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ENFORCEMENT OF SYSTEM STANDARDS DURING COVID-19

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TABLE OF CONTENTS

I. INTRODUCTION

Franchisors develop, implement, and enforce system standards to ensure uniformity and consistency across the network of franchised locations and thereby create and preserve customer loyalty and the goodwill associated with it. But what happens when events impair franchisees' ability to comply with those standards or franchisors' ability to enforce them? As the COVID-19 pandemic rolled out across the country franchisees found themselves constrained by a new layer of operational "standards" imposed by public health officials to mitigate the risks that the pandemic posed, and franchisors scurried to accommodate those public health standards within their own operational schemes, policies, and procedures. In many instances the pandemic in effect demanded that franchisors and franchisees do more with less. This paper considers how the pandemic impacted the maintenance and enforcement of franchise system standards, summarizes important court rulings on issues important to enforcement of those standards, and looks at how what we as lawyers do to enforce those standards has changed.

II. THE COVID-19 PANDEMIC'S IMPACT ON THE FRANCHISE RELATIONSHIP

The COVID-19 pandemic impacted and continues to impact franchisors and franchisees within a franchised system disparately. A FRANdata analysis conducted six months into the pandemic concluded that, as of the end of August 2020, some 32,700 franchised businesses had closed, and anticipated that roughly a third of those would remain closed permanently.[2] Franchised businesses had experienced at that point an average revenue decline of 19.3% on a per unit basis, translating to lost sales totaling $185.3 billion.[3] As of August 31, 2020, franchising had lost 1.4 million jobs, 40.2% of which lost jobs were permanent.[4]

But this impact was uneven. The FRANdata analysis noted that, as of September 5, 2020, some 26% of franchised businesses had either been impacted minimally by the pandemic or had already regained their normal level of operations, suggesting that three-quarters had not.[5] And the measured impacts as of the date of the analysis were shown to vary both by industry and geographically. The hospitality and restaurant industries were hit hardest, followed by personal services and retail.[6] And franchised businesses in the Northeast (*e.g.*, New York, New Jersey, and Massachusetts) and West Coast (California) fared far worse than those in the Midwest-to-Western states (*e.g.*, Idaho, Utah, and Iowa).

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[2] FRANdata, *Six Month COVID-19 Impact Analysis on Franchising Market* (October 2020), https://www.franchise.org/sites/default/files/2020-10/Six-Month%20COVID%20Impact%20on%20Franchising_Final.pdf.

[3] *Id.*

[4] *Id.*

[5] *Id.* at p. 1

[6] *Id.* at p. 2

The pandemic's impact even varied within industries. For example, many fitness concepts struggled or even failed while many delivery-centric concepts—think pizza—thrived.[7] Fast-casual and fast-food restaurants performed especially well during the pandemic. Papa John's stock price increased by 34% in 2020 and Domino's by 31%.[8] This is due, in large part, to the takeout options, drive-thru concepts and strong delivery partnerships already in place. Full-service dining concepts, on the other hand, struggled to adapt as quickly because of their reliance on dine-in menus and wait staff and their stock prices generally reflected that struggle. In 2020, the stock prices of chain restaurants with wait staff decreased by an average of 16%.[9]

Industry segment also seemed to play a role. An article appearing in QSR magazine reported, for example, that within the universe of branded restaurant businesses, quick-service and fast casual brands outperformed all others.[10] Within brands, company-owned units fared better than franchised units: of the total 42,399 company-owned units, only 25 units were lost, as compared with 3,934 out of 171,879 franchised units (a number, the author pointed out, that was heavily impacted by the loss of 1,796 Subway units). "The major point to be gleaned from the data," the author concluded, "is not as much about franchising as it is the advantage of *scale*."[11]

But the FRANdata analysis suggests that the franchising format, too, plays a role. It observed that "[f]ranchised businesses are expected to outperform independently operated local businesses during the pandemic because of the support from the franchisor and benefits and resources received from the community."[12]

If both scale and format matter, it may be because of the enterprise's ability to muster more resources, *i.e.,* provide more support to component units, and display greater flexibility, *i.e.,* deploy that support where it is most needed. In integrated enterprises that is done routinely. But in franchising it poses certain challenges.

A franchisor's ability to treat franchisees differently is limited by several important considerations. First and foremost, some state franchise laws explicitly prohibit

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[7] Sean Ludwig, *8 Franchises That Are Thriving During the Pandemic,* U.S. Chamber of Commerce (August 13, 2020), https://www.uschamber.com/co/start/startup/successful-franchises-during-pandemic.

[8] Jonathan Maze, *Despite the Pandemic, Restaurant Stocks Went Up Last Year*, Restaurant Business (January 4, 2021), https://www.restaurantbusinessonline.com/financing/despite-pandemic-restaurant-stocks-went-last-year.

[9] *Id.*

[10] Don Fox, *The Power of Franchising in a Post-Pandemic World*, QSR Magazine (September 13, 2021), https://www.qsrmagazine.com/outside-insights/power-franchising-post-pandemic-world.

[11] *Id.*

[12] FRANdata at p. 1.

discrimination among similarly situated franchisees.[13] Second, the implied covenant of good faith and fair dealing has been applied to render arbitrary or unreasonable disparate treatment of franchisees actionable.[14] And, setting liability concerns aside, the uneven distribution by a franchisor of support, resources, or other benefits rarely sits well with franchisees. In any scenario, the disparate treatment of franchisees—whether in terms of support given to or enforcement against one or a subset of the franchisee community—is fraught with peril.

A. The Franchise Agreement

Franchisors can minimize the potential liability and other fallout that arises where they treat certain franchisees differently than others through the careful promulgation and implementation of policies designed to commit resources where they are most needed for the benefit of the system as a whole and of the brand. A starting point might be the assessment of key franchise agreement provisions that impact or inform the exercise.

Franchise agreements are drafted, among other things, to provide franchisors with tools to develop, innovate, manage, modify, and enforce system standards. As the pandemic led to stay-at-home orders, mandatory closure of places of public accommodation, restricted business hours, capacity limits, limited sources of supply of scarce commodities, and the like, operational standards that governed those activities, like specified hours of operation and designated sources of supply, often had to give. Certain common contractual terms contained in most franchise agreements enabled franchisors to adjust operational practices and demonstrate the flexibility needed to support their franchisees continued, if modified, operations in these circumstances. In many instances these constraints required franchisors to take affirmative steps to help franchisees, such as in the form of royalty relief to mention but one important concession, without impairing their rights to require strict compliance in the future.

Two important provisions that can permit a franchisor to take these types of actions are the contract's integration and anti-waiver clauses. An integration clause expresses the parties' intent that the written agreement constitutes the entirety of their agreement. It states, in essence, that *all* the terms of the parties' agreement are contained within the four-corners of—and *only* within the four-corners of—the franchise agreement itself. Integration clauses typically provide further that the franchise agreement can only be modified by a writing signed by the parties. The purpose of the clause is to foreclose a claim that something not set forth in the agreement itself was nevertheless part of the parties' agreement, or that some term was subsequently removed, changed, or added.

An anti-waiver clause typically states that a party's failure to require strict compliance in one instance will not be deemed a waiver of its right to require strict

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[13] *See e.g.,* CAL. BUS. & PROF. CODE §§ 20000 - 20043 (2020); HAW. REV. STAT. § 482E-6; IOWA CODE § 523H (2014).

[14] *See e.g., Valley Stream Foreign Cars, Inc. v. American Honda Motor Co., Inc.,* 209 F.Supp.3d 547 (E.D.N.Y. 2016); *GWO Litigation Trust v. Sprint Solutions, Inc.,* 2018 WL 5309477 (Sup. Ct. Del. Oct. 25, 2018).

compliance in the future. Anti-waiver clauses have played (and continue to play) an important role during the pandemic because they provide franchisors with the comfort of knowing that if they accommodate a franchisee's need to deviate from system standards, they will be able to require strict compliance when things return to normal.

Franchisors need also be mindful of the contractual limitations clause contained in many franchise agreements. This alters the statute of limitation that otherwise would apply to a claim arising out of a failure to perform, typically by shortening the otherwise applicable limitation period. For example, where under applicable law a claim for breach of the written franchise agreement might otherwise need be brought within five years of the breach, a contractual limitations provision may require that the claim be brought within one year. The primary purpose of the clause is to cut off claims much sooner than they otherwise would be barred, and thereby prevent lingering or festering claims that might sour the franchisor-franchisee relation with threat of litigation. But where a franchisor affords a franchisee royalty relief, for example, it should be sure to require the franchisee to waive a statute of limitation defense to a claim to recover unpaid royalties, or at least agree with the franchisee that the limitation period will be tolled—meaning not run—during the period that the accommodation remains in effect. This too should be in writing and, ideally, set forth the specific terms associated with, and any conditions upon or limitations to, the accommodation.

Franchise agreements typically require franchisees to comply with all applicable laws in the operation of their franchised businesses. Those laws certainly would include public health measures adopted in response to COVID-19. Where those measures conflict with system standards, the measures may control. What's more, to preserve goodwill and brand reputation, it remains incumbent on franchisors to ensure franchisee compliance with those measures. The trickier challenge may be in requiring the recalcitrant franchisee to reengage fully with their business once health measures are lifted and nudging them back to full operational compliance while acknowledging and respecting their hesitation to do so.

During the height of the COVID-19 pandemic, many franchisees found it difficult if not impossible to meet their financial obligations to third parties, as franchise agreements typically require. For example, retail concepts with no revenue on account of mandatory closures could not pay rent, at least not out of the revenues they count on to pay it and other fixed expenses. A franchisee's inability to either pay rent or reach an accommodation with their landlord might, in and of itself, jeopardize the franchised location. A franchisor might leverage this contract term to encourage the franchisee to reach a deal with the landlord and thereby secure continued occupancy rights.

B. Franchisor Support of Franchisees

In developing and executing ongoing actions or programs to support franchisees in need, whether by affording concessions and accommodations or modifying operational standards, franchisors should carefully document in writing the terms of the concession offered. For example, an economic concession, whether in the form of a royalty abatement (the accrual of fees for payment at a later date) or royalty forgiveness, will

result in the franchisee being, for a time, out of strict compliance with the express terms of the franchise agreement. The franchisee will want to ensure that it will not be placed in default for failure to pay royalties in accordance with the franchise agreement's express terms, and the franchisor will want to make sure that its abatement or forgiveness of royalties otherwise due and payable will not be construed as an amendment or modification of the franchisee's monetary obligations under the franchise agreement or a waiver of its right to collect those royalties or even future royalties. A written policy setting forth with particularity, among other things, (a) the terms of the support or concession offered (is it an abatement or are royalties being forgiven?), (b) eligibility standards or criteria based on objective and quantifiable parameters, (c) the duration of the support or concession and the conditions under which it will remain in force during that period, (d) the acts or omissions that may result in termination of the assistance, (e) whether the assistance is assignable in the event the franchise is sold, (f) repayment terms and timing, and (g) the consideration, if any, being provided in exchange for the concession, should be drafted and distributed to all concerned so that the parties' understand their respective rights, responsibilities, and entitlements, and fact-finders, should it become necessary, will be able to sort them out.

The same considerations and best practices hold true with respect to relaxed compliance with system standards. For example, franchisees subject to a local or state closure order cannot comply with hours of operation prescribed by their franchisor. While it is likely a default to close in compliance with such an order, the default would as likely be excused under the franchise agreement's *force majeure* clause. Indeed, a franchisee might argue that, under certain circumstances, it is excused under the same clause from operating the business even absent a local or state edict requiring closure. Similarly, a franchisee's inability to secure approved product from a designated supplier due to supply chain disruption will require the franchisor to pivot to enable the franchisee to remain in business. It might consider evaluating and approving alternative local sources of supply, including a local supplier proposed by the franchisee. Policies developed to address situations like these should be informed by common sense, understanding, and a concern for public brand perception, and carefully documented in the manner discussed above.

III. OBSTACLES FACED BY FRANCHISORS IN ENFORCING SYSTEM STANDARDS POST-COVID

Given the unprecedented effects that the COVID-19 pandemic had on the world at large, Courts across the country were quickly forced to analyze and consider novel arguments regarding the application and enforcement of contractual provisions in light of the rapidly changing circumstances. For example, how were the parties to a franchise relationship supposed to balance adherence to the operational requirements of a franchise agreement in light of governmentally mandated shutdowns, quarantines, and other emergency orders? How was a Court to reconcile a seemingly broad force majeure (or "act of God") provision, but one that did not specifically identify a "global pandemic" as a source of relief? Even in the event that such relief was granted in the force majeure provision, can the same absolve a franchisee from the ongoing payment of fees (fixed or contingent)? Outside the four corners of a given franchise agreement, what equitable defenses are available to franchisees where strict adherence to system standards may

be infeasible under the circumstances? The answers to these questions can shape the nature of the ongoing relationship between a franchisee and franchisor regarding the parties' respective rights and obligations concerning the enforcement of system standards and strict contractual requirements alike.

A. Force Majeure

Undoubtedly the first thought of a defense to the adherence to system standards during and following the COVID-19 pandemic is one that is expressly defined in most—if not all—of the parties' existing franchise agreements, to wit: *Force Majeure*. A force majeure clause—often also referred to as an "act of God" provision—is a contractual provision that allocates the risk of loss if performance is hindered as a result of unforeseen event outside of the control of the parties.[15] Force majeure events are typically expressly defined in the parties' contract and often include natural disasters—such as floods, fires, earthquakes, and the like—as well as human-driven conditions—such as strikes, riots, wars and the like.[16] Because force majeure clauses are a function of agreement, the Courts look to the express language of the contract executed by the parties in order to determine the scope, application, and intent of the specific force majeure clause at issue in a given case.[17]

Often included in the broad list of circumstances which constitute a force majeure event in franchise agreements are terms such as "governmental action" and "orders of government."[18] Where this language is present in a given force majeure provision, various Courts have found that a governmental "lock-down" or "stay-at home" order triggers a force majeure event, providing relief from compliance with certain operational requirements of an agreement.[19]

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[15] FORCE-MAJEURE CLAUSE, Black's Law Dictionary (11th ed. 2019).

[16] *See*, *e.g.*, *Wash. Crown Ctr Realty Holding LLC v. Hollywood Theaters, Inc.*, No. 20-1997, 2022 WL 623388, at *2, *slip op.* (W.D. Pa. March 3, 2022) ((defining certain events in the contract as force majeure which excuse performance); *Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444, 448 n.8 (3d Cir. 1983); *see also* FORCE MAJEURE, Black's Law Dictionary (11th ed. 2019) (defining "force majeure" to include "both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars)").

[17] *See*, *e.g.*, *Hollywood Theaters*, 2022 WL 623388, at *5 (quoting *Morgantown Crossing, L.P. v. Manufacturers & Traders Trust Co.,* No. 03-CV-4707, 2004 WL 2579613, at *6 (E.D. Pa. Nov. 10, 2004)).

[18] *See*, *e.g.*, *In re Hitz Restaurant Group*, 616 B.R. 374, 377 (Bankr. N.D. Ill. 2020).

[19] *Id*. at 378 (noting that "the force majeure clause in this lease was unambiguously triggered by §1 of Governor Pritzker's executive order."); *see also JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 29 F.4th 118, 127-28 (2d Cir. 2022) (excusing performance under the "proper invocation of the force majeure clause" in light of Governor Cuomo's executive orders); *Encore Big Beaver LLC v. Uncle Julio's of Florida, Inc.*, No. 20-CV-12345, 2021 WL 5413888, at *2 (E.D. Mich. Oct. 27, 2021) (noting that executive orders restricting the activities called for in the agreement "fell within the lease agreement's force majeure clause").

Indeed, during the height of the COVID-19 pandemic, the vast majority of state governments (at least 43) issued a form of lock-down order.[20] These governmental orders primarily required residents of the state to refrain from leaving their home except as necessary to perform essential activities such as obtaining groceries or seeking medical attention.[21] This unprecedented action plan led to a large number of lawsuits in which the Courts were forced to tackle the question of whether such shutdown orders triggered a force majeure event under a given contract.[22] Given the large number of attempts to argue a force majeure defense in COVID-related lawsuits, the Courts were forced to consider a number of questions including, *inter alia*, (i) Does the language of the force majeure provision in the contract cover governmental actions, expressly or impliedly?; (ii) Does the language of the force majeure provision in the contract distinguish between impossibility and impracticability?; and (iii) What obligations does the triggering of a force majeure event include?[23]

Notably, many contractual force majeure provisions expressly exclude the payment of monies from the obligations that are relieved during a force majeure triggering event.[24] Where such financial obligations are contingent on the business operating (such as royalties which are calculated as a percentage of revenues), this may be a distinction without a difference given that the business would likely not be generating substantial revenues during lengthy periods during which the franchisee is relieved from its obligation to operate the business. However, where the fees are fixed (such as licensing fees, software fees, and the like), a franchisee may find itself remaining liable to keep up with

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[20] *See*, *e.g.*, *States that issued lockdown and stay-at-home orders in response to the coronavirus (COVID-19) pandemic, 2020*, BALLOTPEDIA (2020), *available at* https://ballotpedia.org/States_that_issued_lockdown_and_stay-at-home_orders_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020.

[21] *See*, *e.g.*, Fla. Exec. Order 20-91 (April 1, 2020), *available at* https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-91.pdf.

[22] The interpretation of force majeure provisions even made its way into the mainstream media during this time through the application of these types of provisions to athletes and the like during times were scheduled events were unable to take place. *See*, *e.g.*, Wojnarowski, Adrian, *NBA players to receive 25% less in paychecks starting May 15*, ESPN (April 17, 2020), *available at* https://www.espn.com/nba/story/_/id/29050090/under-plan-nba-players-receive-25-less-paychecks-starting-15.

[23] *See*, *e.g.*, *In re Hitz*, 616 B.R. at 377; *see also Gibson v. Lynn University, Inc.*, 504 F. Supp.3d 1335, 1342-43 (S.D. Fla. 2020); *In re CEC Entertainment, Inc.*, 625 B.R. 344, 353-54 (Bankr. S.D. Tex. 2020); *Hollywood Theaters, Inc.*, 2022 WL 623388, at *6 (drawing a distinction between the provision at issue, which did not expressly exclude the payment of fees from the force majeure provision with that present in *In re CEC Ent., Inc.* which expressly excluded from the force majeure clause the "inability to pay any sum of money").

[24] *Vota Inc. v. Urban Edge Caguas L.P.*, No. 20-1634, 2021 WL 4507979, at *7-8, *slip op.* (D. P.R. Sept. 30, 2021) (noting that "the Lease Agreement provides in unambiguous terms that plaintiff agreed to continue with its payment obligations thereunder even in case of an event of 'force majeure'"); *see also In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 346 n.82 (Bankr. S.D. Fla. 2020) (distinguishing between the parties' obligation to pay sums accruing during force majeure event with the requirement to make such payment timely and granting the debtor relief in the form of deferral of payments).

its ongoing payment obligations even where the business is properly shut down in accordance with government orders and the contract's force majeure provision.[25]

B. Other Equitable Defenses: Impossibility, Impracticability, Frustration of Purpose

Even in such situations where a franchise agreements' force majeure provision may not cover the type of situations which arose due to the COVID-19 pandemic—expressly or otherwise—contractual parties can also raise traditional equitable defenses to the performance of obligations that would otherwise be necessary to remain in compliance with system standards. These defenses include impossibility, impracticability, and frustration of purpose.

A frustration of purpose defenses typically requires the party asserting such defense to demonstrate that an unforeseeable supervening event causes a failure of consideration or causes practically a total destruction of the expected value of performance.[26] The contractual defenses of frustration of purpose, impossibility, and impracticability are all related in that they require a party to plead and prove unforeseen circumstances that have materially affected a party's ability to perform and receive the benefit contemplated under the contract.[27] However, and unlike in the case of claiming impossibility, a frustration of purpose defense assumes that performance is technically possible but would not serve the intent of the parties in forming the contract.

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[25] *Simon Property Group, L.P. v. Brighton Collectibles, LLC*, No. N21C-01-258, 2021 WL 6058522, at *6-7 (Del. Super. Dec. 21, 2021) (noting a force majeure provision which expressly requires the payment of fixed "Minimum Annual Rent" and "Percentage Rent" notwithstanding the triggering of the provision); *see also 1600 Walnut Corp. v. Cole Haan Co. Store*, 530 F.Supp.3d 555 (E.D. Pa. 2021) (same).

[26] *See*, *e.g.*, *Home Design Center—Joint Venture v. County Appliances of Naples, Inc.*, 563 So. 2d 767, 770 (Fla. 2d DCA 1990) ("Frustration of purpose refers to that condition surrounding the contracting parties where one of the parties finds that the purposes for which [it] bargained, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party."); *Brenner v. Little Red School House, Ltd.*, 302 N.C. 207, (1981) ("[The frustration of purpose defense is] based upon the fundamental premise of giving relief in a situation where the parties could not reasonably have protected themselves by the terms of the contract against contingencies which later arose."); *Autry v. Republic Productions*, 30 Cal. 2d 144, 148 (1947) (where parties' contract referenced the risks arising from a state of war they may not invoke the doctrine of frustration based on wartime events); Restatement (Second) of Contracts § 265 (1981).

[27] *Home Design Center*, 563 So.2d at 770; *see also Cook v. Deltona Corp*., 753 F.2d 1552, 1558 (11th Cir. 1985) (In determining whether, under the doctrine of impossibility of performance, a supervening event excuses the performance of a contract party, the court should not "pass on the relative difficulty caused by a supervening event, but [ ] ask whether that supervening event so radically altered the world in which the parties were expected to fulfill their promises that it is unwise to hold them to the bargain."); Restatement (Second) of Contracts § 261 (1981) ("Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary."); *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 293 (1916) (court may exercise its discretion and discharge the injured party of its obligations where meeting the obligations created pursuant to a contract have become impracticable).

While parties seeking to avoid performance under a contract due to an allegedly unforeseen event, it is common to raise each of these equitable defenses in addition to claiming a trigger of the force majeure provision. However, in the face of a force majeure provision expressly covering the event in question (i.e. government act or epidemic), Courts have found that such express language in the contract evidences that the conditions were reasonably foreseeable, thus, defeating the defenses of frustration of purpose, impossibility, or impracticability.[28] Accordingly, where a party is seeking protection from its contractual obligations due to an act of God—such as has often been claimed in light of the effects of COVID-19—it must carefully consider whether the force majeure provision in the contract covers the event in question to avoid raising inconsistent allegations in support of concurrent force majeure and equitable defenses.

C. Other Considerations: Insurance Coverage

Although not a defense to a breach of contract action brought by a franchisor to enforce a franchisee's adherence to system standards, franchisors and franchisees alike should consider the availability and applicability of insurance coverage—especially in the case of business interruption coverage—as it relates to the practical and business decisions surrounding strict compliance with system standards in light of the financial implications and operational realities imposed by the same. Indeed, where a franchisee has access to sufficient business interruption insurance coverage, it may consider that a temporary cessation in business operations actually better serves its financial interest than attempting to continue to operate in light of all of the difficulties which arose during the pandemic.

Indeed, following the rise of the COVID-19 pandemic, the number of cases filed seeking payment under business interruption insurance skyrocketed.[29] Since the beginning of the pandemic, over 2,000 cases have been filed across the country seeking insurance coverage for lost business income and other expenses.[30] As noted across these cases, the specific language of the insurance policy at issue will often dictate whether coverage is available, to wit: whether the policy contains an exclusion for communicable diseases or viruses and the language of a given contract's causation provision.[31] Where a given insurance policy contains language excluding viruses as a

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[28] *See*, *e.g.*, *Gap*, 524 F.Supp.3d 224, 234-38, *slip op.* (S.D.N.Y. 2021) (noting that New York's governmental orders prohibiting the operation of non-essential businesses did not frustrate the purpose of a commercial lease nor permit the defense of impossibility given that such event was expressly identified in the contract's force majeure provision, defeating any argument that the event was "wholly unforeseeable," as required to sustain such defenses); *see also Brighton Collectibles, LLC*, 2021 WL 6058522, at *6-7; *Cole Haan Co. Store*, 530 F.Supp.3d at 558-59.

[29] These cases have been tracked by the University of Pennsylvania Carey Law School and the University of Connecticut School of Law, Insurance Law Center. *See Covid Coverage Litigation Tracker*, PENN LAW (accessed April 19, 2022), *available at* https://cclt.law.upenn.edu/.

[30] *Id*. Chart 3 (noting allegations of the types of coverage sought).

[31] *Id*. Chart 4 (noting the differences in policy provisions concerning communicable diseases).

basis of a claim for business interruption coverage, the Courts have granted an insurer's motion to dismiss in approximately 93.7% of cases. Compared with the rate of granted dismissal motions in cases involving a policy that does not expressly exclude viruses (approximately 87.6%), a party is more likely to be able to prosecute such claims in the absence of these specific exclusions.[32]

Accordingly, while business interruption insurance may provide a safety net for a franchisee who is precluded from operating their franchised business due to the effects of government shutdowns such as those experienced during the COVID-19 pandemic, a party must carefully review and consider the various exclusions and limitations contained therein to ensure that their interests are protected.

D. Key Takeaways:

Franchisors and franchisees alike should take extra caution in drafting, reviewing, and negotiating the terms of force majeure and related clauses in their franchise agreements. The parties should also consider the effects that including specific circumstances such as an epidemic and governmentally mandated shutdown order may have on the ability to raise equitable defenses such as impossibility should the need arise. The parties should also include in the franchise agreement a clear expectation with regards to the payment of fees during the time that a force majeure event may be triggered—including whether the payment of such fees may be deferred or waived altogether. Systems should be put into place that clearly define the expectations within the franchise system for upholding operating and system standards in light of government mandates and public health and safety concerns.

Outside of the express terms of the contract, the parties to a franchise relationship should ensure that clear and ongoing channels of communication are in place to aid in the exchange of information, discussion of concerns, and a forum and process in which the franchisor and franchisees can work collaboratively to navigate any unforeseeable issues that can arise in the future, and which are not expressly contemplated in the negotiation of the terms of the franchise agreement. Thinking about and negotiating these critical processes at the outset of a franchise relationship can aid the parties in navigating through any unforeseen issues which may arise in the future. Adequate discussion at the onset of such relationships can help to ensure a lasting and fruitful franchise venture for all parties to enjoy.

IV. DISPUTE RESOLUTION DURING AND AFTER THE PANDEMIC

How we practice law changed meaningfully overnight in the Spring of 2020. And as the pandemic continues to play itself out, we are continuously reinventing our trade in an evolving "new normal" and anticipating what the practice of law may look like in the

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[32] *Trial Court Rulings on the Merits in Business Interruption Cases*, PENN LAW (accessed April 19, 2022), *available at* https://cclt.law.upenn.edu/judicial-rulings/.

months and years to come. In this section we first look back at the pandemic's immediate impact on the practice of law and then forward to what the future may hold in store.

A. The Impact of COVID-19 on the Courts

One legacy of the pandemic will undoubtedly be backlogs in our courts. In 2019, 296,691 civil cases were commenced in federal district courts across the country, while 306,657 were terminated. That resulted in a net decrease in pending cases of 9,966, or nearly 3%, over 2018. In 2020, 495,086 civil cases were commenced and only 276,446 terminated, a 60% net increase in the number of pending civil cases pending.[33] Simply put, new civil case filings were up in 2020 by nearly 70% over 2019, while terminated cases dropped from 306,657 in 2019 to only 276,446 in 2020. This past year exacerbated these figures. In 2021, 327,863 new civil cases were commenced, while only 260,722 were terminated. There were 369,094 civil cases pending in the federal courts on December 31, 2018. As of December 31, 2021, there were 645,435 civil cases pending, a 75% increase.[34]

The state courts have fared no better. According to a survey of state court judges conducted in June 2021,[35] the average of backlogged cases in a state court in 2019 was 958. In 2021, the average was 1,274, a 33% increase. Of the respondents in the survey, 57% said the backlog had increased while only 14% said their backlog had decreased. Interestingly, however, only 26% of respondents said they anticipate the backlog will increase over the next 12 months, while 42% anticipated a decrease.[36]

As a consequence, over the course of the past two years, counsel and their clients have increasingly considered mediation and arbitration to move their matters forward. A senior officer at the American Arbitration Association reports that the AAA has seen a marked uptick in new arbitrations filed pursuant to post-dispute arbitration agreements, suggesting parties were increasingly agreeing to arbitrate disputes that were either stalled in court or likely would be if filed there. And the logjam in the courts undoubtedly has heightened interest in mediation both as an alternative dispute resolution methodology and a means to avoid such logjammed courts. It seems reasonable to expect these trends will continue for so long as courts are unable to afford litigants a reasonably expeditious means of resolving disputes.

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[33] U.S. Courts, *Caseload Statistics Data Tables,* Statistics and Reports, https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables, (last visited April 16, 2021).

[34] *Id.*

[35] Gina Jurva ,*The Impacts of the COVID-19 Pandemic on State & Local Courts Study 2021: A Look at Remote Hearings, Legal Technology, Case Backlogs and Access to Justice*, Thompson Reuters Institute (August 2021), https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/white-papers/covid-court-report_final.pdf?form=thankyou&gatedContent=%252Fcontent%252Fewp-marketing-websites%252Flegal%252Fgl%252Fen%252Finsights%252Freports%252Fimpacts-of-the-pandemic-on-state-local-courts.

[36] *Id.* at p. 4.

B. Remote Testimony

One major impact the pandemic has had on how we practice is how we obtain testimony. The state court judges survey cited above asked respondents about their participation in remote hearings during the pandemic. No fewer than 93% of respondents reported that they had participated in remote civil hearings in 2020, and 89% continued to do so in 2021.[37] Almost two-thirds of those participating in remote hearings had conducted both pre-trial and trial hearings remotely. When asked to evaluate the challenges conducting remote hearings posed, a third of those surveyed responded that they found remote hearings challenging, while another third said they thought it was not challenging.

The ability to access multimedia files virtually, the ease of accessing evidence, sharing evidence, organizing evidence, and communicating on annotations on evidence, were ranked as the most challenging aspects of remote hearings. Notably, however, only 39% of respondents found the most challenging of these to be 'challenging' or 'very challenging.' Roughly two-thirds of respondents rated these aspects of remote hearings either 'middle' or 'not challenging.'[38]

The survey also elicited responses about how evidence is being shared in remote hearings. Seventy-two percent of respondents received exhibits by email submissions to the court, 64% accepted paper submissions, 42% utilized screen sharing technologies, and 31% utilized a Dropbox or other file-sharing platform.[39]

Perhaps the most illuminating finding concerned the future. An "overwhelming majority" of 86% of respondents said they intend to continue to conduct hybrid remote and in-person hearings in the future. Only 13% said they would return to an exclusively in-person format.[40]

Surprisingly, perhaps, a substantial minority of respondents said that virtual hearing *increased* access to justice during the pandemic, while only 23% said access decreased. Eighty-one percent of respondents attributed this increase in access to justice to greater "convenience," "better attendance," and "participation by parties" that remote access affords. Those seeing a decrease in access to justice singled out a lack of access to the internet, lack of technology, or a lack of resources, as the leading causes for the decrease.[41]

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[37] *Id*. at p. 3.

[38] *Id*. at p. 5, Figure 5.

[39] Jurva at p. 6, Figure 7.

[40] *Id*. at p. 10.

[41] *Id.* at pp. 7-8.

1. Notable Cases

Over the past two years, courts have sought to balance legitimate pandemic-related concerns about in-person testimony and perceived disadvantages of remote testimony with the default preference for in-person testimony. These cases suggest courts are being creative and accommodating of competing interests and concerns while demanding that parties move their cases forward.

a. Depositions[42]

The concept of a remote deposition is not new. Federal Rule of Civil Procedure 30, which governs the conduct of depositions, was amended over forty years ago to permit depositions "by telephone or other remote means."[43] It has been applied over the years to permit depositions by telephone, videoconference, and other remote means.[44]

But Rule 30's simple terms sometimes proved challenging to implement these past two years, as lawyers and their clients have jockeyed for advantage for legitimate and tactical reasons. In *Sunstate Equipment Co., LLC v. EquipmentShare*,[45] for example, the court denied defendant's motion for a protective order staying depositions that would have required the deponents to appear in person at plaintiff's counsel's office. The motion argued that it would be "an undue burden to do in-person depositions due to the current COVID-19 pandemic." But the court noted that in-person depositions are "standard practice" and, while acknowledging both "the magnitude of the COVID-10 (sic) pandemic and the serious health challenges it presents" and its authority under Rule 30 to order the depositions be taken remotely, the court stated that "simply referencing the pandemic is not a golden ticket to get out of discovery obligations."[46]

The court's ruling appears driven at least in part by what it perceived as gamesmanship. Defendants' motion asked that plaintiff's counsel not be present in the room with the deponents, citing health concerns, while defendants themselves intended their own counsel would be present in the same room as them. What's more, defendants had declined plaintiff's proposal that the depositions be taken either "entirely remotely—with everyone appearing remotely—or allowing an individual defendant to appear in-

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[42] For a more in depth discussion of this topic, see Michael Boxerman, Kerry Olson and Heather Carson Perkins, *Takeaways from Litigating Remotely After COVID*, paper presented at the ABA 44th Annual Forum on Franchising (October 2021), https://www.americanbar.org/groups/franchising/events_cle/past_materials/.

[43] Fed. R. Civ. P. 30(b)(4).

[44] *See, e.g., DeepGulf, Inc. v. Moszkowski*, 330 F.R.D. 600, 611 (N.D. Fla. 2019); *Ty, Inc. v. Target Corporation,* No. 18 C 2354, 2021 WL 1885987, at *4 (N.D. Ill May 11, 2021).

[45] *Sunstate Equipment Co., LLC v. EquipmentShare, et al.*, 2020 WL 7401630 (D. Utah Dec. 17, 2020).

[46] *Id.* at *1.

person with both their own counsel and opposing counsel present and socially distanced." Acknowledging that "courts have been creative during the current health crisis and have permitted remote depositions," the court ordered the depositions to proceed either entirely remotely or with all present and socially distanced.[47]

Another recent decision suggests that timing and vaccination status may play a role in how courts apply Rule 30 during the pandemic. In *Tijerina-Salazar v. Venegas*,[48] the court ordered a deposition that had commenced remotely to be completed in person. To show the requisite good cause for requiring the in-person deposition, defendants argued that plaintiff's health concerns about COVID-19 were insincere and "no longer valid." The court agreed. It observed that "[p]laintiff's COVID concerns are not nearly as pertinent now, nearing the 2021 Christmas holiday, as they were in July 2021, when the Court issued its remote deposition order."[49] And while "the Centers for Disease Control has revised its guidance due to the emergence of new COVID strains," plaintiff had "appeared himself elsewhere in-person for other depositions," suggesting he "does not truly believe COVID is a pertinent barrier from attending in-person depositions," the court stated. Moreover, the court observed, both plaintiff and his counsel were fully vaccinated and "comfortable with wearing masks amongst themselves in-person, as they have done for the videoconference deposition at issue."[50]

But remote depositions can be fertile ground for misconduct. In a recent case that received a great deal of publicity, the court considered issuing the ultimate sanction—entry of default judgment—against certain parties (and other sanctions against their counsel) based on misconduct that included improper coaching during a remote deposition.[51] In *Nuvasive*, the court recounted the extensive misconduct engaged in by defendants and their counsel throughout the proceeding, including spoliation of evidence, misconduct in connection with an underlying arbitration, and delay tactics designed to run out the clock on the time to seek vacatur of the final arbitration award. But the motion before the court focused on the conduct of two defendants and one lawyer in connection with the deposition of one of the defendants. Specifically, despite having testified under oath at his deposition that he was alone in the room, in fact another defendant had instructed the deponent to keep his phone on and coached the deponent throughout his deposition as to how to answer questions posed to him. The court, in painstaking detail, reviewed the deposition transcript, along with the text messages by which the deponent was coached, and found clear and convincing evidence that the deposition testimony given was consistent with the instructions texted to the deponent by the other defendant.

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[47] *Id.*

[48] *Tijerina-Salazar v. Venegas, et al.,* No. PE:19-CV-000074-DC-DF, 2021 WL 6011137 (W.D. Tex. Dec. 20, 2021).

[49] *Id.* at *4.

[50] *Id.*

[51] *Nuvasive, Inc. v. Absolute Medical, LLC, et al.*, No. 6:17-cv-2206-CEM-GJK (M.D. Fla. Jan. 10, 2022).

The court concluded that the misconduct engaged in throughout the proceeding, including at the deposition, warranted consideration of the ultimate sanction of a default judgment in plaintiff's favor.

Similarly, Rule 45(c), provides that a person not affiliated with a party may be compelled to testify at hearing, trial, or deposition pursuant to a subpoena "within 100 miles of where the person resides, is employed, or regularly transacts business in person . . .."[52] Given that a deponent is not required to travel when the deposition is taken remotely, one might expect courts would interpret Rule 45(c) accordingly.[53] But some courts have enforced the 100-mile limitation.[54] Undoubtedly, similar questions will continue to surface where the once settled procedural rules and practices run into realities of the pandemic.

Finally, the logistics of remote depositions have changed, and solutions to the challenges such depositions (and trial testimony) pose continue to emerge. One logistical challenge involves the use of exhibits. Courts have overruled objections to remote depositions based on the difficulties that might arise in a document-intensive examination, reasoning that these difficulties can readily be overcome simply by providing the deponent in advance with a pre-marked set of exhibits or by using the screen share feature of Zoom and other platforms, including some designed specifically to afford agility, *e.g.* Agile, in working with documents.[55] It bears mentioning that, given attorneys' ethical obligation to keep abreast of "the law *and its practice*," counsel's own lack of technological savvy should not alone constitute a legitimate basis to require in-person testimony.[56] (emphasis supplied).

b. Trials and Hearings

Many of the same considerations inform courts' rulings concerning remote trials. In one notable case, the court ordered that a trial be held by ZOOM remote technology and proposed that it appoint a special master to manage the process. In *Kieffaber v. Ethicon, Inc.*,[57] the court directed the parties to show cause why the court should not appoint a special master and invited the parties to propose special master(s). The court also ordered that any objecting party present a "detailed plan for who shall provide constant monitoring of the Zoom platform throughout its utilization during trial, who shall coordinate with judicial personnel, who shall maintain technical and administrative control

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[52] Fed. R. Civ. P. 45.

[53] *International Seaway Trading Corp. v. Target Corp.,* No. 20-mc-00086, 2021 WL 672990, *4-5 (D. Minn. Feb 22, 2021).

[54] *Broumand v. Joseph,* 522 F.Supp.3d 8, 21-22 (S.D.N.Y. 2021).

[55] *Mosiman v. C&E Excavating, Inc.*, No. 19-cv-00451, 2021 WL 1100597, *2 (N.D. Ind. March 23, 2021).

[56] Ann. Mod. Rules Prof. Cond. § 1.1[8].

[57] *Kieffaber v. Ethicon, Inc.,* No. 20-1177, 2021 WL 780054 (D. Kan. Mar. 1, 2021).

over the Court's Zoom account, and who may travel in the course of performing such duties."[58]

Plaintiff consented to the court's proposal, but defendants did not. Nor did they file a "detailed plan" as the court required. Instead, defendants raised objections the court viewed as "strategically framed in a manner which seems intended to defeat the prospect of a Zoom trial, rather than to constructively participate in a thoughtful decision of how a Zoom trial will occur."[59]

Defendants first argued that they should not be required to pay for a mock trial the court had ordered take place in advance of the actual Zoom trial. The court rejected this objection stating that "the Court has already crossed that bridge." It continued: "If defendants do not wish to participate in any mock trial, and instead wish to try their hand at a virtual trial for the first time on [the set trial date], they must file a notice to that effect [by a specified date]."[60]

Defendants next argued that the court lacked authority to appoint a special master. In overruling this objection, the court held that it had the authority under Federal Rule of Civil Procedure 53 to appoint a special master for a particular purpose if appointment is warranted by "some exceptional condition."[61] It went on to state, in what might be a good synopsis of the Hobson's Choice facing courts (and litigants) across the country, that "[t]he COVID-19 pandemic is an exceptional circumstance that gives the judiciary two options: (1) halt civil jury trials until the pandemic has ended; or (2) adapt to exceptional circumstances." The court went on to note that the case was "long overdue for trial." It noted too that, while Rule 53—adopted in 1937—was probably not drafted "with the specific intent of authorizing special masters to be appointed to administer Zoom-format jury trials," it was to be interpreted consistent with Federal Rule of Civil Procedure 1, which provides that the Rules should be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."[62]

The court stated that the case had been filed in 2012 and had been ready for trial since June 2020. "Further delay, when a suitable alternative is available, is not speedy or just." The court also noted that, even with the added expense of a special master, "a virtual trial will be significantly less expensive than the cost of flying multiple parties,

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[58] *Id.* at *1.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* at *2.

witnesses, experts, staff and attorneys to Kansas City and compensating them for their time and travels expenses."[63]

One of the more rigorous analyses of the pros and cons of remote trials occurred in the context of post-trial motions. In *Goldstine v. FedEx Freight Inc.*,[64] defendant moved for judgment as a matter of law after a remote jury returned a verdict in plaintiff's favor. The motion argued that the remote jury trial violated the Seventh Amendment and Federal Rule of Civil Procedure 43(a), as well as the court's General Order No. 15-20. In denying the motion, the court considered its authority to conduct a remote trial, catalogued the safeguards implemented to ensure the parties received a fair trial, and assessed the effectiveness of the remote jury trial process at reproducing the core components of a civil trial.

First, the court determined that both Federal Rules of Civil Procedure 77(b) and 43(a) permit courts to convene a jury trial by "contemporaneous video conferencing technology." Rule 77(b) provides that trials must be conducted "in open court and, so far as convenient, in a regular courtroom." But, the court noted, trials may be conducted "in a non-traditional manner when 'exigencies make traditional procedures impracticable.'"[65] The court noted that trials have been conducted in "unusual places" in times of crisis like hurricanes and floods. Rule 43(a) likewise permits the court to receive testimony in open court by contemporaneous transmission from a different location "[f]or good cause in compelling circumstances and with appropriate safeguards[.]"[66]

The court found that good cause and compelling circumstances existed in this case. It pointed to the state of emergency declared by Governor Jay Inslee in response to the COVID-19 pandemic; the court's General Order No. 01-20 continuing all civil and criminal in-person matters; the fact that by late Fall 2020 the pandemic "ha[d] continued to disrupt the court's normal operations and quotidian routines throughout Washington;"[67] and the court's General Order No. 15-20 that, with adequate safeguards in place, permitted a limited number of individuals to access the courthouse and allowed for remote video proceedings in civil cases, including jury trials with jurors participating remotely. Lastly, court the noted that because the court's public elevators remained out of service, its 14th floor courtroom was inaccessible to some and impractical for everyone. "To put it mildly," the court concluded, "exigencies existed requiring nontraditional methods of conducting the trial."[68]

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[63] *Id.*

[64] *Goldstine v. FedEx Freight Inc,* 2021 WL 952354 (W.D. Wash. Mar. 11, 2021).

[65] *Id.* at *10, *citing Gould Elecs., Inc. v. Livingston Cty Rd Comm'n,* 470 F.Supp.3d 735, 738 (E.D. Mich. 2020).

[66] *Goldstine* at *10.

[67] *Id.*

[68] *Id.* at *11.

The court next recounted the safeguards put in place to ensure a fair trial. The court noted that, prior to trial, a committee had been convened to study the practical and technical safeguards that could be put in place to provide litigants a fair trial, including means of providing jurors who lacked access to it the technology, training, and internet connectivity needed to enable them to participate. And after conducting a remote mock trial, the committee had issued a detailed set of procedures for both court staff and participating attorneys to follow. The court also entered an order setting standards for remote jury trials, including as to witness and exhibit preparation and the conduct of counsel, and those remote trial processes were discussed with counsel at several pretrial conferences.[69]

The court then evaluated the conduct of the remote jury trial. It found that the Zoom.gov platform utilized permitted instantaneous transmission of live video to all participants; it allowed the parties to examine witness and interpose objections; it allowed the court to make rulings on objections, hold sidebars, and excuse the jury to deliberate in a virtual jury room where each juror could view admitted exhibits on their own device; and it enabled jurors to ask questions of witnesses. The court had also deployed two courtroom deputies to monitor proceeding and juror attention. Jurors and the court were able to assess witness demeanor and credibility in much the same manner as in court "with the added benefit of seeing faces head-on," the court found. Given all of this, the court concluded that "[t]he remote jury trial process implemented in this District works effectively to reproduce the core components of a civil trial."[70]

The court also addressed several of defendant's counsel's complaints about the remote jury trial process. The court rejected counsel's complaint that she was unable to communicate with her client during trial because they were physically separated, noting that nothing in the court's pretrial orders required they be separated. It rejected counsel's complaint that she could not communicate effectively with jurors and witnesses because she could not read their reactions and could not focus on jurors and witness at the same time. But the court found that the technology allowed counsel to create her own rapport with jurors and witnesses "in much the same way as occurs in person," and noted that in an in-person trial counsel would not have been able to focus on a witness and jurors any more effectively than at the remote trial. If anything, the court said, in the courtroom faces would have been far smaller than they appeared on Zoom.gov and most likely would have been covered in masks. The court also overruled counsel's objection that she could not object effectively owing to a "built-in-delay" in transmission or because she was muted, finding she had every opportunity to object, could have raised her hand to object (as the court's pretrial order specified), and could have unmuted herself had she something to say.[71] Counsel also complained that her opposing counsel used objectionable

[69] *Id.*

[70] *Id.*

[71] *Id.* at *12.

demonstratives and the record did not show their use because trial was not videotaped, but the court noted that in-person trials are not videotaped either and counsel had in fact objected to certain demonstratives and many of her objections the court sustained. Lastly, the court debunked counsel's complaint that "every federal Zoom jury trial to date resulted in million-dollar plus verdicts"—suggesting some "structural bias"—as factually baseless.[72]

c. Summary

One tentative conclusion that may be gleaned from the decisional law developed over the past two years concerning remote testimony is that courts generally recognize the pandemic to be a legitimate basis to take testimony remotely. Another, as exemplified by *Tijerina-Venegas*, is that opportunism will not be tolerated. A third is that courts will show flexibility, like that shown in *Sunstate Equipment*, to balance legitimate pandemic-related concerns with the preference for in-person testimony. Finally, as *Kieffaber* and *Goldstine* show, courts seem determined to utilize available technologies and other means to move cases to trial, even over the objection of hesitant or unwilling parties or counsel.

C. Mediation

One might argue that mediation has benefited from the pandemic. (Anecdotally, one of the authors had occasion to mediate recently with a retired Illinois Appellate Court judge who said he will continue to prefer remote over in-person mediation even after pandemic concerns have subsided.)

Remote mediation undeniably affords certain advantages over mediating in-person. By removing mediation location from the equation the parties can select from mediators across the country (or even the world) and eliminate, almost entirely, the costs associated with travel. Remote mediation minimizes the time key decisionmakers must commit to the process and, correspondingly, makes available participants who otherwise might not be able to participate in the mediation. Rather than terminate a mediation in the run up to participants' return flights home, a remote mediation can simply be continued without the travel costs another trip would entail, thereby keeping the discussions going and increasing the likelihood of an eventual deal. Breakout rooms enable the mediator to surreptitiously 'kidnap' counsel for a one-on-one when needed, and to bring all parties together or quickly separate them as the need arises.

Conversely, it is also undeniable that certain advantages of in-person mediation are lost when mediating remotely. Being physically committed to the mediation forces parties and their counsel to engage in the process and not multitask. Remote mediation does not facilitate the personal interaction that, for better or for worse, in-person mediation affords. And the interpersonal dynamic that often plays an important role in building the connection and trust among participants that can advance resolution (or, conversely, set it back) is, if not lost, certainly impaired where the third dimension is unavailable.

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[72] *Id.* at *13.

Again anecdotally, some will argue mediation and the parties who engage in it have benefited because of the pandemic. It remains to be seen whether, when travel and in-person interaction return to what they were pre-pandemic, mediation remains mainly remote as our retired Illinois Appellate Court judge expects it will, or whether we will return to in-person mediation where we can once again leave our scent on the room.

D. Ethical Considerations of "Working from Home"

The widespread practice of working from home during the pandemic implicates ethical concerns for lawyers. Is a lawyer licensed to practice law only in New York practicing unethically in another state if she is "working from home" in Florida for an extended period? What if, during her stay in Florida, she befriends a neighbor who asks for legal advice and she gives it? May she "temporarily update" her contact information on her firm's website to include her Florida address to ensure timely delivery of important materials?

To address the ethical concerns "working from home" raises, the American Bar Association's Standing Committee on Ethics and Professional Responsibility on December 16, 2020 issued its Formal Opinion 495.[73] In it the Committee recognized that "[a] lawyer's residence may not be the same jurisdiction where a lawyer is licensed," and that "some lawyers have elected or been forced to remotely carry on their practice" in a state wherein they are not licensed. The Opinion concludes that "[l]awyers may ethically engage in practicing law as authorized by their licensing jurisdiction(s) while being physically present in a jurisdiction in which they are not admitted under specific circumstances enumerated in th[e] Opinion."[74]

The initial consideration the Opinion addressed is whether the state in which the lawyer is physically present "has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes the unauthorized or unlicensed practice of law[.]"[75] If it has, then the lawyer's conduct would violate ABA Model Rule 5.5(a) prohibiting a lawyer from engaging in the unauthorized practice of law. If it has not, however, the Opinion states that "the lawyer may practice from home (or other remote location) whatever law(s) the lawyer is authorized to practice by the lawyer's licensing jurisdiction, as they would from their office in the licensing jurisdiction."[76] This is because the rules are "rules of reason" to be

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[73] American Bar Association' Standing Committee on Ethics and Professional Responsibility, *Formal Opinion 495: Lawyers Working Remotely*, American Bar Association (December 16, 2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-495.pdf.

[74] *Id.* at p. 1.

[75] *Id.* at pp. 1-2.

[76] *Id.* at p. 2.

construed in accordance with their purpose, and the purpose of Model Rule 5.5(a)—to "protect[] the public against rendition of legal services by unqualified persons"—would not be implicated where a lawyer authorized to practice in her licensing jurisdiction practices that jurisdiction's law while physically present in another jurisdiction.[77]

The Opinion next addressed Model Rule 5.5(b)(1), which prohibits a lawyer from "establish[ing] an office or other systematic and continuous presence in [the] jurisdiction [in which the lawyer is not licensed] for the practice of law." "A local office is not 'established,'" the Opinion posited, "by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, websites, or other indicia of a lawyer's presence."[78]

The same holds true with respect to Model Rule 5.5(b)(2), prohibiting a lawyer from "'hold[ing] out' that the lawyer is admitted to practice law in [the] jurisdiction." If letterhead, business cards, advertising, and the like "clearly indicate the lawyer's jurisdictional limitations, do not provide an address in the local jurisdiction, and do not offer to provide legal services in the local jurisdiction, the lawyer has not 'held out' as prohibited by the rule," the Opinion concluded.[79]

Finally, the opinion noted that Model Rule 5.5(c)(4) states that a lawyer may practice the law of her licensing jurisdiction in a local jurisdiction on a "temporary" basis. Comment [6] to the rule notes that there is no single definition for what is temporary and that it may include services that are provided on a recurring basis or for an extended period. The Opinion concluded that how long a temporary period lasts could vary significantly "based on the need to address the pandemic."[80]

E. What Lies Ahead?

So what will become of the workarounds we have developed during the pandemic? Will we continue to take depositions remotely to save time and travel costs? Will we continue to impanel juries remotely? Will we return to the office? Will mediators like our retired Illinois Appellate Court judge prefer to continue to mediate remotely? There are sound arguments for either answer to these or other, similar, questions.

In a recent exchange on Law360®, two lawyers locked horns over whether post-pandemic remote hearings should the default or norm going forward. Joshua Sohn's

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[77] *Id.*

[78] *Id.*

[79] *Id.* at pp. 2-3.

[80] *Id.* at p. 3.

article, “Remote Hearings Should Be The Default In Civil Litigation,”[81] ably advocated in favor of remaining remote in most instances. His argument is that Federal Rule of Civil Procedure 1, which directs that the Federal Rules of Civil Procedure be construed and administered “to secure the just, speedy, and inexpensive determination of every action and proceeding,” requires judges exercising their authority under Rule 78 to adjudicate motions with or without hearings (and, Sohn argues, “the corollary power to decide what type of hearing is most appropriate”) to select the most inexpensive type of hearing. In support Sohn points to the 1993 advisory committee note to Rule 1 stating that the rule “recognize[s] the affirmative duty of the court . . . to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay.” He argues that remote hearings should be the default because they save travel time and expense, improve lawyers’ work-life balance, and even reduce the carbon emissions that accompany jet travel. He adds that as a practical matter remote hearings allow counsel to spread out their materials on a spacious desk rather than work off a cramped podium and to fact-check their opponent on the fly on-line.[82]

In his counterpoint article, “Remote Hearings Are Ill-Suited Default For Litigation Realities,”[83] Mark Elsen makes three points in support of his view that we should return to in-person advocacy. First, he notes the opportunities to save costs through early settlement created by points of in-person contact, whether on the courtroom steps, in its corridors, or out in the hallway, which are lost when we remain remote. Second, Elsen argues that young lawyers cut their teeth and learn how to effectively address the court through in person appearances. He laments the lost training opportunities that only in-person hearings afford and speculates that “we may well end up with a generation of advocates who know little more than being on brief.” Third, “remote proceedings are a poor substitute for in-person proceedings,” are wrought with pitfalls, and lack “the pomp and circumstance” of in-person hearings that add “a degree of seriousness to a proceeding that is naturally impossible to replicate through the Internet.”

As mentioned above, no fewer than 86% of respondents in the survey of state court judges said they intend to continue to incorporate remote hearing in their conduct of hearings and trials. Lawyers appear to have different plans.[84] A survey conducted in July 2020 by GLG,[85] roughly four months into the pandemic in the US, revealed that, while 87% of lawyers surveyed at the time supported a move toward virtual litigation

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[81] Joshua Sohn, *Remote Hearings Should Be the Default in Civil Litigation*, LAW360 (March 9, 2022), https://www.law360.com/articles/1472017/remote-hearings-should-be-the-default-in-civil-litigation.

[82] *Id.*

[83] Mark Eisen, *Remote Hearings Are Ill-Suited Default for Litigation Realities,* LAW360 (March 14, 2022), https://www.law360.com/articles/1473308/remote-hearings-are-ill-suited-default-for-litigation-realities.

[84] Jurva at p. 10.

[85] GLG Surveys Team, *Survey: The Impact of COVID-19 on Litigation,* GLG Expert Witness Services (July 2020), https://assets.glginsights.com/wp-content/uploads/2020/06/GLG_CovidImpact_LitigationSurvey_Law.pdf?_ga=2.232157468.2016290992.1649877066-1127494136.1649877066.

practice during office/court closures due to COVID-19, only 38% of them supported a move toward virtual litigation practice permanently.[86] It may be that views have changed since the survey was conducted. In any event, we'll see who prevails on that one.

Interestingly, the same survey asked respondents about their views on the effectiveness of certain virtual litigation activities. Ninety-three percent of respondents rated the effectiveness of "virtual hearing/motion" a 3 or higher on a 5-point scale. Ninety-one percent rated the effectiveness of virtual depositions a 3 or higher. And 90% of respondents rated the effectiveness of "other virtual proceeding" a 3 or higher, including 33% who gave that category a score of 5.[87]

One take away from this data may be that, while a large majority of respondents found virtual proceedings effective, as large a majority (87%) want to return to in-person litigation,[88] suggesting that something other than effectiveness is driving our desire to return to in-person litigation. Perhaps we simply miss one another.

V. CONCLUSION

We tend to think of history as a timeline of events, like the last pandemic a century ago. But as we finish writing this paper on its due date, April 22, 2022, we appreciate that this pandemic, like many events that in hindsight seem discrete, having a clear beginning and end, is in fact a process. It rolled across the United States, slowly at first, then quickly shut parts of the country down, one by one. Waves of variants have come and gone and the latest is slowly emerging as we write.

Franchising is based on uniformity and in the face of a pandemic that treated different industries and different areas dissimilarly, franchising bent and the way we franchise lawyers do what we do was bent as well. Considering what we have weathered together these past two years the resilience of our industry is nothing short of remarkable. Franchisors and their franchisees did what was needed to survive and many, but certainly not all, did survive, and emerged ever stronger. And we their lawyers have found ways to continue to serve them, new and innovative ways, some of which may stick around long after our pandemic ceases to be a process and becomes a discrete event.

[86] *Id.* at slide 9.

[87] *Id.* at slide 21.

[88] *Id.* at slide 7.