

## No Peeking Allowed

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By Daniel Pollack and Elisa Reiter | November 03, 2020 at 07:43 PM



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Commonly a symbol for fairness and impartiality before the law, Lady Justice, also known as "Justitia," is usually depicted blindfolded, with scales in one hand, and a sword in the other. The message of each prop is straightforward. The blindfold represents impartiality, the scales represent

a precise weighing of evidence, and the sword represents swift justice. Interestingly, Justitia only donned her blindfold in the 16th century. What **happened? Before then, she didn't need a** blindfold. Remarkably, her innate character trait of fairness was presumed and unquestioned.

**Supreme Court Justice Hugo Black wrote in Griffin v. Illinois (1956), “There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” Seven years later, even more famous words rang out: “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.”** This pronouncement, uttered by the Rev. Martin Luther King Jr., has been quoted innumerable times as expressing the fundamental value of absolute impartiality, of taking all possible measures to safeguard against bias, judicial or otherwise.

Judges have a responsibility to recuse themselves from any cases in which they cannot act impartially. Today, ironically, in the very name of justice, **there are people who want Justitia's blindfold not to be tightened, but to be loosened.** There are times, they assert, that Justitia should affirmatively **inquire as to the litigants' status. “There are exceptions. To ensure true justice, she needs to peek,”** they say. But the expression **“the exception proves the rule”** (from the Latin legal principle *exceptio probat regulam*) really means that the perceived existence of an exception actually gives weight to the rule.

**For thousands of years, the Bible, Leviticus 19:15, has cautioned us: ‘You shall do no unrighteousness in judgment; you shall not respect the poor**

person, nor favor the person of the mighty; but in righteousness shall you **judge your neighbor.** Everyone is equal before the law. It is not tilted in anyone's favor, regardless of their position.

Should COVID-19 allow judges to peek? ZOOM and related platforms were implemented shortly after the pandemic necessitated quarantine in March, 2020. Will potential jurors Google litigants, attorneys, and presiding judges from the comfort of their home screens, to peer at their credentials and histories? Will the absence of the ability to view body language, and to have jurors build alliances during breaks, let alone during deliberations, break the system?

Many find courtrooms, and the very concept of public speaking, intimidating and stifling. The advantages of hearings or trial via video conference platforms include:

- Remote participation may mean more comfort; and more comfort may mean more information is gleaned by the judge and/or jury.
- Screen sharing means that judges and jurors get a clear view of exhibits.
- Body language may be out of frame, but the full on, face to face, **“Brady Bunch” view via video platform allows judges and jurors to look defendants, litigants, and witnesses “in the eye” throughout the proceeding, rather than the “profile view” that is the historical norm.**

- Indigent parents, party to criminal or family proceedings, **suddenly have increased access to the system. Absent a ‘hotspot’ such litigants may still “phone in.”**
- Transportation and child care issues suddenly pose less significant impediments to availing oneself of the judicial system.
- The rule can still be invoked, whereby non-party witnesses can be placed in a waiting room, admonished not to discuss a case.
- If a witness is staring intently at a document, the attorneys may still ask to view such a document.
- Legal fees may be reduced if attorneys are not incurring travel and wait time at the courthouse.
- Copying costs are reduced if all documentation is exchanged electronically.
- **Judges can admonish attorneys not to direct their client’s** testimony, and order that attorneys and clients are not to be in the same room, nor sharing the same electronic device.
- Breakout rooms give judges the ability to allow attorneys to confer, and to allow jurors to bond during breaks.
- Document review during deliberations is eased, as parties/litigants must submit numbered exhibits prior to the start of proceedings.
- There is no exposure to crowded courtrooms.

Since March, 2020, there have been over 175,000 virtual hearings in Texas. Judge Miskel presided over the first virtual jury trial in Texas on May 8, 2020. Her work pushed innovations not only in Texas, but across the United

States. The National Center for State Courts recently announced that Judge Emily Miskel was awarded the 2020 William H. Rehnquist Award for judicial excellence. The Rehnquist award honors a state court whose work **“demonstrates outstanding qualities of judicial excellence, including integrity, fairness, open-mindedness, knowledge of the law, professional ethics, creativity, sound judgement, intellectual courage, and decisiveness.”**

On a national level, the Council on Criminal Justice formed the National Commission on COVID-19 and Criminal Justice (NCCCJ). The NCCCJ will focus on assessing the impact of COVID-19 on the justice system. Moreover, the NCCCJ will develop strategies to attempt to limit COVID outbreaks, and to develop systemic policy changes to attempt to assure public health and safety.

In New Delhi, in September, 2020, the Parliamentary Standing Committee on Law and Justice recommended that virtual courts be continued for certain categories of cases, even after the COVID-19 pandemic.

For now, our judges must peer through plexiglass screens during in-person proceedings, or through electronic devices. Justice should not only be blind, but should be cost-effective, expedient, and not expose participants to COVID-19 or other health risks.

Jurisprudential peeking, however tempting, is at odds with all legal and ethical principles. We must say it resolutely: No peeking allowed. Safety encouraged. Technological innovation is a must.

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