

# VIDEOCONFERENCING AND LEGAL DOCTRINE

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## INTRODUCTION

With vaccination rates approaching herd immunity and infection rates dropping sharply, COVID-19 appears to be on the verge of vanquishment.<sup>1</sup> Yet not everything will revert to its pre-pandemic state. More than a year's worth of grappling with solutions for managing work, everyday life, and the social and governmental restrictions the pandemic required has normalized innovations likely to persist post-pandemic.

One persistence is videoconferencing. Forced adoption may abate, but choice adoption will continue in many cultural areas, including in the workplace, among commercial businesses, and for social interaction. Rather than shrink, the videoconferencing market is projected to expand post-pandemic, by as much as 30%.<sup>2</sup> These new norms of digital commerce and social interaction are likely to increase the connectivity of millions of people while lessening the burdens of physical travel.

Pandemic-fueled videoconferencing adaptations also will endure in federal civil litigation.<sup>3</sup> In a variety of litigation contexts, videoconferencing can reduce litigation costs and improve efficiency, with only marginal loss of fidelity to in-person events. Videoconferencing can be the preferred vehicle for most witness interviews, strategy sessions, status conferences,

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1. Stephanie Sierra, *California "Weeks Away" from Reaching Herd Immunity*, ABC7 NEWS (May 5, 2021), <https://abc7news.com/herd-immunity-sf-san-francisco-covid-19-cases-california/10586281/> ("California could reach herd immunity by June 15.").

2. Rani Molla, *The Pandemic Was Great for Zoom. What Happens When There's a Vaccine?*, VOX (Dec. 4, 2020, 11:50 AM), <https://www.vox.com/recode/21726260/zoom-microsoft-teams-video-conferencing-post-pandemic-coronavirus>.

3. See Scott Dodson, Lee H. Rosenthal & Christopher L. Dodson, *The Zooming of Federal Civil Litigation*, 104 JUDICATURE 13, 13-14 (2020).

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

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

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

## I. THE NORMALIZATION OF VIDEOCONFERENCING

Although videoconferencing was already established before the pandemic, its acceptability and integration have become far more widespread during the pandemic. To set the stage for how legal doctrines must adapt to the new normal, this Part details videoconferencing's arc in social and commercial relationships and in civil litigation practice.

### A. *Videoconferencing in Commercial and Social Relationships*

During the pandemic, videoconferencing became the forced norm for all kinds of commercial and social connections. Millions have become adept—even dependent upon—those virtual connections.<sup>6</sup> As the pandemic eases

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4. *Id.* at 14-15.

5. *Id.* at 15-16.

6. Ken Graven, *Videoconferencing in a Post-Pandemic World: A Historical Perspective*, SALTER (2020), <https://salter-inc.com/wp-content/uploads/2020-05-28-KWG-Videoconferencing.pdf>.

and in-person options return, videoconferencing will continue to be an option used, and even preferred, by some people.<sup>7</sup>

Workplace relationships are strong candidates for continued virtual connections. As one observer notes:

The desire to attend meetings without having to drive across town or board a plane will remain with us well after the pandemic. In the future, a single meeting will likely find participants attending from their work offices, homes, and conference rooms. Workers who find themselves in conference rooms will want the same ease of use they experience at home.<sup>8</sup>

“[T]he vast majority of office employers,” reporters claim, “plan to use a hybrid work model, wherein some of their workforce works remotely at least some of the time.”<sup>9</sup>

The same observations attend to interactions among businesses, and between businesses and customers. Bret Taylor, the President and COO of Salesforce, said, “The COVID-19 crisis has taught us that companies must be able to sell, service, market and collaborate from anywhere, and that won’t change in a post-pandemic world.”<sup>10</sup> Businesses can reach and interact with customers more easily using videoconferencing, saving the customers the time and hassle of physically coming to the business location, and sometimes saving the business the time and expense of having its agents physically available. Telemedicine is an example of how videoconferencing is permanently reshaping customer service.<sup>11</sup>

Beyond workplaces and businesses, pandemic familiarity with videoconferencing alternatives to in-person social connections has laid the groundwork for persistent post-pandemic use of virtual social gatherings. During the pandemic, an American man and an Argentinian woman were legally married by a Utah officiant in a Zoom ceremony while all participants were physically in their own countries and states.<sup>12</sup> Virtual weddings are likely to continue after the pandemic for couples who wish to get married but are separated physically for various reasons, such as because of immigration

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7. *Id.* (“[M]any users will continue to use these tools whether in the office or working from home.”).

8. *Id.*

9. Molla, *supra* note 2.

10. *How the Pandemic Has Become a Windfall for Video Conferencing Platforms*, PR NEWSWIRE (July 17, 2020), <https://www.prnewswire.com/news-releases/how-the-pandemic-has-become-a-windfall-for-video-conferencing-platforms-301095229.html>.

11. Todd Shyrook, *Digital Doctors: What Role Will Telehealth Play After COVID-19?*, 97 MED. ECON. 20 (2020) (reporting that one advocate “estimates that one-third of visits eventually will be virtual”).

12. *Couple Ties the Knot Over Zoom While in Different Countries*, BOUNDLESS (Mar. 9, 2021), <https://www.boundless.com/blog/couple-marry-over-zoom-while-in-different-countries/>.

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

Other social events are likely to have similar post-pandemic reliance on videoconferencing. School reunions and graduation ceremonies,<sup>14</sup> Netflix parties, cast shows,<sup>15</sup> and more have all had great success during the pandemic and are likely to continue in some form after pandemic restrictions lift. In some ways, post-pandemic videoconferencing is likely to increase social contacts across distances and borders.

### B. *Videoconferencing in Civil Litigation*

The same lessons hold for civil litigation. The legal community has long experimented with videoconferencing technology as a way to improve access and reduce costs.<sup>16</sup> Widespread adoption pre-pandemic, however, was resisted out of a concern for the risks videoconferencing poses, including risks to confidentiality, decorum, judicial and attorney control, and constitutional rights of due process and witness confrontation.<sup>17</sup> When travel and in-person appearances were routine and expected, such risks generally weighed against using videoconferencing in civil litigation.<sup>18</sup>

The sudden pandemic-caused lockdown in the United States changed the calculus almost overnight. Stopping the wheels of justice was not an acceptable solution for any of the players—judges, attorneys, and clients. The legal community thus turned to solutions to enable pandemic-era litigation; one of the primary solutions was videoconferencing. A year of

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13. Talia Lakritz, *Virtual Weddings are Becoming the Norm During the Pandemic, and Wedding Planners Think They're Here to Stay*, INSIDER (Sept. 17, 2020, 7:08 AM), <https://www.insider.com/virtual-wedding-planning-coronavirus-pandemic-2020-8>.

14. Ruth La Ferla, *Welcome to Your School Reunion! No Name Tags Required*, N.Y. TIMES, <https://www.nytimes.com/2020/06/27/style/school-reunions-on-zoom.html> (Aug. 24, 2020).

15. Diane J. Cho, *Cast Reunions, Social Distancing Style: See Your Favorite Stars Reunite by Computer*, PEOPLE, <https://people.com/tv/virtual-cast-reunion-photos/> (Dec. 13, 2020, 6:20 PM).

16. *E.g.*, Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59 (2006) (discussing its rising use in immigration proceedings). Federal Rule of Civil Procedure 43(a) specifically allows videoconferenced trial testimony. *See* FED. R. CIV. P. 43(a) (“For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.”).

17. *See, e.g.*, Davidson v. Riley, 44 F.3d 1118, 1122 (2d Cir. 1995) (citation omitted) (discouraging courtroom videoconferencing as “an affront to the very dignity [of the courtroom] and decorum of judicial proceedings that the judge is seeking to uphold”). For a more fulsome discussion, see Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875, 1904-09 (2021).

18. *E.g.*, FED. R. CIV. P. 43 advisory committee’s note to 1996 amendment (“Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.”).

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

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

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

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

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

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

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

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

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

display of tangible evidence is crucial.<sup>23</sup> Jury trials present the most serious obstacles to civil litigation.<sup>24</sup> But even despite these obstacles, videoconferencing might still be the best option if the burdens of in-person attendance are severe.<sup>25</sup>

The pandemic's lessons suggest that internal meetings, witness interviews, status and discovery conferences (in or outside the presence of the judge), non-dispositive oral hearings, and uncontentious depositions are ripe for widespread post-pandemic videoconferencing adoption.<sup>26</sup> The more contentious, important, and document-intensive the event, the more context-dependent the decision between virtual and physical attendance, but videoconferencing as an option, even for these kinds of events, is here to stay. Whether videoconferencing will make litigation cheaper and easier overall is debatable, but it ought to significantly reduce the geography-based costs and inconveniences of litigation.

## II. VIDEOCONFERENCING'S EFFECT ON LEGAL DOCTRINE

Videoconferencing thus is changing both primary conduct and litigation culture. Those changes should have an impact on legal doctrines dependent upon connectivity and the costs and burdens of litigation; such legal doctrines include personal jurisdiction, venue, and discovery.

### A. *Personal Jurisdiction*

The law of specific personal jurisdiction emphasizes the contacts that defendants have with forum states and the burdens on parties to litigate in those forum states. The seminal case of *International Shoe Co. v. Washington* established that specific jurisdiction requires the defendant to have "minimum contacts" with the forum state such that maintenance of the suit is "reasonable" and "does not offend traditional notions of fair play and substantial justice."<sup>27</sup> Subsequent cases have interpreted this formulation to require that the defendant establish contacts with the forum state through its

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23. *Id.* at 15-16 ("Our adversarial system is designed for in-person confrontation and challenge, which can be difficult to replicate via videoconference.").

24. *Id.* at 16.

25. Several civil trials were held entirely (and successfully) online in spring 2020. See Christopher T. Robertson & Michael Shammas, *The Jury Trial Reinvented*, TEX. A&M L. REV. (forthcoming 2021).

26. See Dodson et al., *supra* note 3, at 13 ("[W]e think the efficiency gains and cost savings of videoconferencing are likely to prevail routinely for internal meetings, witness interviews, court conferences, simple oral arguments, and uncontentious depositions, especially when travel is required.").

27. 326 U.S. 310, 316-17 (1945).

primary conduct<sup>28</sup> and that the defendant be protected from the burdens of litigating in a faraway state.<sup>29</sup>

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

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

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

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

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

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

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

31. *Id.* at \*8.

### B. Venue Transfer

Videoconferencing should also affect venue transfer and *forum non conveniens*. Under the general venue statute, a court in one district may transfer a case to a court in a different district “[f]or the convenience of parties and witnesses, in the interest of justice . . . .”<sup>32</sup> In MDL cases, a court in one district may transfer a case for consolidation with an MDL in a different district “for the convenience of parties and witnesses and [to] promote the just and efficient conduct of such actions.”<sup>33</sup> And, under the doctrine of *forum non conveniens*, a court may dismiss an action to allow the plaintiff to refile the case in an entirely different judicial system (usually in a foreign country’s courts) in light of the relative conveniences of the parties and public reasons.<sup>34</sup>

Each of these transfer mechanisms depends upon the relative conveniences to the parties in litigating in two alternative forums. A pervasive role for videoconferencing in civil litigation could influence the convenience calculus in a number of ways.

For ordinary transfer, the calculus may cut *against* transfer if videoconferencing makes an otherwise physically inconvenient transferor forum far less inconvenient in comparison to the transferee forum. To date, courts have been skeptical of videoconferencing’s ameliorative role in this context but primarily because of the uncertainty of post-pandemic norms. For example, in *Hoyt v. Liberty Mutual Group Inc.*, a plaintiff opposed venue transfer during the pandemic on the ground that COVID videoconferencing protocols made depositions and other discovery cost neutral regardless of forum.<sup>35</sup> The court rejected the plaintiff’s argument because, “given the ever-changing situation surrounding the pandemic, video testimony may cease to be the norm.”<sup>36</sup> Importantly, however, the court did not dispute the premise that videoconferencing had the potential to neutralize cost and convenience disparities between the forums.<sup>37</sup> If videoconferencing persists after the pandemic, arguments like the *Hoyt* plaintiff’s should be compelling absent other reasons why the transferee forum is more convenient for the parties or witnesses.

For MDL transfer, videoconferencing is likely to cut *in favor* of transfer because the conveniences of aggregation—as opposed to the inconveniences

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32. 28 U.S.C. § 1404(a).

33. *Id.* § 1407(a).

34. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981).

35. No. 20-CV-00379, 2021 WL 966018, at \*4 (E.D. Wash. Mar. 15, 2021).

36. *Id.*

37. *See id.* at \*4-5.



of travel—favor MDL consolidation. Even assuming videoconferencing renders the forums of equivalent convenience based on geography, the MDL transferee court offers a significant advantage over the transferor court: consolidation and aggregation.<sup>38</sup> Further, because plaintiffs in MDL proceedings can often rely on a steering committee to manage the litigation on behalf of all plaintiffs en masse, individual plaintiff participation in the MDL case is usually far less involved than in a non-MDL case,<sup>39</sup> a distinction that should favor the conveniences of the transferee forum even in a virtual environment.

Videoconferencing also affects the determination of *forum non conveniens*. As with ordinary venue transfer, the availability of videoconferencing can help equalize the relative conveniences and inconveniences of each forum at stake from the perspectives of the parties, as long as the availability is equivalent in the forums. But *forum non conveniens* contains additional complications. In the doctrine, “there is ordinarily a strong presumption in favor of the plaintiff’s choice of forum, . . . [but] the presumption applies with less force when the plaintiff or real parties in interest are foreign” because a plaintiff’s foreign status implies that the plaintiff chose the forum for reasons other than party convenience.<sup>40</sup> If videoconferencing tends to equalize party conveniences between two forums, then both the presumption and its rebuttal should have less force. Taking videoconferencing’s impact a step further might mean diminishing the importance of the private convenience factors substantially, such that the public factors take on a much more significant role in the calculus.<sup>41</sup> Thus, the doctrine of *forum non conveniens*, as with venue transfer and MDL transfer, could be significantly affected by the widespread use of videoconferencing in federal civil litigation.

### C. Discovery

Rule 1 requires federal courts and the parties to balance speed, efficiency, and justice in interpreting and applying the Federal Rules of Civil

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38. See Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 13 (2018) (stating that MDL “offer[s] (usually) swift, efficient, and uniform resolution to what would otherwise be thousands of individual lawsuits”).

39. See *In re Vernitron Sec. Litig.*, 469 F. Supp. 297, 299 (J.P.M.L. 1979) (recognizing that individual MDL plaintiffs need not participate in many of the MDL proceedings).

40. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981).

41. *Cf. Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 571 U.S. 49, 63 (2013) (suggesting a similar change in the calculus when the parties agree to a valid forum-selection clause that selects the alternative forum).

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

Litigation videoconferencing helps balance these values in discovery, which has its own rule requiring that discovery be “proportional to the needs of the case,” considering, among other things, “whether the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>43</sup> As discussed above, depositions, especially depositions of remote nonparty witnesses, are prime candidates for being taken via videoconference. Ordinarily, nonparties demand scrupulous protection from the burdens of being deposed,<sup>44</sup> and even parties can be inconvenienced by travel and scheduling logistics if the nonparty witnesses are located far away. The value of a nonparty deposition must be fairly high to overcome these burdens of the deposition itself.

Videoconferencing changes this calculus considerably. Although a videoconference deposition still imposes burdens on a nonparty witness—including the time to prepare for the deposition, the time and stress of being deposed, and the potential expense of hiring a lawyer—any travel burdens are essentially eliminated for everyone. Videoconferencing may also lessen the stress burdens of being deposed. Reducing the burdens of a nonparty deposition means that such depositions will be more readily approved, thereby increasing the universe of discoverable information. The benefits of videoconferencing are particularly enviable when both the value and the burdens of the nonparty deposition are high, such as if the nonparty is located abroad; in such cases, videoconferencing may allow the deposition and significantly advance the quality of adjudication.<sup>45</sup> Discovery, venue, and personal jurisdiction all are affected by videoconferencing.

## CONCLUSION

To be sure, videoconferencing has limits. It may not reduce costs at all in particular circumstances. In others, it may even increase costs, especially for litigation participants with technological limitations. The salutary effects

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42. FED. R. CIV. P. 1. For a discussion of how this directive applies to the court and the parties, see Scott Dodson, *Cooperativism in the American Adversarial Tradition*, 40 CIV. JUST. Q. 283, 291-92 (2021).

43. FED. R. CIV. P. 26(b)(1).

44. See, e.g., *Mount Hope Church v. Bash Back*, 705 F.3d 418, 429 (9th Cir. 2012) (recognizing a special need to protect nonparties against the imposition of large discovery costs).

45. Ordinarily, Rule 45 requires nonparty depositions to occur within 100 miles of the nonparty, to avoid overburdening the nonparty with distant travel. FED. R. CIV. P. 45(c). Some courts have suspended this 100-mile limit when the deposition is to be taken by video conference. See *In re Newbrook Shipping Corp.*, 498 F. Supp. 3d 807, 815 (D. Md. 2020).

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

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