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Introduction

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This past year challenged everyone’s understanding of normalcy. It changed the way we work and where we work. In truth, however, we do not yet know the full scope of change brought on by the COVID-19 pandemic. But we should take the time to learn from it.

For many, this pandemic brought heartache and despair. It forced people away from each other when they needed the warmth and compassion that comes from spending time with family, friends, and co-workers. This pandemic reminded us that there is no replacement for human interaction. But it also taught us to focus on what matters and to leverage technology where we can to focus our time and attention on the things that matter.

Recent issues of the Department of Justice Journal of Federal Law and Practice (DOJ Journal) focused on investigating and responding to digital crimes¹ and keeping up with electronic evidence.² This issue goes a step further, providing practical advice about how attorneys can maximize their time in front of juries; employ seldomly used trial tactics related to expert reports and testimony; and hone their cross-examinations skills by using Federal Rule of Evidence 106. Then, taking into account the pandemic, the issue offers advice on conducting COVID-period trials, how the pandemic changed bar admissions and legal education, and what may stick around.

Here at the National Advocacy Center (NAC), we were forced to embrace the challenges of the pandemic. We stopped residential trainings in March 2020 and focused solely on distance education. We’ve improved our ability to offer online courses, webinars, on-demand videos, podcasts, and so much more. Those improvements made access to training easier and more convenient than ever before. Indeed, we have virtually trained a record number of students during the pandemic. Going forward, where appropriate, we intend to keep that virtual access available even as in-person trainings resume.

¹ *Technology & Law*, 69 DOJ J. FED. L. & PRAC., no. 3, 2021.

² *eLitigation*, 68 DOJ J. FED. L. & PRAC., no. 3, 2020.

There is, however, no substitute for in-person interaction. The professional networking that occurs during in-person training events help build a lasting culture and strengthen the Department as a whole. That does not mean we should forget about the innovations we developed during the pandemic as we return to our normal working environments. Instead, we should take the time to focus on what is important and how we can incorporate technology into our old habits to make ourselves more effective. We hope that this issue on Modern Trial Advocacy will help meet that goal.

Calling Albert Einstein to the Stand (and Other Seldom-Used, but Effective, Trial Tactics)*

*Joseph F. Anderson, Jr.
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Technological changes of the past few decades have made significant, and positive, changes to the common law trial. No longer do we rely exclusively on eyewitness testimony—everyone has a video camera in their pocket and there is one on every street corner. Satellite transmission makes possible the live testimony of witnesses from remote locations. In the old days, jurors had to laboriously pass documents around the jury box for viewing. Today, software programs and video monitors in the jury box make the process much easier and faster.

But there is a handful of useful—yet rarely employed—devices that have been around for years. They ought to be in the toolbox of every courtroom lawyer. In no particular order, here are my top seven unappreciated and underused devices for use at trial.



Image by George Fulton

I. Don't do a “document dump” on the jury— Use Evidence Rule 1006

The digital age has affected modern pretrial practice in a monumental way. In the old days, information was gleaned from depositions of witnesses, some of whom were then called to testify at trial. Then, there were the documents: a few letters, a contract or two, and some photographs. That was it. Today, communication between people, in person and on the phone, is on the wane. Most

* This article was originally published in the July 2020 issue of *SC Lawyer* magazine and is reprinted with permission of the author and the South Carolina Bar.

conversations are now captured on digital media. In a recent case of which I am aware (a breach of contract action for the sale of real estate), there were 2.6 million emails produced in discovery!

Unfortunately, in my view, many attorneys mistakenly believe that since terabytes of discovery have been produced and examined pretrial, then by golly when trial rolls around much of it needs to be seen by the jury.

Shortly before his death, I was fortunate to hear the legendary Irving Younger deliver a lecture on trial advocacy. He said that no jury is going to look at more than about 75 exhibits. In the years since I heard Younger's speech, attention spans have gotten shorter, and 75 may now be a high number. So, pare your list of trial exhibits down to those really important documents. If, after doing so, you still have three bankers boxes of exhibits (about 6,000 pages), there is a handy evidence rule that can come to your aid.

Rule 1006 of the Federal Rules of Evidence ("FRE") provides that when you need to prove the contents of "voluminous" documents, you may use a "summary" or "chart."¹ And, although Rule 1006 is silent on the subject, most judges will allow the chart to go into the jury room as an exhibit.

Jurors like professionally lettered charts; they do not like thumbing through bankers boxes. Often, it's just a small bit of information from each document that you need. A summary chart allows you to display that information in a visually pleasing way. Summaries save valuable court time and also clarify evidence or testimony for the jury.

II. Laying the foundation the easy way

In order to have evidence admitted, FRE 901 requires that the proponent first have it properly "identified" (if it is real evidence) or "authenticated" (if it is demonstrative evidence).² Under the so-called "business records exception" to the rule against hearsay set out in Rule 803(6), the proponent must first satisfy three requirements set out in the Rule before the document qualifies as a business record.³

I frequently see lawyers struggle in attempting to lay the foundation for the admissibility of their exhibits. For those who successfully lay the foundation, the process is often cumbersome and even boring to

¹ FED. R. EVID. 1006.

² FED. R. EVID. 901.

³ FED. R. EVID. 803(6).

the jury. It should always be remembered that most jurors come to court with expectations formed by watching Hollywood depictions of trials—and Hollywood never wastes time with foundations for documents.

A readily available device that I rarely see used is good old Civil Procedure Rule 36—Requests for Admissions.⁴ Although Rule 36 is most often used to get an adversary to admit to certain undisputed facts, it is broad enough to encompass the foundational requirements for document identification and business records.

And the process could not be simpler. As trial approaches, stack up all of your trial exhibits and attach a request to admit—properly tailored to the foundational requirement you must meet—and serve the other side. Your opponent then has 30 days to either admit or deny.⁵ If your opponent admits, you no longer need a witness, the trial is shortened, and you score points with the jury. If your opponent denies, you then revert to the old way of laying the foundation at trial and, if you do so successfully, the rule allows you to send your opponent a bill for your costs for the in-court foundation laying.

III. A handy shortcut to proof

Generally speaking, a trial is an attempt to replicate or recreate something that occurred in the past, much as the actors on a stage reproduce an event. This is traditionally done by calling witnesses and introducing exhibits, subject to the governing evidentiary and procedural rules.

But there is a shortcut that allows you to dispense with proving something the conventional way: Ask the court to take judicial notice of the fact under FRE 201.⁶ Judicial notice is based on the ancient adage *manifesta probatione non indigent* (“what is known need not be proved”). In the early common law, judicial notice was based upon the common knowledge of the judge. For example, in the 1875 case of *Brown v. Piper*, the United States Supreme Court decided a case that questioned the validity of a patent for preserving fish using a freezing technique.⁷ In holding that the patent did not involve a novel technique, the court took judicial notice that at the time, refrigeration

⁴ FED. R. CIV. P. 36.

⁵ FED. R. CIV. P. 36(a)(3).

⁶ FED. R. EVID. 201.

⁷ *Brown v. Piper*, 91 U.S. 37 (1875).

was used to preserve human corpses and also cited undecomposed fish “embalmed for the ages” found in the ice in Siberia.⁸

Modern Rule 201 moves away from the common knowledge of the particular judge and adds some technical requirements. There are two prongs to the Rule. The court may judicially notice a fact because it “is not subject to reasonable dispute” because it (1) is generally known within the court’s territorial jurisdiction, or (2) can be accurately determined from sources whose accuracy cannot reasonably be questioned.

The first prong can be used to prove, for example, that Five Points within the City of Columbia is a commercial district. The second prong can be used to show that in the year 2010, New Year’s Day fell on a Monday (by reference to a calendar) and there was a full moon (by reference to a Farmer’s Almanac or the National Weather Service records).

The rise of internet-based data has led scholar Leonard Niehoff to refer to judicial notice as “an aspiring star of unfulfilled potential.”⁹ Today, many internet sources, particularly public records and government documents, are judicially noticeable. Most courts have held, however, that the ubiquitous Wikipedia entries do not fall into the category of sources whose accuracy cannot be questioned.

I rarely see lawyers avail themselves of Rule 201. In addition to saving time, the Rule can provide you with a strategic benefit: Most of the time, the jury “bonds” with the presiding judge at trial. If a judge takes judicial notice of something important to your case, the jury gets to hear that the judge has agreed with you on some aspect of your proof. That can only help you in the eyes of the jury.

IV. Win the credibility battle with credibility witnesses

Some trials present a prototypical swearing contest: In a slip and fall case, the plaintiff claims no warning signs were in place while the floor was being mopped; the store employee doing the mopping swears there were three. The entire case turns on whom the jury chooses to believe.

⁸ *Id.* at 44.

⁹ Leonard M. Niehoff, *Judicial Notice: The Dues Ex Machina of Evidence*, 27 LITIGATION 31, 31–34 (Fall 2000).

There is a readily available aid at your disposal, and I have never seen it used in 33 years on the bench. FRE Rule 608(a) allows you to call another witness, who knows your slip and fall plaintiff well and can offer the jury an opinion on whether your plaintiff is a truthful person.¹⁰ Or, your second witness can relate the plaintiff's reputation in the community for truthfulness. There are two caveats: (1) you can only offer this evidence to "rehabilitate" a witness whose truthfulness is challenged. In most cases, sharp cross examination, or contradictory testimony by another witness is all you need to say your plaintiff's credibility has been put in issue. (2) Be careful. If your plaintiff has any skeletons in the closet, your opponent can ask about them on cross, assuming the cross examination has a good faith belief that the skeletons exist.

In my view, such character witnesses could often be the "tie breaker" the jury needs to decide the swearing contest. And, generally speaking, an acquaintance who will give favorable character testimony about your critical witness should not be hard to find.

Rule 608 also allows the converse. You may call a witness to give opinion or witness testimony that a witness from the other side is not a believable witness.

I suspect that one reason Rule 608(a) is not used is that lawyers confuse it with the other rule on character evidence which goes the other way. Rule 404(a) strictly regulates the use of character evidence to show that, on a particular occasion, a person acted in accordance with that character.¹¹ But Rule 404(a)(2) carves out an exception to the character of a witness as it relates to truthfulness and directs the reader to Rules 607–609.

So, if you need a simple mnemonic device to master the differences, just say, "The FRE do not permit you to say 'once a bad driver, always a bad driver' but they do permit you to say 'once a liar, always a liar.'"

V. Know (or at least have a copy of) the Rules of Evidence

Trial judges do not like being reversed on evidentiary rulings. After all, it's their specialty, right? Regrettably, I find that all too often, lawyers who are otherwise competent on the substantive law and who can deliver a brilliant summation, are somewhat weak on the Rules of

¹⁰ FED. R. EVID. 608(a).

¹¹ FED. R. EVID. 404(a).

Evidence. My experience was confirmed by a recent national survey of federal judges who identified evidence law as the one area where trial practitioners are somewhat deficient. And, often the judge needs the attorneys to properly frame the issue before ruling on the evidence issue.

Even worse, sometimes the attorneys, who have nine bankers boxes of paper and three paralegals in the courtroom, don't have a single copy of the Rules of Evidence at trial. When I suggest that we look at the precise text of a particular rule, I get a blank stare: The attorney does not have a copy of the FRE in the courtroom!

Good trial lawyers should periodically brush up on the FRE before trial. And take the booklet with you to the courtroom. If you really want to impress the judge, slap it around just a bit (or maybe run over it in your driveway) to make it appear worn and dog-eared.

VI. Call Albert Einstein to the stand

Most litigation of any significance will feature expert testimony from both sides. Indeed, a cottage industry has sprung up in recent decades, and there are legions of experts at your disposal, ready—for a handsome fee of course—to assist you in your search for the truth.

It is not unusual nowadays for experts to command upwards of \$750 to \$1,000 per hour for these services, so a battle of experts is generally an expensive undertaking. If you find yourself in a situation where you can't afford to match your opponent expert- for-expert, consider using FRE Rule 803(18) to get in testimony of additional experts vicariously.¹² Rule 803(18) provides a hearsay exception for learned treatises, so the writings of distant experts can be read to the jury as substantive proof, not merely as impeachment evidence.

Rule 803(18) allows you to present the testimony of leading experts (and even deceased experts) from all over the world. In theory, at least, you could present to the jury the opinions of Albert Einstein (well, maybe not Einstein, but you get the point) for a mere pittance (the cost of a book or library membership).

Learned treatises can often carry more weight with the jury than expert witnesses. It is tempting for the jury to view both sides' experts as nothing more than "hired gun" paid witnesses. Learned treatises, on the other hand, were not written with a specific trial in mind.

¹² FED. R. EVID. 803(18).

I have seen learned treatises used in only one case, but in my view, their use carried the day for the plaintiff. In the late 1980s, I tried a groundwater contamination case. The critical issue for the jury was the toxicity of the substance put into the underground aquifer by the defendant corporation. Both sides each employed an expert on the subject.

When the defendant's expert finished his direct testimony, the plaintiff's attorneys (Kendall Few and his son, now Justice John Few) rolled in a library cart containing about 10 or 12 volumes they had checked out of various libraries. One by one, they got the expert to admit the sources were authoritative, and then dutifully read particularly damning passages from each to the jury. When they finished each book, they stacked it on the ledge of the witness stand in front of the opposition expert so that, in the end, the jury could barely see the hapless witness's eyes peering over the stack of books.

The Few team skillfully used Rule 803(18) to command a legion of well-credentialed experts to go against the defendant's lone live expert witness. The result was a handsome verdict for the plaintiff. So, a trip to the bookstore or local library to obtain the scholarly work ("treatises, periodicals, or pamphlets," in the words of the rule) of scientists or others who support your theory will enable you to go toe-to-toe with your well-financed opponent.

For Rule 803(18) to be used, there must be an expert witness (yours or theirs) on the stand, and the expert (or the court, if judicial notice is used) must accept the treatise as a "reliable authority." One caveat—if the treatise is admissible, Rule 803(18) allows only for it to be read to the jury. It does not become an exhibit to go in the jury room during deliberations. The rationale for this prohibition is that the treatise deserves no more weight than the oral testimony of the witnesses who are in the courtroom. To allow the treatise to go in the jury room would give it undue emphasis.

VII. Protect against discovery malpractice

Federal Rule of Evidence 502(d)—on the books for more than 10 years—is, regrettably, a well-kept secret.¹³ It was designed to allow lawyers engaged in voluminous discovery exchanges to guard against

¹³ FED. R. EVID. 502(d).

inadvertent waivers of the attorney-client and work product privileges.

In modern practice, most attorneys insist on a document by document review of electronically stored information before producing it to the other side. The reason? To be absolutely sure that none of the documents to be turned over contain documents protected by a privilege, lest the producing party be deemed to have waived the privilege by turning over the documents.

But occasionally, the review process is not perfect and the privilege is waived by the production. Rule 502(d) was designed to provide a lifeline to attorneys who may find themselves in this predicament.

If the parties agree in advance to a Rule 502(d) order, and the judge enters the order, then privileged material may be “clawed back” by the producing party. And, even more important, there has been no waiver of the privilege in that pending action, or in any other pending or future litigation in any other court, state or federal. (The applicability of the rule to state courts was made possible when Congress passed the rule change by legislation, under Congress’ Commerce Clause power, rather than by the traditional rule making route.)

Despite its simplicity, it is extremely rare for attorneys to ask for a 502(d) order. Good lawyers should ask for one in every case. Rule 502(d): Don’t litigate without it.

Those are my top seven. You may have noticed a common thread running through many of them: Simplifying and streamlining the trial for the jury. Modern jurors repeatedly tell me that their cases are overtried and that attorneys often appear to be wasting their time.

One recent episode in my court should suffice to make my point. Earlier this year, I tried a relatively simple case to conclusion in three trial days. There were essentially two witnesses with knowledge of the facts: the plaintiff and the defendant. During the trial, I heard one question asked seven different times without objection from the other side.

After the jury had rendered its verdict and been discharged, I followed my standard practice of walking into the jury room to personally thank the jury for their service. I then asked, as I sometimes do, if they had any suggestions for future trials to make jury service more comfortable. One juror, who had cancelled a trip out of state to be able to serve, responded by saying she would like to ask me a question.

She then stood and said she was speaking for all the jurors. She asked, “Would I have been in contempt of court if I had stood up during the trial and said, ‘We are not stupid! We got it the first time!’” As she said that, she gesticulated for arms wildly and several jurors then chimed in, agreeing with her that the case was greatly overtried.

The takeaway: In modern jury trials, anything you can do to move the case expeditiously toward conclusion will help you with the jury. Some of the tools mentioned in this article should help in that endeavor. Use them.

About the Author

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Using eLitigation Tools to Advance Your Case

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I. Introduction

The introduction of tools radically altered the arc of human history, making difficult tasks easier, introducing new possibilities, and freeing up time for more cerebral endeavors. Similarly, eLitigation tools can radically alter the arc of a case.¹ Understanding and using eLitigation tools can help a case team more quickly identify key information, avoid tedious document-by-document review, and free up time to focus on more cerebral endeavors, like developing a litigation or trial strategy.

This article seeks to educate Department of Justice (Department) case teams about the types of eLitigation tools available to them and how they can use those tools to advance their cases. After reading this article, case teams will understand the different types of tools, why they are used, and how they can help.

eLitigation is a complex amalgamation of law, technology, and processes. To simplify things, eLitigation is often divided into phases.² This article discusses eLitigation tools used in each phase encountered in most Department cases: (1) Collection; (2) Processing; (3) Review and Analysis; and (4) Production.

¹ “eLitigation is a term that describes an integrated approach to litigation that encompasses the employee skills, training, and associated best practices, as well as the technology-based tools, needed to handle the identification, collection, processing, review, analysis, production, and presentation of electronic evidence.” Gregg N. Sofer, *Foreword*, 68 DOJ J. FED. L. & PRAC., no. 3, 2020, at 2, 2.

² The Electronic Discovery Reference Model (EDRM) was created to provide attorneys and electronic discovery professionals a shared lexicon. The EDRM divides the electronic discovery process into key phases. *Electronic Discovery Reference Model*, EDRM, <https://edrm.net/edrm-model/> (last visited Apr. 2, 2021).

II. Collection

Electronically stored information (ESI) fluctuates.³ People (and systems) constantly create, modify, and delete it. To support litigation, case teams must capture potentially relevant ESI and hold it static. That is, case teams seek to freeze ESI at a point in time, petrifying it to protect it. Often, to ensure potentially relevant evidence is available later, ESI must be collected. Collection involves acquiring and storing ESI through technological means.

Sometimes, ESI is collected with complex software. For example, a certified professional makes a forensic copy⁴ of a laptop with computer forensic software (such as AccessData Forensic Toolkit or Guidance EnCase). As another example, a skilled user collects data from a cell phone using cellular acquisition software (such as Cellebrite). Other times, collection is more rudimentary. For example, an information technology (IT) employee at a federal agency exports an employee's email mailbox into a PST⁵ file using functionality innate to the agency's email system.

Collection tools vary based on context. A laptop, cell phone, and social media account are very different. Accordingly, the tools used to collect data from them are different. Indeed, there are specialized tools designed specifically to collect certain unique data sources. What is more, as technology evolves, collection tools are updated and invented. But technology always outpaces collection tools. Thus, it may take months or years for tools to be updated or invented to collect new versions or types of ESI.

³ Electronically stored information is “information that is stored electronically, regardless of the media or whether it is in the original format in which it was created, as opposed to stored in hard copy (*i.e.*, on paper).” *The Sedona Conference Glossary: eDiscovery & Digital Information Management, Fifth Edition*, 21 SEDONA CONF. J. 263, 303 (2020) [hereinafter, *Sedona Conference Glossary*].

⁴ A forensic copy is “[a]n exact copy of an entire physical storage media (hard drive, CD-ROM, DVD-ROM, tape, etc.), including all active and residual data and unallocated or slack space on the media. Forensic copies are often called images or imaged copies.” *Id.* at 312.

⁵ PST stands for personal storage table. A PST file is “A Microsoft Outlook email storage file containing archived email messages in a compressed format.” *Id.* at 357. Clients frequently use PST files to provide email to their attorneys.

Given the number and variety of collection tools, this article does not catalog them. Instead, it highlights two key considerations relevant to case teams: First, the need to query agents and agencies about the collection tools at their disposal. Second, the link between collection and admissibility.

First, in many Department cases, law enforcement agents or other federal agencies collect the ESI. The tools available to those entities vary. Law enforcement agencies may have many collection tools in their arsenal, but not every agent or employee knows about *all* the tools an agency possesses. Often, the tools are managed by specialized and siloed units. Department case teams should inquire about what tools are available to collect data sources relevant to a case. In so doing, case teams need to be thorough and persistent. This effort is well worth it because it can avoid using a basic, less effective collection method when someone at the agency has a tool designed specifically to collect a key data source.

Second, case teams should learn about collection tools because collection impacts admissibility. At trial, ESI is subject to the same evidentiary rules as other evidence. ESI can be modified quickly, easily, and sometimes, unintentionally. As a result, authentication is a key consideration.⁶ For example, a prosecutor must demonstrate that the spreadsheet offered into evidence at trial is an exact copy of the Microsoft Excel file the law enforcement agent copied from the defendant's laptop when executing the search warrant months earlier. Frequently, admissibility is closely tied to the collection tools and methodology, as these tools are critical to establishing that ESI was not modified. Instead of waiting until trial to understand what collection tools were used, case teams should ask questions early—ideally as close to the time of collection as possible. Doing so helps avoid admissibility challenges. Additionally, case teams can streamline presentation at trial by tackling admissibility via an affidavit, avoiding the need for authentication testimony that consumes the court's precious time, bores or confuses jurors, and distracts from substantive witness testimony.⁷

⁶ See FED. R. EVID. 901.

⁷ See FED. R. EVID. 902(14); Andrew Schupanitz & Jacklin Chou Lem, *Judges' Treatment of Federal Rules of Evidence 902(13) and 902(14)*, 68 DOJ J. FED. L. & PRAC., no. 3, 2020. at 109, 109.

III. Processing

In the past three decades, digital technology has exponentially grown in power and prevalence. Legal discovery, however, has remained relatively stagnant. Legal discovery is still dominated by antiquated, paper-based practices. For example, a hallmark of legal discovery is the Bates number, the sequential alpha-numeric value added to each page produced. The Bates number is an artifact from a bygone era. Indeed, it originates from a manual stamp that Edwin Bates patented in 1892.⁸ Even though the Bates stamp is more than 120 years old and most information exchanged in discovery is now digital, legal discovery still revolves around this paper-centric practice.

Modern technology was not designed to be divided, redacted, and Bates numbered for production in legal discovery. To make ESI more amenable to legal discovery's paper-centric paradigm, case teams must perform electronic discovery processing. Processing is a blanket term that refers to a variety of processes used to make ESI more suitable for legal use.⁹ In essence, processing is the detailed and resource intensive step of converting raw, unrefined ESI into a form that can be loaded into the tools case teams use to search, sort, review, tag, redact, Bates-number, and produce discovery.¹⁰ Department case teams use different tools to process ESI, including tools developed by Nuix, CloudNine, and Ipro.

Some case teams avoid discussing processing, not wanting to get involved in what seems like dull, technical details. That is unwise. Processing is a golden opportunity to allow the case team to quickly drill into key information by getting irrelevant and duplicative information out of the way. Case teams should strongly consider using

⁸ E.G. Bates Consecutive Numbering Machine, U.S. Patent No. 484,389, (Issued Oct. 18, 1892).

⁹ Processing is “[t]he automated ingestion of electronically stored information into a program for the purpose of extracting metadata and text; and in some cases, the creation of a static image of the source ESI files according to a predetermined set of specifications, in anticipation of loading to a database.” *Sedona Conference Glossary*, *supra* note 3, at 355–56.

¹⁰ For a detailed analysis of electronic discovery processing relevant to Department case teams, see Carrie Kitchen, *Data Processing Explained: What Case Teams Should Know*, 68 DOJ J. FED. L. & PRAC., no. 3, 2020, at 131.

three processing tactics: (1) De-NISTing; (2) De-duplication; and (3) Email Domain and Attribute Identification.

A. Getting rid of system files via De-NISTing

Not all information on a computer, phone, or digital device is created by the user. A portion of a device's hard drive is filled with system files, including the operating system (for example, Windows or iOS) and applications (for example, Microsoft Word, Adobe Acrobat, Angry Birds, etc.). As a person uses a device, she adds user-generated data (for example, Microsoft Word documents, emails, texts, etc.).

In criminal cases, law enforcement entities often make forensic copies of computers. Those copies typically contain *all* the data on the hard drive (system and user-generated). When a case team looks for key user-generated information, system files can cause problems. System files increase the volume of information to be stored and sifted through and generate false hits when running search terms.

Case teams can avoid some of these issues by removing known system files through De-NISTing.¹¹ The National Institute of Standards of Technology (NIST), in collaboration with the U.S. Department of Homeland Security, the Federal Bureau of Investigation, and other law enforcement entities maintains the National Software Reference Library (NSRL).¹² The NSRL is a collection of the digital finger prints¹³ of millions and millions of known system files traceable to developers.

During processing, software calculates the digital fingerprint of each file encountered. During De-NISTing, software compares each file's

¹¹ De-NISTing is “[t]he use of an automated filter program that screens files against the National Institute of Standards and Technology (NIST) list in order to remove files that are generally accepted to be system generated and have no substantive value in most instances.” *Sedona Conference Glossary, supra* note 3, at 295.

¹² See *National Software Reference Library (NSRL)*, NAT'L INST. OF STANDARDS AND TECH. <https://www.nist.gov/itl/ssd/software-quality-group/national-software-reference-library-nsrl> (last visited Apr. 2, 2021). Electronic discovery professionals commonly refer to the NSRL as the “NIST List.”

¹³ The NSRL contains the hash values of known, traceable software files. Hash is “a mathematical algorithm that calculates a unique value for a given set of data, similar to a digital fingerprint.” *Sedona Conference Glossary, supra* note 3, at 317.

digital fingerprint to the NSRL. If a file's fingerprint matches the NSRL, the file is filtered out. De-NISTing shrinks the volume of data to be stored and reviewed, pushes irrelevant data to the side, and allows case teams to focus on user-generated information.

B. Getting rid of duplicates via de-duplication

ESI can be easily copied and disseminated. As a result, the world is filled with duplicates. All these duplicates can cause problems. First, duplicates generate inefficiency; case teams waste time repeatedly reviewing the same document. Second, duplicates generate the risk of inconsistency; team members may make contradictory decisions about the same document. If one team member correctly tags a document privileged and another team member incorrectly tags it not privileged, a copy of a privileged document may be produced.

Case teams can reduce the number of duplicates through de-duplication.¹⁴ During processing, software calculates the digital fingerprint of each file.¹⁵ Processing software then uses that fingerprint to identify duplicates. Basically, the software (1) calculates the fingerprint of each file it encounters; (2) compiles (and refreshes) a list of the fingerprints of all files encountered; (3) compares the fingerprint of each new file encountered to the list of fingerprints already encountered; and (4) identifies or suppresses files that have the same fingerprint as a file already encountered (duplicates).

The particulars of de-duplication can get complex. There are two types of de-duplication.¹⁶ What is more, different software applications

¹⁴ De-duplication is “[t]he process of comparing electronic files or records based on their characteristics and removing, suppressing, or marking exact duplicate files or records within the data set for the purposes of minimizing the amount of data for review and production. De-duplication is typically achieved by calculating a file or record’s hash value using a mathematical algorithm. De-duplication can be selective, depending on the agreed-upon criteria.” *Id.* at 293.

¹⁵ *See Id.* at 317.

¹⁶ The two types of de-duplication are Custodian De-Duplication (*aka*, vertical) and Cross-Custodian De-Duplication (*aka*, horizontal, global, or case level). Custodian De-Duplication limits the scope of duplicate removal to a single custodian’s data. *Id.* at 286–87. Cross-Custodian De-Duplication seeks to remove duplicates across all custodians’ data in a case. *Id.* at 277, 286, 315.

and settings offer unique options. This article does not delve into these granular, technical issues.

Regardless of the type of de-duplication and software used, de-duplication allows case teams to identify duplicates and determine how the software treats those duplicates. The choices for a case team range from tagging all duplicates (making them easily identifiable) to eliminating duplicates from the dataset before review and production. Depending on the nature and volume of the data, de-duplication can materially reduce volume. For datasets containing email mailboxes of several people who communicated regularly, de-duplication can cut data volume by more than 25%. In some datasets, de-duplication cuts data volumes by nearly 50%. But even small reductions can significantly help case teams reduce the volume of documents they must review and produce.

De-duplication is powerful, but not without controversy. De-duplication is widely accepted and used, but it is best used knowingly and transparently. Case teams should discuss de-duplication options with their litigation support. Case teams should also discuss de-duplication with opposing counsel, for example during a Rule 26(f) conference¹⁷ in a civil case or a Rule 16.1 conference¹⁸ in a criminal case.

C. Getting rid of irrelevant emails via email domains and attributes

Email mailboxes are fertile sources of evidence. Finding key emails, however, can be difficult due to the large volume of email people send and receive. Indeed, most mailboxes contain thousands of emails. Locating key emails in this sea of data can be laborious and frustrating. With that said, case teams can make this task easier by focusing on email domains and attributes during processing.

An email domain is the portion of an email address after the “@” and before the “.” As an example, in this email address, john.doe@fictional.com, the domain is “fictional.” Some processing

¹⁷ See FED. R. CIV. P. 26(f).

¹⁸ See FED. R. CRIM. P. 16.1; Thomas Woods, *Discovery Conferences Come to Criminal Practice: New Federal Rule of Criminal Procedure 16.1*, 68 DOJ J. FED. L. & PRAC., no. 3, 2020, at 61.

software identifies and extracts domain information from emails.¹⁹ The software can use this information to create a list of domains within a dataset, as well the number of emails sent and received from each domain. This information can accelerate a case team's ability to find key information in two ways. First, case teams can focus on email sent to or received from domains of interest. For example, focusing on emails a defendant sent to the domain used by a suspected co-conspirator. Second, case teams can weed out email from irrelevant domains, such as suppressing the thousands of fantasy football emails a person received from ESPN.

Email attributes other than domains can also be useful. During processing, software extracts metadata²⁰ from emails. Emails have metadata familiar to everyday users: From, To, CC, BCC, Sent Date, and Subject. But email also has more obscure metadata. Some email has an attribute for list unsubscribe. This attribute signifies that the recipient has the option to unsubscribe from receiving emails from the sender. This attribute is a hallmark of "junk" mail. Some software extracts this attribute, allowing case teams to quickly filter out junk mail with a few clicks.

Case teams should explore using these processing techniques (individually or collectively). In so doing, they should be cognizant that processing decisions need to be made early, as it may be very difficult (or require starting over) to leverage these techniques after data has been processed.

IV. Review and analysis

Review and analysis involve many interrelated activities. Generally, case teams seek to identify the small subset of key evidence that supports the government's case and the larger subset of documents that should be produced to opposing counsel. eLitigation review tools help case teams do both by bringing structure to ESI, allowing case teams to search it, sort it, review it, tag it, and redact it.

¹⁹ For email chains, domain information is extracted only for the last in time email. Domain information is not extracted for all emails embedded within the chain.

²⁰ Metadata is "[t]he generic term used to describe the structural information of a file that contains data about the file, as opposed to describing the content of a file." *Sedona Conference Glossary*, *supra* note 3, at 337.

There are many eLitigation review tools. Most Department case teams use one of two categories: (1) desktop review tools (such as Ipro Eclipse); and (2) enterprise review tools (such as Relativity). Desktop review tools are well-suited for small to medium cases. They offer core document review functionality (storing documents and their metadata, searching, tagging, and redacting) without the need for a robust IT infrastructure or support. Enterprise review tools are more powerful. They can support large volumes of data and offer advanced functionality, but they require substantial IT infrastructure and constant upkeep by skilled IT resources.

Both categories of review tools allow case teams to quickly find key information.²¹ Search terms are powerful. Combining text search with metadata categories (for example, custodian,²² date range, and file type) is even more powerful. For instance, searching for all Microsoft Excel files within John Doe’s documents created between December 1, 2019, and January 31, 2020, containing the word “reserve” is far more precise and effective than running a basic text search for “reserve.”

Both categories of tools also allow case teams to structure their review to ensure that all documents that should be produced are produced. The corpus of documents can be divided into batches, for example, chunks with 500 documents each. Batches allow reviewers to proceed batch by batch until review is complete. This approach ensures that reviewers understand their individual responsibilities, avoids multiple reviewers unintentionally reviewing the same documents, provides a record of who reviewed what, allows for more disciplined quality control, and helps the case team better estimate when review will be complete.

Enterprise review tools offer advanced functionality called analytics. The analytics most frequently used by case teams fall into two categories: (1) structural analytics; and (2) conceptual analytics.

²¹ For a detailed analysis of document review techniques in Ipro Eclipse and Relativity, see Joseph Derrig & Hetal Doshi, *Effective Document Review Techniques in Eclipse and Relativity*, 68 DOJ J. FED. L. & PRAC., no. 3, 2020, at 147.

²² Custodian is eLitigation terminology for the source of data. At base, custodian is the answer to the question “where did this data come from.” A custodian can be a person, device, or system.

A. Structural analytics: email threading, near duplicates, and email communication analysis

Email threading analyzes email text to pull multiple emails that are part of the same thread together.²³ This empowers a reviewer to call up all emails in a thread with the click of a button. Email threading can also identify the inclusive email in a thread (the email that includes all previous emails). This empowers a reviewer to review the one inclusive email and tag every email in a thread in one action.

Near duplicate detection identifies documents that are extremely similar (for example, greater than 90% identical). De-duplication suppresses exact duplicates (see *supra* section III. B.), but datasets may still contain documents that are nearly identical. Reviewing these documents can be maddening, as a reviewer repeatedly thinks, “Didn’t I just read this?” A tool with near duplicate detection enables a team member to review near duplicates together (expediting review) and may allow the team member to see a blackline view highlighting the differences between two near duplicates (further expediting review).

Email communication analysis scrutinizes the communications between email accounts. It goes beyond providing a list of email domains and the aggregate number of emails sent and received (see *supra* section III. C.). Email communication analysis visualizes the flow of email communications, empowering case teams to understand who communicated with whom and how frequently. This helps case teams more quickly identify key emails, as well as identify previously unknown actors who may be relevant to the case.

B. Conceptual analytics: clustering, concept search, and find similar

Conceptual analytics transcend traditional search terms. Search terms return results where a term is in a document. That is, the exact words and syntax are critical. Use the wrong words, miss potentially relevant documents. In contrast, a conceptual search returns results where a document is about a topic, even if a document does not contain all the words used to construct the search.

²³ See *Sedona Conference Glossary*, *supra* note 3, at 305.

Conceptual analytics is based on advanced math that analyzes word co-occurrence across a population of documents. This functionality supports multiple, valuable features:

- **Clustering:** The tool identifies subsets of documents that are highly conceptually similar—clusters. Clusters break documents into buckets with no case team input required. The clusters provide a case team with a bird’s eye view of the topics in a dataset. Case teams can mine clusters of interest for key documents. Case teams can also push irrelevant clusters to the side.
- **Concept Search:** Case teams can run conceptual searches knowing that the exact terms used are less likely to undermine the results. Conceptual searches are best constructed using multiple sentences of text with a mix of relevant nouns, verbs, and adjectives. One low risk, high reward strategy is creating a fictitious “smoking gun” document. The fictitious text is run as a concept search. This tactic is like a lotto ticket: It is a quick and easy chance to hit the jackpot.
- **Find Similar:** If a reviewer finds a key document in a dataset, “find similar” allows her to quickly retrieve conceptually “similar” documents. With a couple of clicks, the tool returns a list of documents that are conceptually similar to the original document of interest. This is a quick and easy way to compound the value of key documents that a case team has already identified.

All this review and analysis functionality (basic and advanced) can accelerate a case. Case teams should discuss the size and nature of their data with litigation support and decide on the best review tool. Case teams should also schedule case team trainings to ensure that all team members take full advantage of the tool’s features.²⁴

V. Production

Typically, a production is created by the same tool used for review (such as Ipro Eclipse or Relativity). After a case team tags the documents to be produced, litigation support uses the tool’s

²⁴ For additional information on document review strategies, see Derrig, *supra* note 21, at 147.

administrative functionality to create a production for opposing counsel.

In general, production does not offer case teams the same types of opportunities to advance a case as the phases previously discussed. Production, however, does pose the risk of derailing a case. To avoid that, case teams should plan for production early. Indeed, case teams should start by establishing what needs to be produced, whom it needs to be produced to, and when it needs to be produced. Case teams can then work backwards. It is critical that case teams develop a plan, instead of assuming it will all work out.

In preparing for production, one watershed decision case teams must make is production format. In most cases, case teams will produce documents in one of two formats: (1) Load Files; or (2) Portable Document Format (PDF).

Load files are a collection of inter-related files that are designed to facilitate the transfer of electronic discovery productions.²⁵ Collectively, this assortment of files enables litigation support to load data into review tools (such as Ipro Eclipse or Relativity). Load files contain information about the documents being produced, including: the number of documents, their order, where each document begins and ends, relationships between them (for example, emails and their attachments), metadata pertaining to each document, and text used to build an index to make the documents searchable. These files are the industry-standard format for exchanging electronic productions. They are what most case teams request and receive in cases involving thousands to millions of documents.

In contrast, PDF is a relatively crude production format. PDFs have three material limitations. First, PDFs have no integrated means of producing metadata. If an opponent wants metadata, it must be produced separately (without the automated linkage offered by load files). Second, with PDFs, it is difficult to definitively preserve and represent relationships between documents (such as emails and attachments). Indeed, the only indicator may be the order of the documents. This, however, is neither definitive nor ideal. Third, as the volume of data grows, it may be impossible for the recipient to search across the production. Adobe Acrobat can search across multiple PDFs, but as the number of PDFs grows, the software hits its limits. Adobe is simply not powerful enough to search across tens of

²⁵ See *Sedona Conference Glossary*, *supra* note 3, at 332.

thousands, hundreds of thousands, or millions of PDFs. As a result, PDF is often not a practical production format in cases with large numbers of documents.

In choosing a production format, case teams may face a challenge. Looking at the volume of data, a case team may conclude that load files seem to be the only viable option. But when the case team considers opposing counsel's eLitigation capabilities, PDF may seem like the only thing opposing counsel could handle. Opposing counsel may lack eLitigation expertise, eLitigation tools, and the financial resources to acquire eLitigation support.

There is no easy solution to this conundrum. There are no free eLitigation tools capable of handling large volumes of data. Tools (even basic ones) cost something.²⁶ What is more, even if opposing counsel could afford a tool, he may lack the IT infrastructure and support to operate it. Deciding how to handle a case with large volumes of data and unsophisticated opposing counsel requires forethought, transparency, and collaboration.²⁷ Case teams should be prepared to discuss production issues with opposing counsel early in a case (such as during a Rule 16.1 or Rule 26(f) conference) and should leverage resources designed to help case teams have this dialogue.²⁸ When engaging in these discussions, one important topic will be how to shrink production volume by focusing on key information and eliminating irrelevant and duplicative information (reinforcing the need for case teams to understand and use the tools and techniques already discussed herein).

²⁶ Although eLitigation tools capable of handling large volumes of data cost money, court-appointed defense counsel may be able to access eLitigation tools, services, and materials offered by the Defender Services Office. See *Litigation Support*, DEFENDER SERVS. OFF., <https://www.fd.org/litigation-support> (last visited Apr. 2, 2021). Case teams should consider referring court-appointed defense counsel to such resources.

²⁷ For an analysis regarding how to approach defense counsels' requests for assistance from the government in cases involving large volumes of ESI, see John W. M. Claud, *Responding to Defense Demands for Government Assistance in Large ESI Criminal Cases*, 66 DOJ J. FED. L. & PRAC., no. 1, 2018, at 139.

²⁸ See, e.g., JOINT WORKING GRP. ON ELEC. TECH. IN THE CRIM. JUST. SYS., RECOMMENDATIONS FOR ELECTRONICALLY STORED INFORMATION (ESI) DISCOVERY PRODUCTION IN FEDERAL CRIMINAL CASES (2012).

VII. Conclusion

ESI has significantly changed criminal and civil litigation. The volume of ESI involved in Department cases requires that case teams be thoughtful and strategic. eLitigation tools can increase efficiency and effectiveness by eliminating irrelevant ESI and helping identify key information more quickly. Case teams have tools and techniques available to advance their cases, and they must carefully consider whether and when to apply them.

About the Author

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Communicating Complex Information in the Era of Twitter and Snapchat: Keeping Today's Listener Engaged

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I. Recognize the challenge

Imagine you're a juror. You're listening to an attorney explain a complex fraud and conspiracy scheme. It's super complicated, a bit boring, and you really can't see how this even matters or what the big deal is. You're bored, you're hungry, you're tired, and you haven't checked Twitter since you checked in as a juror four hours ago. The attorney has just asked the witness to explain something about illegally purchasing widgets, but you missed it, and now she is rattling on about something called a kickback. You're wondering if the witness is wearing a toupee.

Now imagine you're the attorney. You have a problem, and the first step to correcting any problem is recognizing you have one. Today's jurors, and even judges, are accustomed to receiving information in small chunks: They "YouTube" how to install a ceiling fan or make a soufflé; they "Google" what they want to find; and they read snippets of news on their phones. Jurors have also watched decades of television shows in which cases are solved and tried in one hour with incontrovertible forensic evidence and high drama.

In this environment, it is critical to not only present all the information required to prove or defend your case but also do so as concisely and compellingly as possible. Luckily, much research has been done on attention, learning, memory, and decision-making. Courtroom advocates can take advantage of the findings of this research to gain and keep their audience's attention.

II. Know what the research says

A. How we remember

According to research from the cognitive and behavioral sciences worlds (think *Thinking Fast and Slow*¹ by Nobel Prize winner Daniel Kahneman), to remember some piece of information, we must *sufficiently* do three things:

- (1) Pay attention to the information;
- (2) Process the information; and
- (3) Care about the information.

If any of these three things do not happen, we will not remember the information completely or correctly. For example, think about the last time you drove to work or to the grocery store. What color was the car in front of you? You likely don't remember. Why is that? Well, you probably paid sufficient attention to the fact that a car was in front of you (so you wouldn't hit it). It is not likely, however, that you paid sufficient attention to the *color* of the car because that wasn't as important or interesting to you. Now, if the color of the car had been lime, metallic green with flecks of gold in the paint and it almost blinded you in the sun, then you likely would have remembered the color of the car in front of you because you couldn't help but pay attention to the color, and it was impeding your ability to drive safely. Or maybe you just love lime, metallic green.

B. How we make decisions

Similarly, and from the same research, to make *decisions* about information, we need to feel confident and competent we've done the three things mentioned above. If we don't feel we've had enough time to pay attention to or process the information, or we really don't care about the information, we are less likely to make a decision (bad for advocates who must prove their case) and more likely to make an incorrect decision.

III. Do these things to engage audiences

The research takeaway for presenting complex, hard-to-understand, hard-to-care-about information, is to focus on the audience's attention,

¹ DANIEL KAHNEMAN, THINKING FAST AND SLOW (2018).

processing, and emotion. If you can get your audience to focus on, think about, and care about the importance of key information, they are much more likely to remember that information and make good decisions about it. In the environment of a courtroom and a complex case, making the audience care about the outcome may be the most important.

A. Make it relevant . . . to the audience!

Back to the courtroom. A large energy company is charged with falsifying progress reports on a huge energy project. The company was required to notify a regulatory agency of any unforeseen issues that arose with the project. The company allegedly told the agency everything was “proceeding as expected” when it wasn’t. Ultimately, the project was completed and the issues resolved. How can you persuade a jury to care about something so vague and seemingly unimportant, and what would matter to the jury in this case? Perhaps you can tell the jury that the company’s actions are why the community’s energy bills have been so high. If so, the correct resolution of this case becomes important and interesting because it has been connected to something personal and concrete rather than vague and abstract.

Also, by making this issue relevant to something the audience has familiarity with, you connect new information to information the audience already understands. According to the fundamental principles of learning by John Sweller, the “father of cognitive load theory,” this is how we come to remember new things. For example, say you need to explain how a virtual private network (VPN) works. Instead of starting by explaining all the technical terms and processes, you could instead start with the analogy of sending a postcard through the mail—everyone seeing it can read your comments and see your name and address. Then you could say that a VPN is more like sending a letter sealed in an envelope with no return address. Now, your audience has a mental concept of a private messaging system and is ready to learn about the complex details of that system.

B. Make it interesting . . . to the audience!

As the title of this article suggests, we live in an era of Twitter, Snapchat, and all things fast and entertaining. Jurors do not abandon those preferences just because they step into a courtroom, so

incorporating “fast and entertaining” into courtroom presentations is crucial.

One way to make things more interesting to audiences is by incorporating graphics and multimedia into your presentations. According to the “pictorial superiority effect,” we remember pictures and graphics better than text, and we more quickly become interested in and care about what we see than what we read.² Therefore, if you are trying to explain the fact that a doctor and patient had a romantic relationship that provided the doctor’s motive for some unlawful behavior, you would be better off showing a Facebook picture of the two happily embracing during a beach vacation than just saying that the two were a couple. Even better, you could show a video of the couple.

Another way to make things more interesting is by telling compelling stories. Our brains are primed to listen to stories; that is how we have passed information from generation to generation, and there is endless research on the power of stories to enhance memory and decision-making.³ If you cannot include graphics and multimedia in your presentation, using compelling and descriptive language to tell the story of your case helps your audience paint a picture in their heads, which can serve the same purpose. For example, a well-known research study by Elizabeth Loftus (well . . . well-known in the psychology world) showed that jurors better remembered the details of a car accident (that the window of the car shattered) when they were told “the SUV driver smashed into the side of the car, sending glass flying into the victim’s face,” rather than the more factual “the driver of the car sustained injuries when the SUV driver hit the car, breaking the window.”⁴

C. Make it easy . . . for the audience . . . to understand!

Every one of you reading this article is cursed. You have been vexed with something called “The Curse of Knowledge,” which posits that

² See Allan Paivio & Kalman Csapo, *Picture Superiority in Free Recall: Imagery or Dual Coding?*, 5 COGNITIVE PSYCH., no. 2, at 176–206 (1973).

³ See e.g., Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCH., no. 2, at 242–258 (1986).

⁴ Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV., no. 5, at 585–589 (1974).

because you are the subject matter expert about your topic, your case, your whatever, you will struggle with communicating that information to someone who is not an expert and who knows nothing about what you are trying to communicate.⁵ Facts, patterns, and conclusions that are clear to you make no sense to others.⁶

To remedy this, remember the adage, “Less is more.” Sometimes we provide all the details of a case because we think they are all important and we need to provide everything. But are all the details *equally* important, and do they all contribute to better understanding, memory, and decision-making? For example, do you really need to explain each complicated part of a “short sale” of a home, or does your audience just need to know that the home was sold quickly through something called a “short sale?” Again, it goes back to what the audience knows and what they need to know to understand, remember, and decide. Too much information can easily overload individuals, forcing people to refuse to decide or decide incorrectly, as the most important facts get lost in the deluge of information.

Another recommendation is to “chunk” information into three or four easy-to-remember terms. The reason we easily remember to “stop, drop, and roll” if we catch on fire is because the message is “chunked” into three simple-to-remember recommendations. Imagine if, instead, you were taught to “refrain from all activity, lower your body to the ground, and rotate your body in a cylindrical motion.” Would that be as easy to remember?

IV. Think like a juror

You have just heard the closing argument for the fraud and conspiracy case for which you’ve been called to be a juror. You are confident that you understand and can decide the facts because the prosecutor (thankfully) presented the information clearly and concisely. You understand the importance of deciding this case correctly and you know the facts and evidence most important to that decision. You understand the conspiracy (it’s like the hub and spokes on a bicycle) and the roles of all the players involved (you can visualize the image shown at trial with their pictures and where they fit in). You even understand what evidence offered satisfies the

⁵ Chip Heath & Dan Heath, *The Curse of Knowledge*, HARV. BUS. REV. MAG., Dec. 2006.

⁶ *Id.*

elements of the charges. Deliberation does not take long . . . guilty on all counts. Now you can check your phone!

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Maximizing PowerPoint: Best Practices for Adult Learning

Stani Day

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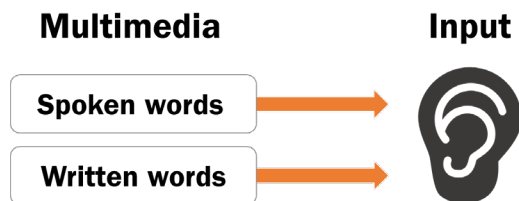
Office of Legal Education

Executive Office for United States Attorneys

We all recognize it, use it, and have seen the good, the bad, and the ugly: PowerPoint. Since its inception almost 20 years ago, this slide show application has found its way into both business and personal realms. PowerPoint offers its users a wide variety of tools and functions to design and customize how we deliver content. The combinations are limitless. But just because you can do something in PowerPoint, should you? How we design our slides for our audience has an impact on their ability to understand, learn, and remember that information. Based on the leading research on multimedia learning and the data the Office of Legal Education (OLE) collects on training effectiveness, I will share with you four simple, yet effective, ways you can maximize learning and retention for your training and trial audiences in your PowerPoint presentations.

I. Information overload

A common mistake we see instructors make when designing their slides is too much text. It is easy to open PowerPoint and start typing what you want to say or what you want your audience to know directly on the slide. When it comes to adult learning, however, adding too much text and words on a slide is a deterrent to learning. It simply leads to information overload. When there is a text-heavy slide and an instructor speaking, the audience must choose whether to read or listen. They cannot do both. The voice of the instructor is an auditory input, as well as the text they are attempting to read on the slide (remember the voice in your head?). Both auditory inputs therefore compete with each other. The audience either listens, reads, or toggles back and forth between the two. Critical information is lost, and learning is not adequately achieved, especially if that



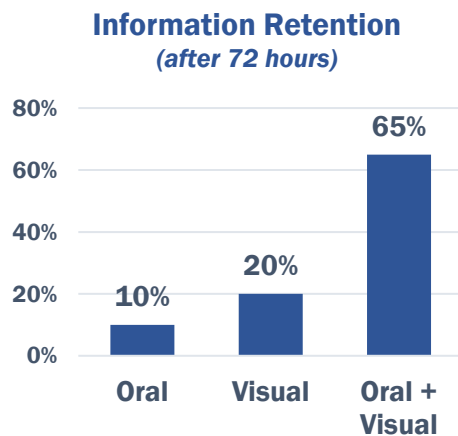
information is new or complex.

The solution is to limit text to key words or phrases. Determine the critical information needed based on your target audience and design your slide content from there. You can verbally expound on those key points and include a substantive handout to accompany your training. You can further tie any text to animation in PowerPoint so that each point is revealed as you cover it. This allows you to control the pace of information and keep your audience attentive to you (so that they are not reading ahead, which means they are listening to you). Your audience will be able to better digest the information presented and avoid information overload.

PowerPoint tip: To add animation to a text box, select the text box > click the “Animations” tab > click to apply an available animation. Simple is best! To have bullet points revealed one at a time within a text box, click “Effect Options” > “By Paragraph”.

II. Picture superiority effect

In the process of limiting your slides to key words and phrases, think about where you can substitute in relevant and appropriate visuals. By visuals, I mean pictures, images, charts, graphs, drawings, and exhibits. Mayer’s research on the inclusion of multimedia (like pictures) shows that the combination of words and pictures is most effective for learning compared to either alone, especially if your audience is new to the subject.¹ Because vision is our dominant sense, we retain and recall more information with visuals due to the “picture superiority effect.” Other research studies show that if you include both visual and oral information, more is remembered. This research goes back to 1963, when researchers on the Weiss-McGrath Study found that if you give an audience just words, only 10% is



¹ RICHARD E. MAYER, MULTIMEDIA LEARNING (3d ed. 2015).

remembered three days later. Add a visual and the audience remembers six times more at 65%.² An exception to this is if your audience is comprised of experts or advanced students. In that scenario, text or visuals are typically more effective. It is all about knowing the experience level of your audience and building your content based on that information.

When choosing visuals for your presentation, know that not all are created equally. The type of visual matters. Images that are purely decorative in nature, while aesthetically pleasing or humorous, do not add any significant meaning to the content and do not enhance learning. Instead, opt for images that evoke emotion, illustrate relationships, illustrate processes, or illustrate how something is structured. This enables the learner to better connect to the material and organize it into their existing knowledge.

Once you have gathered your visuals for your presentation, let them hold their own space on the PowerPoint slide. Do not be afraid to enlarge visuals and balance them with on-screen text. Popping a small picture in the corner of a slide is hard to see and makes it appear as an afterthought. Also, ensure that you are using high-quality, high-resolution images that are not stretched or distorted. The right visuals can enhance attention, understanding, and memory.

PowerPoint tip: Distortion of an image can happen when resizing in PowerPoint. To avoid distorting or stretching an image, click and drag on a corner white circle (along the border of the visual) to maintain its aspect ratio.

III. Slide design

Another common mistake we see are slides that are not legible. This usually comes down to the color and style choices of the background and font. As mentioned, PowerPoint can give you limitless combinations of these slide design elements, but there are careful considerations to make with these selections. With background, a solid color is best. If the background has a gradient or pattern, it can serve as a distraction. Your audience will have to devote mental

² HAROLD WEISS & J.B. MCGRATH, TECHNICALY SPEAKING: ORAL COMMUNICATION FOR ENGINEERS, SCIENTISTS, AND TECHNICAL PERSONNEL (7th ed. 1963).

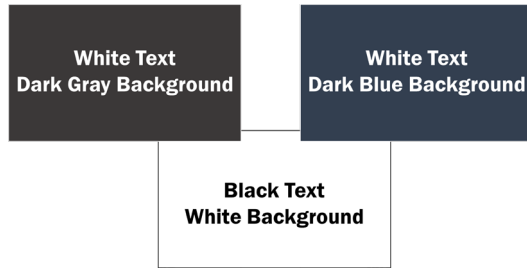
energy to filter out that distraction; mental energy that can, instead, be used for learning and memory.

Regarding font, there are size and type considerations. Using a minimum of 28- or 32-point font size ensures that your audience can read the words in your presentation. This larger font size also means that you cannot include too much text on the slide. That is a win-win!

For font type, there are two main options: serif or sans serif. Serifs, Latin for “little feet,” are little projections off the individual letters (like the font you are currently reading for this article). This is a good option for books, articles, and newspapers as the projections help keep our eyes in line with a body of text. For slide presentations, a sans serif type is best for readability. Sans serif, Latin for “without little feet,” are those that do not have small projections off the individual letters. Some good examples of these in PowerPoint would be Arial, Franklin Gothic, Verdana, or Tahoma to name a few.

Another effect on readability is contrast. If the color of your background does not have adequate contrast with the font color, the audience won’t be able to see the words on your

PowerPoint slide. A best practice for this is to choose a very dark color for your background and a white (or very light) color for the font (or vice versa).



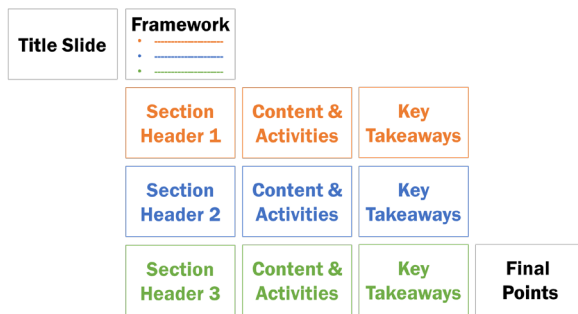
You can set your desired background color, font type, size, and color all at once using the Slide Master in PowerPoint (the “blueprint” for your slide deck). Utilizing the Slide Master is an easy way to set your ideal slide design selections for best readability for your audience.

PowerPoint tip: To set up your slide design choices (background, font, logos, etc.) for your presentation using the Slide Master, click the “View” tab > “Slide Master.” Ensure you’re editing the top-most “parent” Slide Master in the slides pane. Save a theme you like under “Themes” > “Save Current Theme.” It’ll be there in PowerPoint going forward!

IV. Structure

As humans, we constantly search for patterns everywhere as it aids in our performance and understanding. During a presentation, the audience uses mental energy to organize new information into chunks (or schemas). During the organization and integration of this new information with existing knowledge, the brain can get it wrong if there is no clear structure. Instead, if the instructor provides a framework and clearly organizes the information for the audience, they will have a higher likelihood of remembering the information correctly. It can also expand their working memory's capacity, enabling information to move to long-term storage and retrieval. The bottom line: Information that is organized is more memorable. We also find this to be true when we hear from students in the evaluation comments collected at OLE. The number one expectation from students on effective learning is having a clear structure to presentations. It is helpful to include an outline or framework at the beginning of a training, then use that to

structure the rest of your content. You can also bring up the framework throughout to show context to where you are in the presentation.



PowerPoint tip: Add Section Header slide layouts in PowerPoint by going to the “Home” tab > click the drop-down menu for “New Slide” > select the “Section Header” option.

About the Author

Stani Day is a contractor for the U.S. Department of Justice and has been with the Office of Legal Education since 2015. Within the Faculty Development Institute, Stani teaches presentation skills, webinar training, and conceptual and technical skills on PowerPoint. She holds a quarterly webinar series called *PowerPointers*, teaches hands-on PowerPoint training in OLE's Virtual Classroom, and provides one-on-one or group consultations on PowerPoint with regard to training and trial presentations and trial exhibits. She also evaluates and reports on post-course program data, conducts research on instructor performances, and designs educational materials, handouts, videos, and webpages. She has been an instructor in higher and adult education since graduate school. She holds a Master's Degree in Biomedical Science from the University of South Carolina School of Medicine and a Bachelor's Degree in Biology from Erskine College.

Trials in the Age of COVID-19

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I. Introduction

Our obligation to enforce the law did not stop when COVID-19 hit. Our offices continued to operate during the pandemic. We converted to greater reliance on virtual or telephonic court appearances and hearings. But the ability to conduct trials, particularly jury trials, became quite challenging. This article discusses how to prepare for and conduct a COVID-period trial.

II. Pretrial

A. Witness preparation

You will likely encounter your first COVID-period trial challenges while preparing your witnesses. We have listed below some witness preparation challenges to anticipate.

1. Remote preparation

Because of the risks involved with in-person meetings, it is important to seriously consider remote preparation for trial witnesses. Remote platforms like Webex, Teams, and Skype can be used. Work with your office's IT department to make sure you know how to initiate and use your chosen platform. Have practice sessions with your case agent to make sure you know how to set up the meeting, log on, and see and hear each other. Have someone try to join your meeting from a non-Department of Justice (Department) computer and a phone so you know how each works.¹ Make sure you know how to share content, including documents and videos.

¹ Do not assume your witness has or knows how to access these remote platforms. Check with the witness to ensure they have a computer or a phone they can use and that they know how to use the platform. If they do not have

2. In-person preparation

You might feel that it is important to meet with some witnesses in person. You may have several exhibits to review, including physical exhibits or videos, or you may have nervous witnesses who request to meet in person. If you decide to prepare your witnesses in person, make sure you know what the guidance is for in-person meetings in your location—including state, local, and office policies. Schedule your meetings for the largest conference room possible and mark where each person should sit so you can spread out. Consider doing initial or follow-up meetings via phone or video conferencing so you can maximize the utility of your in-person meeting. Minimize the number of people attending the meeting; consider having some people—maybe co-counsel or your victim-witness coordinator—virtually participate. Have all your questions and materials ready and know exactly what you want to go over with witnesses so you have everything ready to show them quickly and easily. Try to use electronic means to show exhibits to witnesses during prep. You can send exhibits to the witness ahead of time via email or mailed discs. Communicate with your witness and agents ahead of time. Make sure everyone understands they have to remain masked unless they are vaccinated. Ask about COVID-related symptoms or concerns before the meeting. Have masks, hand sanitizer, and extra pens available in the room. Sanitize the area between prep sessions. Consider using a portable HEPA air purifier.

3. In-custody witnesses

This pandemic creates unique challenges for in-custody witnesses. You must be in close contact with the United States Marshals Service (USMS) from the moment you think you might have a trial with in-custody witnesses. The typical timeframe to transfer inmates is significantly longer than the normal timeframe due to quarantining and testing protocols. Talk to the USMS (or the facility holding your witness) about the best ways to prep your in-custody witness and whether that can be done remotely. Keep in mind the constraints COVID has placed on USMS resources, consider having agents handle the transport of local inmates, and if you have multiple in-custody witnesses, plan to call them to testify on different days.

access, you may need an agent to go sit with them during the meeting and to provide a computer to conduct the meeting.

B. Exhibit preparation

The judge will likely limit physical contact between the parties and the jury during a COVID-period trial, and as a result, you should plan to publish exhibits electronically. This means that, in lieu of jury binders, you need to do a side-by-side display of a videotape and the corresponding transcript on the juror's computer monitors. The preparation of electronic exhibits requires considerable time and support staff assistance. If your jurisdiction uses the JERS system (Jury Evidence Recording System) for jury deliberations, contact your trial's courtroom deputy about how to mark your exhibits in advance of trial with the JERS naming convention because JERS can be finicky about exhibit names.

C. Pretrial motion practice

It is important to adhere to safety protocols when conducting trials during the COVID-period. These protocols, at times, collide with the parties' rights to a fair trial. Many of the substantive issues raised in pretrial motions involve these rights in relation to safety protocols for witnesses and jurors. The court may deny pretrial COVID-related motions if there are reasonable accommodations to alleviate concerns.

1. Motions to continue trial

For various reasons, either side may seek, through a pretrial motion, to continue the trial to a safer time. For example, COVID has severely limited contact between defense attorneys and incarcerated clients and the Department's ability to transfer inmates between institutions for testimony. The chief judge in your district may also require out-of-state witnesses to follow a region's quarantine protocol before testifying at trial, and the quarantine time and location may not be reimbursable.

We suggest trying to reach an agreement on alternative arrangements for in-court testimony before filing a continuance request based on witness issues. We can request leave to take a Rule 15 witness deposition in a criminal case or explore the possibility of the witness testifying remotely by two-way video.² Federal Rule of Civil Procedure 43(a) provides for the use of two-way video testimony.³ The defendant in a criminal case may object on confrontation grounds

² FED. R. CRIM. P. 15 (Depositions).

³ FED. R. CIV. P. 43(a).

to anything but in-court testimony. You can overcome this objection, however, by showing that it is necessary to further an important public policy and that the reliability of the video testimony is otherwise assured.⁴ One district court suggested livestreaming the trial testimony from a separate, isolated courtroom as a means for witnesses older than 65 to testify during trial.⁵ Of course, a defendant may surprise you and agree to two-way video testimony, so before filing a motion to continue or seeking leave to take depositions, we recommend asking defense counsel about such accommodations.

The safety of the attorneys has also prompted continuance requests.⁶ In some cases, where a safety issue is limited to a single lawyer or witness, a creative solution may suffice. In *United States v. Haas*,⁷ the judge allowed a defense attorney to sit in the first spectator bench, next to, but not at, the defense table and to communicate with the defendant by means of a chat-based computer communication system.⁸ The judge also allowed the attorney to wear a face shield in addition to a mask and gloves.

A district judge may be loath to change the trial date due to speedy trial concerns. A continuance motion should contain specific information about why moving forward on the set date is not feasible so the judge is aware of the magnitude of the problem. In a multi-defendant case with multiple attorneys for each defendant, a trial team in one of our districts added up the number of people required to be in the courtroom for the trial at any given time and used that number to demonstrate that the courtroom population would exceed the recommended number of people in an indoor space at one time. But the judge, even with this degree of detail, may still push back and

⁴ See *United States v. Donziger*, Nos. 19-CR-561, 11-CV-691, 2020 WL 5152162 (S.D.N.Y. Aug. 31, 2020) (granting motion for two-way video testimony). *But see* *United States v. Pangelinan*, No. 19-10077, 2020 WL 5118550 (D. Kan. Aug. 31, 2020) (denying similar motion).

⁵ See, e.g., Dorothy Atkins, *Theranos Judge Says Virus Won't Delay Ex-CEO's March Trial*, LAW360, Dec. 2, 2020; *United States v. Holmes*, No. 18-CR-00258 (the "Theranos" trial).

⁶ *United States v. Colburn*, No. 1:19-CR-10080, 2020 WL 6151094 (D. Mass. Oct. 19, 2020) ("Varsity Blues" case) (request based in part on pre-existing health conditions of attorneys and family members).

⁷ *United States v. Haas*, No. 19-CR-486 (N.D. Ill. Nov. 2020).

⁸ *Id.* (ECF Nos. 221, 229).

ask the parties to address why certain alternative procedures will not work.⁹

2. Fair cross-section challenges

The COVID-19 period has given rise to “fair cross-section” challenges to the grand juries issuing indictments—which are filed as pretrial motions after the indictment issues—and to the venire at trial pursuant to 28 U.S.C. § 1867(a) under the Jury Selection and Service Act (JSSA).¹⁰ These challenges allege that, due to the pandemic, the grand jury or petit jury pool did not or will not represent a fair cross-section of the community. A defendant may pursue a fair cross-section challenge in two parts. The first part is a motion for production of grand jury documents.¹¹ The JSSA allows a defendant access to some documents. The government, in responding, must sift through the categories of requested documents to determine whether, under the JSSA’s terms, to agree or to object to the requested production. Thus far, courts have granted the motions for production in part, allowing production of some documents under a protective order.¹²

A defendant might, after receiving these documents, proceed with the second step and file a substantive fair cross-section challenge. A defendant who files such a motion must satisfy a three-part test under *Duren v. Missouri*¹³ for a court to sustain the challenge. This is a high hurdle. A defendant’s failure to meet any of the *Duren* factors is fatal to the claim.¹⁴ The third *Duren* factor, which requires a showing of systemic exclusion of a group, is particularly difficult to prove. A

⁹ See, e.g., Brian Dowling, ‘Varsity Blues’ Trial Puts Older Lawyers At Risk, *Court Told*, LAW360, Dec. 7, 2020.

¹⁰ Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53.

¹¹ A defendant typically files a motion for production of grand jury materials with the judge assigned to the indicted case. But under some local rules, only the chief judge may order disclosure of materials relating to the grand jury. As a result, in those jurisdictions, the chief judge will decide the motion. See, e.g., N.D. ILL. LOCAL CRIM. R. 6.2.

¹² See *United States v. Holmes*, No. 18-cr-00258, 2020 WL 5408163, at *8 (N.D. Cal. Sept. 9, 2020); *United States v. Shader*, No. 20-cr-202, 2020 WL 4158059 (E.D.N.Y. July 17, 2020).

¹³ 439 U.S. 357 (1979).

¹⁴ See *United States v. Trimarco*, No. 17-CR-583, 2020 WL 5211051, at *5 (E.D.N.Y. Sept. 1, 2020) (denial of fair cross-section motion based on defendant’s failure to show pandemic caused unfair composition).

district's use of random, broadly inclusive plans for jury service should defeat a systemic exclusion claim. The government may also argue an external force (such as a pandemic) does not create a systemic exclusion of a group.¹⁵

3. Challenges to safety protocols

A defendant may claim that mask requirements unfairly foreclose being able to see a juror's face during jury selection or the jury from being able to assess witness credibility during testimony. Judges have largely rejected mask challenges as a basis for continuing a trial and have, instead, found alternatives.¹⁶ In *Trimarco*, the judge noted that there are ways other than seeing someone's mouth and nose by which to gauge credibility.¹⁷ Most mask issues can be resolved by modifying the type of mask worn and the timing of mask wearing. Some judges have supplied FDA-approved transparent masks (not face shields) to prospective jurors for jury selection and have replaced those masks with regular masks once the jury is selected.¹⁸ Most judges will allow a witness to testify without a mask so long as the witness enters and leaves the courtroom wearing one. Given the widespread wearing of masks in the courtroom, we have found the mask issue fades into the background once trial begins.

D. Pretrial conference

The pretrial conference or the last status hearing before trial are opportunities to address COVID-related trial procedures with the judge. The topics to cover include jury selection, sidebars, using masks, seating arrangements, and whether the lawyers will sit or stand during examinations and jury addresses. Check your district court website for current COVID jury selection and trial protocols. Some judges also post their own COVID procedures on their

¹⁵ See *United States v. Haynes*, No. 05-308, 2006 WL 1236059, at *3 (E.D. La. May 3, 2006).

¹⁶ See *Trimarco*, 2020 WL 5211051, at *5–6.

¹⁷ *Id.*

¹⁸ Order, *United States v. Hunt*, No. 19-CR-073, (W.D. Okla. Aug. 31, 2020), ECF No. 124 (using CDC guidance at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html#face-shields> to show transparent face masks provide better protection than face shields because face shields do not prevent the inhalation or exhalation of the virus).

individual sites.¹⁹ We have found it is helpful to have a “walk through” or “talk through” of trial procedures with the judge in the courtroom where the trial will take place with all key trial participants present. These sessions allow the parties to check seating arrangements, sight lines, and audio and visual equipment.

E. Managing anxiety

We are all anxious about conducting trials during the COVID-19 period. No one wants to get sick. Our witnesses are reluctant, or may flat out refuse, to appear. But we have found that most judges are committed to following CDC Guidelines. Many districts have reconfigured courtrooms to maintain social distancing and have installed plexiglass barriers between trial participants. We know from our own experience that, before the trial begins, it feels impossible to do a trial in the COVID period. But once the trial starts, the new procedures become routine. Our best advice is to plan; identify COVID-19 issues, including personal ones; and be flexible by using creative solutions to resolve them. There is no dishonor in not doing a pandemic-period trial if you or a family member have a COVID-susceptible health condition. It may also be possible to remain part of the trial team by working behind the scenes to limit exposure to others.

Well in advance of trial, find out whether there are issues with the availability of your witnesses. If there is an issue, find an alternative witness. If you cannot find an alternate witness or that witness’s testimony is truly essential, request a continuance so that the critical witness can appear. Also, consider technology-based solutions. This planning, combined with an ongoing dialogue with the judge, reduces anxiety about forging ahead.

III. Trial

A. Bench trial

Judges may request, especially in civil cases, that the parties consider proceeding with a bench trial instead of a jury trial. The judge may advise civil litigants that any jury trial will not be

¹⁹ See, e.g., Judge Edmond E. Chang, *Standing Order Governing Bench Proceedings* (NOV. 19, 2020), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Chang/ORDER_bench_proceedings_protocol_2020_11_19_FINAL.pdf.

scheduled until after the judge has cleared the backlog of jury trials in criminal cases. Federal Rule of Criminal Procedure 23(a) generally requires approval of the court and both parties for a bench trial in a felony case.²⁰ But, under appropriate circumstances, such as exigencies created by COVID, a judge can order a bench trial over the government's objection.²¹ Your office may require supervisory or front office approval before a trial team agrees to a bench trial.

The parties in a bench trial may be amenable to remote testimony for a particular witness or even for the whole trial.²² Remote testimony makes the trial faster, more efficient, and safer for all involved. But using remote transmissions does have drawbacks. Judges do not all use the same virtual platforms, and the capabilities of these platforms vary. Currently, at least some Microsoft platforms do not allow for the use of Trial Director, and as a result, we need to use hardcopy exhibit notebooks in those trials. There will be technical glitches during a remote transmission. It is imperative that we try out the chosen platform before trial so that we are familiar with how it works and how the witnesses and exhibits physically appear on the screen. We need to discuss with witnesses before they testify remotely about lighting, non-distracting backgrounds, camera angle, and the volume of their voice. We need to remember that, despite best efforts, it is harder to question a witness remotely, whether on direct or cross-examination, and that remote testimony may not be as effective and persuasive as live, in-court testimony. It is also difficult to object during remote testimony without speaking over the witness or the party doing the questioning.

B. Jury trial

1. Jurors

Many districts rely on prescreening prospective jurors to prevent COVID-19 issues from derailing the trial during jury selection. This means the jury pool coordinator sends each prospective juror a questionnaire containing COVID-related questions before the

²⁰ FED. R. CRIM. P. 23(a).

²¹ See *United States v. Cohn*, No. 19-CR-097, 2020 WL 5050945 (S.D.N.Y. Aug. 26, 2020).

²² A federal district court judge in Washington has conducted civil jury trials via Zoom during the COVID period. See Cara Salvatore, *How Seattle's Federal Court Has Pioneered Zoom Jury Trials*, LAW360, Nov. 20, 2020.

prospective juror reports to the courthouse. Jurors who themselves have or who have family members with COVID-susceptible health conditions may be excused or allowed to delay their service by responding to this form. The prospective jurors who do report to court for jury selection, for the most part, do not raise COVID-related concerns.

Picking the jury may pose the greatest COVID risk during trial based on the number of people involved in jury selection. Each district and each judge mitigates these risks differently, but here are some changes to anticipate (or to suggest, if you are involved in the planning stages):

Multiple courtrooms. Even with a large courtroom, another will likely be necessary for overflow for the public or for questioning multiple groups at a time.²³ Be prepared to dismiss prospective jurors from your table rather than having a bench conference. Know where to look as potential jurors will be spread throughout the courtroom.

Length of process. Jury selection may take a lot longer. The court will likely instruct the prospective jurors on COVID procedures and precautions. Additional COVID-related voir dire questions may be asked. It might take jurors longer to get to and from the courtroom due to social distancing requirements. If your court provides transparent face masks for jury selection, passing them out in the courtroom, giving mask instructions, and having them put them on in the courtroom takes additional time.

Alternatively, your judge might speed up jury selection to get the extra people out of the courtroom more quickly. In that case, you need to be ready to do openings and call your first witness on the first day. The bottom line is to communicate with your judge so you can be prepared for a lengthy or quick jury selection.

Number of alternates. COVID might also affect how many alternates are chosen. Keeping in mind that jurors may have to leave if they develop symptoms or are exposed, you may want to increase the number of alternates. That said, you do not want to have more people than you need, which increases everyone's exposure risk.

²³ An additional courtroom may also be used as a jury room. This allows jurors to remain socially distanced during breaks and deliberations. It may also be significantly closer than the jury assembly room, which will cut down on the time it takes to move the jurors to and from court if small groups are used to maintain social distancing in elevators and hallways.

Jury size. Federal rule of criminal procedure 23(b) provides another option to more alternates that is worth considering: a smaller jury. Rule 23(b)(2) allows the parties to stipulate in writing that the jury may be less than 12.²⁴ The defendant's agreement to this option must be knowing and intelligent. There are some COVID scenarios where this might be useful: (1) before trial if you have run out of potential jurors; (2) during trial if a juror was exposed and needs to be excused; or (3) after deliberations have begun if a juror develops symptoms and needs to be excused. Rule 23(b)(3) also lets the court permit an 11-person jury return a verdict without agreement of the parties. But, once deliberations have begun, unless the parties agree, the court may only dismiss a juror for good cause. If this happens, make sure the judge makes a clear record of the basis of the excusal. During the pandemic, it is important to keep Rule 23(b) in mind, even if you have alternates available, because, once deliberations have begun, if the court excuses a juror for good cause, using an alternate requires deliberations to start over, introduces another person to the deliberation room, and keeps everyone together for an even longer period.

2. Courtroom accommodations

The most visible COVID changes to trials are in the courtroom. The evidence we present remains the same, but so much else is palpably different. We have listed below some COVID-based changes to expect should you conduct a trial during the pandemic:

Courtroom movement. COVID changed the way we move in a courtroom. To maintain distance from the jury, some judges require us to examine witnesses and conduct jury addresses while seated, standing at a podium, or from counsel's table. This is a significant change for the free roamers among us.²⁵

Exhibits. We need to publish our exhibits electronically or, if necessary, to display exhibits on the courtroom document camera.

Masks. Choose a mask that does not muffle sound to the point where it is hard to make out words. To help others hear, use a table

²⁴ FED. R. CRIM. P. 23(B)(2).

²⁵ A defense attorney in one of our districts claimed in a COVID-period pretrial motion that he would be ineffective if he had to conduct his cross-examinations while seated and moved for a continuance on this basis. The judge denied the motion.

microphone or a lapel microphone for amplification. Also, train yourself to speak slowly and to enunciate your words when wearing a mask. When you are mooted jury addresses, wear a mask so that you can adjust to its sound and feel, if the court will require you to use a mask while speaking.

Colleagues in courtroom. There is limited courtroom space in which to seat participants and spectators due to social distancing requirements. Communicating with your colleagues may be challenging. Your judge may leave seating arrangements at your table up to you, hoping for the best, allowing you to be close enough to write notes and whisper through your masks. The judge may also spread you out, in which case you need to figure out how to communicate, whether note passing (to the extent you can without being a distraction) or an instant messaging system. If you have additional people, such as an intern, paralegal, or a second agent, we suggest that you request permission from the judge in advance to allow them to be present. The judge may want to assign them a specific seating location.

Sound quality of recordings. The extensive rewiring required for additional monitors and equipment in the courtroom may affect the sound quality of recordings. Be sure to do a test run by playing a portion of the hardest and easiest to hear recordings before publishing them to the jury.

Sidebars. The parties will likely address the court from counsel table for sidebars using court-supplied headsets and the table microphones. This method, often combined with white noise, prevents jurors and spectators from hearing the sidebar discussion.

Witness testimony. We should request that witnesses testify without masks for Confrontation Clause reasons. Any agreement by the defendant to allow witnesses to testify while wearing masks should be on the record. The witness stand needs to be sanitized for each witness. The judge may require each witness to put a cover on the microphone when the witness sits down and to remove it when the witness leaves the stand. Each witness may have to wipe down the ledge in front of them and the arms of their chair before leaving the witness stand. These steps, performed for each witness, protect witnesses and show the jury the judge's effort to maintain a safe courtroom. You will need to prepare your witness for these procedures before they testify.

In-court identification. In-court identifications of the defendant are more difficult in COVID trials. The defendant may stipulate to the

identification when identification is not at issue. When identification is part of the defense, the defendant and other courtroom participants can wear face shields or transparent face masks when there is a witness on the stand who will be asked to identify the defendant.

Public viewing. Despite the restrictions created by COVID-19, our jury trials must remain open to the public. If your courtroom is large enough, courtroom staff may mark the benches so the public can sit appropriate distances apart, or your court security officers may allow same households to sit together. If your courtroom is small, it may be reconfigured to spread out the jury without leaving room for the public. If so, arrangements should be made for a live audio and video feed of the trial in an overflow courtroom.

IV. Remedies if COVID-19 strikes

What happens if, despite everyone's best efforts, a juror, witness, court staff member, attorney, or agent reports after the trial has started that they are experiencing COVID symptoms or have had a COVID exposure? Here are some options to consider. We can ask for a delay until a COVID test is performed or the results are known. An affected juror may be dismissed and, if enough jurors remain and are willing to stay, the trial can continue. The court may have to postpone the trial, depending on who and how many are affected, or declare a mistrial without prejudice. If the reported concern is exposure to a person who has tested positive for COVID, we need to articulate what the CDC considers an exposure and to determine the nature of the exposure in the case.²⁶ We need to know, for example, the length of contact, the proximity of the individuals, whether masks were worn, and whether those involved have been fully vaccinated. It may be possible to go forward with the trial if the contact is not considered an "exposure." It may also be necessary, as happened in one of our districts, that the chief judge suspend all jury trials for set blocks of time due to a surge in COVID cases.

V. Post-COVID-19 world

Many say COVID has forever altered how we practice law. Our prediction is that, of all the COVID adjustments, the one with the

²⁶ *When to Quarantine*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html> (updated Mar. 12, 2021).

longest lasting impact will be the continued reliance on remote transmissions for witness preparation, trial testimony, and entire bench trials.

VI. Conclusion

We believe the most effective tool in your COVID trial toolkit is communication. Ask the decision makers for COVID accommodations—the worst they can do is tell you no. In one of our districts, we asked for HEPA air purifiers and we got two: one by the podium and one by the jury. Tell your judge about the effects COVID is having on your trial as you go. For example, you may have limited space to spread out witnesses, which might result in you running out of witnesses earlier than you expected. If you communicate with your judge, you may get a little leeway because this is new territory for everyone. Finally, before trial, have all your COVID-related trial questions ready for defense counsel and your judge and *ask them*. We have prepared a non-exhaustive list of questions to assist you.

- How will jury selection work?
- Will we wear masks during questioning and jury selection?
- Will witnesses remove their masks during testimony?
- Will transparent masks to be used during jury selection or by the defendant?
- Will questioning be from the podium or counsel's table?
- Will we sit or stand when speaking?
- How will sidebars be conducted?
- How many people are allowed at counsel's table?
- How long will breaks be?
- Who will clean the podium and witness stand?
- Should all exhibits be electronic? What about physical exhibits? How will the jury review exhibits? Does the court use JERS?
- How will identification of the defendant be handled?
- How many alternates will be selected?
- Where can the public watch the trial?

- What is the plan if a witness, attorney, court staff, or the defendant has symptoms, a known exposure, or a positive COVID-19 test during trial?

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Did the Pandemic Change Bar Admissions for Better or Worse?

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Introduction

Crises test our strength and challenge us to improve. COVID-19 has been one of the biggest crises the bar has faced in recent decades. In this essay, I examine the COVID-19 crisis to reveal the lessons it offers for the future and propose general guidelines so that bar examiners themselves may pass the tests posed by licensing.

First, I detail the nationwide responses to licensing during the pandemic and discuss the post-pandemic impact of these responses.

Second, I discuss the pluses and minuses of online bar exams.

Third, I examine the same with respect to licensing without an exam.

Finally, I reach the conclusion that licensing must change in the future to more adequately vet and prepare lawyers for practice, to better serve the public, to establish a more diverse bar, and to guard public health.

I. Nationwide licensing responses by state

When COVID-19 became a pandemic, state bar licensing responses varied among the following:

- (1) In-person with safety protocols;
- (2) Postponed or additional bar exams;
- (3) Online bar exams; or
- (4) Licensing without an exam.

At least 27 states continued with in-person bar exams, and most included safety protocols such as masks, social distancing, and temperature checks.¹ Other than Iowa, Mississippi, North Carolina,

¹ *Bar Exam Modifications During Covid-19: 50 State Resources*, JUSTIA, <https://www.justia.com/covid-19/50-state-covid-19-resources/bar-exam-modifications-during-covid-19-50-state->

Oklahoma, South Carolina, and West Virginia, the states that offered in-person exams also offered some combination of the following options. At least 24 states postponed their exam,² and at least 24 offered online bar exams.³ At least 8 states offered additional bar exams.⁴ At least 11 states offered temporary or permanent licensing without an exam to 2019 and 2020 graduates.⁵ At least 28 states allowed for graduates or legal interns to perform extended services under attorney supervision.⁶

This year's licensing responses offer lessons for the future. If COVID-19 remains a threat, state bars can learn from 2020. At least 40 bar exams may still occur before herd immunity,⁷ more if the pandemic continues into the summer. The pandemic's likely and

resources/#:~:text=Melton%20announced%20that%20the%20Supreme,applicants%20for%20admission%20in%20Georgia (last visited Apr. 9, 2021) (including Alabama, Arizona, Arkansas, Colorado, Hawaii, Idaho, Iowa, Kansas, Maine, Minnesota, Mississippi, Missouri, Montana (no safety protocols mentioned), Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Virginia, Washington, West Virginia, Wyoming).

² *Id.* (including Alaska, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont).

³ *Id.* (including Arizona, California, Connecticut, D.C., Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, Tennessee, Vermont, Virginia).

⁴ *Id.* (including Alabama, Arizona, Idaho, Minnesota, Nebraska, Oregon, Pennsylvania, Wyoming).

⁵ *Id.* (including D.C. Georgia, Hawaii, Idaho, Kansas, Louisiana, Montana, North Dakota, Oregon, Utah, Washington).

⁶ *Id.* (including Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, D.C., Florida, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Washington, Wyoming).

⁷ *State Bar Exam Information: Alabama-Kentucky*, LSU LAW LIBRARY (June 20, 2020), <https://libguides.law.lsu.edu/c.php?g=191366&p=1263841>; *State Bar Exam Information: Louisiana-Ohio*, LSU LAW LIBRARY (June 20, 2020), <https://libguides.law.lsu.edu/c.php?g=191366&p=1263851>; *State Bar Exam Information: Oklahoma-Wyoming*, LSU LAW LIBRARY (June 20, 2020), <https://libguides.law.lsu.edu/c.php?g=191366&p=1263861>.

hopeful end in the fall of 2021 depends on producing and administering enough vaccinations to achieve herd immunity.⁸ Moreover, while vaccines show extreme promise, their long-term effectiveness remains untested.⁹ Nonetheless, state bars may need to account for COVID-19 in the immediate future.

Second, pandemic bar responses can inform a post-pandemic world. The bar response highlighted long-standing dilemmas regarding licensing, such as the bar-exam's clumsiness as a practice-ability assessment,¹⁰ the long unmet public need for effective counsel,¹¹ and the disparate impact of testing on marginalized groups.¹²

Moreover, moving forward, state bars may decide to enhance wellness. The flu, the common cold, and other such diseases can still spread during a bar exam.¹³ Not only do these diseases impact quality of life and productivity,¹⁴ but some can still threaten the lives of some

⁸ Alvin Powell, *Fauci Says Herd Immunity Possible by Fall, 'Normality' by the End of 2021*, THE HARVARD GAZETTE (Dec. 10, 2020).

⁹ Scott Hensley, *FDA Analysis of Moderna Covid-19 Vaccine Finds it Effective and Safe*, NPR (Dec. 15, 2020), <https://www.npr.org/sections/health-shots/2020/12/15/946554638/fda-analysis-of-moderna-covid-19-vaccine-finds-it-effective-and-safe>.

¹⁰ See Nicholas W. Allard, *The Bar Exam Is Not the Best Test of a Good Lawyer*, N.Y. TIMES (Sept. 24, 2015), <https://www.nytimes.com/roomfordebate/2015/09/24/is-the-bar-too-low-to-get-into-law-school/the-bar-exam-is-not-the-best-test-of-a-good-lawyer>; Stephanie Francis Ward, *A Better Bar Exam? Law Profs Weigh in on Whether Test Accurately Measures Skills Required for Law Practice*, ABA JOURNAL (Jan. 8, 2020), <https://www.abajournal.com/web/article/building-a-better-bar-exam#:~:text=better%20bar%20exam%3F,Law%20profs%20weigh%20in%20n%20whether%20test,skills%20required%20for%20law%20practice&text=Image%20from%20Shutterstock.com.&text=Ultimately%2C%20they%20found%20that%20adding,program%20co%2Ddesigner%20Stephen%20P>.

¹¹ LEGAL SERV. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (June 2017).

¹² Society of American Law Teachers, Statement on the Bar Exam, 52 J. Legal Educ. 446, 450 (2002).

¹³ Cf. Anice C. Lowen & John Steel, Roles of Humidity and Temperature in Shaping Influenza Seasonality, 88 J. Virology 7692, 7692, 7694 (2014) (mentioning increased spread of influenza indoors).

¹⁴ Cf. Jordan Myers, *Cold and Flu in the Workplace*, SMALL BUS. CHRON., <https://smallbusiness.chron.com/cold-flu-workplace-1232.html> (last visited May 14, 2021); Peter Dicipinigaitis, Ronald Eccles, Michael Blaiss & Mark

populations.¹⁵ Additionally, some epidemiologists predict that the world can expect future pandemics.¹⁶ Thus, mitigating disease spread during the exam remains a worthy goal.

Finally, the various responses may have introduced technological and other benefits worth exploring for efficiency, convenience, and savings. The advantages and disadvantages of the varying responses to the bar exam are explored in greater detail below.

II. Impacts of online testing

A. The good

1. Public, test taker, and examiner safety

During the pandemic, online testing offers one of the safest licensing alternatives for the public, bar takers, and exam administrators. Recently, at least two in-person bar takers tested positive after taking the exam.¹⁷ Epidemiologists indicate that sharing indoor air poses one of the highest risks of COVID-19 transmission.¹⁸ The more people and the more time added to that indoor environment, the more the risk increases.¹⁹ In large states with few test sites, such gathering threatens not only test takers and administrators but also the public, whom those takers and administrators can infect.²⁰ While stress's role

Wingertzahn, Impact of Cough and Common Cold on Productivity, Absenteeism, and Daily Life in the United States: ACHOO Survey, 31Current Med. Rsch. & Op. 1519 (2015).

¹⁵ 2019–2020 U.S. Flu Season: Preliminary In-Season Burden Estimates, CTR. FOR DISEASE CONTROL & PREVENTION (2020), <https://www.cdc.gov/flu/about/burden/preliminary-in-season-estimates.htm> (last visited May 14, 2021).

¹⁶ Victoria Gill, *This is not the Last Pandemic*, BBC NEWS (June 6, 2020), <https://www.bbc.com/news/science-environment-52775386>.

¹⁷ Joe Patrice, *Bar Examinee Tests Positive For COVID After Leaving Last Week's Exam Feeling Ill*, ABOVE THE LAW (Sept. 15, 2020), <https://abovethelaw.com/2020/09/bar-examinee-tests-positive-for-covid-after-leaving-last-weeks-exam-feeling-ill/>.

¹⁸ *Deciding to Go Out*, CTR. FOR DISEASE CONTROL & PREVENTION (2020), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/deciding-to-go-out.html> (last visited May 14, 2021).

¹⁹ *Id.*

²⁰ *Cf.* Christie Aschwanden, *How 'Superspreading' Events Drive Most Covid-19 Spread*, SCIENTIFIC AMERICAN (June 23, 2020), <https://www.scientificamerican.com/article/how-superspreading-events-drive->

in COVID-19 infection is still unknown, generally, stress weakens immune systems.²¹ And the bar exam causes great stress. Further, when test takers travel to an exam site, possibly by air or train, and stay in a hotel, their travel can further increase the likelihood of disease spread.²²

In-person testing under such circumstances can also pose a mental health threat. Stress can exacerbate underlying anxiety spectrum disorders and post-traumatic stress.²³ The additional disease threat, combined with this stress, could cause overwhelming mental health issues for some test-takers.

In a post-pandemic world, COVID-19 transmission and the related mental health issues may be inapplicable. A long-term study of other disease transmission, however, such as the flu or common cold, and multi-day exams could be worthwhile. Additionally, the proactive will plan for future disease threats.

2. Reduced time and costs for bar takers and bar testers

Hosting an exam online offers the additional benefit of reducing travel time and travel costs for exam administrators and exam takers. For exam takers, that time-savings potentially means more time for rest and self-care during a busy and stressful period.

For bar examiners, hosting an in-person exam means providing or renting facilities large enough and well-equipped enough to hold exam takers and provide proper security. Even when using a building

most-covid-19-spread1/ (discussing how large gatherings such as funerals and conferences have caused spread).

²¹ Stacy Kish, *Research Informs Possible Susceptibility to COVID-19*, CARNEGIE MELLON UNIV.: DIETRICH COLL. OF HUMANITIES AND SOC. SCI. (July 9, 2020), <https://www.cmu.edu/dietrich/news/news-stories/2020/july/cohen-isolation.html>; Sheldon Cohen, Psychosocial Vulnerabilities to Upper Respiratory Infectious Illness: Implications for Susceptibility to Coronavirus Disease 2019 (COVID-19), 16 *Persp. on Psych. Sci.* 161 (2020).

²² *Travel: FAQs*, CTR. FOR DISEASE CONTROL & PREVENTION (Jan. 13, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/faqs.html>.

²³ Kuan-Yu Pan et al., The Mental Health Impact of the COVID-19 Pandemic on People With and Without Depressive, Anxiety, or Obsessive-compulsive Disorders: a Longitudinal Study of Three Dutch Case-control Cohorts, 8 *The Lancet: Psychiatry* 121 (2020).

already owned by a bar, there are building costs: heating and cooling, electricity, water, technology, facilities staff, security, etc.

B. The bad

1. Technological cost and technological difficulties

Nonetheless, the technology cost may cancel out bar administrators' savings passed on to bar takers. Bar administrators may still have costs for exam software and IT staff.

In addition to the costs, technical difficulties can also subvert exam goals. For instance, after the Florida bar exam moved online, test takers reported that the exam software froze or overheated their computers.²⁴ Moreover, the facial recognition software necessary for security allowed a dog to have access.²⁵ The Florida Board of Bar Examiners had to postpone the exam, and then some test takers reported technical problems again upon taking the exam.²⁶

2. Other discriminatory impacts

Online exams may disparately impact financially distressed bar takers, larger families, primary caretakers, single parents, and test takers with disabilities. To take the exam online, a bar taker needs a computer with a webcam, a microphone, the appropriate operating system, hard drive space, memory, and CPU and sufficient internet bandwidth.²⁷ That may sound easy to wealthy individuals living in major metropolitan areas, but as a professor in semi-rural Georgia, I can attest that both my students and I faced internet outages over the last semester on Zoom. Due to outages and delays, the first week we moved to Georgia, my husband had to rent an Air BNB so that he

²⁴ Dan Sullivan, *Technical Glitches Postpone Florida Bar Exam*, TAMPA BAY TIMES (Aug. 17, 2020), <https://www.tampabay.com/news/florida/2020/08/17/technical-glitches-postpone-florida-bar-exams-set-for-wednesday/#>.

²⁵ *Id.*

²⁶ Karen Sloan, *'One Of The Toughest Things I've Gone Through.'* *Examinees Weigh In On Florida's Online Bar*, LAW.COM (Oct. 15, 2020), <https://www.law.com/dailybusinessreview/2020/10/15/one-of-the-toughest-things-ive-gone-through-examinees-weigh-in-on-floridas-online-bar/?slreturn=20210009124654>.

²⁷ See, e.g., *Massachusetts Board of Bar Examiners*, EXAMSOFT, <https://ei.examssoft.com/GKWeb/login/mabar> (last visited May 14, 2021).

could work online. Thus, location and the costs of a compatible computer and high-speed internet pose yet another licensing hurdle.

Bar takers who can afford their own quiet test-taking space may fare better than those who live in multiple person households with fewer rooms and less square footage. Moreover, while answering two multiple choice questions per minute, a bar taker requires an environment free from distraction.

Law schools can potentially mitigate some of these impacts by offering test-taking spaces to either their graduates or to test takers generally, as did Mercer Law School. While that may reduce some of the COVID-19 benefits, reducing the number of people in a building mitigates disease spread. In this scenario, with some bar takers at home and others dispersed to various law schools, the reduced number of takers in a building decreases risk.

Online testing may also disparately impact people with larger households, particularly family members who care for children or disabled adults. Statistically, such care falls to women.²⁸ When this primary caretaker takes the bar at home, children or disabled adults may have difficulty understanding the primary care-taker's unavailability. Thus, the test-taking environment can become more distracting for primary caretakers and may disparately impact women, larger families, and families of those with disabilities.

Finally, online tests may impact test takers with disabilities. Being surveilled at home can provoke anxiety in test takers with anxiety disabilities.²⁹ Moreover, both reading and typing on a computer screen may pose additional challenges for some test takers.³⁰

²⁸ Nidhi Sharma, Subho Chakrabarti & Sandeep Grover, *Gender Differences in Caregiving Among Family—Caregivers of People with Mental Illnesses*, 6 *WORLD J. OF PSYCHIATRY* 7 (2016); Sarah Jane Glynn, *Breadwinning Mothers Continue To Be the U.S. Norm*, *CTR. FOR AM. PROGRESS* (May 10, 2019), <https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm/>.

²⁹ Colleen Flaherty, *Big Proctor*, *INSIDE HIGHER ED.* (May 11, 2020), <https://www.insidehighered.com/news/2020/05/11/online-proctoring-surg-ing-during-covid-19>.

³⁰ Sandra Thompson, Martha Thurlow & Michael Moore, *Using Computer-based Tests with Students with Disabilities*, *NAT'L. CTR. ON EDUC. OUTCOMES* (Jan. 2003), <https://nceo.info/Resources/publications/OnlinePubs/Policy15.htm>.

III. Licensing without an exam

A. The good

1. Inaccuracy of exams in assessing practice ability

Lawyers and law professors have long criticized bar exams as awkward tools for assessing practice ability.³¹ For instance, any given bar exam may test on the nuances of the rules regarding commercial speech, something that lawyers practicing in other areas are unlikely to need and can research if they do.

At the same time, bar exams fail to assess essential practice skills such as persuasion, active listening, and cultural competency. While some jurisdictions fortunately now include the Multi-State Practice Test (MPT) on their bar exams, this test has its limits. The MPT primarily measures legal writing and analysis skills. Still untested crucial skills include storytelling, client counseling skills, cross-examination skills, dispute resolution skills, and more.

This clumsy gate-keeping measure provides the public with lawyers who may have memorized the arcane details regarding warranty easement deeds in perpetuity. However, it deprives them of counsel who might establish a listening environment more conducive to fact development, counsel who might bridge cultural gaps, or counsel who might powerfully tell their stories in court.

Fortunately, just as this article is going to press, a National Council of Bar Examiners Testing Task Force has proposed a change that replaces the bar with an exam more like the MPT.³² Moreover, the task force is even recommending including investigation and evaluation, client counseling and advising, negotiation and dispute resolution, and client relationship and management.³³

While this recommendation steps in—or even leaps into—the right direction, it remains unclear whether such an exam will or even can measure essential skills such as persuasive storytelling, active listening, or oral advocacy. Thus, the recommendation may still pose some of the challenges below while eliminating other challenges.

³¹ See, e.g., Allard, *supra* note 10; Ward, *supra* note 10.

³² Karen Sloan, *Bar Exam Overhaul Plans Go Public. So Long, MBE*, LAW.COM (Jan. 4, 2021), <https://www.law.com/2021/01/04/bar-exam-overhaul-plans-go-public-so-long-mbe/>.

³³ *Id.*

Because this gate-keeping measure exists, law schools become stuck between Scylla and Charybdis or, rather, between skills lessons and bar drills. If schools wish their graduates to become lawyers, they must impart bar-taking skills that are of little use in practice, such as the ability to take a multiple-choice exam. In allocating course credit, hiring professors, and distributing resources, law schools must strike a balance between bar-readiness and practice-readiness.

If instead, state bars employed a gate-keeping measure that more accurately assessed practice ability, law schools could center their focus and better prepare lawyers to serve their future clients.

2. Exam alternatives

Licensing without an exam could eliminate the concerns above regarding safety, travel, building costs, exam integrity, and technological costs and difficulties; could encourage healthy competition; could increase services to the poor; and could decrease the exam's disparate impact on underserved lawyer hopefuls.

This idea comports with other countries' approaches. Jurisdictions, such as England, license lawyers without a bar exam.³⁴ Such jurisdictions still institute other gatekeeping and assessment measures. For instance, in England, solicitors train with a law firm. In contrast, barristers (roughly litigators), pass an aptitude test, join an Inn of Court, take a training course, and then train under an experienced barrister.³⁵

3. Increased services to the poor

Regarding the benefits, licensing lawyers without an exam may encourage healthy competition and increase legal services to the poor. Non-exam licensing potentially increases the number of lawyers and thus increases the competition among lawyers. While practicing lawyers may prefer less competition, increased competition potentially means lawyers must offer better, less expensive services.

The increase in licensed lawyers potentially also means an increase in services to the public. In 2016, 86% of low-income Americans' civil legal issues went unmet or inadequately met.³⁶ For this benefit to be

³⁴ *How to Become a Lawyer in the UK*, QLTSCHOOL (Oct. 23, 2018), <https://www.qlts.com/blog/profession/how-to-become-a-lawyer-in-the-uk>.

³⁵ *Id.*

³⁶ *See* The Justice Gap, *supra* note 11.

realized, however, a licensing mechanism must include a process that ensures lawyers fill this gap in service. Ten months after graduation, one out of five 2019 law graduates had failed to find JD advantage employment.³⁷ Until enough jobs serving the poor and the public become available and provide a living wage and cover a lawyer's expenses, simply churning out more lawyers fails to address this problem.

B. The bad

1. Law school financial incentives against proper gatekeeping

Thus far, licensing lawyers without an exam in the United States has often meant a diploma privilege, the licensing of lawyers based on a law school diploma as opposed to an exam result.³⁸ This mechanism delegates most of the gatekeeping function to law schools. Tuition dollars may incentivize for-profit and tuition-dependent law schools to admit and retain students who fail to meet practice-ready standards.³⁹ Moreover, when a school relies on students' evaluations to retain, promote, or tenure professors, that reliance may encourage those professors to lower their academic standards.⁴⁰ While these schools and their employees may have noble goals, threats of closure and downsizing can place pressure upon them.⁴¹

Nonetheless, law school critics may overstate both admission and retention concerns and foster inequality in so doing. Many law school

³⁷ Karen Sloan, *Law Grads Hiring Report: Job Stats for the Class of 2019*, LAW.COM (June 9, 2020), <https://www.law.com/2020/06/09/law-grads-hiring-report-job-stats-for-the-class-of-2019/?tokenvalue=52A811E7-B2A4-4379-A7AA-9F203A9DEB91>.

³⁸ See Dan Kittay, *States Mull Diploma Privilege as an Option for Pandemic Affected Bar Exams*, 46 ABA Bar Leader 1 (Sept.–Oct. 2020).

³⁹ See Ry Rivard, *Lowering the Bar*, INSIDE HIGHER ED. (Jan. 16, 2015), <https://www.insidehighered.com/news/2015/01/16/law-schools-compete-students-many-may-not-have-admitted-past>.

⁴⁰ See Craig Vasey and Linda Carroll, *How Do We Evaluate Teaching?*, AM. ASS'N OF UNIV. PROFESSORS (May–June 2016), https://www.aaup.org/article/how-do-we-evaluate-teaching#.X_n9GdhKjZY.

⁴¹ Debra Cassens Weiss, *'Massive Layoffs' Predicted in Law Schools Due to Big Drop in Applicants*, ABA JOURNAL (Jan. 31, 2013), https://www.abajournal.com/news/article/massive_layoffs_predicted_in_law_schools_due_to_big_drop_in_applicants.

predictors often fail to predict student performance⁴² and can often pose a barrier to previously underserved students, students of color, and students who faced previous hardships.⁴³ Likewise, schools that invest in academic success programs and focus on the best teaching practices can rightfully retain previously underserved students.

Despite some critics' exaggeration of this issue, assigning the gatekeeping role to law schools alone likely still invites challenges.

2. Potential for discriminatory impact

Not only does using law schools as gatekeepers invite the challenges above, but diploma privilege could disparately impact traditionally marginalized groups. Whether bars use a diploma privilege or some other non-exam assessment measure, these measures likely form a patchwork quilt. Each law school requires different courses and degree requirements and maintains different academic standards and assessment measures. If practitioners become the assessors, then the potential for widely varying standards grows even greater.

Moreover, if state bars delegated this gatekeeping function to practitioners, then potentially this delegation preserves the opportunity of lawyering for the privileged. While accounting for slightly less than 50% of the U.S. population,⁴⁴ males accounted for 64% of lawyers in 2019.⁴⁵ Caucasians accounted for 85% of lawyers.⁴⁶ Similar lawyer hopefuls may be more likely to know lawyers as a result and have access to lawyers who can help them, particularly in a decentralized system. In fact, the English licensing system, which

⁴² Alexia Brunet Marks & Scott A. Moss, *What Makes a Law Student Succeed or Fail? A Longitudinal Study Correlating Law Student Application Data and Law School Outcomes*, 13 J. Empirical Legal Stud. 205, 206–07 (2016).

⁴³ Marisa Manzi & Nina Totenberg, *'Already Behind': Diversifying The Legal Profession Starts Before The LSAT*,

NPR (Dec. 22, 2020), <https://www.npr.org/2020/12/22/944434661/already-behind-diversifying-the-legal-profession-starts-before-the-lsat>.

⁴⁴ U.S. CENSUS BUREAU, QUICKFACTS, <https://www.census.gov/quickfacts/fact/table/US/SEX255219#SEX255219> (last visited July 19, 2019).

⁴⁵ Nicole Black, *ABA 2019 Report: Lawyer Demographics, Earnings, Tech Choices, and More*, MYCASE, (Jan. 9, 2021) <https://www.mycase.com/blog/2019/08/aba-2019-report-lawyer-demographics-earnings-tech-choices-and-more/>.

⁴⁶ *Id.*

resembles the diploma privilege, still suffers incredible diversity challenges.⁴⁷

Even if lawyer hopefuls from marginalized demographics can secure a legal mentor, these mentors would lack the bar's anonymous and often more objective and uniform assessment. While not all lawyers will intentionally discriminate, implicit bias is likely to interfere with their assessments.⁴⁸ Harvard's implicit association test measures subconscious biases and reveals that 75% of people associate men more strongly with work and women more strongly with family.⁴⁹ Likewise, 48% of white people subconsciously preferred white people over black people.⁵⁰ Another study has found a correlation between higher implicit bias test ratings and lower academic scores among students of color.⁵¹ Thus, likely, a non-anonymous assessment and supervision could disparately impact statistically ill-perceived groups.

3. Increased competition among lawyers

Already practicing lawyers may object to non-exam licensing methods because they increase competition among lawyers. Setting aside lawyers' potential self-interest in cornering the market,⁵² competition does also pose some legitimate concerns. Unemployed or

⁴⁷ *Nobody Thinks Black People Can Be Barristers*, BBC NEWS (Oct. 3, 2020), <https://www.bbc.com/news/uk-england-54297993>.

⁴⁸ See Tasminda K. Dhaliwal et al., *Educator Bias is Associated with Racial Disparities in Student Achievement and Discipline*, BROOKINGS INST. (July 20, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/07/20/educator-bias-is-associated-with-racial-disparities-in-student-achievement-and-discipline/> (discussing implicit bias's impact on assessments generally).

⁴⁹ Scott Sleek, *The Bias Beneath: Two Decades of Measuring Implicit Associations*, ASS'N FOR PSYCH. SCI. (Jan. 31, 2018), <https://www.psychologicalscience.org/observer/the-bias-beneath-two-decades-of-measuring-implicit-associations>.

⁵⁰ Rich Morin, *Exploring Racial Bias Among Biracial and Single-Race Adults: The IAT*, PEW RSCH. CTR. (Aug. 19, 2015), <https://www.pewsocialtrends.org/2015/08/19/exploring-racial-bias-among-biracial-and-single-race-adults-the-iat/>.

⁵¹ See Dhaliwal, *supra* note 48.

⁵² See Robert C. Fellmeth, Bridget Fogarty Gramme, C. Christopher Hayes, *Cartel Control of Attorney Licensure and the Public Interest*, 8 BRIT. J. AM. LEGAL STUD. 196, 198 (Nov. 25, 2019) (describing bar exams with lower pass rates as a form of price-fixing).

underemployed lawyers⁵³ do pose the same societal burdens as all unemployed and underemployed people, and their unemployment or underemployment harms them.⁵⁴ Moreover, they will likely have three years of law school student loans along with three less years of income.

This competitive environment may also tempt some lawyers to engage in unethical behavior to attract clients. Already, the bench and bar disciplines lawyers for filing frivolous suits or pursuing frivolous arguments or defenses, misappropriation of client funds, and more.⁵⁵ In fact, one analysis shows that the larger the bar, the greater the discipline problem.⁵⁶

IV. Conclusions regarding COVID and lawyer licensing

Ultimately, the pandemic has further exposed long-standing challenges in lawyer licensing and perhaps enhanced an ongoing conversation regarding technology, access, equality, and public service. “Regular” bars, remote bars, multi-state practice tests, and diploma privilege all offer some benefits but also some drawbacks.

The most ideal licensing method will increase public access to justice; ensure ethical, competent, and practice-ready counsel for the public; ensure equal access to the profession for everyone and eliminate nearly two centuries of disparity; protect public health and safety; and do so in an efficient and economical manner.

To achieve these goals, the bench and the bar must work to ensure that: (1) the responsibility for licensing lawyers relies on neither law schools, practitioners, nor other self-interested parties alone; (2) the

⁵³ For a description of lawyer employment rates, see James G. Leipold & Judith N. Collins, *The Entry-Level Employment Market for New Law School Graduates 10 Years After the Great Recession*, 86 *The Bar Examiner* 8 (Winter 2017–2018).

⁵⁴ Cf. Stephen D. Simpson & Toby Walters, *The Cost of Unemployment to the Economy*, INVESTOPEDIA (Sept. 24, 2020), <https://www.investopedia.com/financial-edge/0811/the-cost-of-unemployment-to-the-economy.aspx> (describing unemployment costs generally).

⁵⁵ Jean C. Edwards, *Incidence of Bar Discipline in Millennial Attorneys*, HARVARD UNIV. THESIS 11–12 (May 2018), <https://dash.harvard.edu/bitstream/handle/1/37945095/EDWARDS-DOCUMENT-2018.pdf?sequence=1&isAllowed=y>.

⁵⁶ See *id.* at 59.

licensing method has built-in uniformity and anonymity to prevent bias; (3) underserved groups receive equal access to preparation, study, technology, study and exam-taking space, and mentoring; (4) technological errors are either resolved or compensated with re-taking; (5) the assessment mechanism itself focuses on the skills and knowledge actually needed for practice; and (6) public health experts remain involved in the conversation and technology and remote options remain on the table.

About the Author

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Did the Pandemic Change Legal Education for Better or Worse?

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I. Introduction

Crises test our strength and challenge us to improve. COVID-19 has been one of the biggest crises legal education has faced in recent decades. In this essay, I examine the legal academy's response to that crisis to see whether it will triumph or fail.

First, I discuss the overnight transition to online legal education, although there were changes other than moving classes online, such as teaching and learning while masked; spacing students six feet apart; designating doors, hallways, and stairways as unidirectional; and taking one's temperature before entering buildings. Most of these latter changes will disappear when COVID-19 disappears; however, online legal education in some form is here to stay.

Next, I describe synchronous (real time) and asynchronous (recorded) online education. Focusing on synchronous learning because I used that system, I highlight what worked and what did not work for me. Then, I briefly describe the legal academy's resistance to online education and conclude with a prediction that online legal education in some form is here to stay.

II. Pandemic teaching

Twenty years ago, Professor Michael Froomkin of the University of Miami School of Law predicted that, with the advent of the internet, legal education would become virtual and law schools would disappear.¹ He was wrong.

Fast forward to 2020, and his prediction might finally be coming true. In the spring of that year, education turned virtual overnight.

¹ Michael A. Froomkin, *The Virtual Law School, 2.0* (August 20, 2020) (unpublished legal studies research paper, University of Miami), <https://ssrn.com/abstract=3728114>.

Educators who had never used Zoom² or similar online platforms were expected to turn classes into an online learning experience redolent of the introduction to the Brady Bunch. Classes designed for an in-person experience were onlinified,³ a reconfiguring that was often less than ideal. While I was one of the lucky few who had used Zoom before Armageddon, I had never used the program to educate sixty-something 20-year-olds using the Socratic method. Let me say simply, Zoom was not designed for that, and I have never felt less capable as a law professor. Perhaps the students were lucky that most law professors around the country graded on a pass/fail basis that spring. Perhaps the faculty were the lucky ones.

Fast forward again, but just a semester, and I have come to embrace online teaching as an aid to in-person teaching. Online platforms do some things better than in-person and some things worse. If we harness the good and chuck the bad, legal education will triumph over COVID-19. But what was good and what was bad?

III. How COVID-19 changed legal education

A. What is online education?

Before talking about what did and did not work, I first explain the two forms of online education: synchronous, or live education, and asynchronous, or recorded, education. Zoom is a form of synchronous education (although it can be recorded for a poor asynchronous experience). A professor opens a Zoom room online for students to enter. Using gallery view, the professor can see, hear, and call on each of his or her students. Students can raise their virtual (or real) hands, chat in the chat feature, and nudge the professor to speed up (which never occurs) or slow down (which does). The professor can test the students' mastery of the material by running polls and then showing the results to the class. The professor can also ask simple yes/no questions, and the students can see each other's answers in real time,

² In this article, I use Zoom to refer to videoconferencing platforms generally.

³ Kyngmee Lee, *Coronavirus: Universities Are Shifting Classes Online—But It's Not as Easy as It Sounds*, AL-FANAR MEDIA (May 19, 2020), <https://www.al-fanarmedia.org/2020/03/coronavirus-universities-are-shifting-classes-online-but-its-not-as-easy-as-it-sounds/> (coining the term "onlinification").

which is both good and bad, much like raising hands in class can be. Finally, a favorite feature of most professors and students is the ability to break students into small groups to work together on a project or discussion question. The professor then hops from room to room to ensure students are staying on task.

In contrast, Echo360,⁴ YouTube, and other platforms are forms of asynchronous education (although I understand Echo360 can be used to also provide a poor synchronous experience). I am significantly less familiar with these products and asynchronous learning generally, so I will merely describe them. At Mercer, a few professors used Echo360 to prerecord lectures for students. They then offered to answer student questions either in a separate class or outside of class. Before COVID-19, some professors started “flipping the classroom.”⁵ Echo360 made that process a bit easier. But for many of us, learning more than one system was impossible during the overnight transformation to online learning. We stuck with synchronous, which better mirrored in-person learning.

In the spring, there was much I hated about Zoom, but there were a few things I preferred to in-class education. In contrast, by fall, I had become an online Zooming Jedi, able to travel to far off places and still hold virtual class. Able to present at an online conference for a thousand lawyers in the morning and teach Civil Procedure on Zoom in the afternoon. No need to cancel class to travel anymore. And this, folks, is one reason why I think online education will endure in some form after we see the last of COVID-19. But more about that in a moment. First, I will explain the best and worst of online synchronous education.

1. The good

Online synchronous education has much that is good. Zoom works well for lectures, presentations, office hours, paper reviews, and smaller classes (under 20). Professors can see every student’s face (assuming video is left on), call on students, hear their responses (after pointing out “you’re on mute!”), and occasionally read their

⁴ Echo360 bills itself as “the first video platform designed to foster active, engaged, and personalized video-based learning.” ECHO360, <https://echo360.com/> (last visited Jan. 15, 2021).

⁵ Flipping the classroom involves recording a short lecture outside of class, asking the students to watch the lecture, then using class for interactive activities, involving application, problem-solving, and discussion.

chats (a teaching assistant significantly helps professors multi-task here). While I avoided calling on students in the spring, I reverted to it this fall, and class improved. Zoom classes can be “Socratic.” Whether I can be is a separate question.

In the fall of 2020, my law school choose to teach using a hybrid model. Some professors taught entirely remotely, but most of us taught both online and in the classroom. When we taught in the classroom, we also Zoomed so that students who needed to quarantine did not feel obligated to attend class and put their colleagues (and me) at risk.

I found these hybrid classes the most challenging. Because of acoustic issues, students on Zoom could not hear students in the classroom (heck, even I often could not hear the students behind their masks). I had to repeat student answers, which meant I was often both professor and student (sometimes offering better answers, always offering shorter ones). Calling only on those students online might work better than calling on those in class, but if a student is home because she is sick, that option proves more difficult.

There are some options not available for in-person classes. For example, for group work, professors can assign students to breakout rooms and give the students a task, such as drafting the jurisdictional section of a complaint or a research exercise. The professor and teaching assistants can bounce from room to room to ensure students stay on task and help with questions. Anecdotal evidence indicates that students generally like breakout rooms and exercises, which speed up the class time and offer relief from dry lectures.

The share screen feature works particularly well online to show PowerPoints and other documents. Students are also adept at using this feature and will share their own screens during group work. Some professors also use the white board feature, although I have not used it myself. And sharing videos works well, so long as you remember to optimize audio for video first.

Students also like the online polls (although I personally found this feature difficult to master). Polling is a great way to confirm that students understand the material. And students cannot “cheat” by waiting to see their colleagues’ responses, as they can with the yes/no and hand raising features. Finally, the professor can share the polling responses: “great you are all doing well” or “well perhaps we should reexamine that topic.”

Finally, virtual office hours and paper reviews are terrific ways to use Zoom. Students rarely show up for scheduled office hours these days. Being able to schedule a time that works for the student and the professor using Zoom is handy. Moreover, I can easily pull up class notes and PowerPoints for a topic the student finds challenging. Using the share screen feature, I can easily edit student written work, whether it be a case note or seminar paper, in real time, eliminating my need to review papers in advance.

But Zoom has its limitations.

2. The bad

First, and in no particular order, Zoom fatigue.⁶ Apparently, it is a thing. One Zoom meeting or class a day is almost enjoyable—who would not want to interact with someone other than their household members each day? But a day full of Zoom is exhausting.

Second, the overwhelming silence and lack of feedback. There is no longer a buzz in class before it begins; everyone is on mute. And reading the room becomes almost impossible. Also, students sometimes trip over each other as they try to speak. Zoom is a platform “made for a single speaker at a time.”⁷ Additionally, professors see a one-dimensional image of their students rather than a complete three-dimensional presence.⁸ Zooming can feel lonely.

Third, the cumbersome breakout rooms. When students have established groups, a professor must manually put students in groups, which takes time. Assigning students randomly to groups takes time. Moving from breakout room to breakout room takes time. Also, it is difficult to share information with the entire class when students are in breakout rooms. Moreover, sometimes students may be placed in a breakout room with a person who has harassed them or is otherwise uncomfortable to be around. Prepopulating the breakout rooms before class, asking students if there is anyone they prefer not to work with, and maintaining consistent groups remedy some of these issues.

Fourth, the emotional issues. During the pandemic, student mental health needs increased exponentially (faculty too). Faculty are not

⁶ Susan D. Blum, *Why We're Exhausted by Zoom*, INSIDE HIGHER ED (Apr. 22, 2020), <https://www.insidehighered.com/advice/2020/04/22/professor-explores-why-zoom-classes-deplete-her-energy-opinion>.

⁷ *Id.*

⁸ *Id.*

trained to support students' mental health remotely or provide emergency counseling.⁹

Fifth, loss of research time. Transforming our courses took more time than any one of us would have guessed. Consequently, time for research and writing, especially for those with children at home, largely disappeared. This issue disproportionately affected women, who are typically the primary care givers.¹⁰ Whether the delay will hurt these academics as they seek tenure and promotion remains to be seen.

Sixth, community involvement. In short, we lost campus community and social interactions. A big part of legal education is social. We lost the ability to see students in the hallways, in our offices, in the library, and in the cafeteria. Zoom happy hours just do not serve the same role.

Seventh, the technological glitches. Students lack internet bandwidth, computer capability, quiet places to work, childcare, and even pet care (cats have a particular affinity for wanting to share their owner's screen space). Zoom lags. Attendees trip over each other trying both to speak and not interrupt, participants freeze for seemingly no reason or get kicked off the platform, and participants are either unmuted when they should be muted or muted when they should be unmuted. "You're on mute" will surely replace "Can you hear me now" as the most ubiquitous phrase in our vocabulary.

In sum, Zoom is not perfect, but it is better than academics anticipated. Until 2020, legal academics largely shunned online education.

B. The birth of online legal education

Distance education is not new; William Sprague launched the first correspondence legal education course in 1889.¹¹ Concord Law School,

⁹ Colleen Flaherty, *Faculty Pandemic Stress is Now Chronic*, INSIDE HIGHER ED (Nov. 19, 2020), <https://www.insidehighered.com/news/2020/11/19/faculty-pandemic-stress-now-chronic>.

¹⁰ Juliet Isselbacher, *Women Researchers are Publishing Less Since the Pandemic Hit. What Can Their Employers Do to Help?*, STAT (July 9, 2020), <https://www.statnews.com/2020/07/09/women-research-covid19-pandemic/>.

¹¹ Bernard Hibbitts, *Missionary Man: William Sprague and the Correspondence Law School*, LEGAL HISTORY BLOG (Feb. 26, 2014), <https://legalhistoryblog.blogspot.com/2014/02/missionary-man-william-sprague-and.html>.

founded in 1998, was the first U.S. law school to offer students a traditional law school education online.¹² Law schools soon recognized that they could pool resources and share courses online. For example, the former dean of Cornell Law School, my alma mater, taught “a distance learning course to students enrolled at four participating schools” in the late 1990s.¹³ Moving to a virtual online education system seemed inevitable. Technology continued improving, and the American Bar Association’s (ABA) hostility and bigotry¹⁴ to alternate forms of legal education began dissipating.¹⁵ Froomkin argued that legal education was on its way to becoming a smorgasbord of opportunities, in which students chose online courses from different law schools around the country based on the course’s reputation rather than the institution’s reputation, a “pick-and-mix” education if you will.¹⁶

If legal education went entirely virtual, there would be no need for buildings, campuses, administrations, or faculty. Bar examiners could simply confirm the successful completion of approved courses and credits. The cost of law school would plummet. Law schools would

¹² Robert E. Oliphant, *Will Internet Driven Concord University Law School Revolutionize Traditional Law School Teaching?*, 27 Wm. Mitchell L. Rev. 841, 843–44 (2000).

¹³ Peter W. Martin, *Distance Learning—The LII’s Experience and Future Plans*, CORNELL L. SCH. (Dec. 1999), <https://www.law.cornell.edu/background/distance/liidistance.htm>.

¹⁴ Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Education*, 79 Wash. U.L.Q. 1035, 1088–89 (2001) (claiming that “the ABA’s efforts to control accreditation and its insistence on continually raising standards were, indeed, rooted in its desire to exclude ‘Jew boys,’ immigrants, children of immigrants, and the lower class. The record relating to discussions of law school standards and accreditation during that period is replete with unabashed comments from bar leaders about their desire to keep the legal profession a bastion of privileged ‘old-American’ families”).

¹⁵ *Compare* ABA Standards for Approval of Law Schools § 304(g) (2002) (prohibiting “credit for study by correspondence”), *with* ABA Standards for Approval of Law Schools 2019–2020 § 306(e) (2019) (allowing up to one-third of credits to be taught online). The ABA relaxed this standard further during the pandemic. *Council Moves to Expand Flexibility for Fall Academic Year*, ABA (June 31, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/council-moves-to-expand-flexibility/>.

¹⁶ Froomkin, *supra* note 1, at 7.

shutter their doors or become continuing legal education facilities. The job of a law professor as we know it would disappear.

Despite Froomkin's dire speculation, legal education remained impervious to significant change, until, that is, a pandemic struck. The question now is whether it will remain.

IV. Keeping the good, jettisoning the bad

As a result of this two-semester experiment, I have no hesitancy in saying that in-person legal education is better, particularly for larger classes and likely for first year courses. Legal education is about more than classes. It includes clinics, mock competitions, student leadership opportunities, law review, networking, laughter, and sometimes, tears. Friendships, reputations, and contacts made during law school survive graduation, aiding legal careers.

But being forced to teach online showed me that online legal education is not all bad. For smaller classes, maybe for 12 students or less, online classes work as well as, if not better than, in-person classes.

There is also a flexibility both for professors and students in being able to teach or participate remotely. Professors who are sick or unable to attend class in person can teach remotely. Those who are asked to participate in conferences and other out-of-town events can move their classes online when needed. Indeed, canceling classes could soon be a thing of the past. Guest speakers can zoom in whether they are in an office across town or in another country. Finally, office hours and exam and paper reviews are at least as good online, if not better.

Students who have childcare issues, illnesses, long commutes, and other issues that prevent them from attending classes in person, whether once or regularly, can benefit from the online alternative. Perhaps we might rethink the third-year experience so that students can travel to jobs and externships while still attending classes. We have long asked what to do about the third year of law school. Moving it online might make law school more affordable as students would not need to live on or near campus.

Finally, online education forces students to take more responsibility for their learning. They can no longer simply show up for class and expect knowledge to effortlessly flow into their minds; paying attention during zoom lectures requires focus, concentration, and work. Students may not like this aspect, but professors will.

In sum, when we finally emerge from this pandemic, legal education will likely be changed; my hope is that it will be changed for the better.

About the Author

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Discovery of Expert Reports and Testimony in Criminal Cases

Paul W. Grimm

United States District Judge

District of Maryland

Ever since 2000, when Rule 702 of the Federal Rules of Evidence was amended¹ to incorporate the analysis of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*² and *Kumho Tire Co. v. Carmichael*,³ the process of determining the admissibility of expert witness testimony has become more challenging for lawyers and judges in civil and criminal cases. Judges are expected to be the “gatekeepers,” charged with determining whether proposed expert testimony meets the requirements of Rule 702, a process that requires them to evaluate not only the qualifications of the proposed experts, but also the sufficiency of the facts that they relied on in forming their opinions, the reliability of the methodology they used to reach them, and whether the methodology was reliably applied to the facts of the particular case.⁴ The ultimate goal of this exercise is to determine whether the expert’s testimony will “help the trier of fact to understand the evidence or to determine a fact in issue.”⁵ This task is not made easier by the fact that expert testimony—characteristically in the form of opinion testimony—deals with scientific, technical, and specialized knowledge that is unfamiliar to most judges, lawyers, and jurors.

¹ FED. R. EVID. 702 advisory committee’s note to 2000 amendment.

² 509 U.S. 579 (1993).

³ 526 U.S. 137 (1999).

⁴ FED. R. EVID. 702(b)–(d). But Rule 702 is just the starting place, because the *Daubert* and *Kumho Tire* cases identified additional factors that the judge should evaluate when assessing the reliability of the methodology used by expert witnesses, including: Has the methodology been tested; is there an error rate associated with the methodology; has the methodology been subjected to peer review evaluation; is the methodology generally accepted as reliable among practitioners of the relevant field of science or technology; and are there standard testing standards or protocols that govern the application of the methodology, and has the expert complied with them? FED. R. EVID. 702 advisory committee’s note to 2000 amendment.

⁵ FED. R. EVID. 702(a).

As challenging as this process can be in all cases, it often is especially so in criminal cases.⁶ Why? There are many reasons, including the accelerated pace at which the Speedy Trial Act requires criminal cases to proceed,⁷ the sheer breadth of expert testimony offered in criminal cases, especially with respect to the so-called “forensic sciences,”⁸ the delay in disclosure of expert testimony by defense counsel who often put off decisions about retaining experts until after plea negotiations have been concluded,⁹ and challenges that defense counsel can face in finding defense experts to evaluate, challenge, or refute government experts.¹⁰ But however great these challenges may be in a particular criminal case, they are exacerbated by the anemic and inadequate disclosure provisions of the current version of Federal Rule of Criminal Procedure 16(a)(1)(G), which provides:

Expert witnesses. At the defendant’s request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant’s request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant’s mental condition. The summary

⁶ Paul W. Grimm, *Challenges Facing Judges Regarding Expert Evidence in Criminal Cases*, 86 *FORDHAM L. REV.* 1601 (2018).

⁷ *Id.* at 1603–04.

⁸ *Id.* at 1604. For example: fingerprint analysis; ballistic and toolmark evidence; DNA testing; footprint and tire-track evidence; hair and fiber analysis; bite-mark evidence; handwriting evidence, mental health testimony addressing competency or sanity issues; coded language used by drug distributors to avoid detection; characteristics of gang activity; factors affecting the reliability of eyewitness testimony; characteristics of digital currencies, such as bitcoin; computer forensics; characteristics and operation of firearms and explosives; analysis of controlled substances; vulnerability of sex-trafficking victims; cell phone location evidence, to name but a few. *Id.*

⁹ *Id.* at 1605–07.

¹⁰ *Id.* at 1607–08.

provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.¹¹

Federal Rule of Criminal Procedure 16(b)(1)(C) imposes reciprocal requirements on the defendant.

At first blush, the expert disclosures required by Rule 16 may seem perfectly adequate. After all, they require a summary of the expert's opinions, the bases and reasons for the opinions, and the qualifications of the witness. What more do the parties need to evaluate and challenge proposed expert testimony in criminal cases, and what more does the court need to resolve these challenges and rule on expert witness admissibility? The answer to these questions can be better appreciated by comparing the expert witness disclosures required (but only if requested) by the rules of criminal procedure with their counterparts in the rules of civil procedure, where expert disclosures are mandatory, regardless of whether requested, and the rules impose deadlines for doing so well before trial.¹²

Federal Rule of Civil Procedure 26(a)(2)(B) applies to experts required to prepare written reports—those retained or specially employed to provide expert testimony in the case, as well as those whose duties as an employee of a party regularly involve giving expert testimony. The rule requires the expert to prepare and sign a report that must contain specific information: “a complete statement of all opinions the witness will express,” as well as the basis and reason for them; “the facts or data considered by the witness” in forming his or her opinions; “any exhibits that will be used to summarize or support” the opinions; the qualifications of the witness, “including a list of all publications authored in the previous 10 years;” a list of all other cases that, in the preceding four years, “the witness testified as an expert at trial” or in a deposition; and “a statement of the compensation to be paid for the study and testimony in the case.”¹³ And, unless the court orders otherwise, these written disclosures must be made at least 90 days before the trial date.¹⁴

Civil Rule 26(a)(2)(C) applies to witnesses who will testify under Evidence Rules 702, 703, or 705, but who are not required to prepare

¹¹ FED. R. CRIM. P. 16(a)(1)(G).

¹² See FED. R. CIV. P. 26(a)(2)(B) & (C).

¹³ FED. R. CIV. P. 26(a)(2)(B)(i)–(vi).

¹⁴ FED. R. CIV. P. 26(a)(2)(D)(i).

written reports (because they are not retained or specially employed to provide expert testimony in the case, or whose duties as an employee of the party do not regularly require them to give expert testimony, or because they are not employees of a party, or otherwise retained or specially employed to provide expert testimony in a case). The rule does not require a written report to be prepared by the witness, but does require the party sponsoring the witness to disclose the subject matter on which the witness is expected to offer testimony under Evidence Rules 702, 703, or 705, as well as a summary of the facts and opinions to which the witness is expected to testify.¹⁵

The rules of civil procedure regarding the disclosures relating to expert witness testimony are substantially more helpful to counsel for the parties and for the court—the disclosures are mandatory, they are detailed, they must be made well in advance of trial (sufficiently far to allow the court to schedule an evidentiary hearing, if needed, to rule on admissibility), and importantly, there are significant sanctions that may be imposed on a party that fails to comply with them.¹⁶ In contrast, the criminal rules require expert disclosures only upon request, do not impose default deadlines for making them, do not require a detailed written report (containing a complete statement of all opinions that will be given, the facts and data considered by the witness, any exhibits that will be used, details of the expert's qualifications and prior publications and testimony) signed by retained experts or employees of a party whose jobs regularly requires them to provide expert testimony, and they do not provide for the imposition of significant sanctions against parties who fail to make the disclosures. As a consequence of these shortcomings, lawyers and trial judges in criminal cases often find themselves underprepared for the obligations imposed by Evidence Rule 702, *Daubert*, and *Kumho Tire* regarding sponsoring, challenging, and ruling on challenges relating to expert witnesses.

Why does this matter? The answer lies in understanding the extraordinary power that expert witnesses have that lay witnesses do not. Consider this: Lay witnesses may not testify unless it is

¹⁵ FED. R. CIV. P. 26(a)(2)(C)(i)–(ii).

¹⁶ Rule 37 prohibits a party that fails to make a mandatory discovery disclosure (including expert disclosures) from using the information that should have been disclosed at trial, in a hearing, or to support a motion, unless the failure was substantially justified or harmless. FED. R. CIV. P. 37(c)(1).

established that they have personal knowledge of the facts about which they will testify,¹⁷ but experts may testify to matters that they have been made aware of but have not personally observed, and those matters need not be admissible in evidence, provided that experts in their particular area of scientific or technical knowledge would reasonably rely on facts or data of that nature in forming opinions.¹⁸ Similarly, while lay witnesses are confined to testimony about facts of which they have personal knowledge and may express only such opinions as are rationally related to those facts, are helpful to the jury, and do not involve scientific, technical, or specialized knowledge,¹⁹ experts are allowed to testify in the form of opinions,²⁰ which may even “embrace[] an ultimate issue” in the case.²¹ And, perhaps most importantly, experts testify about matters involving science, technology, or specialized information that is beyond the knowledge of lay jurors and generalist judges and about which the factfinder needs “help” to understand.²² The aggregate effect of the rules of evidence regarding expert witnesses is that they have the potential to wield enormous power over the jury, and if they express opinions that are not based on sufficient facts, or flow from unreliable methodology, or methodology that was not reliably applied to the facts of the case, they have the ability to mislead the jury and cause a verdict that is unfair.

So, how do you guard against these undesirable adverse consequences? By having pretrial disclosure obligations that require parties who designate experts to make pretrial disclosures of the opinions and supporting bases in sufficient detail to allow opposing counsel to evaluate whether (and how) to challenge the expert evidence and far enough in advance of trial to allow the trial judge to do the difficult job of evaluating the admissibility of the evidence as required by Evidence Rule 702, *Daubert*, and *Kumho Tire*. And the

¹⁷ FED. R. EVID. 602 (“A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”); FED. R. EVID. 701(a) (“If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness’s perception[.]”).

¹⁸ FED. R. EVID. 703.

¹⁹ FED. R. EVID. 602, 701.

²⁰ FED. R. EVID. 702.

²¹ FED. R. EVID. 704(a).

²² FED. R. EVID. 702(a).

disclosure obligation must have teeth in it—namely that the deadlines for making the required disclosures and the obligation to provide all of the information required to be disclosed are enforceable by the court.

Fortunately, during its May 2020 meeting, the Advisory Committee on Criminal Rules unanimously approved a draft amendment to criminal rule 16 to substantially fortify expert disclosure requirements in criminal cases.²³ The advisory committee developed its proposed rule change in response to the suggestions of two United States District Judges²⁴ and an attorney,²⁵ and was informed by a presentation from the Department of Justice during its fall 2018 meeting and an April 2019 mini-conference, where it heard from experienced prosecutors and defense attorneys.²⁶ The advisory committee forwarded a proposed draft of an amendment to Rule 16 to the Standing Committee on Rules of Practice and Procedure in December 2019 and revised the draft based on recommendations from the standing committee submitted after its May 2020 meeting.²⁷ The proposed amendment to Rule 16 was intended to address two shortcomings in the current version of the rule: The lack of an enforceable deadline for disclosure and the lack of adequate specificity about what information must be disclosed.²⁸ The goal of the proposed new rule was “to facilitate trial preparation by allowing the parties a fair opportunity to prepare to cross-examine expert witnesses who testify at trial and to secure opposing expert testimony if needed.”²⁹ The advisory committee memorandum noted that the proposed rule change received

unanimous support because members agreed that serious problems can be addressed by amending the current rule; that the proposed changes would address

²³ Memorandum from Hon. Ray Kethledge, Chair, Advisory Comm. on Crim. Rules to Hon. David G. Campbell, Chair, Comm. on Rules of Prac. and Proced., Report of the Advisory Comm. on Crim. Rules (May 20, 2020), in COMM. ON RULES OF PRAC. AND PROC., AGENDA BOOK (JUNE 23, 2020), https://www.uscourts.gov/sites/default/files/advisory_committee_on_criminal_rules_-_may_2020_0.pdf [hereinafter “Advisory Committee Memorandum”].

²⁴ Judge Jed Rakoff and Judge Paul Grimm. *Id.* at 584.

²⁵ Carter Harrison, Esq. *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 584–85.

those problems; and that the amendment constitutes a fair and workable compromise reflecting the needs of both the prosecution and the defense. The Advisory Committee believes that adding these provisions would be significant improvement to the current rule.³⁰

If the proposed amendment to Criminal Rule 16 is adopted,³¹ revised Rule 16(a) (Government's Disclosures) (1)(G)(i) (Duty to Disclose) will read as follows:

At the defendant's request, the government must disclose to the defendant, in writing, the information required by (iii) for any testimony that the government intends to use at trial under Federal Rule of Evidence 702, 703, or 705 during its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C). If the government requests discovery under (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, disclose to the defendant, in writing, the information required by (iii) for testimony that the government intends to use under Federal Rule of Evidence 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition.³²

³⁰ *Id.* at 585.

³¹ The proposed amendment was approved by the Standing Committee on Rules of Practice and Procedure, and by the Judicial Conference of the United States (which is responsible for adopting policy for the United States Courts), and it has been released for public comment. After the public comment period, the proposed rule (in its current version, or as amended based upon the public comments), if approved by the Standing Committee and Judicial Conference, will be forwarded to the United States Supreme Court for its approval, after which (if approved) it will be forwarded to Congress not later than May 1 of the year in which the Court approves it, for Congressional approval. If Congress does not reject the proposed rule, it will become effective on December 1 of the year in which it was approved by the Court and submitted to Congress. The process by which rules of practice and procedure are approved is set out in the Rules Enabling Act, 28 U.S.C. §§ 2072–74.

³² Comm. on Rules of Prac. and Proc., Preliminary Draft: Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and

Revised Rule 16(a)(1)(G)(ii) (Time to Provide the Disclosure) will read:

The court, by order or local rule, must set a time for the government to make the disclosure. The time must be sufficiently before trial to provide a fair opportunity for the defendant to meet the government's evidence.³³

Revised Rule 16(a)(1)(G)(iii) (Contents of the Disclosure) will read:

The disclosure must contain: a complete statement of all opinions that the government will elicit from the witness in its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C); the bases and reasons for them; the witness's qualifications, including a list of all publications authored in the previous 10 years; and a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.³⁴

Revised Rule 16(a)(1)(G)(iv) (Information Previously Disclosed) will read:

If the government previously provided a report under (F) [(Reports of Examinations and Tests)] that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.³⁵

Revised Rule 16(a)(1)(G)(v) (Signing the Disclosure) will read:

The witness must approve and sign the disclosure, unless the government: states in the disclosure why it could not obtain the witness's signature through reasonable efforts; or has previously provided under (F) [(Reports of Examinations and Tests)] a report, signed

Criminal Procedure 253– 54 (Aug. 2020), https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_to_federal_rules_august_2020_0.pdf.

³³ *Id.* at 254–55.

³⁴ *Id.* at 255–56.

³⁵ *Id.* at 256.

by the witness, that contains all the opinions and the bases and reasons for them required by (iii).³⁶

Revised Rule 16(a)(1)(G)(vi) (Supplementing and Correcting the Disclosure) will read:

The government must supplement or correct the disclosure in accordance with [16](c) [(Continuing Duty to Disclose)].³⁷

The proposed amendment to Rule 16 follows the current requirements of the rule that impose reciprocal obligations on the defendant to make expert disclosures. Accordingly, the proposed revised Rule 16(b) (Defendant's Disclosure) (1) (Information Subject to Disclosure) (C) (Expert witness) (i)(Duty to Disclose) will read:

At the government's request, the defendant must disclose to the government, in writing, the information required by (iii) for any testimony that the defendant intends to use under Federal Rules of Evidence 702, 703, or 705 during the defendant's case-in-chief at trial, if—the defendant requests disclosure under (a)(1)(G) and the government complies; or the defendant has given notice under Rule 12.2(b) [(Notice of Expert Evidence of a Mental Condition)] of an intent to present expert testimony on the defendant's mental condition.³⁸

Revised Rule 16(b)(1)(C)(ii) [*Time to provide the Disclosure*] will read:

The court, by order or local rule, must set a time for the defendant to make the disclosure. The time must be sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence.

Revised Rule 16(b)(1)(C)(iii) [*Contents of the Disclosure*] will read:

The disclosure must contain: a complete statement of all opinions that the defendant will elicit from the witness in the defendant's case-in-chief; the bases and reasons for them; the witness's qualifications, including a list of

³⁶ *Id.* at 257.

³⁷ *Id.*

³⁸ *Id.* at 258–59.

all publications authored in the previous 10 years; and a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

Revised Rule 16(b)(1)(C)(iv) (Information Previously Disclosed) will read:

If the defendant previously provided a report under (B) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.³⁹

Revised Rule 16(b)(1)(C)(v) (Signing the Disclosure) will read:

The witness must approve and sign the disclosure, unless the defendant: states in the disclosure why the defendant could not obtain the witness's signature through reasonable efforts; or has previously provided under (F) [(Reports of Examinations and Tests)] a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).⁴⁰

Finally, Revised Rule 16(b)(1)(C)(vi) (Supplementing and Correcting the Disclosure) will state:

The defendant must supplement or correct the disclosure in accordance with (c).⁴¹

The Committee Note that accompanies the proposed changes to Rule 16 provides valuable insight as to how the Advisory Committee recommends that the new rule be interpreted and enforced.⁴² The following takeaways from the note are significant. First, although the proposed revised rule did not include explicit language that authorizes the court to enforce the obligation to make timely and complete expert disclosures, it is clear that the Advisory Committee intended the obligations to be enforceable, explaining: "To ensure enforceable deadlines that the prior provisions lacked . . . [the amendment]

³⁹ *Id.* at 260.

⁴⁰ *Id.* at 261.

⁴¹ *Id.*

⁴² *See* Advisory Committee Memorandum at 608–12.

provide[s] that the court, by order or local rule, must set a time for the government to make its disclosure of expert testimony to the defendant, and for the defense to make its disclosure of expert testimony to the government.”⁴³ And of course, there was no need for the advisory committee to add explicit enforcement language to the new expert disclosures because, if adopted, they will be subject to the provisions of current Criminal Rule 16(d), which deals with court regulation of discovery. Rule 16(d)(2) (Failure to Comply) states:

If a party fails to comply with [Rule 16], the court may:
(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances.⁴⁴

In addition to the explicit enforcement authority of Rule 16(d), the proposed rule requires the court to set the disclosure deadlines in a court order or standing order, and failure to comply with a court order also is grounds for sanctions, including contempt, if warranted. For these reasons, the proposed expert witness disclosure rule will be enforceable.

Second, the new rule is intended to be implemented flexibly, with the deadlines tailored to the needs of each individual case. As the Committee Note observes, “Deadlines should accommodate the time that [it] may take [to make expert disclosures], including the time an appointed attorney may need to secure funding to hire an expert witness, or the time the government would need to find a witness to rebut an expert disclosed by the defense.”⁴⁵ The proposed rule will work best when the trial judge confers with counsel in each case to obtain their thoughts about when the disclosure deadlines should be set. As the Committee Note states, “[b]ecause caseloads vary from district to district, the amendment does not itself set a specific time for the disclosures by the government and the defense for every case. Instead, it allows courts to tailor disclosure deadlines to local

⁴³ *Id.* at 608–09.

⁴⁴ FED. R. CRIM. P. 16(d)(2).

⁴⁵ *Id.* at 609.

conditions or specific cases”⁴⁶ In this regard, the new rule will work in tandem with existing Criminal Rule 16.1, which requires counsel to meet and confer (no later than 14 days after the defendant has been arraigned) to try to agree on a timetable and procedures for Rule 16 disclosures, and to seek assistance of the court “to determine or modify the time, place, manner, or other aspects of disclosure to facilitate preparation for trial.”⁴⁷

Third, the Committee Note makes it clear that, while the enhanced expert disclosures are similar in some respects to the extremely robust expert disclosure requirements imposed by civil rule 26(a)(2), the amendment to Rule 16 was “not intended to replicate all aspects of practice under the civil rule in criminal cases.”⁴⁸ For this reason, while “[t]he amendment [to Rule 16] requires a complete statement of all opinions the expert will provide . . . [it] does not require a verbatim recitation of the testimony the expert will give at trial.”⁴⁹ That said, prudent counsel will be wise to make sure their expert disclosures fairly cover all opinions that their experts are expected to give at trial, to avoid a possible court ruling that prohibits the expert from giving undisclosed opinions at trial.

Fourth, while the amendment requires the expert witness to approve and sign the disclosure (which may be drafted by counsel), this requirement may be waived if counsel state in the disclosure why the expert’s signature could not be obtained (for example, if the expert is a treating physician in private practice, rather than a government employee, or a consulting expert hired specifically to provide testimony in the case, or the expert previously signed a report that contains all the opinions and bases that the expert is expected to testify to at trial, and that report was produced during discovery).⁵⁰

Expert witness testimony can present some of the most challenging issues for counsel and the court in criminal cases. Addressing and resolving these issues in a timely and fair way cannot be accomplished in an informational vacuum. The rules of evidence require analysis of the factual basis for expert testimony, the reliability of the methodology used in reaching the opinions to be testified to at trial,

⁴⁶ *Id.*

⁴⁷ FED. R. CRIM. P. 16.1.

⁴⁸ Advisory Committee Memorandum at 610.

⁴⁹ *Id.*

⁵⁰ *Id.* at 611.

and the reliable application of the methodology to the facts and circumstances of the particular case. Neither counsel nor the court may fulfill their roles in this process without sufficient information. Until now, the existing expert disclosure provisions of Criminal Rule 16 were inadequate. The proposed amendment to Rule 16 unanimously approved by the Advisory Committee on Criminal Rules, after careful consideration and input from all affected stakeholders, is a vast improvement over the current rule. It is balanced and fair to both the government and the defendant, and it greatly enhances the ability of the trial judge to make principled rulings on the admissibility of expert testimony. If finally approved by the Supreme Court and Congress, it will greatly enhance the goal of Criminal Rule 2, that the rules of criminal procedure “are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.”⁵¹

About the Author

Paul W. Grimm is a United States District Judge for the District of Maryland. The opinions expressed in this article are his own and not those of the United States Judiciary or the United States District Court, District of Maryland.

⁵¹ FED. R. CRIM. P. 2.

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Practicing Federal Criminal Law in the Time of COVID-19 and Beyond

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I. Introduction: differences and similarities

You might think it is difficult for criminal defense lawyers and federal prosecutors to see eye-to-eye on much. This article, written by defense counsel on one coast and an Assistant United States Attorney (AUSA) on the other, demonstrates both sides concur that the global pandemic has markedly impacted the federal criminal justice system and disrupted the way we each perform our jobs.

What became clear during our initial discussions is that districts vary in the procedures they implemented to deal with the global pandemic, often dramatically so. In the District of Oregon, for example, multiple standing court orders, beginning in March 2020 and continuing through today, have mostly stopped all jury trials, with few exceptions, and almost all in-person hearings. The various orders have also significantly limited grand jury practice. On the other hand, in the District of South Carolina, court hearings are done partly in person and partly remote, and one criminal jury trial, with substantial COVID-19 protections, went forward in October 2020. Many districts fall in between. Despite these variations, everyone has faced numerous obstacles and challenges in our federal criminal practice as a result of COVID-19.

After conferring with our respective colleagues and one another, we discovered that many of those challenges are similar regardless of which party you represent. The major overlapping challenges we found are (1) limited access to clients or law enforcement partners; (2) limited access to and “virtual” advocacy with the courts; and (3) an inability to personally interact with colleagues and each other. Below, we discuss each in turn, our observations on how we have adapted to them and how we can continue to improve, and final thoughts on how we harness these lessons to carry us beyond the pandemic (fingers crossed that is relatively soon) to improve our practice and interactions with each other, clients, colleagues, law enforcement, and the courts.

II. Federal criminal practice in the COVID-19 era: challenges and strategies

A. Challenge: limited access to clients and law enforcement

From the AUSA perspective, interacting with our law enforcement partners during the pandemic is challenging on many levels. Many law enforcement agencies scaled back their activities as a result of COVID-19, including limiting agents work in the field, putting restrictions on interviewing witnesses, and restricting agent travel. This can hinder AUSAs’ ability to move cases forward or provide information to the court or opposing counsel. AUSAs’ law enforcement partners are on the front lines of the pandemic executing search warrants and arrests, conducting interviews, and trying in earnest to keep our communities safe. There is a real human toll on them that AUSAs must be sensitive to.

Some courts have changed procedures, sometimes dramatically, as the pandemic proceeds, and case strategies have had to shift with them. The lack of, or delay in, grand jury, as has occurred in many districts, may impact decisions about which cases should or can proceed by complaint. The shifting nature of the proceedings, while necessary, are often frustrating. When grand jury is cancelled or delayed, AUSAs must manage their law enforcement partners’ expectations about when and how an investigation can move forward.

From the defense perspective, communicating with our client is vital to effective advocacy. Communication with the client is critical to respond generally to the government’s allegations and to ensure there

is sufficient information to conduct an independent investigation. Most importantly, communication is key in building trust with the client to ensure clients receive due process and, if appropriate, resolve cases in the most expeditious and beneficial manner. Before COVID-19, meeting in person with a client was the best way to do that. One of the things we have all learned during COVID-19 is that real, personal interaction is a superior form of communicating with anyone you work closely with and with whom you want to build trust and rapport. With COVID-19, building the relationship necessary in a criminal case has been an incredible struggle, particularly with incarcerated clients. For these clients, the lack of access is acute given the varying visitation privileges in prisons and jails (depending on location) and the significant technological issues at each facility. For non-English speaking clients who need interpreter assistance, it is even further compounded. Video calls are already hard to navigate, but even more so with an interpreter. For clients who are not detained, there are limitations on meeting with clients in effective and safe spaces, particularly for those who are immune compromised.

One of the keys to overcoming this is for everyone to recognize that, for the defense bar, it will take longer than normal to build a relationship and obtain and provide information from clients. In large part, this realization appears to be happening across the country with parties making proper adjustments to routine, pre-COVID-19 procedures. But it is helpful for AUSAs and the court to understand and facilitate, where possible, quality communication between clients and defense counsel. This may include modifying standard protective orders, extending plea deadlines, or modifying other routine practices that require a defendant's consent. It is also helpful for United States Attorneys' Offices (USAOs), Federal Public Defender Offices, and Criminal Justice Act panel counsel to work with federal facilities through the U.S. Marshals and the Bureau of Prisons (BOP), as well as local holding facilities. For example, working together in the District of Oregon, we have found ways to set up rooms to allow defendants to review protected discovery and set up video conference opportunities. While this collaboration has been smoother at federal facilities than at county jails, for the most part, it is happening.

Along these lines, one must understand that many incarcerated clients are understandably terrified of contracting COVID-19 and having serious complications as a result while living with insufficient medical care. Jails and prisons are some of the biggest hotspots for

COVID-19 outbreaks in the country. In many places, it took unified action by defense counsel through the Federal Defenders' Offices to bring civil lawsuits to obtain basic hygiene materials like masks, personal bars of soap, and cleaning supplies for the cells. Concerted action really helped in this regard. For individual concerns (that is, your client suddenly has a sore throat and a cough and needs medical attention), you must be prepared on the front end. Have clients sign releases of information before there is a crisis so there is not a several-day hold up before you can speak to medical personnel. Fighting for clients on these things is also builds trust.

B. Challenge: limited access to the courts and virtual advocacy

Courts across the country have tried to strike the right balance between defendants' constitutional rights and protecting the health and safety of juries, court family, and the public. In many jurisdictions, trials have completely stopped or are extremely limited; status conferences, first appearances, and violation hearings are performed via videoconference. Where evidentiary hearings on substantive motions are permitted, they pose significantly more challenges, and the logistics are difficult and awkward. This may impair the quality of the motion presentation and our ability to be effective advocates.

As a criminal defense lawyer, you must communicate with your client closely during these proceedings, and there is no ability for social distancing. If you or your client are immune compromised, this will be a significant challenge. In addition, when clients appear via video call or on the telephone, it is difficult to effectively communicate with the client during the hearing; a client may make an admission or say something out loud that he or she would not if sitting by your side. These risks make preparation even more important. Communicating to the client exactly what will be expected of them at the hearing and conveying the importance of asking for a side conversation before saying something in court is critical. Though some districts are permitting in-person hearings or trials, in most instances, the participants are socially distanced and proper precautions, such as mask wearing and sanitizing court equipment are taken so similar preparation is necessary.

AUSA Flynn was a member of a trial team for an in-person criminal jury trial in October 2020. Overall, the trial looked very much like a

normal pre-COVID-19 trial, but adaptability mattered: There were barriers to prevent counsel from getting too close to the jury, witness stands and the podium had to be cleaned with each new person, and counsel ultimately opted to ask questions from counsel table (rather than the podium, which would have had to be cleaned with each change in attorney) to help move the trial along.

In our collective experience, courts have been very mindful of the challenges in these situations and creative in trying to balance these concerns. Courts have permitted participants in a hearing to opt in or out of live presentation and been understanding of the technological challenges presenting virtually presents. We should all be unafraid to ask the court to help us manage these concerns, and as court officers, we should try to assist in overcoming these issues through communication and providing professional assistance (even to our adversaries). Regardless, it is still sometimes difficult to manage a client's or law enforcement agent's expectations about the speed of effectively presenting motions, getting discovery, negotiating a plea agreement, and obviously, getting to trial.

C. Challenge: limited access to colleagues and opposing counsel hinders our efficacy.

Many lawyers are working from home. Meaningful interactions with our colleagues are limited, often to calls or videoconference, or are nonexistent. In cases with complicated legal or factual issues, this lack of access to our colleagues' experiences and insights limits our ability to brainstorm and problem-solve. Pre-COVID-19, these interactions were crucial in effectively representing our clients and resolving cases.

In addition to limited in-person interaction with colleagues, AUSAs may be even more limited in access to their own physical space—their offices. In many USAOs, going into the office requires pre-approval, and AUSAs are strongly encouraged to telework as much as possible. Legal support staff is also limited in access to the office. Working in the office meant having ready access to colleagues. When AUSAs hit a “speed bump” in our cases, we could walk down the hall and immediately ask someone else for an opinion or idea. Working in the office also meant having instant access to our paper files. When legal support staff all worked in the office, they “knew” their attorney's cases and were available as court hearings came up.

If there is anything we have learned during the pandemic, it is that we need to be adaptable. Thus, it is important to reach out to colleagues in other ways. If you cannot walk down the hallway, can you call someone or Skype? Colleagues are remarkably willing to answer calls, emails, and Skypes. If you cannot get a paper document from your office, can you get it another way? If you must go into the office, can you consolidate the list of things you need to do and get so that each trip is maximized? Also, there has been a need to plan ahead because there is no guarantee there will be a legal support staff person in the office familiar with your case on the day you go in or have court.

In the pre-COVID-19 era, AUSAs frequently saw defense counsel and defendants in person. Now, as AUSAs are trying to move cases forward, they are increasingly seeing defendants virtually or speaking with defense counsel via phone. Sitting down for proffers/debriefs has been complicated as detention centers have restricted movement of incarcerated defendants because of COVID-19.

From the defense perspective, meeting in person with AUSAs about cases is crucial—it builds rapport, builds trust, and is the most effective way to bring better understanding to the difficult and often emotional issues in cases. Having an AUSA meet a defendant or a witness in person, as opposed to video conference, is more effective in making credibility determinations and other case-related decisions.

For all these reasons, it is more important than ever that we reach out to opposing counsel in our cases, call, and build the relationships we otherwise would have built waiting for/at in person hearings. Kindness goes a long way here. These are complicated times for all of us—kindness and a willingness to listen and problem solve helps all of us do our jobs better. Bottom-line, we must build these relationships to further build efficacy for our clients and to serve the criminal justice system.

III. What can we bring to our post-COVID-19 practice?

COVID-19 dramatically shifted the way we practice law. Many of the shifts were simple patches until we can get back to normal, but others are fundamental changes that should be considered on a going-forward basis. These include:

- **Video conferencing and scheduled private calls at all jails.** Nothing will (or should) replace in-person client visits. But

certain conversations can happen over video or phone. Until COVID-19, there were still many jails that did not provide for scheduled private attorney calls, let alone video visits. COVID-19 forced jails to find ways to allow lawyers and clients to connect. Having these options continue will make it easier for attorneys and clients to connect on a regular basis.

- **Being prepared for a client medical crisis.** Before COVID-19, client medical crises were few and far between and could be handled as they came up. But COVID-19 taught lawyers to be prepared—have a release of information on file with the jail early so you can speak with medical quickly if health concerns arise and know the right person to call when your client is not getting prompt medical treatment.
- **Telephone or videoconference colleagues and opposing counsel.** We now know that in-person interaction is the most effective form of communication in most situations. We have also learned, however, that calling someone or using a videoconference system for important conversations can be beneficial and productive, even where you cannot meet in person. Post-COVID-19, scheduling video calls will be less frequent but may be more efficient and productive than a letter or email to discuss critical case matters with opposing counsel or colleagues.
- **Be intentional about reaching out to colleagues, law enforcement partners, the court, and opposing counsel.** One of the things the pandemic has taught us is how much our connections with colleagues, opposing counsel, the court, and law enforcement partners matter and how much those connections help us as we practice federal criminal law. At some point, our access to one another will return to a more normal state. Even then, it will be necessary to maintain the relationships that help us resolve our cases and make us better at what we do.
- **Be willing to be creative and adapt.** Another lesson of the pandemic has been the need to adapt to changing procedures. We have argued virtually, left exhibits for hearings at witness stands rather than walking each individual exhibit to the witness for identification, prepped for hearings over the phone or on Zoom, and thought creatively about when and how to bring cases. Some of these strategies may be worth bringing into our

post-COVID-19 operations and may help us in our future federal criminal practice.

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Remote Control: Best Practices for Online Depositions

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I. Introduction

The past year has taught all practitioners a simple lesson—we can practice law from the comfort of our own homes. During the pandemic, litigators have conducted hearings, mediations, depositions, and even full trials remotely with videoconferencing platforms like Zoom, Teams, Skype, and Webex. Even as infection numbers decrease and attorneys return to the office, remote depositions are likely here to stay. They offer undeniable benefits. One such benefit is streamlining the discovery process.

As any civil litigator knows, litigation typically requires spending more time in discovery than in actual trial. Discovery can drive up the cost of litigating a case. Recognizing this reality, the Federal Rules of Civil Procedure were amended in 2015 to reduce the burden and cost of discovery.¹ Among other amendments, Rule 26 now explicitly includes a proportionality limitation, requiring that the scope of discovery account for pragmatic considerations, such as cost.²

Remote depositions help achieve proportionality by reducing the cost and expense of depositions. In-person depositions often require travel, sometimes extensive travel. Attorneys, support staff, court reporters, and the deponent must all converge in a single location. Besides the fact that traveling to and from in-person depositions is time consuming and tiring, it drives up costs. These travel expenses can quickly accrue, especially when multiple attorneys or support staff attend each deposition. These additional costs are hard to justify when

¹ Proposed Amendments to the Federal Rules of Civil Procedure, U.S. SUP. CT. (2015), [https://www.supremecourt.gov/orders/courtorders/frcv15\(update\)_1823.pdf](https://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf).

² FED. R. CIV. P. 26(b)(1).

remote depositions can be nearly as effective—or sometimes even more effective—than in-person depositions.

There are also significant advantages to remote depositions, such as the ease of recording. Unlike recording an in-person deposition, which requires hiring a videographer, remote depositions can be recorded with the click of a button. These recordings can then be used at mediations, arbitrations, and trial.

Of course, there are disadvantages. During in-person depositions, attorneys can more readily assess how deponents will present to the factfinder at trial. Nuances in eye contact and delivery style, which can impact credibility, are harder to detect remotely. A deponent who performs well on a videoconferencing platform may not perform as well under the pressures of an in-person trial—where the deponent looks the jury in the eye.

In the future, it is likely that some depositions will return to being in-person, but others will be conducted remotely. Good litigators should view online depositions as one of the many tools in their toolbox even when online depositions are no longer a necessity but simply an option. Although there is no one-size-fits-all approach to a successful remote deposition, this article suggests a methodology for tailoring a deposition strategy that can be applied to remote depositions in a variety of cases.

II. Develop a protocol the parties can agree upon when you are taking a remote deposition

The first step should always be to develop a plan. Although this is relevant for in-person depositions, it is even more relevant for remote depositions. In the case of in-person depositions, very little must be stated in advance because most attorneys rely upon well-established norms setting the ground rules for deposition procedure. Usually, a notice of deposition is served, the parties gather in a conference room, and the questioning begins. If, for example, counsel defending the deposition needs to consult with the deponent as to the scope of privilege, it is an unspoken norm that the deposition can be paused while the two exit the conference room and consult in private.

In a remote deposition, however, the parties do not gather in person. Accordingly, the norm identified above does not apply—a deponent and defending counsel cannot simply stand up and walk out of the conference room and consult in the hallway. This norm must be

adapted and modified to an online context. Counsel can still privately consult with the deponent, but creating that opportunity requires more forethought and planning. This is just one example of many norms that do not directly transfer to the online forum.

Nor is it a foregone conclusion that all counsel will agree to how a remote deposition should proceed. Much of discovery under the federal rules is self-executing, and depositions are no exception. There is tremendous leeway for the parties to negotiate and agree to ground rules, even those that depart from the general norms used for in-person depositions. The default assumption for in-person depositions is that the general norms apply. The same assumption may not hold true for remote depositions. They are simply too new a tool for there to be consensus on norms. For this reason, because the usual norms may not apply, nearly every part of the remote deposition procedure should be agreed upon and stipulated to in writing. Things an experienced litigator might take for granted, like the handling exhibits, should be agreed upon by the parties in advance so there are no unnecessary disruptions once a deposition begins.

To develop an effective protocol, it is important to begin by visualizing every step of the deposition—from the moment the participants log in until the moment they log out. Logistics are particularly important to consider, including what platform and court reporting service you will use. There are similarities between Zoom and Webex, for example, but there are differences. Familiarity with various platforms allows you to make a meaningful decision when selecting one. Familiarity also enables you to visualize the deposition from beginning to end with knowledge of the available tools in the platform you select.

After visualizing the steps, consider where the participants will be located and whether the court reporter and the deponent will be in the same location to administer the oath. If the court reporter will not be with the deponent, your protocol must reflect an agreement among the parties that the oath will be administered remotely.

Furthermore, it is best practice to have the parties appear in separate locations. This reduces connectivity and feedback issues that happen when multiple devices are connected in the same room. It also reduces the potential of opposing counsel trying to communicate with the deponent during the deposition.

If opposing counsel will be in the same room as the deponent, consider requiring that both of them appear on the screen at all times

to ensure no inappropriate coaching occurs off screen. You may also want a camera angle that allows you to see whether the deponent is reading from documents.

Your protocol should explicitly address what is and is not permissible during the deposition and how technology will be used to enforce those rules. If the parties and their counsel agree to appear in separate locations, they must stipulate that there will be no communication, electronic or otherwise, while the deposition is ongoing. They must also stipulate to always keep their cameras on.

Second, consider what materials the deponent may use. Unless you state otherwise, a deponent may have multiple applications and windows open during a remote deposition, allowing the deponent to read prepared answers or covertly reference documents. Your protocol should address exactly how the deponent is permitted to use his or her electronic device(s) and whether other electronic tools will be used to block the deponent from accessing those devices during the deposition. For some deponents, the “honor system” may be fine; you can ask the deponent to put all devices on airplane mode and to close all open windows other than the videoconferencing platform program. For others, you may want to require the installation of software that disables all applications other than the videoconferencing platform program itself. In extreme cases, you may even agree to send a neutral monitor to watch the deponent testify and certify that no other windows were open during the deposition. What is appropriate depends on your confidence in the deponent and opposing counsel.

Third, consider how attorneys will communicate with their clients during the deposition. You may wish to prohibit the use of private messaging, texting, and chatting during the deposition. However, other options can be provided for permitted communications. One option available in many videoconferencing platforms is a “breakout room,” where the parties can move to a private virtual room. Another option is for the parties to turn off their cameras and mute their microphones and communicate via telephone. There is also the option for the parties to leave the videoconferencing platform altogether and log back in once their communications are complete.

As always, there are advantages and disadvantages to each option. If the parties remain in the conference, there is the risk that someone will forget to mute a microphone and accidentally disclose attorney–client communications. Whatever option you choose, ensure your

protocol protects attorney–client communications and addresses how you will handle inadvertent disclosures.

Fourth, the parties should stipulate that the deposition will be transcribed and recorded in the same manner as any other deposition: A court reporter will be present on the videoconference and transcribe the questions and answers. You may also agree that the deposition will be videorecorded in the videoconferencing platform. This is helpful in the event that the court reporter is disconnected during the questioning. If the parties have so agreed in advance, the recording can be played back once the court reporter rejoins, and those questions and answers will not be omitted from the transcript. The parties should also stipulate that they will not challenge the validity of any oath administered remotely, even if the court reporter is not a notary public in the state where the deponent resides.

Fifth, the parties should agree how technical problems will be addressed. If an attorney’s connection lags or freezes, it may prevent that attorney from making a timely objection before a deponent begins answering a question. For this reason, it may be prudent to relax the general rules about timeliness of objections by stipulating that so long as the objection is made before an additional question has been asked, that objection is timely. A hand gesture or other visual sign, combined with a verbal objection, could be helpful to ensure the deponent and opposing counsel clearly understand that an objection has been made. In extreme cases where participants are talking over each other, it may even be necessary to agree that objections can be made by typing them in the chat. Whatever method you choose, ensure that all counsel are on the same page.

The parties should also agree to stop all questioning if it appears that an attorney has been dropped from the conference. One method to reduce the impact of this problem is to have counsel log into the videoconferencing platform through a device like a computer or tablet for purposes of appearing on screen, but also to join with a muted telephone as a backup connection. This way, if the computer or tablet disconnects, the attorney can use the telephone to notify the others about the technical problems.

Additionally, the parties should also discuss and agree upon who the deponent should communicate with if technical problems occur. To avoid subsequent complaints about inappropriate communications between counsel and the deponent, it is beneficial to choose the court reporter as the point person in this circumstance.

Finally, the parties should agree as to how exhibits will be handled during the deposition. There are various methods to consider, such as circulating hardcopy exhibit binders in advance, emailing or uploading electronic exhibits in real time before using those exhibits, or simply displaying the exhibit on the screen in the videoconferencing platform. You should keep some things in mind when choosing your preferred method. Although the element of surprise is lost when hardcopy exhibits are exchanged in advance, many deponents find exhibit binders easier to navigate. Expecting a deponent to answer coherently while navigating multiple open windows may simply be unrealistic. This is especially true when the deponent connects through a phone or a tablet.

Another method is to send hard-copy exhibits in sealed envelopes and have the deponent open the envelopes on the record. This preserves some element of surprise while still providing for the use of hard copy exhibits. Of course, there are always ways to cheat, and it could be difficult to determine if a deponent opened an envelope, reviewed the exhibits, and resealed the envelope before the deposition.

A similar approach involves sending the exhibits to the court reporter and having the court reporter upload them to a repository where the exhibits can be downloaded or printed just before the deposition. You can do the same by sending the exhibits to the deponent with only sufficient time to print them before the deposition. This approach allows the deponent to have the exhibits in hard copy but will provide insufficient time for the deponent to meaningfully review the exhibits before questioning begins.

Transmitting exhibits during the deposition preserves the element of surprise, but deponents may be unable to effectively open and review exhibits while videoconferencing from a mobile phone or tablet. For this reason, you may require that the deponent connect through a laptop or desktop computer. Also, consider the cost of any additional support staff necessary to efficiently transmit exhibits in real time.

Lastly, there is screensharing. Although using screensharing focuses the deponent on the exhibit and allows the questioning attorney additional control to manipulate the exhibit on the screen, it can be unwieldy to display the entire exhibit. Displaying the full exhibit may be necessary so the deponent can authenticate the exhibit before testifying about it. With all these considerations in mind, tailor your protocol to meet the particular needs of your case.

Once you have developed your ideal protocol, reach out to opposing counsel to negotiate that protocol. For your plan to be successful, it is critical that all parties adhere to it. There may be technical limitations or other issues that both parties are aware of and can resolve in advance. An open dialog, together with a protocol that is in writing and signed by all parties, is critical to success.

Once that protocol is in place, amend your initial instructions to include every step of that protocol. If the parties have agreed that no one will be in the same room as the deponent, your standard initial instructions should be sure to include this instruction as well. If the parties have agreed that only the videoconferencing application may be open on the deponent's device, this additional instruction should be added to your script.

Not only should you give these additional instructions to the deponent, but you should phrase each instruction as a question—asking the deponent to agree to each step of the protocol, one by one. This reminds the deponent of the ground rules, reinforces the seriousness of following those rules, and creates an avenue for either impeachment or discovery sanctions if the deponent breaks the rules. If the deponent agrees to these rules under oath, and the deponent then violates the rules the deponent swore to follow, this shows the deponent's character for untruthfulness. This area of impeachment could provide fertile ground for cross examination at trial in addition to any substantive issues in the case. By reducing your protocol to a stipulation signed by all counsel, you can, if necessary, seek court intervention if counsel fails to abide by the agreed-upon terms.

Although you may have never developed a protocol for an in-person deposition, it is in your best interest to develop one for remote depositions. Planning is even more key to success in a remote setting.

III. Prepare your deponent when you are defending a remote deposition

Usually, deposition prep is straightforward. You are likely familiar with meeting deponents to discuss case issues, explain the question-and-answer format, and emphasize the need to protect privilege. These are issues you should also plan to address when preparing deponents for remote depositions. Remote deposition preparation, however, should cover more than these basic topics.

During a remote deposition, there are many moving parts, and as an attorney, you will play many different roles. Therefore, you must first

consider the technical aspects that are unique to the videoconferencing format. For example, the deposition will likely be recorded. This means, in addition to serving as counsel, you are also fulfilling the role of cinematographer. You can control how effective the deposition recording will be when it is later used at mediation or at trial.

You should ensure that the deponent has the necessary technology to be deposed remotely, including a computer, a microphone, and a video camera. You should also perform a test run with the deponent beforehand. This test run should make sure that the testimony is audible and that the deponent has a strong internet connection that will not be interrupted while the deponent is under oath. If the deponent does not have the technology to make this possible, the deposition should be held at your office or at the office of a court reporting firm.

Additionally, it is helpful to use the same videoconferencing platform that will be used during the actual deposition to conduct a test run with the deponent. You may choose to do all preparation on this platform, providing multiple opportunities for the deponent to use the platform and gain familiarity. Preparing remotely using the same platform gives you adequate time to adjust certain settings and gives the deponent time to become accustomed to those settings. The deponent can also experiment with headphones or external speakers to see if either are necessary. As you prepare the deponent, consider the camera angle, lighting, and background. You want the deponent to be in a quiet, distraction-free space with excellent lighting and a plain background. You may even consider recording a small portion of the preparation to play back for the deponent to show the importance of good lighting and sound quality.

You should also review the deposition protocol with the deponent and discuss any material substantive issues. In addition to the usual instructions and those specific to your protocol, you may want to emphasize the importance of pausing before answering a question. When you are defending a deposition, you need adequate opportunity to hear the question and object. This becomes far more difficult during a remote video conference. Lag, static, and poor microphone quality can make it difficult to hear a pending question. The deponent should be instructed to take a longer pause than normal to ensure that you can clearly object on the record and interject to protect privilege. Enough practice with questions and answers will allow the deponent

to feel comfortable with both the substance of the deposition and with the necessary technology.

IV. Prepare yourself to take and defend remote depositions

Remote depositions may move quicker than typical in-person depositions: The deposing attorney does not need to hand out paper documents to each attorney and the deponent; breaks may be shorter; and ultimately, no one wants to be on an uninterrupted seven-hour videoconference. Inconvenience is a great motivator, so use this forum to your advantage. A deponent may be inclined to agree with your questions when the deponent believes doing so will end the deposition sooner. But a deponent can also become uncooperative and withhold answers when it appears you are wasting the deponent's time.

Be efficient and use your time wisely. When taking a deposition, be very selective about using exhibits. Use only those exhibits you truly need and resist the urge to mark everything in the case file. Although this advice should probably apply to all depositions, it is particularly important when you are performing a skill in a different arena, like using exhibits as part of a remote deposition. Do not overcomplicate the process by using exhibits that do not advance your case theory. Less can be more when it comes to remote depositions. You may be surprised how much you gain when you focus more on questioning and less on using exhibits.

Furthermore, if you plan to screenshare your exhibits, practice until you feel comfortable with the process. You may choose to have all the exhibits open at once but only screenshare a specific exhibit when necessary. You may instead choose to individually open an exhibit and share your screen as you go. No matter how you handle screensharing, practice until it is second nature. It is also important to consider what you name exhibits and whether you are sharing your entire desktop since the parties can see everything when you are sharing. You may not want opposing counsel to see how you organize the exhibits, and you certainly do not want to share other things—such as your email or personal information. Therefore, be cognizant of other applications that are running in the background before sharing your screen. You should close email applications, internet tabs, and iMessage chats so they are not visible during the time you plan to share your screen. Even the name of folders on your desktop may reveal confidential

client information. Consider what opposing counsel will see before you click “share” to share your screen.

If you intend to annotate exhibits (or to have the deponent annotate those exhibits), practice this as well. When you retain a court reporting service, ask if the service will create a practice videoconference for you so you have ample time to familiarize yourself with the platform’s tools. The tools in each platform are slightly different.

Ease of presentation is not just a matter of convenience—it will likely affect the amount of time and effort you put into trial preparation down the road. In the future, in-person jury trials will resume. Some video depositions taken online will almost certainly be shown at an in-person trial. The amount of time spent editing and cutting around portions of the remote deposition video that were awkward or were spent resolving technical difficulties will likely be multiplied if ease of presentation is an afterthought.

Imagine if a piece of powerful testimony is interrupted by the deponent asking the deposing attorney to scroll through an exhibit or to re-share the screen because the attorney’s connection is poor. The jury will lose interest, and the video will lose its impact. The same applies to recording your depositions. Ensure that the videographer solely records the deponent during the remote deposition—no jury wants to watch testimony that is recorded in gallery mode with all other parties present on the screen. The focus should be on the deponent giving first-person narration to the camera. Having the best possible technology for your deposition goes hand in hand with preparing for trial. The best microphone, the strongest internet signal, and the clearest camera feed will all make a difference when it comes to making an impact at trial.

V. Conclusion

If the pandemic has taught us anything, it is that attorneys are excellent at adapting to challenges—namely, conducting depositions remotely. These tips will continue making remote depositions an effective tool in your tool kit going forward into the future.

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Federal Rule of Evidence 106: Both a Sword and a Shield

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I. Introduction

A little-known rule can make a big difference in the outcome of a case, as federal prosecutors learned in the Southern District of Florida when Federal Rule of Evidence 106¹ became the primary focus of a drug smuggling case. The case arose after the defendant, Allen Kyode Pacquette, was detained by customs at Miami Airport.² He arrived from the Virgin Islands holding a bag.³ During an initial inspection—and before the bag was searched—the border agent asked Pacquette whether everything in the bag belonged to him.⁴ Pacquette admitted that he packed the bag, and he claimed that everything in the bag was his.⁵ Suspicious that Pacquette was smuggling drugs into the country, the border agent searched the bag and found cocaine.⁶ When Pacquette was shown the drugs, he claimed to know nothing about them and said they were not his.⁷

Pacquette was indicted and tried for possession with intent to distribute.⁸ The admissibility of Pacquette's two statements—the first inculpatory and the second exculpatory—became a focus of trial. During the prosecution's case, the border agent testified, and prosecutors elicited Pacquette's inculpatory statement.⁹ The prosecution did not elicit the exculpatory statement, and the defense

¹ FED. R. EVID. 106.

² *United States v. Pacquette*, 557 F. App'x 933, 934 (11th Cir. 2014).

³ *Id.*

⁴ *Id.* at 935.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 934.

⁹ *Id.* at 935.

was barred from offering the statement through questioning the border agent.¹⁰ As grounds for admitting the statement, the defense relied on Rule 106, the rule of completeness.¹¹ After the district court excluded the evidence, the circuit court reversed on appeal and ordered a new trial, highlighting why a savvy litigator should be aware of Rule 106 and its nuances.¹²

In this case, Rule 106 was used as a sword against the prosecution. In other contexts, it can be a shield to protect the jury from out-of-context evidence. Being able to effectively deploy Rule 106 requires understanding the rule and its nuances.

II. Federal Rule of Evidence 106

Although less commonly cited than other federal rules of evidence, Rule 106 embodies the overarching goal of the rules: ensuring fairness.¹³ Rule 106 is based on the common law rule of completeness. Under the common law rule of completeness, when a party introduces an incomplete statement at trial, the adverse party may introduce other parts of that statement (or related statements) to ensure the factfinder views the incomplete statement in its full context.¹⁴ In other words, if part of a statement is offered at trial, that may justify the introduction of other evidence to complete the jury's understanding.¹⁵ The common law rule of completeness allowed the admission of a wide array of statements without regard for other rules of admissibility.¹⁶ The only criteria under the common law rule of completeness was fairness.¹⁷

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 935–37.

¹³ FED. R. EVID. 102.

¹⁴ *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171–72 (1988).

¹⁵ *Id.*

¹⁶ Daniel J. Capra and Liesa L. Richter, *Evidentiary Irony and the Incomplete Rule of Completeness: A Proposal to Amend Federal Rule of Evidence 106*, 105 MINN. L. REV. 901, 905–910 (2020).

¹⁷ See e.g., *People v Shepard*, 37 N.W. 925, 926 (1888) (explaining that where a prosecutor introduced an inculpatory partial statement, fairness required that the defendant be permitted to inquire into the remainder of the statement even though the remainder was inadmissible, self-serving hearsay).

The common law rule of completeness is partially codified in Rule 106, which states:

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.¹⁸

Pursuant to Rule 106, if an incomplete writing or recorded statement is offered by one party, the opposing party may interrupt the trial at that time to demand that the jury be provided the statement's context contemporaneously. Rule 106 recognizes the misleading impression caused when matters are taken out of context and similarly acknowledges that it may be difficult or impossible to rectify this impression after the passage of time. Rule 106 does not supplant other methods of rectifying a misleading perception, such as cross-examination or subsequent evidence. Rule 106 simply provides an additional tool to seek the admission of certain types of evidence at trial.

Using Rule 106 may be strategic—where it applies, the rule allows for the immediate introduction of additional evidence. The rule can be used as a sword to interrupt an opposing party's case. Other rules do not permit such an interruption. Typically, an opposing party must wait for cross examination or its own case-in-chief to offer evidence.

It can also be used as a shield. Its narrow, plain language may be used against a party seeking to admit evidence pursuant to Rule 106. The rule says nothing about hearsay. Litigants have successfully argued that Rule 106 is inapplicable to hearsay.¹⁹ By its plain language, the rule is limited to written or recorded statements. Litigants have successfully used Rule 106 to block oral statements or oral statements tantamount to written statements.²⁰

It can be a powerful tool and, though uncommonly used, its application can be determinative—as was the case in *Pacquette*. Over time, three major circuit splits have arisen among courts applying Rule 106. Understanding these circuit splits can aid in successfully

¹⁸ FED. R. EVID. 106.

¹⁹ See e.g., *United States v. Adams*, 722 F.3d 788, 826 (6th Cir. 2013); *United States v. Woolbright*, 831 F.2d 1390, 1395 (8th Cir. 1987).

²⁰ See e.g., *United States v. Shaver*, 89 F. App'x 529, 532 (6th Cir. 2004).

introducing evidence or opposing the introduction of evidence pursuant to this rule.

III. Rule 106 and hearsay

The plain language of the rule does not expressly address whether it permits the admission of otherwise inadmissible evidence. Such otherwise inadmissible evidence includes hearsay. Some courts have admitted hearsay under Rule 106, often using creative reasoning. The lack of clarity on this issue created a three-way circuit split.

The Sixth Circuit views the rule as nothing more than a timing rule. According to the Sixth Circuit, Rule 106 only allows otherwise admissible evidence to be admitted during an opposing party's case.²¹ In other words, according to the Sixth Circuit, Rule 106 does not permit the introduction of otherwise inadmissible evidence.²²

As stated, the Sixth Circuit has explained, "Exculpatory hearsay may not come in solely on the basis of completeness."²³ In *United States v. Welch*, defendant Welch made inculpatory statements regarding possession of child pornography during an interview with law enforcement.²⁴ The district court allowed the prosecution to introduce those inculpatory statements, but it prohibited Welch from offering exculpatory statements made during the same interview with law enforcement.²⁵ On appeal, the exclusion was affirmed because Welch's exculpatory statements were "inadmissible hearsay that were not made admissible by the rule of completeness."²⁶

The First, Third, and D.C. Circuits, in contrast, interpret the rule to favor completeness, even at the expense admitting otherwise

²¹ *United States v. Cosgrove*, 637 F.3d 646, 661 (6th Cir. 2011).

²² *United States v. Howard*, 216 F. App'x 463, 472 (6th Cir. 2007) (citing *Shaver*, 89 F. App'x at 532); *see also* *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) (holding that Rule 106 does not render admissible evidence that is otherwise inadmissible under hearsay rules); *Woolbright*, 831 F.2d at 1395 (holding that neither Rule 106 nor Rule 611(a) allow a court to admit unrelated hearsay if that hearsay does not fall into a hearsay exception).

²³ *Howard*, 216 F. App'x at 472.

²⁴ No. 10-2677, 2011 U.S. App. LEXIS 26816 at *3 (6th Cir. Oct. 20, 2011).

²⁵ *Id.*

²⁶ *Id.*

inadmissible evidence.²⁷ In these circuits, Rule 106 functionally serves as an additional hearsay exception beyond those set forth in Rule 803 and Rule 804. Hearsay that would not otherwise be admissible can be admitted under Rule 106 where necessary to provide context.²⁸

The Second Circuit eschews a bright-line rule on the issue, providing the trial judge with direction to decide on a case-by-case basis whether the rule permits hearsay evidence.²⁹ These circuits view Rule 106 as more of a catch-all exception to other rules, allowing trial judges freedom to decide issues of fairness outside the rigid application of other rules.³⁰

IV. Rule 106 and oral statements

The three-way circuit split regarding whether Rule 106 allows the admission of otherwise inadmissible hearsay is not the only Rule 106 circuit split. As written, Rule 106 has a significant limitation: It applies only to written or recorded statements. The Rule does not apply to conversations or oral statements. The same is not true of the common law rule of completeness, which lacks such a limitation.

Some courts have shown a clear preference for a similar outcome under the federal rules and the common law but have used a different rule, Rule 611(a), to justify admission:

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

²⁷ *United States v. Bucci*, 525 F.3d 116, 133 (1st Cir. 2008); *United States v. Green*, 694 F. Supp. 107, 110 (E.D.P.A. 1988); *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986) (reasoning that Rule 106 can fulfill its role “by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously”).

²⁸ *United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001) (noting that the rule operates to ensure fairness and allows the introduction of the full text of an out-of-court statement where a misunderstanding or distortion can only be averted by the complete introduction of that statement).

²⁹ *United States v. Benitez*, 920 F.2d 1080, 1086–87 (2d Cir. 1990).

³⁰ *See e.g.*, *United States v. Gonzalez*, 399 F. App’x 641, 645 (2d Cir. 2010) (reasoning that it is within the trial court’s discretion to determine that the admitted portion of a statement does not distort the meaning of the full statement or exclude information that was substantially exculpatory).

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.³¹

Rule 611(a) provides trial judges with latitude over the mechanics of trials. Some circuit courts hold that this latitude includes the discretion to apply Rule 106 to oral statements, notwithstanding the rule's contrary language.

One example of a court reading Rule 611(a) and Rule 106 in tandem to justify admission of oral statements is from the Eleventh Circuit. In *Pacquette*, the circuit court used Rule 611(a) in combination with Rule 106 as grounds for reversal, concluding (somewhat reluctantly) that the plain language of Rule 106 alone did not support the rule's application to oral statements like the exculpatory one defendant *Pacquette* made to the border agent.³²

Still, other courts have found ways to read Rule 106 such that it alone justifies admission of oral statements. Courts in the First and Seventh Circuits allow the admission of oral testimony by focusing on the intent of the rule rather than its plain language. Noting the

³¹ FED. R. EVID. 611(a).

³² See *Pacquette*, 557 F. App'x at 936 (holding that, although Rule 106 does not expressly apply to oral statements, the Eleventh Circuit has extended Rule 106's fairness standard to oral statements "in light of Rule 611(a)'s requirement that the district court exercise 'reasonable control' over witness interrogation and the presentation of evidence to make them effective vehicles 'for the ascertainment of truth'"); see also *United States v. Verdugo*, 617 F.3d 565, 579 (1st Cir. 2010) (reasoning that the district court "retained substantial discretion under Fed. R. Evid. 611(a) to apply the rule of completeness to oral statements") (cleaned up); *United States v. Alvarado*, 882 F.2d 645, 650 n.5 (2d Cir. 1988) (questioned on other grounds) (finding that, although Rule 106 applies to written and recorded statements, Rule 611(a) "renders it substantially applicable to oral testimony as well") (cleaned up); *United States v. Lopez-Medina*, 596 F.3d 716, 734 (10th Cir. 2010) (noting that the Tenth Circuit has "held the rule of completeness embodied in Rule 106 is substantially applicable to oral testimony as well by virtue of Fed. R. Evid. 611(a)") (cleaned up); *United States v. Bailey*, 322 F. Supp. 3d 661, 675 (D. Md. May 24, 2017) (finding that an alternative way of dealing with oral statements is applying Rule 611(a)).

inherent unfairness of a rule that allows context to be offered for a written statement but not for the exact same statement if it had been an oral statement, these courts conclude that Rule 106 must not have been intended to be read narrowly.³³

In contrast, courts in the Sixth and Ninth Circuits prohibit such evidence, enforcing the plain language of Rule 106. Courts in these circuits adhere to a rule of construction that the plain language prevails unless it is ambiguous. Finding no ambiguity, these courts conclude that Rule 106 was intended to be narrower than the common law rule of completeness.³⁴

V. Rule 106 and oral statements tantamount to a recording

Another circuit split under Rule 106 arises from the question of whether the rule's form or substance ought to prevail. The circuit split arises from cases where a recorded statement exists, which would be subject to Rule 106, but in lieu of offering a portion of that recorded statement at trial, a offers an oral statement to which Rule 106 may not apply. By doing so, parties can circumvent Rule 106 in jurisdictions that have strictly limited its application to recorded

³³ See *Verdugo*, 617 F.3d at 580 (noting that the district court retained substantial discretion to apply the rule of completeness to oral statements because the rule is based on both (1) correcting misleading impressions by taking matters out of context and (2) the inadequacy of repair work when delayed to a later point in trial); see also *United States v. Li*, 55 F.3d 325, 329 (7th Cir. 1993) (holding that despite Rule 106's lack of application to oral statements, the district court retains the same discretion regarding oral statements under Rule 611(a) as it does regarding written and recorded statements under Rule 106); *United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir. 1993) (reasoning that Rule 611(a) "gives the district courts the same authority with respect to oral statements and testimonial proof" as Rule 106 gives regarding written and recorded statements).

³⁴ See *Shaver*, 89 F. App'x 529 at 532 (reasoning that Rule 611(a) is the equivalent of Rule 106 for oral statements and both Rule 106 and 611(a) "merely affect the order of the trial"); see also *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996) (reasoning that according to the text of Rule 106, the Rule does not apply where an oral statement rather than a written or recorded statement is introduced by a party).

statements. A trial witness can serve as a conduit for the recorded statement by simply relaying the statement on the stand so that no portion of the recording itself is offered into evidence.

Without squarely deciding the question, the Eleventh Circuit has suggested that Rule 106 should apply in such a circumstance. In *Rainey v. Beech Aircraft*, the circuit court held that the plaintiff should have been permitted to introduce the entirety of a letter when the plaintiff read portions of it on cross examination.³⁵ In essence, asking the plaintiff whether he had written excerpts of the letter was tantamount to admitting these portions of the letter, therefore triggering application of Rule 106.³⁶ Affirming on appeal without explicitly adopting the “tantamount” standard, the United States Supreme Court noted the misleading impression this line of questioning gave the jury.³⁷

In contrast, in *United States v. Pendas-Martinez*, the same court declined to apply Rule 106 where defense counsel used a report on cross-examination, but the witness did not read from it.³⁸ While citing approvingly the tantamount standard articulated in *Rainey*, the *Pendas-Martinez* court distinguished merely utilizing the contents of a writing to craft questions from verbatim reading portions of that writing at trial.³⁹

VI. The future of Rule 106

As these circuit splits have deepened, amendments to Rule 106 have been proposed and debated by the congressional advisory committee responsible for the Federal Rules of Evidence. Although no amendments have been approved, the debate suggests that Congress may eventually act to address several of the previously discussed circuit splits.

The October 2019 committee meeting, the last advisory meeting with recorded meeting minutes, reveals that the committee was focused on the circuit split arising from whether the rule acts as an

³⁵ 784 F.2d 1523, 1530 (11th Cir. 1986).

³⁶ *Id.*

³⁷ *Rainey*, 488 U.S. at 172–73.

³⁸ 845 F.2d 938, 941–42 (11th Cir. 1988).

³⁹ *Id.*

additional hearsay exception.⁴⁰ The Committee Chair cautioned against such a reading, noting that Rule 106 was only intended as a partial codification of the broad common law rule of completeness and that even the common law rule of completeness did not wholly override hearsay concerns.⁴¹ The Reporter proposed a compromise whereby Rule 106 would permit the jury to hear the inadmissible hearsay for purposes of understanding context but would be barred from considering the hearsay for its truth. This compromise triggered debate as to whether jurors are capable of understanding this limitation.⁴²

The issue was again listed for discussion on the 2020 advisory committee meeting agenda.⁴³ The agenda contained two suggested amendments for debate—one that would recognize Rule 106 as a hearsay exception and one that would limit hearsay statements introduced under the rule to being used only for context and not for their truth.⁴⁴

The 2020 advisory committee also proposed amendments to address the circuit split over whether Rule 106 should apply to oral statements. Some of these proposed amendments might address the circuit split arising from the introduction of oral statements tantamount to a writing or recording. The issue was again raised in 2021, but again, there was insufficient consensus for adoption of an amendment.⁴⁵

VII. Conclusion

Rule 106 can be a powerful tool. It can be used against the prosecution, as illustrated in *Pacquette*. It also may be used by the prosecution to interrupt the defense case where it is necessary to do so to provide context. As discussed herein, however, applying Rule 106 is not always cut and dry. Several circuit splits exist, and it appears

⁴⁰ See *Meeting of Advisory Committee on Rules of Evidence* 77–85 (Oct. 25, 2019), <https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-2019>.

⁴¹ *Id.* at 77.

⁴² *Id.* at 81–82.

⁴³ See *Id.* at 7–10.

⁴⁴ *Id.*

⁴⁵ See *Meeting of Advisory Committee on Evidence Rules* 12–15 (Apr. 30, 2021), <https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-evidence-rules-april-2021>.

unlikely that Congress will swiftly remedy the disagreement by amending the rule.

Practitioners in circuits that have weighed in on the circuit splits identified above should understand how the rule is applied in those circuits. Practitioners elsewhere should be aware that there is little agreement on the issues discussed herein. As such, if there is suspicion that the rule may be used at trial, it is prudent to seek a pretrial ruling through a motion *in limine* to determine how a particular court will decide the issue in the absence of binding in-circuit authority. Rule 106 is a powerful tool, but its power can be used as a sword or a shield. Understanding how the rule will be interpreted in a particular case before trial commences can ensure the sword strikes effective blows and the shield protects against them.

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An Approach to Cross-examining Defendants

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In the Western novel *Shane*, a retired gunslinger watched the young narrator, Bob Starrett, play with a broken Colt pistol with a rigged holster. Shane told Bob that he was not correctly handling the weapon and demonstrated how to effectively draw it from the holster. Bob wondered if Shane's technique matched those of real gunfighters, and Shane responded,

No. Not all of them. Most have their own tricks. One likes a shoulder holster; another packs his gun in his pants belt. Some carry two guns, but that's a show-off stunt and a waste of weight. One's enough, if you know how to use it. . . . The way I am telling you is as good as any and better than most.¹

Likewise, there are many ways to cross examine a defendant. I hope the suggested methods here will be "as good as any and better than most."²

When a criminal defendant chooses to testify, the defense case turns on the defendant's testimony. A prosecutor can never avoid cross-examining a testifying defendant. Because defendants are the star witness in any prosecution, their cross-examinations must destroy their credibility. Inexperienced prosecutors dread a defendant cross-examination because they do not have a purpose in mind, but a testifying defendant creates an opportunity for the prosecution. This article provides techniques to successfully examine any criminal defendant.

¹ Jack Schaefer, *Shane* 77 (1949).

² *Id.*

Defendants do not take the witness stand to admit culpability, but their credibility must be attacked.³ A prosecutor must select topics for cross examination and the order to present them. Effective cross-examination involves making your arguments through the defendant-witness by focusing on four areas: (1) getting help from the witness that supports your case; (2) revealing discrepancies between the defendant's testimony and the evidence presented at trial; (3) showing that the witness's story does not meet the rule of probability and plausibility;⁴ and (4) destructive cross-examination to discredit the witness.⁵ The goal at the end of the cross-examination is for you to "look good" and the defendant to "look bad."⁶

I. Supporting the government's case through cross-examination

In criminal cases, the jury must decide if the crimes alleged in the indictment occurred and, if so, whether the defendant involved himself as a participant, an aider and abettor, or a conspirator. Often, defendants concede that a criminal event occurred, such as a homicide, robbery, or drug transaction. Then the issue becomes the defendant's culpability. Likewise, in white collar cases, defendants rarely question whether the transactions at issue transpired, but they do generally assert that they lacked knowledge or intent to defraud. Defense opening statements often admit important facts related to the crime itself or the defendant's presence at the crime scene. These concessions, together with any statements made by the defendant, are useful in crafting a cross-examination.

During cross-examination, without attacking the defendant, you can obtain helpful information. This is done by eliciting information the defendant admitted in pre-trial prior statements, during direct examination, or revealing new facts not disclosed⁷ that he knows and

³ HERBERT J. STERN, TRYING CASES TO WIN: CROSS-EXAMINATION 22 (1993).

⁴ LOUIS NIZER, MY LIFE IN COURT 14 (1961).

⁵ STERN, *supra* note 3, at 18.

⁶ TERRENCE F. MACCARTHY, MACCARTHY ON CROSS-EXAMINATION 43 (2007).

⁷ THOMAS A. MAUET, TRIALS: STRATEGY, SKILLS AND THE NEW POWERS OF PERSUASION 215 (2nd ed. 2009).

will admit. Herbert Stern calls this technique *hitchhiking* and points out that every witness can provide the cross examiner “at least some helpful information.”⁸ My experience of over 35 years in courtrooms establishes this truism.

Helpful concessions drawn from defendants can narrow the issues for the jury. The prosecutor should review the jury instructions and determine the elements the defense will concede. From direct examination, it may become clear that a defendant readily admits some elements of the charged offenses. In white collar cases, defendants may acknowledge conducting the transactions at issue through the United States mail or through wire transmissions. They may also agree that the transactions financially benefited them. In firearms cases, defendants may admit knowledge that they are felons.⁹

The jury is then left with the issue of actual or constructive possession.

Cross examination must also exploit a defendant’s prior statements, even false exculpatory statements. At the start of cross-examination, these statements may enable the cross-examiner to draw concessions from a defendant, including motive and opportunity to commit the crime.¹⁰ Always list for yourself the helpful information a defendant has already admitted in prior statements or in his direct testimony. Indexing these statements by topics enables you to locate prior statements on any point. This forces the defendant to admit the prior statement on the pain of impeachment by contradiction.¹¹

For example, during the prosecution of a drug-related murder, DNA evidence linked a defendant to the murder scene. Agents obtained a DNA search warrant and, during the execution of the warrant, the defendant waived *Miranda*¹² and provided a taped statement. In addition to establishing his gang affiliation and five-star rank, he told

⁸ STERN, *supra* note 3, at 14.

⁹ MACCARTHY, *supra* note 6, at 50.

¹⁰ JOHN MUNKMAN, *THE TECHNIQUE OF ADVOCACY* 116 (1991).

¹¹ STERN, *supra* note 3, at 72.

¹² *Miranda v. Arizona*, 384 U.S. 436 (1966) (establishing the admonitions law enforcement must provide before a custodial interrogation).

agents that he traded the victim cocaine base in return for Percocet pills. The victim, however, cheated him by providing him fake Percocet in the form of sugar.

The defendant admitted to summoning a gang subordinate to accompany him with a firearm to the victim's rooming house to recover cocaine base or the real Percocet pills. During a forcible entry into the rooming house, the defendant cut his hand, causing him to leave blood in the house. Before the defendant arrived at the house, the victim used the cocaine base and initially claimed the Percocet pills were in an upstairs bedroom. The defendant escorted the victim upstairs at gunpoint, forcibly entered the upstairs bedroom, and had his co-conspirator search the bedroom while the defendant pointed the firearm at the victim. The search established the victim did not have Percocet pills. To avoid the murder charge, the defendant claimed his co-conspirator unexpectedly discharged the firearm into the victim after the defendant handed him the firearm. During direct examination, the defendant expanded upon his lack of involvement in the shooting, claiming that he was walking away when the co-conspirator fired.

During the cross-examination of the defendant, helpful facts were elicited through leading questions. These helpful facts included element-by-element admissions to the charged counts of cocaine distribution and his drug conspiracy with two other individuals. The defendant's statements were then expanded upon to build his motive, means, and opportunity. Specifically, the defendant's anger over the drug rip-off, the frustration at cutting his hand, and the victim's continuing deceit about the drugs at the rooming house were established and the motive insinuated. He also admitted that he alone and not the co-conspirator had any animus towards the victim. The defendant also agreed that, as a gang leader, he controlled the actions of the co-conspirator and acknowledged that he directed the firearm be brought to the scene, that it be used to pistol whip the victim, and that shortly before the shots were fired, the pointing of the weapon at the victim—who was continuing “to play him.” These concessions undermined the defendant's version of events.

II. Confront the defendant with the evidence against him

Jury instructions on witness credibility list factors for the jury to consider in determining if someone is worthy of belief.¹³ This list includes the extent to which a witness is supported or contradicted by other evidence in the case.

During cross-examination, you may confront the defendant with evidence that diverges from his version of events, including texts, telephone records, and any other forensic evidence. To a limited extent, a Department of Justice (Department) attorney may direct a defendant's attention to the testimony of other government witnesses that conflict with the defendant's testimony and ask him if these witnesses were mistaken or got it wrong.¹⁴ This allows Department attorneys to focus the defendant "on the differences and similarities between his testimony and that of another witness."¹⁵

To do this, your questions should recount the testimony of the other witnesses that differ from the defendant's on important points. Limit this line of questioning to asking the defendant if he heard the witness make the statement and whether he disagrees with the witness's version or believes the witness got it wrong. You can then ask if he understands that the jurors will listen to his testimony on direct and cross and to the other witnesses, and it will be these jurors who decide the case.¹⁶

You may not ask the defendant to opine or comment on the veracity of another witness. Caselaw establishes that it is improper to ask a defendant whether another witness was lying because, "Such questions invade the province of the jury and force a witness to testify as to something he cannot know, [that is], whether another is

¹³ Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions* § 15:01 (6th ed. 2021).

¹⁴ *United States v. Gaind*, 31 F.3d 73, 76-77 (2d Cir. 1994) (asking witness whether previous witness who gave conflicting testimony is mistaken, highlights the objective conflict without requiring witness to condemn prior witness as purveyor of deliberate falsehood, i.e., a liar).

¹⁵ *United States v. Harris*, 471 F.3d 507, 512 (3d Cir. 2006).

¹⁶ MICHAEL E. TIGAR, *EXAMINING WITNESSES* 348 (2nd ed. 2003).

intentionally seeking to mislead the tribunal.”¹⁷ Of course, the defendant could open the door by calling the witnesses liars on direct examination.

The goal is to show the discrepancies between a defendant’s testimony and other evidence. In closing argument, this type of cross-examination allows you to use the credibility instruction to argue the defendant’s version of events differs from the other witnesses’ and is unreliable.

III. Showing the implausibility of the defendant’s version of events

Both Louis Nizer and Herbert Stern argued that juries decide cases based upon the rule of probability.¹⁸ In 1961, Nizer wrote,

The jury decides the case because of the rule of probability. It accepts one version as against another because it accords with its own standard of experience. The judge, when he is faced with conflicting testimony, decides on the basis of probability. We talk of the credibility of witnesses, but what we really mean is that the witness has told a story which meets the test of plausibility and is therefore credible.¹⁹

This means the jury will not believe testimony if a witness’s answers do not comport with the experiences of ordinary people. Nizer wrote this in 1961, and it remains true today.

Often, through a series of questions, you can take the defendant’s decisions and show that they were not the choices of an innocent person. You can ask a series of questions to show the anticipated course of action of an innocent person, contrasting the defendant’s actions—which were incompatible with the choices a reasonable person would be expected to take.²⁰ The defendant may claim an innocent state of mind, but questioning can demonstrate that the

¹⁷ *Harris*, 471 F3d at 511.

¹⁸ NIZER, *supra* note 4, at 14; STERN, *supra* note 3, at 177.

¹⁹ Nizer, *supra* note 4, at 14.

²⁰ VINCENT BUGLIOSI & BRUCE HENDERSON, AND THE SEA WILL TELL 350-51(1991).

defendant did not act consistent with that state of mind. For example, conduct like flight, changing appearance, and false exculpatory statements may disprove an innocent state of mind. Before cross-examination, list actions that the defendant did and did not take.

For example, in a fraud prosecution, the defendant was the office manager of a medical practice employed by a large healthcare provider who paid her salary. She used her supervisor's credit cards for personal expenditures without any authority, claiming the supervisor allowed her to use three of his credit cards as additional compensation.²¹ On cross-examination, under the rule of probability, the implausibility of her assertion that this was additional, authorized compensation came to light:

- She failed to report the income from the credit cards on her tax returns.
- This compensation was outside of the healthcare provider's policy.
- She failed to tell the company to include her additional compensation on her W-2 tax form.
- She failed to tell management about this arrangement despite signing conflict-of-interest forms indicating she was not aware of any transaction not made in accordance with the healthcare provider's policy.
- She was not given extra compensation by her supervisor in the form of currency, check, or a debit card with a limit.
- Finally, her assertion that she left for a better paying job was belied by the amounts of payments she obtained from the credit cards. She claimed she moved to Michigan to take a \$135,000 job despite getting \$77,000 in total income from the healthcare provider and an additional \$188,000 of income through her fraudulent use of the credit cards.²²

²¹ Trial Transcript at 800, *United States v. Darnell*, 776 F. Appx' 192 (4th Cir. 2019) (No. 17-cr-00092), ECF No. 100.

²² *Id.* at 829–49.

IV. Develop a destructive cross-examination through traditional impeachment

Traditional impeachment methods include (1) prior convictions; (2) prior bad acts related to dishonesty; (3) Lack of capacity, such as drug use; (4) prior inconsistent statements; and (5) bias and interest.²³ Normally, prosecutors save this portion of cross-examination for the end. Techniques to attack defendants in these areas are as follows:

A. Prior felony convictions under Federal Rule of Evidence 609

When a defendant testifies, the government may impeach his or her “character for truthfulness” by admitting evidence of prior criminal felony convictions.²⁴ “[I]f the probative value of the evidence outweighs its prejudicial effect to that defendant,” then the evidence of the prior conviction must be admitted.²⁵ Alternatively, if “establishing the elements of the crime required proving—or the witness’s admitting—a dishonest act or false statement,” then “the evidence must be admitted” regardless of the length of imprisonment.²⁶ Finally, there is a 10-year limit on prior convictions, subject to a notice requirement and a finding that the probative value “substantially outweighs” the prejudicial effect.²⁷ A defendant’s prior felony convictions are admitted for the limited purpose of impeachment and not as substantive evidence of guilt.²⁸

In the event the district court allows impeachment of the defendant with his felony convictions under Rule 609(a)(1), the court will allow the prosecutor “inquiry into the ‘essential facts’ of the conviction, including the nature or statutory name of each offense, its date, and

²³ See *United States v. Abel*, 469 U.S. 45, 49–50 (1984) (bias); Fed. R. Evid. 608 (dishonesty), 609 (prior conviction), 613 (inconsistent statements).

²⁴ FED. R. EVID. 609(a)(1).

²⁵ FED. R. EVID. 609(a)(1)(B).

²⁶ FED. R. EVID. 609(a)(2).

²⁷ FED. R. EVID. 609(b)(1).

²⁸ *United States v. Mitchell*, 1 F.3d 235, 242 (4th Cir. 1993).

the sentence imposed.”²⁹ Courts do not allow a cross-examiner “to probe in depth the nature of the felonies, when they occurred, and their details.”³⁰ Therefore, the factual basis of the underlying acts of the prior felony convictions are inadmissible.

The trial court also has discretion to limit evidence of a prior conviction to the bare fact of conviction and may exclude the statutory name of the offense. For instance, where there is similarity between a charged crime and a prior felony, or the impeachment value of the conviction is low, courts are reluctant to allow the impeachment. In such a case you should seek a compromise to allow the inquiry into the fact that the defendant is a convicted felon without describing the nature of the prior felony. This is especially true when the defendant’s credibility is the central issue in the case, and this compromise allows a prosecutor to inquire into the fact of a conviction and sentence without unfairly prejudicing him by showing the nature of the conviction.

Often the defendant’s direct examination will bring out the prior felony conviction to soften the blow. The cross-examiner must then tactically determine the placement for the prior felony conviction in the defendant’s cross-examination. Remember, the prior felony is admitted for the sole purpose of impeaching the defendant’s credibility. In this regard, it is useful to frame the issue the jury must decide. You then confront the defendant with it and juxtapose it with his prior felony conviction.

B. Acts of dishonesty under Federal Rule of Evidence 608(b)

Prosecutors should carefully examine a defendant’s prior record to see if he engaged in specific acts of dishonesty. Under Rule 608(b), courts have discretion to allow inquiry into a witness’s or defendant’s “specific instances of conduct” not resulting in conviction on cross-

²⁹ *United States v. Estrada*, 430 F.3d 606, 616 (2d Cir. 2005); *United States v. Boyce*, 611 F.2d 530 (4th Cir. 1979) (holding in proving felony conviction on cross, the AUSA may ask about the name of the crime, the time and place of conviction and the punishment).

³⁰ *United States v. Samuel*, 431 F.2d 610, 613 (4th Cir. 1970).

examination to suggest that the witness or defendant has a character for not telling the truth. The prior conduct must be probative of the individual's dishonesty. For instance, prior acts of perjury, swindling, fraud, altering a license, and bribery are acts of dishonesty under Rule 608(b).³¹ Under Rule 403, the court may also restrict cross-examination into specific instances of prior conduct if it finds that the prior conduct is not probative of truthfulness.³²

With this rule, a cross-examiner runs the peril of not being able to rebut a witness's denial with extrinsic evidence.³³ The rule states, "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness."³⁴

The classic example of using acts of dishonesty comes from Martin Littleton's cross-examination of a prosecution witness who lied on a federal employment application.³⁵ Herbert Stern fully quoted this cross examination as a model of linking the impeaching material to the case on trial before closing argument.³⁶ After eliciting the falsity of the employment application, Littleton asked the following questions:

Q. You knew it was false, didn't you?

A. Yes Sir.

Q. And you knew you were *swearing* to a falsehood when you *swore* to it?

A. Yes, sir.

....

³¹ United States v. Wilson, 985 F.2d 348, 351–52 (7th Cir. 1993); United States v. Leake, 642 F.2d 715, 718 (4th Cir. 1981).

³² United States v. Flaharty, 295 F.3d 182, 191 (2d Cir.), cert denied, 537 U.S. 936, 123 S.Ct 37 (2002).

³³ United States v. Bynum, 3 F.3d 769, 772 (4th Cir. 1993).

³⁴ FED. R. EVID. 608(b).

³⁵ STERN, *supra* note 3, at 235–41; FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION, 56–59 (4th Ed. 1936).

³⁶ STERN, *supra* note 3, at 240.

Q. Didn't you *know* you were committing *perjury* by *swearing* and pretending you [had] been 20 years in this business?

A. Yes sir.

. . . .

Q. And you are swearing now, aren't you?

A. Yes sir.

Q. In a matter in which a man's liberty is involved?

A. Yes sir.

Q. And you know the jury is to be called upon to consider whether you are worthy of belief or not, don't you?

A. Yes sir.³⁷

Any prosecutor can use this line of questioning for cross-examining any defendant who committed an act of dishonesty. This is especially effective where a defendant lied about his identity to law enforcement on a Form 4473 to purchase a firearm, a credit card application, or a lease agreement. Most judges will allow some form of this type of questioning. This model cross-examination allows you to use the cross-examination to argue through the witness that the dishonesty relates to the case on trial.

C. Lack of capacity

A defendant's drug use goes to his capacity. A witness's prior use of drugs is relevant to his ability to perceive the underlying events and testify lucidly at trial.³⁸ This is especially true where the drug use occurred during the time the witness observed the events in question.³⁹

For example, you may ask the defendant these questions regarding his drug use:

³⁷ *Id.* at 239–40; WELLMAN, *supra* note 37, at 56–59.

³⁸ *United States v. Sampol*, 636 F.2d 621, 667 (D.C. Cir 1980).

³⁹ KENNETH S. BROUN, ET. AL., 1 MCCORMICK ON EVIDENCE § 44 (8th ed. 2020); *Wilson v. United States*, 232 U.S. 563, 568 (1914).

Q. [Y]ou're telling us that you committed the robbery because you were an addict; Is that right?

A. I said that was one of the reasons, I was a drug addict, I was addicted to Percocet.

Q. And you're telling us at the time of the robbery, you were under the influence of Percocet?

A. Yes.

Q. And because you were under the influence of Percocet, Percocet affects your body, doesn't it?

A. Some people, yeah.

Q. So the jury can consider, when they assess your testimony, that you were operating under the influence of a drug, a narcotic controlled substance and what effect that might have had on your ability to remember, can't they?

A. I guess.⁴⁰

This questioning allows a prosecutor to argue that a defendant's testimony fits into the cautionary instruction regarding the credibility of drug users.⁴¹ It also gives another reason for the jury to determine the defendant is not worthy of belief with or without a limiting instruction.⁴²

D. Bias

The partiality of a witness is always relevant to discrediting and affecting the weight of testimony.⁴³ For instance, accomplice witnesses can be cross-examined on the minimum and maximum penalties they face to show the witness's motives and expectations were for a sentence reduction.⁴⁴ These beliefs about potential sentences are

⁴⁰ Trial Transcript at 348. *United States v. Cheatham*, 778 F. App'x. 221, (4th Cir. 2019) (No. 12-cr-00111), ECF No. 84.

⁴¹ O'MALLEY, *supra* note 12, at § 15:05.

⁴² *United States v. Howard*, 590 F.2d 564, 569–70 (4th Cir. 1979).

⁴³ *United States v. Turner*, 198 F.3d 425, 429 n.2 (4th Cir. 1999).

⁴⁴ *United States v. Ambers*, 85 F.3d 173, 176–77(4th Cir. 1996).

sources of bias.⁴⁵ The countervailing concern when a defendant testifies is that questioning the defendant about his potential punishment impinges the court's discretion to ultimately decide on a sentence and that the jury cannot consider the sentence.

Most courts will not permit a cross-examination of a defendant about the specific sentence he faces, despite the leeway given the defense in cross-examining government cooperators. In their discretion, however, judges normally permit questions along the lines that the defendant faces a severe sentence if convicted. Such information enables the jury to make "a discriminating appraisal" of bias.⁴⁶ Therefore, the defendant's cross-examination should include that he faces serious charges and a substantial potential incarceration if found guilty. For example:

Q. You are aware of the charges against you?

Q. You know these are serious crimes?

Q. You know they carry a potential of a long prison term?

Q. Staying out of prison is important to you?

Q. Is it worth telling lies?

This line of questioning applies to the instruction that the jury may consider the manner a defendant or witness might be effected by the jury's verdict.⁴⁷ In rebuttal argument, use this instruction to ask a rhetorical question: Of all the witnesses that testified in this case, who has the most interest in the outcome of the case?

V. Application of principals

In a pharmacy robbery, the defendant was charged with Hobbs Act robbery and brandishing a firearm. On the day of trial, the defendant pled guilty to the robbery and possession with intent to distribute the stolen Percocet pills but denied possession of a firearm during the robbery, claiming he brandished a cellphone—not a firearm. The

⁴⁵ United States v. Cropp, 127 F.3d 354, 358 (4th Cir. 1997).

⁴⁶ *Id.* at 359.

⁴⁷ O'MALLEY, *supra* note 12, at § 15:01.

defense strategy was to avoid the mandatory minimum seven-year penalty under 18 U.S.C § 924(c).

The cross-examination of the defendant included acts of dishonesty, a prior felony conviction, and bias based on the potential for a lengthy sentence. This portion of the cross occurred at the end, after the defendant denied brandishing the firearm during robbery and refused to admit seeing pictures of a firearm on his phone. Through the cross-examination, we argued the jury should consider the defendant's assertion that he did not possess the firearm in the context of his acts of dishonesty, his prior conviction, and the potential for substantial incarceration. Here is how the cross was structured:

Q. Mr. Cheatham, you admitted that you not only lied to the police officer about this case but you lied to your own mother, correct?

A. Yes.

Q. And you also, on July 20th of 2008, provided a false Social Security number to members of the Henrico Police Department, did you not?

A. That case was dismissed.

Q. I 'm asking you whether or not you lied to the police about giving a false social security number?

A. It wasn't intentional. I won't say I lied. I made a mistake.

Q. You gave your father's Social Security number, not your own?

A. Right. It wasn't intention[al], it was a mistake.

Q. It was false?

A. Yes, it was.

Q. And you were convicted in July of 2009 of obtaining prescriptions by fraud, weren't you?

A. Yes.

Q. That is a felony, isn't it?

A. Yes, sir.

Q. And you have told us and the jury has to decide whether or not you possessed a firearm, the date of this offense; isn't that true?

A. Say it one more time.

Q. The jury has to decide whether or not to believe you when you say you didn't have a gun; is that right?

A. Yes.

....

Q. And the jury can certainly consider the fact that you are a convicted felon on a crime of—

[DEFENSE COUNSEL]: Objection, Judge.

THE COURT: Sustained.⁴⁸

Q. You're also aware that you told us that you pled guilty to the robbery; isn't that right?

A. Yes.

Q. And that's a second felony now that you have, right?

A. Once I get convicted, yes.

Q. And you've pled guilty to possession with intent to distribute Percocet, correct?

A. Yes.

Q. Now you're aware that possessing a firearm in furtherance of a drug crime is a serious crime, aren't you?

A. All of them are serious crimes, but yeah.⁴⁹

VI. Conclusion

A successful cross-examination of a defendant should include four areas. First, begin by *hitchhiking* on information favorable to the case based on prior statements. Second, confront the defendant with other

⁴⁸ This judge disallowed the question, but other judges have permitted it.

⁴⁹ Trial Transcript at 364–66, *United States v. Cheatham*, 778 F. App'x. 221, (4th Cir.), ECF No. 84.

evidence, including the witnesses who contradict his version of events. This involves asking him whether he heard other witnesses' testimony that differed from his version of events on important facts. Third, show that his testimony violates the rule of probability and is, therefore, implausible. Fourth, end the cross-examination by showing that he is unworthy of belief because of felony convictions, prior acts of dishonesty, and an interest in the case's outcome.

About the Author

Howard J. Zlotnick is a former Managing Assistant United States Attorney for the Newport News Division located in the Eastern District of Virginia. He served as an AUSA for over 35 years. Before joining the Eastern District of Virginia, he spent 17 years in the District of Nevada, where he was, at various times, the Criminal Chief, First Assistant, and interim U.S. Attorney. Earlier in his career, he worked as an Assistant District Attorney in Suffolk County, New York, and as a Navy JAGC officer. He is a graduate of Hiram College (B.A. 1975) and the University of Dayton School of Law (J.D. 1978). He is admitted to practice in Ohio, New York, and Nevada. He received two Executive Office for United States Attorneys Director's Awards in 1996 and 2017.

Book Review: Remote Advocacy in a Nutshell¹

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The pandemic brought us many things—social distancing, masks, closed businesses, increased telework, the resurgence of drive-ins, and in some places, alcoholic beverages in to-go cups. But for lawyers, it also brought cataclysmic changes in the way we practice: remote advocacy. Even the notoriously traditional United States Supreme Court went to telephonic arguments, streamed live for the first time. Seizing upon this major upheaval in advocacy, Senior Lecturer and Director of Advocacy at the University of Texas School of Law, Tracy Walters McCormack, quickly put together an entry in the much-loved West Nutshell Series called *Remote Advocacy in a Nutshell*, published in January 2021. But is this a worthy, useful effort or just an opportunistic money grab? Let's find out.

The 429-page (in typical Nutshell style, the pages are small) paperback has 11 chapters and an appendix of remote advocacy resources. Chapter 1 is a clarion call to the new reality of remote advocacy, including a discussion of topics to make the burgeoning remote advocate more comfortable, such as the need to master the area and how to overcome resistance to this new way of life. The chapter has the first of numerous tips. I can't call them "pro tips" because they are more common sense than anything else, for example, "Find your technology source and your practice buddies"² and "Do a tutorial with a tech person."³

We learn two myths of remote advocacy in Chapter 2: (1) Remote advocacy is the same as live advocacy, except over a screen;⁴ and (2) You can't read body language through a screen.⁵ With only two myths, it's an awkwardly structured chapter, but under each myth

¹ TRACY WALTERS MCCORMACK, *REMOTE ADVOCACY IN A NUTSHELL* (2019), West Academic.

² *Id.* at 14.

³ *Id.* at 17.

⁴ *Id.* at 23.

⁵ *Id.* at 49.

there are tips, such as how to choose and arrange your remote advocacy space, how to dress, and the concerns about video and audio. (On audio, the author suggests to “[a]lways dial in early for any remote proceedings,” an *amazing* bit of advice. Not!⁶)

Chapter 3 is “Preparation and Planning Ahead.”⁷ In this chapter, one of the better ones in the book, the author takes the reader on an overview of preparing for remote advocacy. I especially liked the sections on “The Screen Expectation”⁸ and PowerPoint, which I think is the devil’s tool if it falls into the wrong hands.⁹

Chapters 4–8 discuss how to handle different remote proceedings, such as conferences, depositions, jury trials, arbitration and mediation, hearings, bench trials, and appellate arguments, using a similar format of mixing theory with tips. Since there is a lot of overlap, the author should have pared things down to all-purpose lists instead of cluttered outlines with topics, subtopics, and sub-subtopics. Again, much of this will be common-sense advice for someone who’s done at least one remote proceeding, but it’s still good to have a handy compilation of useful tips.

The book’s final chapters, Chapters 9–11, deal with best practices, a deep dive into the videoconferencing software Zoom,¹⁰ and some tips on remote advocacy for law students and new lawyers. It’s great to have a “user guide” for Zoom in Chapter 10, and—unusual for a Nutshell—the chapter contains numerous graphics and screenshots, helpful indeed.

Wrapping things up is an appendix with resources for remote advocacy. The appendix contains lists of articles and where to find equipment, digital backgrounds, and digital evidence stickers.

⁶ With my apologies to Wayne and Garth from *Saturday Night Live*. ... *Not!*, WIKIPEDIA, https://en.wikipedia.org/wiki/..._Not! (last visited July 22, 2021).

⁷ My anal-retentive disorder, contracted many years ago as an editor, compels me to mention that “planning ahead” is redundant. Benjamin Dreyer, *DREYER’S ENGLISH: AN UTTERLY CORRECT GUIDE TO CLARITY AND STYLE* 249 (2019).

⁸ MCCORMICK, *supra*, at 93.

⁹ A former boss of mine, a well-respected law enforcement trainer, gave me some great advice about 25 years ago at the dawn of the PowerPoint age: Put only as much text on a PowerPoint slide as could comfortably be read on a t-shirt.

¹⁰ *Zoom*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Zoom_\(software\)](https://en.wikipedia.org/wiki/Zoom_(software)) (last visited July 22, 2021).

Resource lists are nice but, like instructions on how to use software, they tend to go out of date quickly.

In summary, this book has a few issues. While it contains useful information, a lot of the material could be found online for free by using Google. In addition, it's overwritten, perhaps with an eye toward appearing as not just a Nutshell, but rather as the comprehensive guide on this topic. And, as mentioned, a book about current software and technology becomes obsolete in part almost immediately after publication. The author and publisher will need to frequently revise the book to keep pace with the ever-changing field of remote advocacy. But overall, it's a unique, good Nutshell that any advocate will find useful. On a scale of * to ****, I give *Remote Advocacy* ***.

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Note from the Editor-in-Chief

In this difficult year, we here at the Department of Justice's Office of Legal Education thought that an issue dealing with pandemic legal topics might supply some timely—and much needed—assistance. Welcome to Modern Advocacy!

The legal profession tends to fall behind other professions in using new technology. The *anni horribiles* of 2020–2021 forced lawyers to change their ways and adapt to using technology for virtual meetings, conferences, and court proceedings. This issue of the DOJ Journal discusses that move, as well as how the pandemic affected legal education and the bar exam. We also have articles on evidentiary issues, eLitigation, and trial advocacy. It's a veritable cornucopia of topics to aid the twenty-first-century advocate.

A huge thank you goes out to Chief Learning Officer Mark Yancy for spearheading this issue and helping to enlist the superb authors. My personal thanks go to mainstays of OLE Publications, Managing Editor Addison Gantt, Associate Editor Phil Schneider, as well as our law clerks. Issue in and issue out, they do a great job of bringing this journal to you. And thanks to you, our readers. We're gratified by the response we receive, measured in online views of the DOJ Journal and orders for hard copies (and some shout-outs on social media platforms too).

I wish you the best in your future court appearances, whether in-person or virtual.

Chris Fisanick
Columbia, South Carolina
July 2021