

Professional Perspectives

# 2020 in Review: Virtual Litigation

**Bloomberg  
Law**

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# The New Etiquette for Remote Hearings

Contributed by *Michelle Kallen*, Virginia Office of the Attorney General

The legal industry is saturated in meaningful but sometimes rigid traditions. A common drawback to the traditional nature of the legal industry is its resistance to change and emerging technology. But the Covid-19 era is compelling rapid adaptation. The fast-moving global pandemic has spurred jury trials, client meetings, and oral arguments to move to remote formats.

As a result of this change, a new etiquette has emerged that melds traditional expectation with our new virtual world. This list below seeks to capture some of those expectations.

• **Determine whether you should “appear” via video.** In a physical courtroom, there is an understanding about where to sit based on one's role in a case. The attorneys arguing a case sit at counsel's table at the seats closest to the podium, counsel walks up to a podium to argue, and the audience is physically separated in a designated portion of the courtroom. On most video platforms, by contrast, all those appearing via video are placed on equal footing—or, more accurately, in equally spaced boxes of Brady Bunch style floating heads.

Many courts give attorneys a choice between appearing via video or simply dialing in to a hearing. In that situation, it is important for each attorney to evaluate their role and determine if it is appropriate to appear via video.

- If you are arguing a case or serving as lead counsel at a hearing that will be conducted via video you should certainly “appear” via video. If, however, you are not arguing, consider the option simply dialing in to the hearing.
  - One reason to dial in rather than appear via video is that, just as counsel who is not arguing will not step up to a podium in the courtroom, you do not want to be featured in the court's view in a way that overshadows the lead lawyers in the case.
  - Another thing to keep in mind is that some remote platforms (like WebEx) can become slower as more people appear via video. No lawyer wants to contribute to a court experiencing technological problems during a hearing.
  - If you decide that you need not appear via video, opt for the option of dialing in over the phone rather than appearing via video and simply covering your camera or turning off the camera. Your initials, name, or picture may still appear on the court's screen and can be a distraction. You also risk accidentally turning the camera on and perhaps drawing attention to yourself in a way you did not intend.
  - Even if you are included in the court's invitation to appear via video that does not mean you should appear via video. Often, courts will send the invitations to all the attorneys who have appeared in the case. It is important to evaluate for yourself and your team whether you truly should appear via video.
- **Take opportunities to test out the technology.** Various courts will facilitate a test run of their platform before the hearing. Make sure to take full advantage of that opportunity.
- Try to avoid delegating this task to a junior team member. Even if that person will be physically with you when you present your argument, you will come off less authoritative if you cannot navigate the technology on your own.
  - Just as you walk yourself up to the podium when you present an argument, so too should you be able to navigate your own technology. Most of the platforms courts use are easy to navigate, and staff is often very happy to help attorneys learn to use the court's platform.
- **‘Appear’ early.** As with an in person hearing, it is important to be on time. Some remote formats, like Zoom, will not let a participant in until the meeting formally begins. Even in that scenario, attempt to sign in a few minutes before the meeting actually begins. Do not be late.

• **Be aware of your title.** Many platforms, like Zoom, will associate your image with a name. It is important to make sure that the name is correct.

- On Zoom this is done by clicking on the “Participants” button at the top of the Zoom window. If you hover your mouse over your name in the “Participants” list, you will see an option to “Rename” yourself. That will allow you to enter the name you would like for the meeting.
- If you are using someone else's device, there is a good chance that your name will appear as that person's name, or even “so and so's iPad” if you are on an iPad. As you enter a remote meeting, check to see how your name appears to the court.
- Note if you are appearing via telephone without video, it is especially important to introduce yourself each and every time you speak. Unlike being able to see someone's face in a video hearing or in person, neither the judge nor the court reporter is likely to recognize your voice. You can avoid the inevitable awkward question about who is speaking by beginning your statements with, “Your Honor, this is [say your name],” and then begin your point.

• **Turning your camera on and off.** Some people turn their cameras off when they are not speaking. Although that may be perfectly acceptable during many situations, it is important to be aware of the image that appears when you do so. Some formats, like Microsoft Teams, will simply use a blank color with your initials. Other formats might use a picture (for example, one associated with your email account). If your image is one of your dog or your family, be aware that you will be projecting that image to the court when you turn off your camera during a remote hearing.

• **Be cognizant of your remote setup.** Unlike a courtroom where your image is conveyed by what you wear and how you conduct yourself, you control your surroundings in a remote hearing. Thinking through your setup ahead of time—and testing it out—can help you appear more polished and be more comfortable during the hearing. Here are some things to keep in mind:

- **Background.** Much like your attire during an oral argument, your background says something about you. Camera placement that provides a view of a messy house is both distracting and can make a litigant look unprofessional. A background of a bookshelf or even a blank wall can look professional without being distracting.
  - If you are concerned your preferred location for the argument does not provide a court-appropriate background, you can use a virtual background. In addition to the stock virtual backgrounds available on remote platforms, virtual backgrounds can also be downloaded. As with a real background, it is important to make sure the virtual background looks professional. Although many participants in the hearing might prefer to be at a beach, a beach background is typically inappropriate for a remote hearing.
  - Keep in mind that with virtual backgrounds the space between your body and the background may often look distorted. And if you have special guests—like children or spouses—who decide to visit you, they will likely be visible even with the virtual background.
  - Another thing to keep in mind with virtual backgrounds is that different lighting can make the virtual background look different (or at least can be more or less flattering for you personally). Test out your selected background with different lighting.
- **Sound.** It is crucial that the court and the others involved in your case be able to hear you. The quality of your sound during the hearing can make a difference.
  - Try to find a setup that minimizes background noise. If you are in a room with a window, keep the window closed (you cannot control when your neighbor decides to mow their lawn or when a dog decides to bark). Let the people in your household know that you will need quiet and ask them to respect that. If the garage is near where you will partake in the hearing, for example, instruct people in your household to avoid opening and closing the garage during the time of the hearing.
  - Smaller rooms have less echo. A rug can also help remove an echo.

- Many people use headsets or ear pods. Although using such technology is typically inappropriate in a traditional courtroom, it is perfectly appropriate to use such technology for a remote hearing. Recognizing, however, that a large headset can be distracting, smaller devices are less likely to take attention away from you and your argument.
- As with an in-person hearing, be very careful not to interrupt the judge. Because it may be harder during a remote hearing to tell when the judge is attempting to ask a question, make sure to leave pauses that provide an opportunity for the court to ask questions.
- **Lighting.** Lighting matters . . . a lot. The right lighting can make you look friendly and trustworthy. The wrong lighting can be distracting, or even make you look sinister. Here are a few tips about lighting:
  - Situate your camera in front of a window. Light from the side can cast an odd shadow. Light from behind can make it difficult to see your face and can create a distracting halo effect.
  - Keep in mind the time of day of the hearing and note that the lighting during a cloudy day will appear different than a sunny day.
  - Zoom has a filter that can make you look more polished. This filter can be turned on under “video settings” by checking “touch up my appearance.”
- **Camera placement.** As with other features of a remote hearing, the goal of the camera placement should be to replicate one's appearance at a podium in the courtroom. Think of how the judge perceives the advocates from the bench and then endeavor to recreate that angle.
  - Many people place their cameras somewhere lower than their face so that they are looking down at the camera. For example, if you are seated with your laptop on your lap, you will be looking down at your camera. This can look odd and can make the speaker look like they have multiple chins.
  - Eye contact occurs when you look at the camera, not at yourself on the screen. Eye contact during a remote hearing is just as important as it is in an in-person hearing. If your camera is on a laptop, but you are using another screen, when you look at that other screen it will appear like you are looking away (and not paying attention) to the hearing.
  - A good placement of the camera is right at the top of your screen. It is often more flattering for the camera to be slightly above your head such that you are barely looking up to the camera, rather than lower down such that you look down to the camera.
  - One benefit of a remote hearing is that if you place your camera directly above your monitor, you can look at your computer screen and it will appear like you are looking at the camera. (This is in contrast to paper during an in-person hearing where it is clear when a litigant is looking at her notes.)
- **Mute.** The mute button is like making sure you are quiet in court. Although you cannot control the background noise around you, you certainly can control your mute button.
  - Background noise during a hearing from someone other than the person who is supposed to speak is akin to one's phone ringing from the audience.
  - It is not a big deal if you start talking when you are on mute. It can be a big deal if you think you are muted when you are not. So erring on the side of muting is not a bad thing.
- **Attire.** A remote hearing is not an excuse to argue a case in unprofessional attire. And, popular culture jokes aside, you really should wear pants. You never know when an iPad might tip down, or your camera may fall such that the rest of your outfit is visible.

Note that any instructions you receive from the court should supersede this etiquette. And, as with a typical hearing, it does not hurt to ask questions. There will often be time with the court's clerk or a technology staff member who sets up the hearing before the judge joins. Do not hesitate to ask about your remote setup, including whether your voice carries well in the remote setting.

The overarching goal is to convey the same decorum and respect central to the legal profession in this entirely new format. Expectations certainly vary from court to court, panel to panel, and may change over time even with the same audience. Ultimately, lawyers must rely on their judgment when faced with new scenarios. As with most any new situation, a positive attitude and deference to the court go a long way.

# Mastering the Virtual Deposition

Contributed by *Aaron T. Goodman, Nick Kennedy, and Kyle Richard Olson, Baker McKenzie*

The legal profession has long remained unchanged in core aspects, including key tools of advocacy such as evidence gathering and witness testimony. Now, almost overnight, the Covid-19 crisis and shelter-in-place orders have forced counsel to re-invent the main mode of deposition, a critical component in the U.S. system of discovery and civil trial work. Covid-19 may change the profession for good.

Depositions, for now, have to be taken entirely online, with witnesses, counsel, court reporters, and others all participating remotely and from different locations. This abrupt change from in-person practice to a virtual construct presents a host of challenges. But, ultimately it could lead to a “Law 2.0,” where remote deposition taking is the norm rather than the exception.

Indeed, adapting to this new technology is not a choice, but a necessity. It is arguably mandated by the ABA Model Rules. Model Rule 1.1 requires that “A lawyer shall provide competent representation to a client. Competent representation includes the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Comment 8 to this rule makes clear that technological competence is a core aspect of this duty: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology ....” The new normal of remote depositions, and the technology that enables them, likely falls within this duty. Lawyers cannot simply put their cases and their obligations to their clients on hold until they can take depositions the old-fashioned way. Competent representation requires technological adaptation, now more than ever.

## Challenges and Considerations

### **Now or Later?**

Strategy questions are critical when it comes to any deposition. They are magnified for a remote deposition. They begin with an array of up-front considerations of whether to go forward with a remote deposition at all, including the importance of the witness to the case, the difficulty in coordinating the logistics, how contentious the case is, the trustworthiness (or lack thereof) of opposing counsel, any risks of witness coaching, and broader witness cooperation, among other factors. Right now, when in-person depositions may not yet be possible, certain depositions may need to be postponed if they cannot be effectively taken by remote means.

### **Remote or In-Person?**

But even when there is a return to the office, counsel will need to consider the strategic impact of taking a virtual deposition, if, for no other reason than to assess whether the witness warrants the time and expense of taking it in person. Indeed, there is no doubt that budgeting and case management, including scheduling orders filed with the court, will now encompass the question of how and when to deploy remote practice capabilities. Clients may become more selective about whether an in-person deposition is worth the expense, especially when it involves attorney travel, if there is a viable remote deposition-taking alternative.

### **Technology Capabilities**

As practitioners and clients are learning, taking a remote deposition has a variety of unique challenges. These include threshold connectivity and technological issues, including whether all of the participants have a computer, microphone, camera, and stable internet connection (note that the witness is likely the weakest link for technology and connection purposes).

### **Deposition Exhibits**

The most significant challenge in the remote deposition context, however, is the use of the deposition exhibit. This bears directly on which documents the lawyer uses to question the witness and how and when to use them (including whether and how to mark up any exhibit). Other challenges arising from the use of remote exhibits include how to simultaneously

present a document in real time to participants in different locations each remotely attending the deposition, how to introduce the document to the court reporter and witness, and how to have it stamped as an exhibit after it is introduced.

### ***'Reading the Room'***

Challenges in taking a virtual deposition do not stop at logistical and exhibit issues. The art of taking a deposition in person changes complexion in the remote context. For one, the ability to read the people in the room diminishes, since the camera shows only the face on a screen, often in a "Brady Bunch" style alongside other participants. Similarly, the remote deposition format may make it harder to establish a rhythm during questioning.

### ***Monitoring Opposing Counsel***

Unfortunately, taking a deposition remotely also makes it difficult, if not impossible, to monitor opposing counsel and prevent them from engaging in unethical or improper conduct. This poses a real risk to the integrity of the deposition. For example, in a remote deposition in which the defending counsel alone is physically present with the witness (not a practice recommended), the questioning attorney cannot prevent the proverbial kick under the table.

Even in the likelier scenario of the defending attorney also being physically separate from the witness, the taking attorney cannot fully police opposing counsel's ability to text or otherwise electronically communicate with the witness during questioning. The following tips and tricks address some of these issues.

## **Technology Solutions**

There are three key mechanical aspects of a deposition that require technical adaptation to operate in a remote environment—video, real-time transcription, and document exchange. The best technological solution may change depending on the deposition or other intended use (such as interviews or hearings). The unicorn in this remote universe is the platform that seamlessly integrates video, real-time transcription, and document introduction and delivery.

Various legal vendors have attempted to provide an all-in-one solution. To date, though, the available options for such a comprehensive solution fall short. As a result, the best offerings currently on the market address each requirement individually. The applications can then be run simultaneously in split-screen or through multiple computers or tablets.

### ***Video Streaming***

In many ways, the video stream is the most important technical aspect to the deposition. That is how the witness, and each participant, will virtually appear to one another. The only remote alternative to a video-streamed deposition is a telephonic one. This will likely continue to be used, but may fall out of favor as video options become increasingly robust. Counsel must determine how to manage the video stream or multiple video streams that come from each participant—deponent, opposing counsel, and client representative. They must also determine how the video will be recorded, including whether a separate videographer should be present to formally memorialize the viewing deposition.

Even less tech-savvy lawyers can take comfort here that multi-party video is relatively easy to manage, so long as all attendees have a computer or tablet, a decent connection, a camera, and a microphone. There are a number of multi-party video streaming platforms available. That being said, Zoom is fast becoming ubiquitous in this area, so much so that many vendors are not bothering to create their own video streaming technology. Instead, they are building on the Zoom platform, adding additional layers of security. Many vendors also offer active management of the video platform and on-the-fly trouble shooting, all of which can be done by the videographer taking the recording or another hired technician.

### ***Real-Time Transcription***

During in-person depositions, court reporters already have a tough enough time transcribing when a witness and counsel speak over each other, or when counsel interrupt during in-person depositions. In a remote deposition, there are new complications for the transcriber when, for example, it is not clear who is talking, when there are errant background noises, where there is confusion as to which document is being referenced, or when one party is on mute or has technical issues. These are serious challenges for even an experienced court reporter.

As a result, real-time transcription becomes much more critical, and must account for the reality that the court reporter will likely not be in the same room as the witness or other deposition participant. Testimony may be harder for the court reporter to hear, and accurately transcribe, in real time. Real-time transcription allows counsel to confirm the accuracy of



the record as it is being created, rather than waiting for the transcript to come back only to find out there were gaps or errors. To avoid these issues, it is important to make sure that the court reporter has experience taking a remote deposition or to practice with them in advance.

### **Document Handling**

Remote depositions prevent the attorney from taking a large box of documents, handing them to the witness across the table for the court reporter to mark them as exhibits as would be done in an in-person deposition. Historically, counsel taking a remote deposition were often required by practice, if not by rule, to present their deposition exhibits to the court reporter and opposing counsel before the deposition took place in order to ensure each party had accurate copies. This had obvious strategic downside for taking counsel, who was generally required to “tip their hand” by providing opposing counsel with their exhibits, and the order, in advance.

Although hard-copy documents can be shipped ahead of time, this also requires that counsel prepare significantly in advance and makes it difficult to make any additions or changes close in time to the deposition or on-the-fly. That is true even if the disclosure risk is mitigated by sealing the exhibits until they are introduced during the deposition. Sending hard copies also precludes the use of video or native files.

Advances in remote technology have improved the way in which exhibits can be used in remote depositions. Now, counsel are not required to send exhibits in advance. Rather, counsel in remote depositions can distribute and introduce exhibits in real-time. The best method depends on the circumstances of the case. Zoom and other video-streaming platforms have a share-screen function, which allows users to share their screen, a portion of the screen, or a specific program. In small cases, where there are fewer documents or where the exhibit is a video or other native file, this is a good method to show the document. However, this method does not address the issue of delivery and may not be good for voluminous depositions or more complex cases.

Documents may also be delivered via email. Email is not ideal because it is cumbersome and hard to track, requiring multiple emails and limiting the size of the file that can be sent. Zoom and other platforms generally offer a function that allows documents to be sent directly to all participants. The court-reporter would then stamp and distribute a set of the official exhibits after the deposition. Here, too, however, the downside is that it can become difficult to track these documents, there is no running log, and control over the documents is lost once the documents are sent to the participants.

Perhaps the best solution for cases with voluminous documents or a number of depositions is to use a platform specifically designed for this precise purpose. There are several on the market, but the idea is that this platform runs alongside the video and real-time feed. Taking counsel, opposing counsel, and the witness will each have a separate login.

Taking counsel can drag and drop their potential exhibits into a case library. During the deposition, counsel can mark-up, stamp, and introduce documents that have been loaded to the platform in real-time. These documents then feed into separate libraries containing only the stamped and introduced exhibits, which opposing counsel and the witness can independently access and review. These platforms allow quick and easy on-the-fly document loading (even during the deposition).

The applications also allow access to any document introduced in the case at another deposition if the platform was previously used. This becomes a significant advantage over traditional depositions, particularly in cases using continuous exhibit numbering in multiple depositions over many months or years. A second chair co-counsel, or perhaps a paralegal or technician, can provide support during the deposition and, through the platform, run the exhibit function. In this way, the exhibit applications best simulate the distribution and introduction of documents during in-person depositions.

The downsides of these platforms—which are cloud-based systems—include a limitation on the type of files that can be distributed (no native files) and file size (only short videos). In such cases, screen-share and file delivery through the video platform can be used. Cost considerations also come into play. The performance concerning exhibit use may be better with the help of a junior associate, with whom the taking attorney can practice ahead of time and develop a joint familiarity with the key documents. But exhibit technicians generally charge out at materially less per hour than a junior associate performing some of the same preparation work.

## Best Practices

There are many moving parts in the remote deposition. It is important to become familiar with each aspect, your preferred technological solutions, and how to use them. Plan for things to go wrong and how to respond in each instance. By identifying potential issues ahead of time, many can be avoided or, if not avoided, contingency plans can be set up in the event there is a platform failure. Preparation, testing, and “live-fire” practice is key. In addition, there are a number of best practices that can facilitate a successful virtual deposition.

- Confirm that the witness and opposing counsel have the necessary devices. Test internet access, audio, and video feeds in advance, ideally by at least two days before the deposition. The court-reporting service may do this for you as part of their offerings. If possible, arrange for the person acting as the court reporter to be the same person involved in the advance testing.
- Know the capabilities and limitations of your virtual deposition platforms and how to use them.
- Consider conducting a mock virtual deposition using the technology that will be used at the actual remote deposition, with colleagues acting as the remote witness, court reporter, and opposing counsel.
- Review local law on introduction of deposition testimony, transcripts, and videos, including requirements for certified records and authentication. In general, and depending on state/local rule, a transcript from a remote deposition should be indistinguishable from a transcript from an in-person deposition for purposes of how it can be used in the case.
- Obtain stipulations from opposing counsel and the witness that the remote video deposition, along with remote swearing in of the witness, is acceptable, and confirm the time and date.
- Consider a broader stipulation and agreement concerning objections, conduct during the deposition, and the authentication and admissibility of the deposition transcript and recording.
- Confirm the non-waiver of privilege and work product arising from any inadvertent sharing of privileged or work product documents, or communications in a virtual break-out room.
- Confirm non-retention of any confidential documents by those not subject to a protective order.
- Confirm that anyone appearing in the deposition can potentially be recorded by audio or video.
- Determine where all of the attendees will be located, and share contact information for each location.
- Schedule the deposition with the vendor, specifying in the notice that the deposition will be remote and providing the email address for each attendee.
- Adjust questioning style for the virtual environment.
- Modify deposition techniques, considering factors like uncomfortable silences and eye contact.
- Speak slowly and clearly and confirm an accurate record.
- Be very descriptive and identify documents specifically and by Bates number for the record.
- State any peculiarities on the record, for example, if the witness keeps looking down.
- Remember that the virtual deposition is on the record and consider dress and virtual background.
- Consider opportunities for junior attorneys to observe for training purposes.

Like any new skill, mastering the remote deposition and the related tools and applications takes time, research, and practice. Yet, it is incumbent upon senior and junior counsel alike to become proficient with remote technologies, because clients, especially sophisticated ones, will expect it. And based on discovery rule amendments and court reopening orders that are already being issued, courts will expect it too. Even after the pandemic ends, a broader use of remote practice will be the new normal.

# Key Counsel Agreements for Remote Depositions

Contributed by *Shawn J. Rabin, Susman Godfrey, and Canby B. Wood, Magna Legal Services*

The legal industry has been on a steep learning curve adapting to the new normal of remote depositions. Attorneys have been managing new hurdles presented in the online environment, such as preparing witnesses, handling hearings, and managing large documents remotely, while also benefiting from unexpected positives in this new world—travel savings and an efficient war-room setup in home offices.

But, to make this new reality work, it is even more important to reach agreements with counsel on how to handle discovery remotely. Here are a few examples:

## Agree Court Reporter Can Be Remote

For remote depositions, parties should agree and stipulate to the court reporter being remote, and to the oath being administered remotely. Some parties will further stipulate that the court reporter is not required to be licensed in the state where the witness is located, thus allowing the parties to use the same CSR-licensed court reporter to transcribe depositions for the entire case, regardless of where the witness is physically sitting during the deposition.

## Agree How Exhibits Will Be Managed

For depositions with many exhibits, parties can agree to use one exhibit management system like AgileLaw, or a file sharing platform, like Egnyte or eDepoze. And, when exhibits are very complex—for example, huge spreadsheets—parties may decide to hire a trial technician to manage the exhibits during the deposition through a trial presentation platform like Trial Director or OnCue.

## Agree How Exhibits Will Be Shared

If not using an exhibit management or file sharing platform, agree on the process for sharing exhibits beyond just a shared screen. For example, parties sometimes agree to mail hard copies of the exhibits to counsel and the witness in a sealed envelope before the start of the deposition. Or, parties could agree to email or share electronic versions of the exhibits through the Zoom chat to all parties and the witness either before or as soon as the exhibit is introduced at the deposition. Depending on the content of the documents, and the nature of the relationship between parties, sending exhibits in advance may not be a viable option for all depositions.

## Agree to Number the Exhibits Sequentially

This will allow easier access for all counsel likely to have copies of relevant documents already in their files and will make it easier when preparing an exhibit list for trial.

## Agree on Ethical Issues

The parties can agree that the witness will state under oath that no one will be in the room with the witness during the deposition, and that the witness will not communicate with anyone about the case or deposition during the course of the deposition testimony. Parties might also agree that, during breaks, the witness and counsel can speak consistent with court rules and ethical obligations, but there will be no off-the-record communication between the witness and counsel during the deposition.

## Agree How Objections Will Be Handled

For multi-party depositions, parties might agree that the objection of one party is considered an objection by all parties, which minimizes disruptions. Parties can even agree to reserve all objections until trial, or before, with the exception of objections based on privilege, or instructions to a witness not to answer. The latter approach is used to avoid disruptions caused by parties lodging form objections.

## Agree About Method of Video Recording

Agree on whether the parties need a certified legal videographer to videotape the remote depositions. Unlike in-person depositions, parties do not need to hire certified legal videographers to videotape remote depositions. All that is needed is a person to push “Record” on Zoom, and that recording should be provided to parties free of charge.

However, it is still questionable whether that video is admissible in court. To ensure that the video is admissible in court, parties may either elect to use a certified legal videographer to record the deposition, or they may agree to self-record the deposition, stipulating that no party will object to the use of that video in court. If the parties intend to sync the video to the transcript, they should consider using a certified legal videographer who can go on and off the record and make sure the transcript lines up with the video post-production, thus allowing for the sync.

## Agree About Scope of Video Recording

The parties should agree on who and what is actually recorded if the deposition is recorded. Parties usually agree to continuously record only the witness, or the witness and the exhibits as a picture-in-picture, with no other attorneys or participants videoed on the platform. If the witness is in the room with their own counsel, and only the taking attorney is remote, the parties might also consider recording a wide angle of the room for the remote parties to view the room during the deposition.

## Agree on Technical Capabilities of All Parties

Counsel might agree that all witnesses and parties shall make reasonable efforts to have the necessary technology and bandwidth to appear for remote depositions. If a witness does not have all the devices or bandwidth to appear on a camera for the deposition, that must be communicated to all counsel, so that accommodations—e.g., shipment of equipment, setup of a video teleconference center—can be made before the start of the deposition.

## Conclusion

Most courts have few, if any, rules or guidelines for handling depositions remotely. Stipulating to procedures like those above will make the deposition process in the new virtual world run smoothly and with fewer conflicts during and after the depositions.

# Key Steps for Mastering Virtual Mediation

Contributed by *Bruce Edwards, JAMS*

Sheltering in place and conducting remote mediations have forced lawyers, their clients, and mediators to work outside of their comfort zones and learn new tools.

Here are some key steps for successful virtual mediations.

## Convening

The goal of the convening process is to gain the willing and meaningful participation of all stakeholders. This phase is even more important for virtual mediations. Consider doing the following:

**Write a pre-mediation letter.** The neutral may write a pre-mediation letter to all participants, explaining in great detail the methodology and technology that will be used in a virtual mediation.

**Hold a pre-mediation conference call.** If the parties have questions about virtual mediation, a pre-mediation conference call is the best vehicle to provide information and reduce anxiety. It also presents an opportunity to describe the experiences of others regarding what has worked and what hasn't.

**Troubleshoot potential problems.** Technology is only as good as its weakest link, so testing and making adjustments are important.

**Do a test run.** Having a practice session to become familiar with the technology is key to a successful virtual mediation. The parties may also want to have a preliminary joint session with experts and clients to present the case and ask each other questions, followed days later by a more traditional negotiation.

## Opening

The goal of the opening session is to ensure an environment of safety and hope in the virtual world.

**Meet and greet.** Participants should plan to be ready about 15 minutes before the scheduled start of the mediation. This allows for everyone to be greeted and placed into appropriate breakout rooms, if necessary. Importantly, if there are any technical glitches, they can be fixed beforehand. It is essential for the mediator to greet participants upon their arrival. The presence of the mediator will provide a measure of comfort and a sense that parties are in control of the technology and the mediation process.

**Plan for technical issues.** It is important to explain how technical issues will be handled. All parties should provide the mediator with their cell phone numbers. If there is a problem with the virtual platform that cannot immediately be fixed, the parties may wish to continue via conference call.

## Communication

The goal of communication is to encourage expression and understanding. In the virtual world, the two most significant issues that need to be addressed are confidentiality and establishing a meaningful connection.

**Ensure confidentiality.** Here are some steps that can be taken to protect security and privacy:

- Inform participants not to share the video invitation and its unique meeting code with anyone.
- Provide participants with a separate passcode for an added layer of security.
- Explain to participants that only the mediator and host can control the "record meeting" feature. Unless otherwise agreed to by all parties, this feature will remain disabled.
- In the joint session, clearly identify all participants.

- Educate participants on how to use the “screen share” function so that they share documents with their intended audience only. Consider disabling the function initially to ensure that the parties understand a screenshot will be seen by all.
- Ensure that the participants understand that unmuted conversations can be heard by everyone.

**Create a connection.** Obviously one of the great tradeoffs, or limitations, of virtual mediation is connecting with people in a virtual room. Especially in mediation, the majority of communication between individuals is expressed not with words, but through body language and other cues. To help address this limitation, everyone participating in a virtual mediation should appear via video.

Unfortunately, not everyone has a computer with a built-in camera, so they will need to participate by audio connection. For a variety of reasons, extra care needs to be directed to those participants to ensure they remain engaged, including using direct questions or specific tasks to gauge their level of involvement.

## Negotiation

The goal of the negotiation step is to explore the art of the possible. The following can be helpful:

**Use private breakout rooms.** Once the group session has exhausted its potential or reached stalemate, the parties can be easily returned to their private breakout rooms. This process is expedited when parties have been preassigned to breakout rooms at the beginning of the Zoom conference. Once separated, it's easy for the mediator to toggle back and forth between the parties to engage in private negotiations. Mediators can also use a mix of other technologies such as phone calls and emails to assist this key function.

**Confidentiality and security.** Early concerns about security breaches and confidentiality have largely been addressed by the service providers. That said, one of the limitations of many platforms is that they lack a doorbell feature to announce the arrival of the mediator in the breakout rooms which creates the risk of interrupting private conversations. Using text or email messaging to communicate with those in breakout conversations about when the mediator is invited back can avoid potentially awkward moments.

**Make effective use of downtime.** Because many Zoom participants may be working from home, or surrounded by distractions, it's important to keep them focused and engaged when the mediator is out of their virtual presence. The mediator should consider leaving the parties with specific questions to discuss or tasks to complete that will compel their ongoing attention.

**Patience and persistence.** The key to any effective negotiation is to persevere through challenging moments and to maintain patience in the presence of those who would abandon the process. This is especially important in a virtual environment where parties are just a click away from terminating their commitment. Don't overlook the potential for multiple shorter sessions rather than the more traditional focus on concluding negotiations in one sitting. This will provide parties a chance to reflect on new information and hopefully adjust their settlement positions

## Closing

The goal of the closing step is to reach a binding, agreed-upon resolution that reflects a complete understanding between the parties. In the virtual world, this raises the issues of timely and appropriate document sharing and obtaining signatures in real time.

**Agree on how the settlement will be documented.** It's important to preview how the settlement agreement will be reduced to writing with the parties in advance of the mediation. This sets the tone for settlement and ensures that the parties' “final dance” with technology will be a successful one.

**Use virtual signatures.** Reducing an agreement to writing as a prerequisite to enforceability in the virtual world might require the parties to download software that allows for virtual signatures, such as DocuSign.

While the world awaits the “all clear” signal to return to business as usual, however that will be defined, mediation is likely here to stay. There have always been instances in which parties were unable to meet in person.

While in-person mediation will likely resume at some point, the benefits of virtual mediation are too numerous to ignore.

# Tips for Conducting a Virtual Arbitration Hearing

Contributed by *Matthew Jacober, Alicia Goedde, and Brooke Wheelwright, Lathrop GPM*

In spring 2020, the legal system faced the unprecedented task of operating entirely remotely following the nationwide shutdown caused by the coronavirus pandemic. For months now, in-person court hearings have been suspended, and judges and lawyers, as well as their staff members, have been working from inside their homes versus a courthouse or office building. Still, members of the legal system have done their part to keep the wheels of justice spinning.

This article provides tips for conducting a virtual arbitration hearing, based on the experience of attorneys who litigated a 10-count arbitration demand arising out of a \$2.3 million stock purchase agreement in June 2020. The only live task in this expedited matter, filed in late February with the American Arbitration Association, was the initial interview of potential expert witnesses. The sophisticated financials at issue made expert witnesses necessary on both sides.

The defense team prepared for and conducted the entire hearing without ever meeting with each other, the client, the witnesses, opposing counsel, or the arbitrator in person. Witnesses were prepared remotely. Expert reports were developed via Zoom through screen sharing. Document production, production review, exhibit preparation, and outline drafting were all done without printing a single piece of paper.

The entirety of the preparation process and hearing was conducted from inside each of the team member's respective homes, via Zoom. This seemed impossible a mere six months ago. Indeed, when the realities of the shelter in place orders set in, the initial reaction was to seek an indefinite continuance.

The task of trying this case virtually taught the team many lessons worth sharing. Although the team was prepared for a number of the challenges presented, some of these lessons were learned the hard way. Here are the top takeaways.

## Be Prepared

The logistical challenges of a virtual arbitration require you to be more prepared than you think you need to be. Assemble a team that can work well together and can serve in multiple roles—everyone needs to be prepared to address technology issues, at a minimum. There are multiple challenges that arise simply as a result of attempting to effectively communicate over a computer. The following tips will help you face such challenges:

- Be prepared for your cross examinations to be more challenging. It may take longer to achieve the desired answer from a witness in a virtual form. Be prepared to be flexible.
- Connectivity issues are bound to arise. Copy all exhibits, your outlines, your notes, and other documents to be used during the hearing onto a laptop or portable media device. This will ensure network-connection issues do not cause any delays during the hearing.
- Plan an alternative platform to chat with your team during the hearing. Here, the arbitration was done via Zoom, so the team utilized breakout rooms to talk with the client on breaks, and “passed notes” to team members through Microsoft Teams. This actually proved to be far more effective than the standard passing of notes during an in-person hearing. Note: Ensure all team members are cognizant to not reveal the alternative communication platform to the arbitrator or opposing counsel (such as via a screen-sharing mishap).
- Spend time before the hearing with any vendors, ensuring they have reached the necessary level of technological mastery needed to smoothly do their part in your case. Remember they are there to help you, so make sure they can do so.
- Coordinate alternative forms of communication with the client.



## Be Informed

Proceeding virtually requires you to reach beyond the comfort zone of the courtroom you undoubtedly grew accustomed to throughout your career. Being informed of the capabilities and limitations of the technology involved will go a long way to a smooth virtual arbitration. The following tips are key to creating your new comfort zone:

- Understand the technology forum and do not be afraid of it.
- Educate the client on what to expect, but do not be afraid to admit, “This is new to me, too.”
- Make sure all team members understand how to use the virtual platform. More than one team member should be able to share documents on the screen. Indeed, it's much better to have a lawyer other than the lawyer conducting the questioning move through documents on a screen share. Your team's understanding of the platform and its tools may benefit the proceedings for all parties involved, including the Arbitrator. For instance, an understanding of the use of “break out” rooms can enable seamless “bench conferences” solely with counsel and the Arbitrator as well as facilitating conferences between counsel without the ears of the client or the Arbitrator. At times, the clients were pushed into separate break rooms so the attorneys could conduct such conferences.
- Make sure your client is comfortable with technology. Learn how your client will be connecting, and be prepared to help them through any issues during the hearing.
- Take advantage of training sessions offered by host—it will likely benefit both the lawyer and the client.
- Test video, lighting, and audio in advance of the hearing. This may include using ear phones or calling in via phone.
- Remember the virtual setting is new to all parties. To ensure the new setting has not caused the witnesses (or their counsel) to forget or disregard the rules governing the proceedings, incorporate into the introduction and conclusion of examinations a stipulation from the witness that they were not communicating with anyone electronically during their testimony or using unidentified documents to assist in their testimony.

## Be Organized

Organization is critical to any arbitration preparation, but it's even more critical in the virtual setting. Being organized throughout—from the preliminary hearing until the final hearing—will minimize the logistical issues associated with remote exchanges between the parties. The following organizational techniques will be useful:

- Coordinate with opposing counsel for the entry of an agreed to scheduling order providing firm and early due dates (e.g., exhibit exchange, witness lists, and deposition designations). Early deadlines are essential given the logistical difficulties of being presented with a new exhibit or witness virtually. We crafted a scheduling order which included agreements to create a streamlined process for introduction of evidence—this avoided the need to authenticate and introduce exhibits at the hearing unless an exhibit was explicitly objected to in advance—and time limitations for each party to put forth its case in chief.
- Utilize joint stipulations as much as possible—“telling the story” and providing details is more difficult in a virtual forum. The less you have to present, the better.
- Coordinate exhibit numbers and exhibit books with opposing counsel. This is more important in a virtual hearing than when in person. One congruent set of documents for the arbitrator and witnesses will make the entire process smoother and less stressful.
- Ask witnesses and the arbitrator, in advance of the hearing, whether they prefer the exhibits in electronic and paper format. Everyone has a different preference.
- Provide witnesses and the arbitrator the exhibits well in advance of the hearing. Because this task may take coordination with office staff and sending items via mail, it must be done days before the hearing date to allow time for follow-up documents.



## Be Comfortable

Much like your comfort level in a courtroom or before an arbitrator in-person, your comfort level in the virtual setting will most certainly impact the case you present. The more comfortable you are, the cleaner your case will appear. The following are tips helpful in maximizing your comfort level:

- Be open to the idea the virtual form may, in fact, be better in some ways.
- A definite advantage is possible with a virtual examinations—the witnesses can be made full screen and facial cues, while slightly delayed, are more pronounced and easier to read. However, remember your facial expressions are also easily observable by all participants. Remind your client of this, too.
- Use the “hide self view” option on your virtual form—seeing yourself talk is unnatural and can be quite distracting. Similarly, when questioning a witness, it may be helpful to pin the video of the witness so you can focus only on the witness. Advise witnesses of these options as well.
- Do not hesitate to address audio/video issues. This includes asking others to reconnect, if needed.
- Embrace the fact that all it takes to look professional virtually is wear suitable business attire from the waist up, but, if doing so, always remember to turn your video off before standing up.
- Properly equip everyone on your team. As a firm, we allowed everyone to safely return to our offices to take technology home, including docking stations and multiple wide screen monitors thereby replicating our work setups. This allowed all team members to have multiple screens, avoiding having to run separate laptops during the hearing.

# How to Prepare for a Remote Trial

Contributed by [Gregory Hauck](#), Troutman Pepper

On Aug. 6, 2020, the U.S. District Court for the Middle District of North Carolina completed its first-ever remote trial. The court had conducted the five-day civil bench trial by using its video-conferencing technology. No one appeared in the courtroom other than the judge and the court reporter.

The judge held the trial with witnesses and lawyers participating from remote locations, primarily to avoid having individuals physically present together in a courtroom during the ongoing coronavirus pandemic. Needless to say, the remote trial proved to be a learning experience for everyone involved.

As remote trials become more commonplace, practitioners will need to consider novel issues that aren't normally associated with traditional trials. In my case, the judge compelled the parties to think about potential problems and propose ways of addressing those problems by requiring them to submit a proposed set of remote trial procedures about six weeks before the start of the trial. After holding a conference to discuss the parties' proposals, the judge entered an order—"Protocols for Remote Trial Proceedings"—that set forth various agreed-upon and court-imposed procedures. These procedures helped make the trial run smoothly and reduced the number of surprises.

As lead trial counsel for the plaintiff, I had a front row seat watching this historic trial unfold. For lawyers currently facing the possibility of their own remote trial, I've identified several issues they should consider.

## Can the Courtroom Safely and Fairly Accommodate an In-Person Trial?

When deciding whether to hold an in-person trial during the pandemic, the primary factors the judge considered were whether an in-person trial would jeopardize the health and welfare of those involved, and whether an in-person trial would be fair to the litigants. Despite the fact that her courtroom was quite large, the judge was unsure whether she would be able to adequately protect the safety of those involved. The judge acknowledged that she may be able to manage the risk by imposing social distancing requirements. Yet she expressed concern that the additional traffic by lawyers, clients, witnesses, and court personnel in and out of the courtroom would not only increase risk to those individuals, but also to their families and the larger community. Ultimately, the judge determined that going forward with an in-person trial at the scheduled time would be problematic from a public health standpoint.

The judge also expressed concern about the possible unfairness that could result from an in-person trial. The defendant's client representatives and witnesses were located in Canada. Travel restrictions associated with the pandemic prevented them from being able to be present for a trial in North Carolina without self-quarantining for a lengthy period of time and incurring other extreme hardships. The judge determined that the trial would be unfair if the plaintiff and its witnesses were able to be physically present, but the defendant and its witness were not.

Based upon these safety and fairness considerations, the judge decided to conduct the trial by using its videoconferencing technology. In reaching this decision, the judge relied upon [Rule 43\(a\) of the Federal Rules of Civil Procedure](#), which allows courts to receive testimony by contemporaneous transmission from different locations for good cause in compelling circumstances so long as appropriate safeguards are in place.

By no means does the judge's decision in this case foreclose the possibility of in-person trials in other cases. Litigants who strongly desire in-person trials before the end of the pandemic should be prepared to offer proposed procedures that the court can implement to ensure the safety of the individuals in the courtroom without giving one side an unfair advantage. Of course, litigants will have an easier time formulating such procedures in bench trials that do not require additional protections for jurors.

## Who Can Be Physically Present in the Courtroom?

Although Rule 43(a) allows witnesses to testify from locations outside of the courthouse, the rule is silent about where the lawyers, clients, and other involved individuals should be located. In my case, the judge and the court reporter were the only individuals present in the courtroom throughout the trial. While the judge initially ruled that she would allow each party to have one of its lawyers in the courtroom, she later reversed course and barred anyone else from being present.

The judge made this decision based upon the limitations of the videoconferencing technology, rather than on safety concerns or fairness principles.

For videoconferencing, the judge used Zoom, which requires each participant to be in front of a computer screen so they can see and hear others and be seen and heard by others. The judge was concerned about feedback and other technological issues that could arise with two attorneys, the judge, and the court reporter simultaneously using their own computers to videoconference from a single courtroom.

In retrospect, the trial may have been more difficult to manage if the judge had allowed each side to have a lawyer in the courtroom. During trial, there are invariably instances when lawyers consult with their clients and members of their legal team at counsel's table by speaking quietly to them so as not to disrupt witness testimony. If the lead trial counsels had been the only party representatives in the courtroom, they would have been forced to communicate by phone, text message, or some other method less efficient than real-time oral conversations and/or unsuited for whisper-like conversations.

Parties facing remote trials in other lawsuits should consider whether having a lawyer or other person in the courtroom for at least some portion of the trial offers an advantage. Such a consideration will require understanding the capabilities and limitations of the courtroom technology. Aspects of an otherwise remote trial that may be well-served by in-person participation are the opening statements and closing arguments because they typically require only a small number of individuals in the courtroom and often try to convey emotions that cannot be fully appreciated through a videoconference.

## Where Should Lawyers and Witnesses Be Located?

Here, the judge required all attorneys, parties, and witnesses to participate in the trial remotely. Plaintiff's counsel was in a conference room in Pennsylvania. Defense counsel was at their law firm in North Carolina. Witnesses and party representatives were in their respective offices in North Carolina, Tennessee, and Canada. Almost everyone who participated in the trial did so from their workplace, rather than their homes, to reduce the risk of internet connectivity issues.

Perhaps the biggest advantage of holding the trial remotely was the convenience to the witnesses. If the trial had been in-person, most of the witnesses would have had to fly to North Carolina, stay overnight in a hotel, and sit in the courthouse hallway until they were called to the stand. With the remote trial, most witnesses adhered to their normal routine and were at work on the day they testified. When it was time for witnesses to testify, counsel simply called them and directed them to a workplace conference room that had been pre-equipped with a computer so they could join the trial through the computer's Zoom videoconference feature.

While the remote trial offered a significant amount of flexibility concerning the location of participants, the judge nonetheless imposed several restrictions. For example, the judge required everyone to appear on their own computer screen, including lawyers from the same firm who were physically present in the same office. This requirement allowed the judge to have a direct view of each participant's face.

The judge also precluded witnesses and client representatives from being physically present in counsel's office. There were two reasons for this requirement. First, the judge was concerned about the feedback and other technological issues that could arise when two people in the same room were separately connected to the videoconference. Although the judge allowed lawyers to be together in the same room, each one kept their lines muted except for the person who was speaking. Second, the defendant's client representative and witnesses were located in Canada and the then-existing travel restrictions made it almost impossible for them to be physically present in the same room as their counsel. The judge accepted defendant's argument that it would face an unfair disadvantage if it was unable to be present with its counsel, but plaintiff was able to present with its counsel.

During trial preparations, attorneys should plan out how they are going to communicate with their clients during the trial. A court order that prevents attorneys from being in the same location as their clients creates a challenge for attorneys to have the kind of quick exchanges that are needed to help rebut unexpected witness testimony and shape trial strategy.

## Who Is Permitted to Watch a Remote Trial?

As with an in-person trial, a remote trial can be viewed by almost anyone. In my case, the courtroom remained open. It had video monitors facing the gallery so that members of the public could watch. Prior to the trial, the court also emailed each of the attorneys a link that would allow them to join the videoconference on each day of the trial. The attorneys were permitted to forward the link to their clients and anyone else.

Although the trial was open to the general public, the judge sequestered certain witnesses. Under [Rule 615 of the Federal Rules of Evidence](#), a court has the power to exclude witnesses from trial so they cannot hear other witness' testimony. The purpose of the rule is to discourage later witnesses from fabricating testimony based upon testimony heard from earlier witnesses. The judge policed her sequestration order by requiring each party to provide the court with a list of the individuals who were expected to join the videoconference trial and requesting any unexpected participants to identify themselves when they joined.

During an in-person trial, enforcing a sequestration order is usually simple because a lawyer can easily scan the courtroom and quickly determine whether a witness who should not be there is present. By contrast, enforcing a sequestration order in a remote trial is more difficult because a lawyer may not know if a witness is listening in the background from another participant's computer.

If lawyers in a remote trial are concerned about a witness violating a sequestration order, they should ask the judge to adopt additional procedures aimed at making sure the sequestered witness complies. One possible procedure would be to require sequestered witnesses to separately contact the court and confirm they are not physically present with anyone else on the videoconference while the key witnesses are testifying.

## How Can Witnesses Be Questioned About Documents?

Here, the judge required the parties to provide each witness with notebooks containing the exhibits, demonstratives, and deposition transcripts in advance of their trial testimony. Although witnesses could be shown, and questioned about, documents that the lawyers displayed on the videoconference, the judge wanted each witness to possess hard copies in the event the witness wanted to review other parts of the document or had difficulty viewing the document on their monitor.

The judge also prohibited the parties from providing notebooks that contained any notes, highlighting, post-its, or other changes that did not appear in the original versions. During the trial, attorneys were permitted to question witnesses about their surroundings to ensure they were complying with the judge's order. The judge wanted the parties, attorneys, and witnesses to comport themselves in a manner consistent with a trial taking place in person and within the courtroom.

Questioning witnesses about documents remotely was a relatively straightforward process that was almost no different than what would have happened if the trial had been in-person. When a lawyer showed a document to a witness, the lawyer used part of the computer screen to display the document and reserved the other part of the screen to display the faces of the witness, the judge, and other participants. If any witnesses would have had trouble viewing the document, they had hard copies by their side as a backup.

## How Can Attorneys Make Objections?

The judge also had procedures in place for handling objections. During the trial, the judge's clerk operated the videoconference and kept all of the participants muted except for the judge, the witness, the lawyer examining the witness, and opposing counsel. When the lawyers wanted to make an objection, they simply voiced it just as they would have done during an in-person trial.

The judge also retained the ability to create virtual breakout rooms that allowed for private communications. At one point, the judge sustained an objection to one of defense counsel's questions on the ground that it sought information protected by the attorney-client privilege, but the judge wanted to preserve the answer.

Using the videoconference platform, the judge's clerk transferred the witness, the court reporter and plaintiff's counsel into a virtual breakout room, where the court reporter transcribed the witness' answer outside the presence of the judge, defense counsel, and everyone else who was participating in the videoconference. By doing so, the judge created a sealed record of the answer that can be reviewed on appeal if necessary.

## How Can Lawyers Make a Remote Trial Run Efficiently?

As with almost anything in life, practice makes perfect. About one week before the trial, the judge held a pre-trial conference for the lawyers and their clients to practice using the videoconference platform. The lawyers experimented with displaying documents, questioning individuals, and becoming familiar with how to operate the technology. The conference enabled the parties to be well-prepared when the trial began.

Any lawyer conducting a remote trial should have an IT person, or someone knowledgeable about the videoconferencing platform, on standby and ready to assist. In my case, the judge had a courthouse IT employee available throughout the trial. Whenever a new witness connected to the videoconference, the courthouse technician ensured the video and sound quality were sufficient before they started testifying. Each party's lawyer also had their own IT person on hand to address technical issues on their end. Regardless of how well a lawyer is prepared, a remote trial cannot happen without a well-functioning videoconference.

# Virtual Trials and War Room Design

Contributed by *Kingdar Prussien, Samantha Lovin, and Allison Markowitz, Milbank LLP*

There are no treatises or handbooks on how to conduct a trial during a global pandemic, but health and safety concerns have to be your primary concern. There is still a lot we do not know about Covid-19, so it is important to focus on the basic principles we do know—stay socially distanced from the people you need to be around, and critically assess who actually needs to be in the room where it happens. In complex trials with a large team of lawyers, paralegals, hot seat operators and other support staff, setting up a trial “war room” during a pandemic is a significant undertaking.

## Setting Up the War Room

With health and safety in mind, the first step to setting up a successful war room is meticulous planning. Contacting and involving key members of building/office operations early in the process will benefit you in the long-run. It is unfortunately fairly easy to take certain things for granted, but everything good that happens in the world happens because of someone's efforts—someone needs to turn on the lights, someone needs to turn on appropriate air ventilation, someone needs to order food, someone needs to connect monitors to printers to keyboards, the list goes on. If you take care of these details early on in the process, you will luckily reach days where all you need to worry about is putting on a compelling case.

The optimal war room is designed in a way that streamlines communication while allowing members to focus on their specific assignments. Setting up tables and workstations around the perimeter of a large room, facing inwards, allows everyone to look up and see everyone else when necessary, but also gives people the ability to focus on their own screens.

Almost as important as the war room itself is its relation to everything else. The more everything is located in one place, the less interaction the team has with others outside of the war room. In effect, the war room becomes almost like an office version of the “bubble” similar to those created by professional sports teams. The ideal war room will be close to other rooms with other team members, the bathrooms, the printers, food, and, of course, the elevators. So, if in the office, the war room may not be on the floor the senior partner usually sits on; it may be on the conference room floor where everything intersects.

Masks and personal hand sanitizers should be provided at every station in the war room. Obviously wearing masks and washing your hands is more important as ever if a team of people are going to be in the same room for every day of trial.

Lastly, unlike a traditional trial war room, a virtual trial war room is where the lawyers actually participate in the trial. That means, at any given time, the trial could be in session and having the distractions of people coming in and out of the war room is a serious concern. Therefore, it is important to label all entrances to the war room with signs that alert people that a trial may be in session.

## War Room Conveniences

Convenience is the name of the game when it comes to the war room. When not constrained by the limitations of the counsel table in a courtroom, why not take full advantage?

Ideally, the war room will have several large projection screens on which you can project the virtual trial proceedings. While attorneys can pull up the video feed on their individual computers, the ability to also have the proceedings on the large screens is invaluable during witness examinations, particularly when reviewing documents introduced at trial.

Similar to a traditional trial, in a virtual trial each party is able to use call-outs and highlights to focus the attention of the witness and the court to particular language within the documents. Having documents projected onto larger screens has the obvious advantage of being much easier to read.

Another perk of using large projection screens is that, while the examining attorney questions the witness, another team member can assist the hot seat operator (the third-party controlling document and video projection, who should physically be in the war room) by pointing to the sections of the documents that need to be highlighted. This practice provides clear guidance to the witness and the court and helps ensure minimal interruptions in the flow of examinations.

As mentioned above, it is best practice for the attorneys in the war room to have their own workstations throughout the trial. In addition to limiting the number of people touching the same equipment, this allows the attorneys to customize their workstations to accommodate varying preferences and needs.

The lead attorneys who address the court and examine the witnesses may wish to have a single laptop with the necessary video and audio capabilities, as this allows for fluid transition from one on-screen presence to another. All notifications should be disabled to eliminate distractions from the virtual courtroom. And, just like any other trial, the attorneys should still have printed copies of their outlines, transcripts, and key documents at their fingertips. This arrangement allows the examining attorneys to somewhat recreate a traditional trial setting.

Meanwhile, team members who are not video participants in the trial should take the opposite approach—the more computer screens, the better. For example, a workstation with two desktop monitors and a laptop allows for significant multitasking; one screen can be dedicated to the real-time reporting feed, the second to monitoring communications from other team members, and the third to research.

## **Audio and Visual Considerations**

### ***One Person on Camera at a Time***

By this point, you have likely been on a Zoom videoconference that resembled the Brady Bunch opening title sequence—full of talking heads and no one knowing where to look. Parties and the court want to avoid this at trial. Thus, unlike in a courtroom where all team members are present and visible at all times, in a virtual trial the court will likely order that only one attorney from each party be on camera at a time. This results in, at most, visibility of only a handful of participants in the virtual courtroom—the judge, the witness, and the attorneys for the two (or more) parties.

The Zoom platform (or similar video platform) allows for smooth handoffs from one attorney to another, as the exiting attorney can simply stop their video feed and go on mute. This is the best approach to a virtual trial, as it both limits distractions and allows others to engage in a variety of tasks behind the scenes.

### ***Limit Distractions***

Another recommendation for a successful virtual trial is to utilize a virtual background. It serves the practical purpose of hiding the mountains of binders and boxes that will inevitably be in the war room. But, more importantly, it can be used to provide visual references for the court. Consider creating virtual backgrounds that include the name of your client. That way, even when one attorney cedes the virtual podium to another, it is always apparent to the other participants in the virtual courtroom which attorney represents which party.

Noise-canceling headphones are also a must-have. With everyone else in the war room wearing headphones, the examining attorney can present the case normally without their computer's microphone picking up on the feedback from six other computers also broadcasting the same virtual proceeding. Meanwhile, the other team members in the war room are able to comfortably listen to the proceedings through headphones, negating the need to rely on the speakers of the examining attorney's computer being loud enough to project throughout the war room.

### ***Multi-Tasking***

Perhaps the most significant advantage of a virtual trial is the flexibility it allows the trial team. Because likely only one member of the team will be visible to the court at any given time, the rest of the team can engage in a number of other activities simultaneously. Contrast this with the traditional trial, where the attorneys sit impassively in the courtroom during that day's proceedings, and then spend their nights in a flurry of research, drafting, and continued preparations for future stages of trial.

Depending on the size of the case, one to two team members should be dedicated to supporting the examining attorney. Among other things, these team members should work with the hot seat operator to ensure that the proper documents, call-outs, and highlights are presented on the screen to the witness, while also fielding in-the-moment requests to find a certain document or fact-check testimony that the witness just gave. Another team member might be dedicated to keeping track of exhibits introduced and whether the documents are moved into evidence.

At various points throughout a trial (in-person or virtual), the parties will make various objections on which the court then requests briefing. In a virtual trial war room, when this occurs, trial members can immediately begin the necessary legal research and drafting. This ability to multi-task allows the trial to move forward without delay, as the parties are in the best position to complete the requested briefing promptly.

Again, the need for likely only one attorney to be on screen at any given time frees up other team members to conduct witness preparation for later stages of trial, which affords the ability to work around witnesses' schedules. This sort of flexibility is crucial if you are dealing with out-of-state witnesses and preparing them to testify in a virtual trial.

## Communications Inside and Outside the War Room

A hybrid approach to the war room is ideal—meaning, some members of the team will occupy the war room, some are in offices or locations nearby, and others are completely remote. Within the war room itself, attorneys can communicate with one another normally, so long as the one attorney actively participating in the virtual proceedings remembers to mute their microphone. Alternatively, note-passing and emailing are other fine options for relaying real-time feedback. Regardless of the form of communication, a well-designed war room provides for the ability to react fluidly and immediately to issues as they arise.

Attorneys in the war room necessarily need to communicate with team members who are stationed elsewhere. It is practical to have a set of attorneys located physically nearby, who can be contacted in person or through email and come in and out of the war room as needed. Similarly, it is important to have a set of essential staff members physically nearby—*i.e.*, audio/visual technology specialists and members of the firm's printing department, among others—who can quickly provide assistance to those in the war room.

There can also be a subset of attorneys and case team support who operate completely remotely. This practice works so long as those team members closely monitor communications and are ready to relay information as appropriate to the in-office team. It is recommended that attorneys that will be video participants in the virtual trial be in the war room rather than operate remotely. This eliminates potential issues such as household distractions and ambient noise. Additionally, being in the war room allows attorneys to consult their team members and make real time strategic decisions.

## Practice Points and Takeaways

Again, while nothing is certain during a global pandemic, you should keep in mind and strive for the following:

- Health and safety should always be a priority. The optimal war room setup allows for people to stay socially distanced but also be 100% engaged in the proceedings.
- A well-designed virtual courtroom facilitates offline communications among in-office team members and online communications to other team members (either physically nearby or remote), which allows for dynamic strategy calls and the flexibility to engage in a number of activities simultaneously.
- Technology is everything. The computer setup must be functional and meticulous, the internet connection stable, and have a plan for if (and when) technology fails. Strive to have your audio and visual technology specialists nearby and ready to assist. And, work closely with your hot seat operators or whomever controls how documents and video get presented in the virtual trial—they steer the ship, but you direct the course.



# Win Your Virtual Trial With Visual Persuasion

Contributed by *Juliet Huck, Academy of Persuasion*

Visual persuasion is more important now than ever before. While the nation grapples with the coronavirus pandemic, there is little room for delaying legal proceedings, and lawyers often must continue their work in a remote capacity. For trials where the jury could be listening from home, it will be particularly important to keep their attention, ensuring they understand and process each facet of your argument. However, there can be a lot of distractions at home. A key advantage of being in the courtroom is focus, so lawyers practicing virtually will have to put in some extra effort to maintain that same level of focus.

Recent experience from the [first ever virtual patent trial](#) confirms how difficult the process can be, and visual persuasion will be the main tool used to retain focus and lead jurors to the lawyers' desired conclusion.

## The Attention Situation

Attention spans are rapidly changing. In 2000, the average human attention span was 12 seconds, but it has since shortened to a mere [eight seconds](#). Trial lawyers will need to adapt and take this short attention span into account. Lawyers should consider using persuasively designed visuals in their arguments, such as animation and video (making sure they are admissible), as opposed to still slides.

Studies have shown that the average viewer retains 95 percent of a message they watch as opposed to only 10 percent when they read text. Lawyers will have to learn how to take what they did in the live courtroom and put it on steroids. They cannot prepare for trial the same way they did six months ago. They will have to prepare for trial earlier, in a more robust, persuasive and engaging way. The antiquated process of how trials are conducted must now include something that's more visually dynamic, and equally engaging, especially if jurors participate from home.

## A Good Starting Point

The number one thing to know when working on a virtual trial is to start your visual concepts early, even earlier than you think. A good time to start the creative development process is when discovery is being exchanged. Your story begins to surface when evidence is reviewed.

The first rule to persuasion is that your decision maker(s) must be able to relate to your subject matter. So, take the time to develop tools that will lead them to your conclusion. To help with the gap between personal knowledge and complicated trial evidence, the trial team should develop a visual tutorial to help the jurors connect to the subject matter.

Significant expenses will be saved by not having trial support staff on site, and these resources should now be reinvested into creative development on the front end so that the team and witnesses will be more prepared. Be aware that last-minute development of demonstratives will drive costs up quickly.

It's vital to work with a graphic designer who knows trial work, as there are too many nuances to trials that only insiders know. They will be able to help with visual development that will assist lawyers as a virtual presenter, guiding jurors to the conclusion in a persuasive manner. Since trial lawyers won't be able to lean on the strength of an engaging personality alone, the persuasion of the visual presentation will carry an important load.

## Actionable Advice for Lawyers

A visual story that plays out through motion is far more interesting than static text or photography. Develop more animation and motion graphics for your trial presentation with pieces that move and captivate. If jurors will have to have a camera facing them, they will need to have a consistent focus that they are not used to maintaining, so more visuals will be welcomed. To overcome this obstacle, lawyers should have at least two screens set up for the jury by the juror technician—one to focus on other jurors and the presenting lawyer, and the other should only show moving visuals to keep jurors' attention on the story being told.

Millions of dollars are often at stake, and it is necessary to take an extra step and spend time presenting something like a general tutorial for the jurors to understand the specifics of the case. The first virtual patent trial was a very technical patent infringement case with large amounts of data. The first day of trial was taken up with a tutorial run by experts who walked the judge through each of the systems. This required additional time, but in the end, the judge felt prepared to move forward with the case.

The law is strict on admissibility, so be careful pulling images off the internet. It could immediately get you in trouble if it is not in evidence. Also, make sure whatever animations you put together can be backed up with an expert or a witness, and are supported by evidence that has been exchanged by the parties.

Questions to ask yourself when creatively developing your case:

- What do you know about your decision maker(s)?
- Do your visuals relate to what you know about your decision maker(s)?
- Are you a persuasive storyteller? Are you comfortable on camera?
- Do your visuals help tie together the main points to your case?
- Have your visuals led your jurors to your desired conclusion?

A strong virtual persuasion presentation will:

- Include a common thread which is the storyline that runs from opening statement to closing argument
- Present visuals designed to persuade, not just to inform
- Be dynamic to keep the jurors' attention
- Rely on short messaging that's easy to digest
- Be quick and relatable, directing jurors to the answer you are seeking

## Tips for New Lawyers

A virtual trial will be the same process as a courtroom trial, simply with a different way to deliver evidence to the court. A young lawyer doing this for the first time needs to make sure their visual package is persuasive and visually compelling. Having a mentor or resource who is already well-versed in preparing for trial will help develop your virtual presentation assets that could be the key in a desired trial outcome.

Young lawyers who understand the full extent of the features on a virtual software such as Zoom will also have an advantage. With touchscreens you can draw on, you can conduct collaborative sessions with artists to create and edit visuals to make them as persuasive as possible.

When using a conference tool like Zoom, the best way to make sure you are on screen with your visuals is to be ahead of the game and prepare for your viewer to be set up with two screens. The basic Zoom plan can handle 100 participants, but they will be randomly broken up into small groups on one of the screens that you can toggle between. Then the second screen should be used for documents, graphics or testimony and should be constantly moving as motion will keep everyone's attention. This should all be directed by a trial technician behind the screens.

## Use Screens Wisely

Just like any video conference call, multiple screens can add value when presenting to the jury. Depending on the number of participants in the trial, a lawyer can benefit from having additional staff watching the jury and providing feedback simultaneously. If the judge orders multiple participants, lawyers may need to toggle between groups to see everyone, so an extra set of eyes is advantageous. Also, multiple screens provide a variety of juror views and allows lawyers to look jurors in the eye when presenting. Be prepared that a group of screens gives a much different vantage point than presenting solely to a jury box. Though the same rules apply when presenting in the courtroom, the budget will determine in the end whether you use a professional consultant or an attorney from the trial team to provide extra feedback.

## Preparation

Be prepared! The one thing that never changes in the trial process is that the lawyer who wins is usually the one who is most prepared. Take time to do a dry run in tandem with your visuals. Make sure everything works correctly and that timing and pace of the presentation are optimal. Don't just go into a virtual trial without practicing first. Practice by taping yourself, review, and adjust where needed. Then run it again. Leave time to circle back with your designer to make necessary updates.

## Things to Avoid

Do not repeat visuals unless they are needed for closing argument to cement your point. Visuals can be similar to a degree, but they have to be different enough to hold the attention of the jurors. Too much repetition turns people off as they get bored of visuals they've already seen and may feel like you are wasting their time.

The persuasive process deserves your full attention even as you juggle other things like motions and depositions. But in a virtual setting you will need to put more emphasis on story and visual development.

## Conclusion

If the court system empanels "at-home juries," focusing on visual persuasion will be critical, but it can't happen at the last minute. Your story and your visuals, if developed correctly, will hold the attention of your jurors and close the gap between the energy of an in-person trial and a virtual trial.

# Guidelines for Handling Exhibits in a Socially Distant Courtroom

Contributed by [Daniel B. McLane](#) and [Michael P. Pest](#), Eckert Seamans

Confronted with the prospect of an indefinite delay as Covid-19 continues to frustrate the progress of trials in the courts, we recently opted to proceed with a Zoom bench trial in the U.S. District Court for the Western District of Pennsylvania. This article offers guidance on navigating perhaps the most difficult aspect of a virtual trial—the remote use and handling of trial exhibits.

## Disseminating Exhibits Before Trial

The advance dissemination of exhibits is one procedural hurdle that counsel must clear before trying a case remotely. In a typical trial, the exhibits are present and immediately accessible by the attorneys, witnesses, judge and jury, all of whom are located in the same courtroom. A remote trial, however, presents a number of practical difficulties. For instance, the judge may, as he did in our case, direct the parties to provide to all witnesses in advance only the exhibits that they reasonably anticipate will be used during the trial. While this does not create a problem for witnesses that counsel intends to call on direct, such a directive might raise concerns with respect to the cross-examination of an adversary's witnesses. An attorney in this situation must face the issue of how to have all exhibits readily available to an opponent's witnesses without providing the opposing party with advance notice of potential avenues for cross examination.

## Presenting Exhibits During Trial

The manner in which exhibits are actually presented is yet another potential obstacle for counsel in a remote trial. Depending on the social distancing guidelines in effect in a particular area, one party's counsel and witnesses could be together in the same conference room, while the other party's counsel examines his or her witness by videoconference from across the country. This can lead to a disconnect between counsel and the court that could seriously impact the effective presentation of a party's case. This problem is compounded if the court does not utilize a platform that allows the parties to share a common computer screen to display exhibits that all participants can view simultaneously.

## Moving Exhibits Into the Record

Finally, exhibits that are moved into the record remotely still must find their way into the court's actual record for purposes of an appeal. The judge, for instance, might take notes on the hard copy exhibits provided to the court in binders in advance of trial, so those copies would not be entered into the official record. In that case, it is counsel's responsibility to ensure that remote exhibits are properly entered into the record at the conclusion of trial.

## How to Prepare in Advance

In order to avoid the countless logistical issues that can arise from the use of exhibits in a virtual trial, an attorney preparing for such a trial should consider addressing the following issues as far in advance of the remote trial as practicable:

- Propose a pre-trial order directing that all exhibits must be electronically uploaded and accessible for all witnesses and counsel several days in advance of the trial.
- The pre-trial order should also require all counsel to certify to the court that a pre-trial test was run to confirm the accessibility of the exhibits by all party witnesses and counsel during the trial.
- If the parties cannot reach an agreement on the use of electronic exhibits and opt to proceed with traditional paper copies in exhibit binders, an effort should be made to reach an agreement on the cost-sharing or cost-shifting of copying the exhibits and binders to be mailed in advance to each witness.
- Similarly, if a non-party is to testify remotely, the pre-trial order should require the parties to reach an agreement on providing copies of anticipated exhibits to that witness.

- Counsel should confirm with the court in advance of trial whether the platform utilized by the court allows for exhibits, pleadings and transcripts to be uploaded and viewed by all participants during the trial. The Zoom.gov platform utilized in our trial, for example, did not allow for external uploads, which necessitated the use of physical exhibit binders and extra laptop computers for the witnesses to view the exhibits.
- In order to ensure that exhibits moved into the record remotely make their way into the court's record, the parties should agree in a pre-trial order that the party who moves an exhibit into the record shall have the responsibility of filing that exhibit with the court, particularly any exhibits that have been highlighted or otherwise marked by a witness, at the end of the trial. The pre-trial order should also address the manner of filing the exhibits (i.e., hard copy vs. electronic) and any confidentiality issues.

# How to Make Your Zoom Appellate Oral Argument a Hit

Contributed by *Raffi Melkonian, Wright, Close & Barger*

Appellate courts moved to Zoom and other video-conferencing technology very early in the Covid-19 pandemic—far earlier than trial courts began experimenting with Zoom bench and jury proceedings. There are potentially many reasons why appellate courts led the way, but perhaps most obvious: A short appellate argument with a few judges is a much easier technical problem than a trial court proceeding. There is no evidence to consider, no court reporters to accommodate, no witnesses to question and cross-examine. Oral argument is just a discussion between an advocate and the bench of judges.

But that does not mean that performing well in a Zoom argument is easy. The format poses difficult questions for even experienced appellate advocates who want to do their best to represent their clients. Here are some tips based on experience arguing in a federal court of appeals and in a Texas intermediate appellate court, as well as observation of several Zoom arguments in those courts and in other courts to prepare.

- Many courts are offering practices or rehearsals for advocates up to a week in advance. You should maximize these opportunities. The staff are often extremely keen to help you put your best foot forward in front of the court.
  - Focus on your virtual background, if any, whether you need a microphone, and your video quality.
  - Consider logging off and then back in to simulate a loss of connection.
- Once you get to the argument, it's crucial to be attentive to whether a judge wants to speak. You don't have the normal cues—like the slight lean forward—so keep an eye on the judges and listen hard. If you don't, you end up speaking over a judge. That isn't good for you, the court, or for your clients.
- There's a deep split among advocates about whether it is better to stand at a podium or to sit at a desk while giving a Zoom oral argument. Having watched both styles, sitting at your desk—only your chest and head visible—is better than standing at a podium. You might initially think the formality of standing would be more respectful to the court and also minimize the differences between Zoom and regular oral arguments. But it does not work as well. The camera angles are awkward. Moreover, to get the head and torso shot into the camera, you correspondingly make your face smaller, which hurts the connection you can make with the judges. Note below that a judge who offered advice in response to these hints prefers advocates to stand.
- Practice not moving your head or hands around too much while speaking, even if you are an expressive speaker. Close-up, on camera, it's more distracting than in person. Plus, too much movement, especially over a virtual background, stresses the video conferencing software and bandwidth.
- Work especially hard to keep your voice steady, even, and clear. All of us sometimes drop words or phrases when arguing, but this problem seems more pronounced on Zoom.
- If your face is on screen during your opponent's oral argument, know that your expressions are more visible this way than in normal arguments. Judges do not like head shaking or eye rolls, but they really don't like those things up close and in high definition.
- Humor seems to translate worse on Zoom than in person. To be clear, humor is usually tricky during oral argument—the best advice is to play it straight unless you are very experienced—but even the little grace note of humor you might throw in with judges you are comfortable with should be removed.
  - Clear your desk except for your notes in arguments.
  - Remove your phone from anywhere nearby. For many lawyers, it can be like a beating heart of distractions, especially during your opponent's argument—you need to be as focused as you would in the courtroom.

- Avoid shuffling papers around. Consider either taping notes to your screen or keeping your notes electronically instead.
- Relatedly, don't think that just because you have your computer, that you can refer to extensive written notes on screen.
  - Prepare and present the same way you do normally. For example, if you normally go to the podium with a small binder, do that here as well. Of course, everyone has a different comfort zone, but you should stay with what normally works.
- Watch other Zoom oral arguments before yours, preferably those with the same panel or at least some of the same judges. There is nothing better than seeing what has worked in the past.

The following is feedback from judges around the country as part of an online discussion. As repeat players in the process in a way that lawyers rarely are, judges have picked up on issues that most advocates will likely miss:

- A plain virtual background is probably best. Otherwise, it feels like an intrusion into other people's homes and offices, and some of the architecture and windows can be distracting, not to mention mementos, and so on.
- Do not wander off while opposing counsel is speaking. It is really bad form.
  - Also, it is so noticeable and distracting to grimace or roll your eyes.
- Make sure your first and last name are below your picture.
- Remove your pets from the room, particularly your loud ones.
- Do not let any person helping you be visible on the screen. It is distracting.
- Do not forget to introduce yourself even if your name is on the screen. Make sure to say, "My name is X and I represent Y, the appellant/ee."
- It is good to stand if you have a set-up for that, but standing is not mandatory.
- Invest in a fast internet connection, and if possible, invest in an ethernet cable instead of WiFi. The majority of glitches at Zoom arguments are caused by WiFi. In a pinch, cutting off the camera will help you make it through the argument if you are having glitches.

Zoom oral arguments are unlikely to ever be perfect. But it's important to remember that even in person, there can be miscues and technical difficulties, including exploding pens or spilled water. With experience and hard work, Zoom arguments can provide the due process that clients deserve and help judges do their job.

# Virtual Litigation in the Post-Pandemic Era?

Contributed by [Martin Roth](#), Kirkland & Ellis

The Covid-19 pandemic has forced the world to adjust to living and working virtually. For civil litigation, largely gone are the days of live in-person hearings, mediations, depositions, and trials. In their place, for the foreseeable future and possibly permanently in some respects, are virtual substitutes. After trudging through initial uncertainty and speedbumps inherent in learning emerging technology, in certain ways the virtual substitutes have proven at least as good as, and perhaps even better than, the pre-pandemic live events they replaced in some situations.

This piece assesses the benefits of the new virtual litigation world, in particular for motion hearings and mediation, as well as proposes some practical tips for using these platforms effectively during the pandemic and beyond.

## Motion Hearings: Less Travel, More Screen Time

Just seven or eight months ago, many civil litigators could be described as road warriors and logistical savants. It was common when working on complex national cases to travel from city to city or state to state, frequently within the same week, to argue at hearings before various state and federal judges.

Endemic to that sort of practice were many logistical challenges: scheduling, determining the best and most efficient travel itinerary, ensuring printed materials needed for hearings were shipped to the right hotel or office, and often, determining what technology a particular courthouse had available for the display of evidence or presentation slides. In fact, many courthouses still lack the equipment needed to connect a laptop to run a Powerpoint presentation.

In the virtual world, nearly all of these practical challenges have been replaced by new ones: Where should I sit or stand to best optimize lighting, background, and screen presence? How can I ensure that my microphone and audio setup will work? How can I avoid audio interference or sound feedback if colleagues are located on their own devices nearby to assist? What software will I need to install to connect to the court's platform? What should I do when, inevitably, someone is yelling that I'm talking while on mute?

The good news is that with proper planning and testing, each of these technological issues is readily solvable. Prevailing wisdom has emerged about the proper lighting (in front of and/or above the speaker) and sound (sitting or standing close enough to the microphone and selecting a room with carpet or a rug to prevent echoes). Keeping other users nearby on mute and using one set of speakers or headphones per room usually eliminates audio interference. Most court staff and judges have enough experience and facility with the virtual technology such that with proper testing and a phone number to call or text chambers just in case, most hearings go forward without the inability of a party to connect and without leaving a party on mute for very long.

Beyond these new logistical challenges, new opportunities have emerged from virtual hearings. For example, because courts are using Zoom, Microsoft Teams, and other platforms with a "screen share" feature, the days of awkward paper "hand ups" have gone by the wayside. Most virtual courts welcome slides and other interactive presentations. In addition, the efficiencies gained from not having to travel allows for the scheduling of hearings in far-flung locations on back-to-back days that would not have been possible or would have been too risky to plan pre-pandemic.

Avoiding the scramble to print materials last-minute from a hotel conference center has certainly decreased litigators' stress and increased their preparedness. And many courts' use of Zoom has allowed clients a new direct opportunity to watch hearings that they might not have elected to travel for but now can easily access from the comfort of their office or home by watching live on screen.

These efficiencies and gains make it easy to see why some judges and litigants might well prefer the virtual experience for certain hearings, particularly where the issues involved are discrete. Although "Zoom fatigue" has been widely discussed and might limit the utility for longer hearings and witness testimony, and while there are still some difficulties with multiple speakers talking simultaneously created by audio or video lag, for motions to dismiss, discovery motions, and other legal arguments that can be held in 60 minutes or less, virtual hearings have become efficient. So efficient, perhaps, that they may supplant certain in-person hearings they replaced even after the pandemic subsides and allows for travel with greater frequency.



Time will tell whether judges will only do Zoom hearings in the future upon joint consent of the parties, or whether local rules will govern use, but this is an issue courts and lawyers will confront even as the world “goes back to normal.”

## **The Virtual Mediation: Gathering Needed Principals to Negotiate By Zoom**

Similar to court hearings, prior to the pandemic, mediation of significant cases involving distant parties and national counsel was often a logistical Rubik's cube. Aligning dates on the calendars of mediators, opposing counsel, and the relevant client representatives—and then selecting a location that was sensible for all of these various constituencies—commonly posed a challenge.

Parties would often leverage these logistical challenges strategically during mediation, claiming they only had a number of hours for the case to settle before needing to catch their flights or that they only had a certain amount of settlement authority available without needing to contact a colleague not in attendance. Beyond this, clients and lawyers alike would need to be present on site, usually for hours on end, waiting on the mediator and trying to make productive use of the downtime.

Again, the virtual world has solved for many of these previous logistical concerns. Now mediations can be conducted remotely, with each participant in their own office or home. Foregoing travel allows for ease in scheduling, and has generally increased the availability of business principals to participate both in pre-mediation tactical discussions and in the sessions themselves. Waiting on the mediator's return via Zoom is easier than being captive on site, especially if the participants turn off their cameras and microphones and wait for a text or other signal that the mediator is going to re-enter the virtual room. And “Zoom bombing” and other confidentiality or security concerns that emerged earlier in the year appear to have resolved with increased password protection, locking sessions, and as mediators learn how to utilize and control the technology.

Virtual mediation is obviously not ideal for every case. For example, there may be instances where relationships between business principals that are most effectively leveraged in person facilitate settlement. There are also plenty of suits where for a settlement to occur one side or the other feels the need to present their case in truncated fashion in person at a mediation, as they would in court.

Many mediators and clients may still feel more can be accomplished while everyone is captive on site, especially if there are intricate business and commercial terms to negotiate beyond just the price of settlement. But for the efficiency reasons noted above, like shorter hearings, virtual technology provides mediation with opportunities for greater efficiency, decreased costs, and broader client participation in a way that may be attractive in many cases even in a post-pandemic world.

## **Virtual Testimony: A Work in Progress**

One area where it remains difficult to see a virtual experience replacing an in-person one is for events where extensive witness testimony is required, like trials and depositions. Complex trials and depositions are already a huge logistical challenge without the need to resort to virtual technology. Coordinating the use of documents as exhibits, the placement of demonstratives, and the setup for examination of witnesses requires careful thought and planning in the actual world, let alone in a virtual one.

Compounding these issues, staring at a screen for hours and days on end requires more patience and creates more fatigue than the few hours required for a hearing or mediation. With multiple participants all on the screen together, it can be difficult to decide where to look—and one never knows when all eyes are on you. It is harder to read tone and body language of witnesses on screen. Making sure objections are properly lodged and heard given audio and video lag time presents a challenge. Exhibits may need to be sent in advance such that the spontaneity that is so important to an impactful cross-examination will be lost—if it even can be captured on Zoom at all. And it is more difficult for trial team members to pass discreet notes to each other when they are socially distanced or in different places than a well-timed note next to the podium in the courtroom or in the conference room.

For these reasons and others, and although many depositions and trials have gone forward with great success during the pandemic, the reviews seem more mixed and most trial lawyers seem to yearn for an end to the pandemic so that live, in-person trials can resume as they did before.

## Conclusion

Frequently innovation is borne by necessity. We are in such times. As a result, while there will probably be a transition back to the pre-pandemic litigation world in many respects, it is fair to assume that the virtual world has created a “new normal” for certain litigation events like non-testimonial hearings and mediation, at least where clients consent to that new and perhaps cheaper option. That world will be welcome in many circumstances, creating efficiencies by reducing travel and its attendant costs and allowing for greater client visibility and participation.