Apres le Deluge: Emerging Appellate Issues in Covid-Era Trials

FDAP Staff Attorney Richard Braucher
FDAP/CADC Zoom Convening

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Introduction: The goal of this document is to assist appellate practitioners in ferreting out meritorious issues arising out of pandemic-era cases. Not all issues will be apparent from reviewing the record. So it is more important than ever that appellate counsel *thoroughly* discuss the case with trial counsel and the client to learn of COVID-19 irregularities or problems which may not be evident from the record.

This time of ours cries out for maximum lawyerly creativity. Do not expect cookie-cutter challenges. The situation in many trial courts is chaotic and may result in highly unusual legal challenges. The following is a list of emerging issues, focusing on remote hearings and socially distanced "hybrid" hearings. Hybrid hearings (often jury trials) are mostly in-person, but may be partially remote. Often such courtroom proceedings are partially or totally physically inaccessible to the public, but permit individuals to live-stream them via the Internet. There is overlap. Some issues discussed in the section on remote hearings may be applicable to hybrid hearings, and vice versa.

Remember: *this is a work in progress*.[1] FDAP intends to complete and enlarge this list of issues, so please email rbraucher@fdap.org with any additional issues, and we will recirculate updated versions. *Thank you*.

I. Issues Arising in Remote Hearings

Currently, in California, hearings may be held remotely at every stage of the case. Take a look at Emergency Rule 3 of Appendix I: Emergency Rules Related to COVID-19. Courts may require that judicial proceedings and court operations be conducted remotely. (Emergency Rule 3(a)(1).) In criminal

[1] Some issues, still under construction, signified by 🛠.

proceedings, courts must receive the defendant's consent (Emergency Rule 3(a)(2).) "Remotely" includes but is not limited to, the use of video, audio, and telephonic means for remote appearances; the electronic exchange and authentication of documentary evidence; e-filing and e-service; the use of remote interpreting; and the use of remote reporting and electronic recording to make the official record of an action or proceeding. (Emergency Rule 3(a)(3).) Study applicable county local rules which expand on these rules (e.g., Contra Costa County: May 29, 2020 Amended Emergency Local Rules–Video Technology in Criminal Cases).

Remote hearings in the Covid-19 pandemic may impinge on a host of constitutional rights, including:

- Right to Counsel
- Right to Cross-Examine and Confront Witnesses
- Due Process and Equal Protection
- Right to a Public Trial (includes preliminary hearings) (See II.A, *post*.)

A lot can, and does, go wrong at these hearings. Technological malfunctions, glitches and other problems can impact a variety of constitutional rights. Job Number One is to connect "what went wrong" to a constitutional violation. (Note: That your client may have consented to a remote hearing does not necessarily result in forfeiture of fundamental constitutional rights.)

A. Right to Counsel

Be on the lookout for any problems regarding attorney-client consultation in your case. Any interference with consultation between attorney and her client before, during, or after a remote hearing may constitute a Sixth Amendment violation of a right to effective counsel. (*Geders v. U.S.* (1976) 425 U.S. 80 (Sixth Amendment violation when client barred from speaking to attorney for during an overnight recess during trial); but see *Perry v. Leeke* (1989) 488 U.S. 272, 284-285 (no violation where trial court ordered defendant not to speak with attorney during 15-minute recess). The communication must be private. Defendant must have not only unfettered access to counsel but also the assurance of confidentiality. (*Barber v. Municipal Court* (1979) 24 Cal.3d 742, 751, ["if an accused is to derive the full

benefits of his right to counsel, he must have the assurance of confidentiality and. . . absolute. .. privacy of communication with his attorney"].)

B. Right to Cross-Examine and Confront Witnesses

1. Remote and/or masked witness testimony

Remote testimony of witnesses presents many kinds of challenges to a defendant's right of confrontation. In discussing whether remote testimony should be allowed, Justice Scalia commented, "[v]irtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones." (Richard D. Friedman, *Proposed Amendments to Fed. R. Crim. P. 26: An Exchange: Remote Testimony* (U. of Michigan Law School Scholarship Repository, Summer 2002) p, 703.) A factfinder's ability to assess credibility remotely is impeded when a testifying witness is a small image on a screen and cues, body language, visual pauses, and other aspects are lost in a virtual environment. (*Ibid*.)

The leading confrontation cases on the use of remote witnesses or witnesses obstructed from view are *Coy v. Iowa* (1988) 487 U.S. 1012, *Maryland v. Craig* (1990) 497 U.S. 836 and *People v. Arredondo* (2019) 8 Cal.5th 694. *Coy* considered whether the trial court had violated the defendant's right of confrontation by placing a large screen between him and the witness stand while two complaining witnesses testified that he had sexually assaulted them. The *Coy* court held that use of the screen, which only permitted the defendant to "dimly ... perceive the witnesses" while they testified, had violated the defendant's right of confrontation. (*Coy, supra,* 487 U.S. at p. 1015.)

Coy observed that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." (*Id*., at p. 1016.) This "guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality"; that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" (*Id*., at p. 1017.) The court reversed: "It is difficult," the court

said, "to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter."[2] (*Id.*, at p. 1020.)

In *Maryland v. Craig, supra,* 497 U.S. at p. 840, an alleged child abuse victim testified at trial in a room separate from the courtroom, in the physical presence of only the prosecutor and defense counsel, while the defendant, the judge, and the jury remained in the courtroom and watched the testimony by one-way closed-circuit television. *Craig* held that the right to face-to-face confrontation under the Sixth Amendment is not absolute, but it may not be "easily... dispensed with"; it may only be modified "where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." (*Id.*, at p. 850.)

Craig concluded in that case: "[W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." (*Craig*, at p. 857.) "So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case." (*Craig*, at p. 860.)

People v. Arredondo, supra, 8 Cal.5th 694, examined Evidence Code section 1347, a procedure for allowing some child witnesses to testify remotely by closed-circuit television "out of the presence of the judge, jury, defendant or defendants, and attorneys" when their testimony will involve reciting the facts of "[a]n alleged sexual offense committed on or with" them. (§ 1347, subd. (b)(1).) The statute: (1) required a court to make a finding "shown by

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[2] *Coy* noted, that if there are "any exceptions" to the confrontation clause's "irreducible literal meaning" (the "'right to meet face to face all those who appear and give evidence at trial'"), "they would surely be allowed only when necessary to further an important public policy." (*Coy*, at p. 1020.)

clear and convincing evidence" that testifying in front of the defendant "would result in the child suffering serious emotional distress so that the child would be unavailable as a witness" (*id.*, subd. (b)(2)(a)). Applying the analysis in *Craig*, *Arredondo* held that the statute did not violate confrontation rights. However, the evidence in the record did not establish the necessity for the accommodation.

Under *Coy*, *Craig*, and *Arredondo* use of remote and/or masked witness testimony requires sufficient evidence in the record establish the necessity. Litigants mounting a challenge will need to overcome any showing of necessity of remote and/or masked witness testimony and provide evidence (expert or otherwise) as to how it harms the defendant.[3]

2. Unnecessarily suggestive in-court identification (where court is asking accused to lower mask for identification by witness)

C. Right to a Public Trial (See II.A, *post*.)

D. Due Process and Equal Protection

II. Issues Arising in Socially Distanced "Hybrid" Hearings and Jury Trials

A. Does a "Zoom Trial" Satisfy a Right to a Public Trial?

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial… ." (U.S. Const., Amend. VI.) This right "is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their

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[3] For ideas on harm, see J. Simon-Kerr, *Unmasking Demeanor*, 88 Geo. Wash. L. Rev. Arguendo 158 (Sept. 2020).

responsibility and to the importance of their functions." (*Waller v. Georgia* (1984) 467 U.S. 39, 46.) Courts specifically recognize the important role a defendant's family members play in reminding the trial participants of this duty. (*In re Oliver* (1948) 333 U.S. 257, 272.) Further, "[i]n addition to ensuring that [the] judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury." (*Waller,* 467 U.S. at p. 46.) A public trial also protects the public's and the press's qualified First Amendment rights to attend a criminal trial. Waller, 467 U.S. at 44.)

"[A] trial is public, in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, which facilities are not so small as to render the openness negligible and not so large as to distract the trial participants from their proper function, when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings." (*Estes v. State of Texas* (1965) 381 U.S. 532, 584 (Warren, C.J., concurring).)

The First Amendment guarantees: "The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." (*Press-Enterprise Co. v. Superior Court of California for Riverside County* (1986) 478 U.S. 1, 7.) "[I]n *every* criminal case …the public is a party." (*NBC Subsidiary (KNBC-TV) Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1210; italics in original.) Both the California and the nation's high court agree that "the governing principles under [the Sixth] [A]mendment are the same as those pertaining to the right of access under the First Amendment." (*Id*., at p. 1213, fn. 31.)

Under *Waller*, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." (*Waller v. Georgia* (1984) 467 U.S. 39, 48.)

Many counties provide little or no physical public access to criminal proceedings. Contra Costa County, for example, reportedly provided two

seats for the public in a criminal jury trial recently; all further access had to be conducted by means of live stream audio over the internet. Any argument that a few seats in a courtroom, along with audio access via the internet, fails the *Waller* test will require careful factual development.

B. Jury Selection Issues

1. Failure to seat fair cross section because of COVID-19 hardship process violates the Sixth Amendment

The right to have an impartial jury drawn from a representative cross section of the community is guaranteed under both the Sixth Amendment to the United States Constitution, and article I, section 16, of the California Constitution. (*Taylor v. Louisiana* (1975) 419 U.S. 5, *People v. Bell* (1989) 49 Cal.3d 502, 520.) Preserving a representative cross-section of potential jurors is an "essential prerequisite to an impartial jury." (*People v. Wheeler* (1978) 22 Cal.3d 258, 266.) This right is abrogated when any aspect of the jury selection process tends to underrepresent a discernible class, thereby precluding the possibility of obtaining a truly representative cross section of the community. (*Id*., at pp. 267-268.) "[E]xcessive excuses on such grounds as sex, age, job obligations, or inadequate jury fees, can upset the demographic balance of the venire in essential respects." (*Id*., at p. 273.)

NJP Litigation Consulting/West conducted a survey June 12-18, 2020, of more than 400 jury eligible residents of Los Angeles and six Bay Area counties (Alameda, Marin, Santa Clara, San Francisco, San Mateo and Contra Costa) concerning jury service and COVID-19. (NJP Litigation Consulting, COVID 19 and Jury Service (June 26, 2020.) The survey concluded that "a majority do not feel they can take on the responsibility of being a juror now and give a trial their full attention, nor are they willing to participate in deliberations which go on for longer than one day."

Further, the survey determined, "It will be difficult to select juries throughout 2020 which are diverse and represent a cross section of the public without imposing undue hardship." More than two-thirds of those unwilling to serve this year say they are afraid to be in a large group and risk exposure to COVID-19. Other notable findings:

- "Nearly half of all respondents (46%) suffered household income losses due to the pandemic.
- 31% of people of color, as compared to 23% of whites, experienced a job loss in their household.
- Women, more than men, are unwilling to serve on trials this year.
- More than two-thirds of those unwilling to serve this year say they are afraid to be in a large group and risk exposure to COVID-19.
- Young people (18-30) were particularly hard hit by the pandemic: over 40% suffered a loss of household income; especially young African American women (77%).
- Latinx men 31 and older were hard hit by income loss, especially those 51 and older (67%), along with a narrow band of white men aged 31-50 (58%)."

2. Masked jurors prevent defendant from assessing the jurors' demeanor and properly challenging jurors for cause, or peremptorily

Given COVID-19 masking requirements and social distancing protocols, venire members are often masked throughout voir dire and a located at a great distance in the courtroom. It can be argued that this state of affairs violates a defendant's Sixth Amendment right to effective assistance of counsel in voir dire and to an impartial jury. There are strong argument that counsel cannot meaningfully voir dire or challenge jurors without being able to observe their demeanor. Nor can counsel guarantee that a jury is fair and impartial when their entire voir dire testimony was given from behind masks. Demeanor is critical. (See *People v. Tuilaepa* (1992) 4 Cal. 4th 569, 587 [observing that "counsel might have determined from the demeanor of these prospective jurors that additional questioning would be futile.") Subjective reasons for challenges based on demeanor or "body language" are valid (provided they are not pretexts for invidious discrimination). (*People v Hall* (1983) 35 Cal.3d 161, 170; *People v Wheeler* (1978) 22 Cal.3d 258, 275 [demeanor evidence of hostile looks].)

C. Jury Seating Issues

Reconfiguring courtrooms to allow for social distancing may result in an inability of jurors to see the face of the defendant, who may himself be unable to observe those jurors. This state of affairs may impinge on a host of constitutional rights. "It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. *Taylor v. United States* (1973) 414 U.S. 17, 19 (per curiam). At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. If the defendant takes the stand […] his demeanor can have a great bearing on his credibility, persuasiveness, and on the degree to which he evokes sympathy. The defendant's demeanor may also be relevant to his confrontation rights. See *Coy v. Iowa* (1988) 487 U.S. 1012, 1016–1020 (emphasizing the importance of the face-to-face encounter between the accused and the accuser)." (*Riggins v. Nevada* (1992) 504 U.S. 127, 142 (Kennedy, J., concurring).)

D. Deliberation Issues