

Trial court record considerations when there is a confrontation objection about remote participation

A Resource from the
Pandemic Rapid Response Team

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This resource is a companion reference to the [Constitutional Concerns Related to Jury Trials During the COVID-19 Pandemic](#).

Historical context

The federal Constitution’s [Sixth Amendment](#) guarantees the criminal defendant the right “to be confronted with the witnesses against him.”

This guarantee, however, did not originate with the federal government. “When it came time to draft the first eight amendments in the Bill of Rights, for example, Madison and others drew from the existing state constitutions,” explains Sixth Circuit Judge Jeffrey S. Sutton in his book *51 Imperfect Solutions*. As far back as 1898, the United States Supreme Court recognized that a defendant’s right to confront was separately guaranteed in “most if not all of the States composing the Union.” *Kirby v. United States*, 174 U.S. 47, 56 (1899).

Because state appellate decisions interpret different sources of law and different interpretations of federal constitutional doctrine, this resource cannot offer a state court-by-state court taxonomy of substantive confrontation doctrine. For example, jurisdictions may differ in their analysis and application of *Maryland v. Craig*, 497 U.S. 836 (1990) and *Crawford v. Washington*, 541 U.S. 36 (2004). And some state constitutions or laws expressly include a “face-to-face” requirement. Others do not. And courts may make different determinations about a criminal defendant’s consent to a remote proceeding.

This resource, instead, focuses on identified state court record-making considerations for confrontation objections in remote proceedings. There generally should be no confrontation problem when the parties agree to remote participation. But a careful record can be critical for appellate review if a defendant does not consent to a remote proceeding.



The judiciary's COVID-19 response

The COVID-19 pandemic accelerated and expanded the state courts' use of remote technology. As a result, the judiciary has been asked to evaluate confrontation objections from litigants forced onto remote platforms.



Figure 1: *Open-air police court being held in Portsmouth Square, San Francisco during the 1918-1919 influenza epidemic. To prevent crowding indoors, judges held outdoor court sessions.*

Figure 2: *Jurors are sworn in on August 11, 2020 for the nation's first virtual criminal jury trial in Travis County, Texas.*



These public health emergency-related confrontation questions have not yet been reviewed or decided by the Supreme Court of the United States.

No matter the future development of the Confrontation Clause doctrine, there are best practices for trial courts handling confrontation objections. State appellate court decisions all point in one direction: the importance of a complete trial court record and findings.

The early confrontation decisions considering COVID-19 and remote participation: A focus on the trial record

Appellate courts appreciate a thorough record to review. *Diaz v. Commonwealth*, 487 Mass. 336, 338 n.2 (Mass. 2021) (“The judge’s explanation of the Zoom procedure was thorough, careful, and a significant aid to this court.”) [The trial court’s opinion was attached to the petitioner’s brief at A.60. The Zoom platform is explained at A.63-65.]

An incomplete record often triggers a remand order. That was the outcome in:

State v. Sweidan, 13 Wash. App. 2d 53 (2020)

State v. Seale, No. M2019-01913-CCA-R9-CD (Tenn. Crim. App. July 20, 2020)

State v. Hamed, 21-K-167 (La. Ct. App. Aug. 18, 2021) (“In the absence of any evidence from which the necessary findings of fact can be made, the trial court’s ruling and pursuant admission of video-conference testimony of an out-of-court prosecution witness at trial do not meet the standards set by *Craig, supra*, *Hoff, supra*, and *Luckey, supra*. We therefore vacate the trial court’s ruling, and remand for an evidentiary hearing.”)

Suggested record-making blueprints when considering future confrontation objections to remote participation

Several state appellate decisions have helpfully offered blueprints for the record that appellate courts rely on.

Louisiana’s Fifth Circuit Court of Appeal in *State v. Hamed*, 21-K-167 (La. Ct. App. Aug. 18, 2021) held that before permitting remote testimony, the trial court must determine at a pretrial evidentiary hearing that:

- (1) denial of face-to-face confrontation is necessary to further an important public policy, and that the alleged necessity applies specifically in the trial of this case; and
- (2) the reliability of the video-conferenced testimony can and will be procedurally assured, as in *Hoff*.

The burden is upon the State to show an adequate assurance of both of these requirements by a preponderance of evidence, and the trial court must establish conditions which assure an untainted process for examining the remote witness.

When affirming the trial court's use of remote testimony in *State v. Castonguay*, 2021-CA-2 (Ohio Ct. App. Sep. 10, 2021), the **Ohio Court of Appeals** observed that the trial court record "clearly establishes that the trial court complied with the requirements set forth in *Marcinick* and repeated in *Howard*." Specifically:

- The three remote witnesses testified under oath.
- The defendant, opposing counsel, and the trial court could observe the witnesses as they testified remotely.
- Each witness faced cross-examination.
- "Upon reviewing the transcript, it appears there was only one instance when the video feed froze during [one witness's] remote testimony, and the issue was resolved quickly without incident. The transcript reveals no further glitches with the video feed."



In a non-COVID-19 challenge to the prosecution's use of video testimony, **Washington's Division Three Court of Appeals** addressed best trial court practices in April 2020. *State v. Sweidan*, 13 Wash. App. 2d 53 (2020). *N.b.*, the Washington Courts referenced the *Sweidan* decision in its June 2021 *Remote Jury Trials Work Group Best Practices in Response to Frequently Asked Questions*.

- Verify on the record the structure and the mechanics of the video conference presentation. Such details should include:
 - the number and location of the video screens in the courtroom,
 - the technology present at the location of the witness,
 - the dimensions of the respective screens, and
 - what sections of the witness's body that the jury can see on the screen.
- The record should confirm that the jury and the defendant see the witness and the witness's body language, and that they hear the witness.
- The record should also verify that the witness sees the jury and the defendant.
- At the end of the testimony, the trial court or the State should substantiate that no errors in the transmission occurred.

Confrontation-adjacent objections in non-criminal proceedings

While the federal Sixth Amendment right to confrontation is limited to criminal defendants, other courts have addressed similar objections in non-criminal proceedings. They have not used the phrase “due process,” but perhaps that’s another way to consider them.

In affirming a termination of parental rights decision, the **Illinois First District Court of Appeals** in *People v. N.D. (In re R.D.)*, 1-20-1411 (Ill. App. Ct. Aug. 27, 2021) included these considerations from the trial court record:

- At the Zoom termination hearings, respondents were represented by counsel and had the chance to be present, to be heard, to present evidence, and to cross-examine the witnesses against them.
- While in-person testimony and cross-examination are preferred, respondents and their counsel could view and hear the witnesses as they testified.
- The trial court found that its “ability to evaluate the credibility of witnesses has not been negatively impacted by remote versus in-person hearings.”
- The court also made certain “that all witnesses called to testify are alone and not subject to being coached *** [and] that witnesses are not using notes, documents or electronics while testifying and the only properly admitted exhibits are viewed by the witnesses if necessary.”



In *People v. E.R. (In re E.C.)*, 2021 Ill. App. 210197 (Ill. App. Ct. 2021), the **Illinois First District Court of Appeals** referred to its *People v. N.D. (In re R.D.)*, 1-20-1411 (Ill. App. Ct. Aug. 27, 2021) holding when rejecting the mother’s appeal objecting that a portion of the parental rights trial was held over Zoom. The appellate court noted from the trial court record:

- E.R. was represented by counsel and had the opportunity to be present, to be heard, to present evidence and to cross-examine the witnesses against her.
- The trial court ensured that the witnesses were alone and not referencing documents while testifying and the court found that it was able to effectively assess the credibility of witnesses.
- Additionally, the same important state interests in the welfare of the minors and safely resolving the case amidst a global pandemic at issue in *R.D.* are present here.

On the horizon, the **Michigan Supreme Court** is now considering an objection to a remote judicial discipline proceeding in *In re Hon. Bruce U. Morrow*, No. 161839 (Mich. filed Aug. 10, 2020). The respondent challenges the propriety of the special master's decision to conduct the discipline hearing over Zoom. The [respondent judge argues](#) that the Court's pandemic-era orders do not justify departing from the plain text of the judicial discipline court rule ([MCR 9.231\(B\)](#)), which required the master to "set a time and place for the hearing," and that the virtual hearing format impaired the factfinder's ability to assess credibility.

Memorializing the written judicial record with images

Trial and appellate courts may consider inserting a visual screengrab into their opinions (such as Figure 2 in this document) to enrich a written opinion about important remote proceeding visual considerations. But be cautioned that images are not "carried over" to many online platforms where the bar and public search and read opinions. Images should not substitute from non-image explanation. Consider and compare the different online versions of the Supreme Court of the United States per curiam opinion in *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017). The opinion's appendix included two images. The Court's [original .pdf written opinion](#) includes the images. But when the text-based opinion is retrieved online (for example, from [FindLaw](#), [Google Scholar](#), or [Casetext](#)), the images are left out and cannot be instructive for readers.

Masks and confrontation

Remote testimony is not the only COVID-19 confrontation challenge. Masks, too, can cause challenges. The **Ohio Court of Appeals** recently outlined why there was no Confrontation Clause violation when a witness was allowed to wear a mask (covering his nose and mouth) while testifying during an in-person jury trial. *State v. Hadlock*, 2020-A-0054 (Ohio Ct. App. Sep. 13, 2021):

Demeanor is the language of the entire body. The jurors were able to observe how Dr. Haniff moved when he answered a question; to observe hesitation(s), if any, in his answers; if he blinked in an unusual way or rolled his eyes. The Confrontation Clause cannot be reasonably construed to afford the right to see a witness' lips move or nose wrinkle any more than it could be understood to guarantee that jurors must observe a witness' bare arms to determine whether he or she had "goosebumps" as the result of a uniquely probative question. Just as proper clothing will cover sweating or other potentially inadvertent physical reactions to effective questioning, masks will invariably cover a witness' nose and mouth. This does not, however, prevent a jury from constructively assessing the credibility of the testimony a witness offers.

Other courts may decide differently. No matter the outcome, this opinion too shows the importance of making a good record.

Lessons and reminders for all remote proceedings

Even though the confrontation jurisprudence continues to evolve, many of the outlined criteria also complement the first two [Guiding Principles for Post-Pandemic Court Technology](#) issued by the Conference of Chief Justices and Conference of State Court Administrators (CCJ-COSCA) in July 2020:

1. Ensure principles of due process, procedural fairness, transparency, and equal access are satisfied when adopting new technologies.
2. Focus on the user experience.

In other words, during *any* remote proceeding, best practices suggest attention to and record-making about:

- The remote technology used.
- The number and location of video screens in the courtroom.
- The dimension of the respective screens used by each participant. (Smaller screen sizes, particularly tablets or cell phones, may limit the number of participants that can be seen at a time. For example, Microsoft Teams [recently announced](#) a gradual rollout to add a large gallery layout on mobile devices. Until then, some mobile users may only see four at a time. The [Webex website](#) includes the grid view layouts for different iOS and Android devices. Depending on their device, [Zoom users](#) may see only four people at a time (mobile) or dozens more (desktop)).
- What sections of the witness's body are visible.
- Whether participants can see and hear each other—and any introduced evidence. ([Remote Hearings and Access to Justice](#) explains how “the technology must be capable of presenting a usable, clear picture of the documents to all participants. *** If not all participants have access to the same technology, those who do not may be denied an equal opportunity to present their positions. [D]ifferences such as in screen size and resolution can impose disadvantages on some parties that may not be apparent to the judicial officer during the hearing.”)
- Whether litigants participating by telephone are fully informed and have the chance to speak. See [Conducting Fair and Just Remote Hearings: A bench guide for judges](#).
- Whether remote testifying witnesses are alone, are not being coached, and are not using unauthorized notes, documents, or other electronics.
- Whether represented litigants can confer with their counsel confidentially.
- Whether any interpreters can perform their duties.
- Confirmation that no errors in the transmission occurred.