the lack of Governmental consent:

> Before the Court is the defendant's application to proceed with a bench trial notwithstanding the Government's objection. While the Federal Rules of Criminal Procedure require the Government's consent, in extraordinary situations, the Court is empowered to conduct a bench trial upon the defendant's waiver even over the Government's objection when required by the interests of justice. **Upon careful consideration, the Court finds that the unusual, if not unique, circumstances presented by this particular case dictate that a bench trial be held notwithstanding the Government's objection. The facts and circumstances considered within the legal framework discussed herein include (a) the length of time during which the charges have been pending, which in this case is more than a year; (b) the uncertainty of providing a jury trial in this particular case within an ascertainable time frame; (c) the**

> **complexity of this case — involving weeks of testimony and hundreds of thousands of pages of documents — which will serve to further complicate a jury trial under present circumstances; (d) the defendant's age and health profile, which not only render a trial more difficult but may bear upon his right to testify in his own defense; (e) the marked public interest in this case and the delays in its resolution, which implicates the public's right to a speedy trial; and (f) evidentiary issues already identified by the Court raising the specter of possible juror confusion.**

The court cited the numerous challenges it faces in accommodating jury trials, particularly in the criminal context: effective credibility evaluation (and the Sixth Amendment's Confrontation Clause) requires that witnesses testify without traditional masks; the sheer number of individuals, often from far-flung locations, involved at jury selection and thereafter "make the problem of conducting a trial with reasonable safeguards exquisitely difficult."

One such problem is the simple absence of square footage: "When compared to many indoor spaces, courtrooms could be considered large, if not gargantuan. But the space requirements dictated by social distancing prove brutally demanding." While the Central Islip courthouse features "generously-sized facilities," distancing guidelines would allow a maximum of 20 to 30 persons, creating problems for larger trials.

The court reviewed caselaw to distill four factors relevant to a governmental refusal to allow a defendant to waive a jury trial: First, whether a governmental objection is made for an improper purpose; second, whether the government's insistence on a jury trial unfairly interferes with the defendant's exercise of a separate constitutional right; third, whether the government's insistence on a jury trial implicates the public's right to a speedy trial; and fourth, whether case-specific factors, such as the nature of the evidence or the predominance of legal issues over factual issues, would render obtaining an impartial jury trial difficult or unworkable.

The court found substantial significance in the second of these—whether the government's posture would impair the defendant's exercise of other constitutional rights. Here, Cohn's ability to testify before a live jury was compromised:

> Based on present knowledge, current circumstances of the pandemic combined with this defendant's health profile presents an unacceptable risk. Taken together, these factors, at this time, could effectively rob the defendant of a meaningful opportunity, if he chose to do so, to testify on his own behalf. . . .Thus, conditions arising from the pandemic effectively pit this defendant's right to a jury trial against his right to testify at that trial. Such conflict presents a problem of constitutional dimension. Simmons v. United States, 390 U.S. 377, 394, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968) ("we find it intolerable that one constitutional right should have to be surrendered in order to assert another"). A nonjury trial permits far more flexibility to accommodate these concerns. By way of example, the Court's video system could be employed to permit the defendant to testify

remotely, if he so chose, without concerns of jury prejudice that could arise from such a procedure.

Also significant were speedy trial considerations. Given the inherent complexity of the case, and the defendant's age and health, a jury trial would be susceptible to Covid-related interruptions. “[A]t this writing, it remains unclear when a jury trial could commence in this particular case, and even if started, whether that trial would be afflicted by inordinate delay. As such, the public interest in a speedy trial would be far better served by a nonjury trial, which could commence sooner, and be more certain of successful conclusion under present circumstances.”

The parties were directed to appear before the judge in person on September 8, 2020, to resolve pretrial issues, with a nonjury trial to commence shortly thereafter.

Trials: Lack of Expertise with Zoom and Possibility of “Glitches” not Enough to Deter Bench Trial via “Contempraneo us Transmission”

Argonaut Insurance Co. v. Manetta Enterprises, no. 19-cv-00482 (E.D.N.Y. June 11, 2020).

Expressing incredulity at an argument by defendant and its counsel that they did not have the equipment, software, or expertise to participate in a virtual bench trial, the court finds the requisites of F. R. Civ. P. 43(a) satisfied and moves forward.

In a case where defendant’s liability for unpaid insurance premiums had already been decided, and the only issue remaining was whether the insurer was entitled to $1.9 million in payments, the court was faced with a litany of reasons why the defendant could not participate in a video trial.

The court first found that the pandemic, and the months' long delay it has caused--having shut the courthouse since March 2020--constituted the "good cause and compelling circumstances" required by F. R. Civ. P. 43(a) to hold a bench trial via video-conference: “This Court finds that it is "absolutely preferable" to conduct the bench trial via such ‘contemporaneo us transmission,’" rather than to delay the trial indefinitely.

The judge was unpersuaded by a raft of reasons proffered by the defendant in opposition to a video-conference proceeding. Defendant first claimed that due to the pandemic, its attorneys had been prevented from "meeting and having full access to all files and other preparatory materials. " This assertion rang hollow, however, given that in the midst of the pandemic, the parties submitted their respective trial briefs and

motions *in limine*, “which were presumably based on their review of the relevant trial materials.”

Second, defense counsel claimed that the defendant was not equipped with the necessary electronic equipment and that neither defendant nor its counsel knew how to use it. This was non-sequitur:

> The Court does not know what to make of this statement. All that is required to participate in a trial by video-conference is a computer and Internet access—which the Court presumes that MEI or its officers have in their homes. While defense counsel asserts that it will need to procure equipment if trial is conducted via video-conference, they fail to explain what that equipment is. **The Court also does not credit defense counsel's hyperbolic assertion that "MEI is not set up for that kind of video communication, nor does the principal of the company have any expertise in using such equipment (nor does the undersigned counsel)." The technology used for video-conferencing is straightforward, easy to use, and will likely only require the principal (and defense counsel) to click on a link in an email for access to the proceedings.**

Third, defense counsel asserted that "video conference platforms Skype and Zoom routinely have both audio and video glitches, and poor sound or visual quality can negatively affect the Defendant's presentation to the Court." The court was unconvinced: although an occasional technical glitch might occur with video-conferencing software—the court or the parties could address the problem.
Fourth, the defense raised various objections based on a third-party witness having to testify from home instead of a business setting and the lawyers being impaired in their ability to examine and cross-examine witnesses. The court recognized that "virtual reality is rarely a substitute for actual presence," both parties would be in the same position in this regard; “the video-conferencing format does not favor one party over the other with respect to the presentation, or cross-examination, of witnesses.”

The virtual trial began on August 24, 2020.

Trials: Videoconference Trial Denied due to Potential that Movant would not Comply with Court Rules for Virtual Proceedings

Auritt v. Auritt, no. 2:18-cv-471 (D. Me. Aug. 24. 2020).

Gary Auritt sued his former wife Shannon Auritt, alleging that after their divorce she created a shower head company that unfairly competed with his existing enterprise and fraudulently obtained a trademark similar to his, which now

infringes on his federally registered mark. The pro se defendant moved for a bench trial by videoconference; the plaintiff objected.

The court set out the relevant Federal Rules: Fed. R. Civ. P. 77(b) states: "Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom." Rule 43(a) provides generally that "witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise;" but Rule 43(a) goes on to say: "For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location."

The court declined to proceed via videoconference, citing inexperience and the possibility of noncompliance by defendant:

> This District has not yet conducted a videoconferenced bench trial. The relationship of the parties in this case is unusually contentious. The defendant is proceeding without a lawyer to guide her or apply the Rules of Evidence, and she will necessarily be a witness. **Service of process issues in her counterclaims naming new parties and the summary judgment proceedings both have demonstrated her difficulty in complying with court rules. It would be very difficult for me as a judge to control the virtual courtroom under such circumstances. This is not the case to be the bellwether for virtual trials.**

Acknowledging the defendant's frustration, the court denied her motion without prejudice to its being renewed “if the courtroom closure drags on and/or the court gains experience with bench trials by videoconference.”