

# SOUND JUDGMENT

## Hello Judges

By Judge Rod Ring, (Ret.)

*ABA/NHTSA Judicial Outreach Liaison*

I would never have guessed when I did the first quarter newsletter in 2020 how much our world would change. I hope all of you and your families are well and coping with the restrictions on normal activity. The job of a judge has always been challenging and difficult at times, but the virus has added complications to our lives. Making sure that everyone is provided due process and access to justice while keeping yourself, your staff, and the parties safe is not easy.

So much of judicial training has been cancelled, including the Summer Oklahoma Judicial Conference, that it is hard to stay current on changes in statutes and case law. With that in mind, I will be adding a section to the newsletter with information about free judicial training available through the National Judicial College and the National Center for State Courts among others. I will also update you through email about new opportunities that I find between newsletters.

We have added new judges in the last few months, and I want to welcome them to the bench. I hope you find your new profession as rewarding as I have. There is an adjustment in transitioning from an advocate to the role of a judge. I hope the information in our newsletter helps in that transition. The Oklahoma Bar



Association/Oklahoma Highway Safety Office Judicial Education Program is funded by the National Highway Traffic Safety Administration and the American Bar Association Judicial Division. The purpose of the program is to reduce traffic deaths and injuries from impaired driving by bringing judges the latest information on impaired driving laws and best practices in sentencing.

I started this position three years ago when Judge Carol Hubbard decided to retire and move out of state. At the same time, the OBA was taking over the program and I started working with Susan Damron, Director of

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Continuing Legal Education for the OBA. Susan has been the editor of the newsletter, has overseen the grant requirements, coordinated with the Oklahoma Highway Safety Office, and made sure we complied with the financial restrictions of the grant. Susan has announced her departure from the OBA, and I want to thank her for all she has done for us and wish her the best of everything in the future. She has become a friend and will be missed.

## First Remote Jury Trial Shows Potential for Widespread Use

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Let the record show that history was made at 8 a.m. CDT Monday, May 18, 2020, in northeast Texas, where 26 potential jurors met in the comfort of their homes for the nation's first-ever remote jury trial, presided over by two judges, one of whom was making

sure the technology worked the way it should.

"This is the first time this is happening in Texas and maybe the first time anywhere in the country," Judge Emily Miskel, who was handling the technology, told the jurors, who logged in on cell phones and laptops. "Thank you to those who contacted the court to ask if this was a scam. . . . We sincerely thank you

for giving this a try."

Retired Judge Keith Dean then addressed the jurors: "Welcome to the Collin County Courthouse. You're not at home on jury duty. You're on jury duty. You just happen to be at home. The courthouse came to you."

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As he would if the trial occurred in a courthouse, Judge Dean told the potential jurors they must not discuss the case with anyone or conduct any independent investigation, such as using the Internet to try to find more information. “The same rules apply,” he said. “This (jury duty) is very serious business.”

The case, which was supposed to go to trial in March, involved a man who sued State Farm for denying his claim after a wind-and-hail storm damaged his office building on March 26, 2017. Judge Miskel separated the 12 potential jurors with the lowest jury numbers from the others, and the jury selection process began with the plaintiff’s attorney addressing the 12. “This is as strange as it is for us as it is for you,” he told them.

During voir dire, one potential juror said she is a State Farm customer, and a few others said they also suffered damage from that storm. Despite that, they said they could be fair and impartial jurors. At various times during the jury selection process, a couple of the jurors briefly made eye contact with others in their homes. One appeared to say,

“Get out.”

After lawyers for both sides asked their questions, there was a break, and everyone except for one juror quickly returned. As everyone waited for the juror to return, Judge Dean explained that this also happens during trials at the courthouse. “We have to go find people who are in the hallway talking on their phones,” he said, and bring them back into the courtroom.

About seven minutes later, the missing juror returned, and Judge Dean gently reminded him that nothing can happen until all jurors are together. The tardy juror said nothing. Then Judge Dean announced that the lawyers accepted all 12 of the people they questioned and that the other 14 prospective jurors would be dismissed. He also said the lawyers decided to use alternative dispute resolution, a process other than litigation. That decision closed the trial to the public. The jurors ended up hearing from witnesses and seeing exhibits during an abbreviated, one-day trial and then rendered a non-binding verdict, which is private. Armed with that verdict, the lawyers will enter into mediation later this

week to attempt a settlement.

Before the jurors were dismissed, they were asked about the experience. Judge Miskel said during an interview the next day that she was pleasantly surprised how enthusiastic the jurors were about the remote trial. Those who served on in-person juries said they preferred serving this way because it was more convenient and because it was easier to see the exhibits.

Judge Miskel, who said she was asked on April 19 to find a trial to do remotely, said it was challenging to master the technology in such a brief time. “We’ve been forced to learn quickly,” she said. “Normally, this process—from request to execution—would have taken two years, not one month.”

In the future, she predicts courts will use a hybrid approach. “I think we’ll discover that portions of trials will be better to do remotely than in a courtroom,” she added.

Judge Miskel also thinks remote trials will be a boon to access to justice, especially for people who live in rural places where no lawyers live. “Lawyers will be more likely to take cases,” she said, “if they don’t have to drive hours to represent their clients.”

# Judges Are Split on Whether Virtual Hearings Have Reduced the Number of No-Shows

By Anna-Leigh Firth

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Our June Question of the Month asked NJC alumni if they were seeing fewer no-shows in virtual hearings compared with conventional in-person hearings.

The vote came out roughly even: 47 percent of the 363 judges who responded said they had seen an improvement during the coronavirus-driven move to virtual hearings; 53 percent indicated that no-shows had stayed about the same or had even gotten worse.

Commented one judge, anonymously: “I have conducted hearings both in person and by phone for roughly 20 years. My in-person hearings show nearly all the time; the telephone hearings show about half the time.”

On the other hand, Maricopa County (AZ) Judge Gerald Williams reported: “In residential eviction actions, we have gone from a 90 percent no-show rate for tenants to an 80 percent rate of appearances because they can appear by telephone.”

Attendance hasn’t improved...

Oklahoma Judge Mike Hogan, whose jurisdiction covers Pittsburg and McIntosh counties, reported that fewer people were showing up for remote hearings than they had for in-person hearings, and that trend was contributing to a case backlog. One reason for the absenteeism, he speculated, was that it had become easy for people to use “technical difficulties” as an excuse for not showing up.

Other reasons mentioned for no-shows included:

- Defendants being unaware of their virtual hearing date
- Lack of access to electronic devices



- Limited court access and assistance for self-represented litigants
- Genuine technical difficulties

... except in some places, it has improved

Among the 47 percent of judges who said they were seeing improved attendance at hearings, many cited ease of access.

Virtual hearings remove traditional obstacles like lack of transportation (locally or from out of state), risk of losing employment if taking time off for court, and lack of childcare, wrote Blount County (TN) Juvenile Court Judge Kenlyn Foster.

Other factors mentioned:

- Defendants in prison can’t fail to appear in court
- One judge mentioned having better success reaching hearing participants by accessing contact information in the DMV’s database
- No fear of being arrested on the spot

- Self-represented litigants are more comfortable appearing by phone
- More people show up when the court sends a hearing reminder with virtual instructions to the attorney, bail bond company and the defendant

A few judges wrote that it was hard to tell whether absenteeism had improved because fewer citations were being issued and fewer court hearings were being held. Additionally, many courts have defaulted to cancellation of all hearings unless litigants specifically request that a hearing take place.

*\* Each month the College emails an informal, non-scientific one-question survey to its more than 12,000 judicial alumni in the United States and abroad. The results, summarized in the NJC’s Judicial Edge Today, are not intended to be characterized as conclusive research findings.*

## An Interesting Case

Last week a Wisconsin appeals court declared unconstitutional a state provision allowing an unconscious driver to have their blood drawn and tested. The panel concluded “the incapacitated driver provision is unconstitutional because the implied consent that incapacitated drivers are deemed to have given and presumed

not to have withdrawn does not satisfy any exception to the Fourth Amendment’s warrant requirement.”

To read the full opinion, click the link below.

<https://law.justia.com/cases/wisconsin/court-of-appeals/2020/2016ap000308-cr.html>



# The Rule of Law is Powerful and Fragile; It's Your Job to Protect It

By Hon. T. W. Small (Ret.)  
*Reprinted with permission*  
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The following excerpts from [\*You Are Not a Lawyer Anymore: A Primer for Those Who Want to Be a Good Judge\* \(2018\)](#) appear here with the permission of the author.

There are many definitions of the rule of law. Commissions have studied the meaning of the rule of law. Numerous articles have been written about the rule of law in our country. Presidents have tried to export the rule of law to other countries.

As a judge you should have a clear understanding of just what the rule of law is before taking the bench.

The rule of law in our country began in the 1600s, when persons fled Europe in order to have the freedom to practice whatever religion they chose. The common theme of all religions is to follow the law because that is what good people do. It has been the tradition in our country since the very beginning.

The rule of law is both powerful and fragile. Let me illustrate. As a judge, you have no ability to enforce the decisions you make. In a civil case you must rely on the parties to bring motions to compel or motions to find the other party in contempt when someone violates your order. Even if you order someone to comply with a discovery request, for example, or find someone in contempt, you have no power to enforce those decisions. If you sentence someone to jail, you have no power to make certain that sentence is carried out. Fragile.

One of the most difficult decisions you may face is whether a mother and father are no longer fit to be a mother and father. In a termination of parental rights case, if the state meets its burden of proof, it will be your duty to declare that these individuals are no longer the parents of their children. Incredibly, those individuals will leave your courtroom accepting the fact that they are no longer the mother and father of their children. Powerful.

Thus, the rule of law means that good people follow the law because that is what good people do — unlike in many countries, where they follow the law only out of fear of



being caught.

In our country, a judge's decision is the law. Yet the main reason court decisions are followed is because the rule of law has existed in our country since the beginning. Good people follow the law because that is what good people do.

Therefore, when you order compliance with a discovery request, that order is followed. When you find someone in contempt, that order is followed. Even when you declare individuals to no longer be parents, that order is followed.

Another obvious example of our rule of law can be observed whenever traveling a busy highway. There is often an 8-inch-wide, solid white line of paint dividing one high occupancy vehicle (HOV) lane from the other lanes of travel. Generally speaking, only vehicles with two or more persons may travel in that designated lane. There is no physical barrier that prevents everyone from driving in that lane. There are not enough state troopers to enforce that law if most drivers ignored it. Yet, generally speaking,

drivers respect the HOV lane because that is what good people do.

When President Trump ordered immigration restrictions against certain countries and some federal courts issued injunctions preventing the president's directives from being implemented, a potential constitutional crisis existed. Would the president obey the court orders? After all, in our country, a court's decision is the law, but the court has no power to enforce it. When President Trump followed the trial judges' orders and appealed to a higher court, a constitutional crisis was averted.

Consider what would happen if high-ranking government officials refused to obey court orders. Or consider the impact on our rule of law if courts allowed individuals to be attacked because of their religious beliefs when religious freedom lies at the very foundation of our rule of the law.

Unfortunately, during the last 40 years the rule of law has eroded in our country. But

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there are at least two ways a person in your position can begin to stop, or at least slow, the erosion of our rule of law.

First, you must not only be fair to both sides but maintain the appearance of fairness. Practically speaking, this means you must “sell” your decision to the loser. People are more likely to obey your ruling if: they believe they have been given the opportunity to present all of their arguments; you have heard and understand their position; and your decision, although contrary to their position, is well reasoned and follows the law in the manner that you understand the applicable law.

The appearance of fairness requires you to treat the loser with the same amount of respect you treat the winner and with even more respect than you are treated. In this way, your decisions are more likely to be obeyed.

Consequently, you must listen attentively to both sides’ arguments, regardless of which way you may be leaning, in order to understand their position. That way your decision can acknowledge the loser’s reasoning and respectfully explain why it was not persuasive.

The second way you can slow the ero-

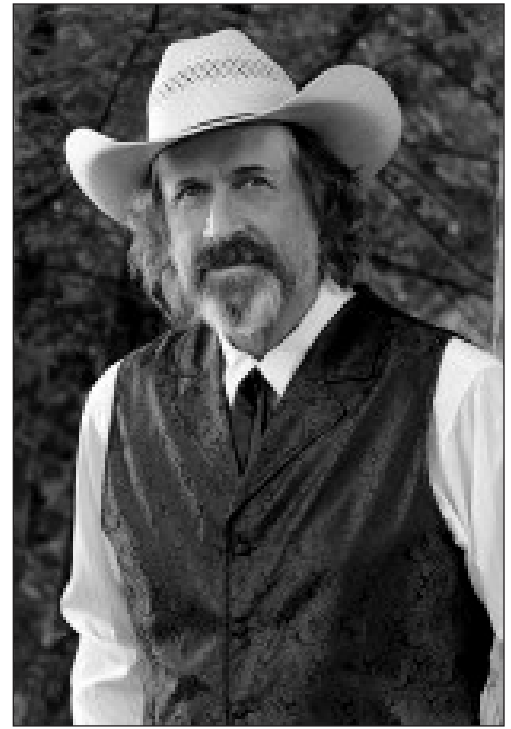
sion of our rule of law is to understand and appreciate your role is that of a judge, not a legislator. Certainly there are gaps in legislation that courts are required to fill. After all, legislation cannot provide for every possible scenario. So you must “fill in” the gap. However, in doing so you must honor the intent of the legislation and follow the appropriate rules of statutory construction.

You will also discover that many laws are ambiguous, sometimes deliberately so in order to obtain enough votes to pass. It is your job to resolve these ambiguities in a manner that at least attempts to honor the perceived intent of the legislature – again, following the appropriate rules of statutory construction.

If you become adept at “selling” your decisions, by not just being fair but appearing to be fair, and understand and appreciate your role as a judge, then you can be confident that your actions will help preserve the rule of law.

As Justice Stephen Breyer stated in his book *Making Our Democracy Work: A Judge’s View*:

“[P]ublic acceptance is not automatic and cannot be taken for granted. The Court itself must help maintain the public’s trust in the Court, the public’s confidence in the Constitution, and the public’s commitment to the rule of law.”



NJC alumnus T. W. “Chip” Small retired in 2018 after nearly 27 years as a superior court judge in Washington state. He previously served 13 years as a trial attorney. He is a past chair of the Access to Justice Board for the state of Washington and received the group’s Judicial Leadership Award in 2001.

# Everybody hates you.

You don’t see  
bullying like  
this every day.  
Your kids do.

Teach your kids how to  
**be more than  
a bystander.**



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August 19, 2020

[How Judges Should Use Their  
State Constitutions](#)  
August 27, 2020

# CDL Enforcement and Adjudication Post-COVID-19

By Romana A. Lavalas  
National Traffic Law Center, Senior Attorney  
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On March 11, 2020, the World Health Organization classified the COVID-19 (Coronavirus) outbreak as a global pandemic. As part of the federal government's response to the Coronavirus pandemic, on March 13, 2020 the President of the United States declared a [nationwide emergency under the Stafford Act](#). In addition, the White House Coronavirus Task Force developed and issued a document entitled, [30 days to slow the spread](#), identifying those in the [Transportation sector](#), including the commercial motor vehicle (CMV) industry as a "critical," directing these workers to maintain their normal work schedules.

The transportation industry and others related to it (shipping, manufacturing, etc.) have always been the backbone of the American economy. According to research conducted by the American Trucking Associations (ATA), "[o]ur economy depends on trucks to deliver ten billion tons of virtually every commodity consumed—over 80 percent of all freight transported annually in the U.S."<sup>1</sup> Although the federal government immediately identified trucking and truckers to be essential to the safe and efficient transportation of goods throughout the country, American consumers quickly realized just how essential the trucking industry and truck drivers truly are, as they eagerly wait for weekly commercial deliveries of toilet paper, hand sanitizer, anti-bacterial wipes and sprays. The food supply chain, the healthcare and retail sectors, are just a few of the industries that would be crippled by the halt of truck traffic.<sup>2</sup>

The Federal Motor Carrier Safety Administration (FMCSA) is the federal agency responsible for promulgating rules and issuing regulatory guidance for the trucking industry, as well as setting the minimum standards required to obtain commercial driver's licenses that are issued by the states. To facilitate the delivery of essential supplies and equipment by commercial vehicles, and the drivers who operate them, FMCSA,

responded by issuing its own [Emergency Declaration](#) on March 13, 2020, as well as notices of relaxed enforcement policies that pertain to this group of drivers, many of whom are Commercial Driver's License (CDL) holders.

Since the issuance of FMCSA's first Emergency Declaration, FMCSA has extended this declaration and expanded guidance for the states. For a list of FMCSA's and state specific Emergency Declarations, Waivers, Exemptions and Permits affecting CDL holders and the trucking industry, [click here](#). Additionally, NTLC's partner organizations (who are also FMCSA grantees) have their own Coronavirus resources pages. For links to our partners' pages, [click here](#).

While this time of crisis seems interminable, we will eventually move from crisis, to recovery. Courts will reopen, prosecutors' offices will return to full staff and dockets will return to a new, but socially distant normal. As states ease into recovery, many court proceedings may be handled virtually or for many traffic courts, almost entirely by mail. As more vehicles retake the roads, dockets will be flooded with both backlogged cases and new traffic citations. No doubt judges and prosecutors will face pressure to "clear up the backlog" of all cases but particularly traffic cases, since these cases tend to lag unnecessarily and accumulate quickly. Moreover, once FMCSA's and state's emergency declarations waivers and exemptions expire, courts may notice CDL holders and/or motor carriers claiming protection under these declarations with increased frequency. This may result in requests for more deals or hasty dismissal of cases to ease crowded dockets.

As prosecutors and courts deal with CDL holders and drivers of CMVs who claim to have provided "direct assistance"<sup>3</sup> in support of relief efforts related to the COVID-19 Pandemic by transporting essential supplies, equipment or people, prosecutors and courts are encouraged to examine those claims thoughtfully and thoroughly. Undoubtedly, there will be drivers who, when cited, were in fact operating well within an FMCSA or state declaration, waiver, exemption, etc. Generally, CDL holders are a law-abiding group of individuals. However, there are always those who will use times of crisis to impose upon the goodwill of judges and prosecutors by using these waivers to justify prohibited behavior or

claiming these exemptions after their expiration.

Therefore, while FMCSA intended these emergency declarations, waivers, exemptions and permits to be extended to drivers assisting with COVID-19 pandemic relief efforts, these measures do not relieve CMV drivers (or motor carriers) from their continued obligation to operate safely. Further, prosecutors, judges and law enforcement officers are not relieved from their obligations to refrain from Masking<sup>4</sup> CDL offenses.

Because FMCSA was concerned that that the use of their emergency declarations and waivers might be prone to abuse by bad actors, the agency specified that "direct assistance does not include routine commercial deliveries, including mixed loads with a nominal quantity of qualifying emergency relief added to obtain the benefits of this emergency declaration."<sup>5</sup>

Further, FMCSA's [expanded emergency declaration](#) (modified for easier reading below) indicates that "[c]ommercial carriers and drivers providing direct assistance to the nationwide emergency are not granted emergency relief from, and must continue to comply with, the following Federal Motor Carrier Safety Regulations and conditions (emphasis added):"<sup>6</sup>

A) State laws and regulations, including speed limits and traffic restrictions (49 C.F.R. § 392.2);

B) Drivers may not be permitted to operate a CMV while a driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the motor vehicle (49 C.F.R. § 392.3);

C) Motor carriers must not force or allow fatigued drivers to operate a CMV. A driver who informs a carrier that he/she needs immediate rest shall be given at least 10 consecutive hours before the driver is required to return to service;

D) A motor carrier whose driver is involved in a crash while operating under the emergency declaration must report any

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recordable crash within 24 hours, to the FMCSA Division Office where the motor carrier is domiciled;

E) Motor carriers must continue to abide by the controlled substance and alcohol uses and testing requirements (49 C.F.R. Part 382), the CDL requirements (49 C.F.R. Part 383), the insurance requirements (49 C.F.R. Part 387), the hazardous material regulations (49 C.F.R. Parts 100-180), applicable size and weight requirements, or any other portion of the regulations not specifically exempted under 49 C.F.R. § 390.23;

F) Motor carriers or drivers who are currently “out-of-service” are ineligible for the relief under the emergency declaration until they have met the applicable conditions for its rescission and the order has been rescinded by FMCSA in writing (emphasis added).

Prosecutors, courts, and law enforcement officers should look to the declarations themselves, both state and federal, to verify whether any of these declarations, waivers, exemptions or permits apply to the CDL holder who is claiming their protection. Prosecutors should also look to other forms of documentation, such as receipts, bills of lading or reports regarding dates and cargo from the driver’s trip(s). While FMCSA has messaged to the CMV industry that it wants to facilitate the smooth delivery essential supplies, equipment and people, by motor carriers and their drivers, these waivers do not provide CDL holders or their employers a “green light” to commit traffic violations.

The National District Attorneys Association’s (NDAA) National Traffic Law Center is available to assist prosecutors and other traffic safety professionals in navigating these declarations and exemptions and their impact on traffic adjudications. For help

with specific questions about FMCSA’s Emergency Declaration as it relates to CDL and/or CMV cases, contact Senior Attorney Romana Lavalas. In addition, NDAA has compiled additional targeted resources to assist prosecutors and the courts about COVID-19 in other related matters. Those resources may be accessed here: [here](#).

1 American Trucking Association, Trucking Moves America Forward, (last visited, May 12, 2020), <https://trucking.org/sites/default/files/2019-12/When%20Trucks%20Stop%20America%20Stops.pdf>.

2 Id.

3 Direct Assistance means transportation and other relief services provided by a motor carrier or its driver(s) incident to the immediate restoration of essential services, such as medical care, or essential supplies such as food, related to COVID-19 outbreaks during the emergency.

4 Prohibition on masking Convictions. The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP or CDL holder’s conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) from appearing on the CDLIS driver record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State. 49 C.F.R. § 384.226. See, Elizabeth, Earleywine, *MASTERING MASKING: Why & How to Avoid Masking CDL-Holder Convictions*, Vol. 27, Issue 6, Between the Lines, (Jul. 2019), <https://ndaa.org/wp-content/uploads/July-BTL-Masking-1.pdf>.

For additional resources on Masking, please visit the [National Traffic Law Center](#) or contact Senior Attorney [Romana Lavalas](#).

5 Expanded Emergency Declaration Under 49 C.F.R. § 390.23 No. 2020-002 (Relating to COVID-19), issued April 8, 2020.

6 Id.

## SJEP Staff:

**Judge Rod Ring (Ret.)**  
**Judicial Outreach Liaison**  
405.246.5023  
[joloklahoma@gmail.com](mailto:joloklahoma@gmail.com)

**Susan Damron**  
**Project Director**  
*Director of Educational Programs,*  
*Oklahoma Bar Association*  
405.416.7028  
[SusanD@okbar.org](mailto:SusanD@okbar.org)

**Gary Berger**  
**Layout & Design**  
*Production Specialist,*  
*Oklahoma Bar Association*  
[GaryB@okbar.org](mailto:GaryB@okbar.org)



## SUBMISSIONS/ COMMENTS

Please send your submissions  
or comments to:

**Judge Rod Ring, Retired**  
**Judicial Outreach Liaison**  
[Joloklahoma@Gmail.com](mailto:Joloklahoma@Gmail.com)  
405.246.5023

