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## LITIGATION PRACTICE

# Notes from the Field

## Best Practices for Virtual Litigation

BY LISA C. WOOD

ONCE A RARITY, VIRTUAL LEGAL PROCEEDINGS are now happening across the country in state and federal courts, in civil and criminal litigation, in government investigations, and in alternative dispute fora. The possibility of remote jury trials is being considered as backlogs grow and there remains no end in sight to the public health crisis.

This has very much been a learn-by-doing experience for judges and litigators. We have no treatise to consult, no procedural rules to guide us, or indeed any relevant case law. This gives us all a unique opportunity to be entrepreneurial and innovative, characteristics one may not immediately associate with legal professionals. But necessity is indeed the mother of invention, and lawyers and judges alike are digging in to build something new.

Over the past summer, I interviewed many judges, enforcers, and private practitioners to elicit their thoughts about virtual litigation. In this column, I share the best practices and pitfalls of virtual litigation. In a sidebar, I summarize the thoughts from judges and practitioners about what virtual litigation tools we should retain when we get to the other side of this pandemic.

**Be prepared.** This of course is good advice for all litigation, but it is particularly important with virtual proceedings. Insist on a practice session with the court and/or opposing counsel to make sure everyone understands the technology, and how to use it on their equipment. In our office, we have found it helpful to have IT support participate in the practice runs and to be available during hearings and depositions if there are any technical difficulties.

**Agree on a protocol.** In the absence of rules or precedent to guide us, we need to reach agreement with the court and counsel on the rules for the virtual proceeding. Court reporting

firms have developed some written protocols to consider when designing your own, and courts and arbitration panels have also issued numerous procedural orders regarding remote proceedings. The level of detail will depend largely on the court's management style and the level of trust among opposing counsel. In designing the protocol, also name one emergency contact for each party and the court and decide on an alternative means of communication. If you get booted off the virtual hearing platform, you don't want to have to scramble to reach the court, and particularly in multi-party proceedings, the court might not notice your absence immediately.

**Ensure good connectivity with a computer wired to the internet.** Whenever possible, make sure that counsel and the witnesses are speaking through a computer that is hard wired to the internet. This will greatly reduce the problems associated with poor connectivity—a degraded picture, varying sound quality, loss of video capabilities, or sound delays. One trial team I interviewed arranged for counsel to participate in the trial from the office, and most witnesses testified from the corporate client's office. That was not possible for all witnesses, however, and arrangements were made for them to testify from their home on a computer wired to the internet. With all counsel and witnesses, make sure they have an alternative means to communicate should the video fail. Audio only connections, while not ideal, are a good back up, and easy to arrange.

**Ensure good lighting and sound.** Invest in a good speaker, and make sure you and any witnesses you are presenting are clearly visible on camera. Avoid back lighting, which creates shadows on your face, and consider investing in a light specifically designed for video conferences. Teach yourself, and the witnesses, to look at the camera rather than at the screen so that you make eye contact with the court. Practice this, and get used to the fact you will have a picture of yourself on the screen, as well as pictures of the court, witnesses, and other counsel. It is human nature to look at those images when you are speaking, but it is better to look right at the camera. Be aware of the fact that if you look down at your notes, your audience will see the top of your head rather than your face. Arrange the camera and your notes to avoid this problem. As painful as it was, I found that it was helpful to videotape my practice argument, and then take a look at the tape, and make necessary adjustments.

**Think through how the trial team and client will communicate during the proceeding.** There are both challenges and opportunities presented when the trial team and client are not all in the courtroom together. You have to plan for

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how the team and client will communicate during the proceeding. Frankly, it is much easier to communicate with your trial team and client during a virtual proceeding than it is during a live trial with the court and jury watching. We have experimented with a variety of communication tools at my firm, including Jabber, WhatsApp, texting, email, and telephone. We have even set up parallel Zoom conference links to use for talking during breaks in the proceeding. However, if you want to communicate during the proceeding, WhatsApp has a group text function that is very quick, and Google Documents is a great collaborative editing tool that everyone can use simultaneously. Email is generally too slow to be effective. One trial team I interviewed set up three conference rooms in its office for a virtual trial they handled—one for the core trial team, and any additional lawyer presenting a witness; one for the rest of the trial team to watch the trial, take notes, and relay thoughts to the main trial room; and one for trial team members to communicate with the client, who was in a conference room at its facility.

Several lawyers I interviewed said that it was a great benefit of a virtual proceeding to be able to communicate easily with the whole team, and with the client. You do not need to rely on hushed whispers in the court room, or small handwritten notes with illegible suggestions passed up from the galley. You also do not need to worry about the visual effect of a large trial team—the court and jury will never see the whole team on camera at one time.

Some lawyers I interviewed also relayed that the virtual setting made it easier to involve junior members of the trial team. It is relatively easy for a more experienced lawyer to support a junior lawyer taking testimony when it can be done in a conference room, with only the questioning lawyer visible to the court.

**Consider your background, and any likely distractions.** Not all lawyers will be able to conduct virtual proceedings from their office. Child care responsibilities, or public health concerns may mean that a lawyer is confined to her home, where she may or may not have an office in a separate room. I heard a variety of thoughts on how to handle the home setting. Several people recounted amusing anecdotes about children zoom bombing a hearing, or teenagers arguing about what was for lunch while a lawyer tried to complete his cross examination of a witness during an audio-only trial handled from his open floor plan home. In one Zoom call I had with a senior agency official, the two junior lawyers from the agency office dispatched their families to avoid interruptions—one to the basement with snacks and one to a long walk outside.

While it certainly makes sense to try to avoid interruptions if at all possible, the reality of the current situation for many working parents is that children are very present in their lives. While it may be distracting for the parent-litigator, one of the judges I interviewed made an interesting comment about this issue. The judge recounted how a lawyer in the midst of an argument had to stop to discipline a child, and then return to the argument. This

endeared the lawyer-parent to the court. If you are arguing from your home, that setting allows you to reveal your humanity, which, depending on the audience, may be a positive, albeit unintended side effect of virtual litigation.

While several judges worried about the informality of the Zoom hearing, they also were quick to acknowledge the unique intimacy of the setting, and how a lawyer can use that to her advantage to establish a connection with the court. I asked many judges whether they would be bothered by interruptions caused by children. Each judge said no, but counseled lawyers to alert the court to the possibility and explain their circumstance in advance of any oral argument. One court now offers virtual backgrounds on its website, so that a lawyer handling a virtual hearing from home can appear as if she is sitting in court.

**Practice good video conference etiquette.** Several judges complained about lawyers who constantly interrupted the court or other counsel during a video argument. Avoid jumping in when there is a pause in the court's remarks to make sure the court is done and not just pausing to collect her thoughts. Learn how to mute your device to avoid unintended interruptions, and make sure the protocol establishes the rules for who will be on video and who will be muted and off camera to save on bandwidth. When defending a witness in government testimony taken remotely, I have insisted on having my video on, so that the witness can see me at all times. Other lawyers in my office assisting me, however, have turned off their video and muted their devices to save bandwidth.

Another good habit to follow when presenting via video is to sit still and not wander or wiggle. Several judges commented on how distracting it was when a lawyer either bobbed up and down in her seat or walked around while speaking. Finally, make sure to look at the court during your argument. One judge emphasized the importance of nonverbal cues, including a judge's "tell." You want to be sure to notice when the judge lets her glasses slip down her nose, and glares at you directly over her glasses. That is a not so subtle cue to wrap up your remarks. The judge explained that this is why she does not like audio-only hearings. She likes counsel to be able to see her.

**Be prepared with your exhibits.** Everyone I talked to commented on how a lawyer needs to be better prepared to use exhibits during testimony than might be the case in a live proceeding. Some judges have insisted on all exhibits being identified, and pre-marked in advance of a virtual trial, whether for use on direct or cross-examination. This could adversely impact cross-examination strategy, and certainly takes away the valuable element of surprise. However, flubbing the use of documents during your virtual examination, whether by having the court or the witness in a position of not being able to see the exhibit, is a risk to avoid at all costs.

One strategy for dealing with cross-examination exhibits that I learned of during my interviews was to group exhibits in bundles, by witness, and to circulate the bundle immediately before you begin your cross-examination. This preserves the element of

## What Will You Retain from Your Virtual Litigation Practices When We Get to the Other Side?

I posed this question to each judge and lawyer I interviewed. Their answers demonstrate that virtual litigation, while new, has been surprisingly effective and efficient. We will retain many of these practices when we get to the other side of this pandemic because they level the playing field (between counsel who are local and those who are out of state or from another country), and make litigation far more efficient.

### Judges Would Keep:

- virtual motion hearings in cases involving out of state counsel
- video hearings for class certification, *Daubert*, motions to dismiss, or summary judgment
- Zoom bench trials when one of the parties is overseas
- video status conferences in all cases, whether counsel is local or out of town (this judge previously held such conferences by telephone conference)
- video conferences between detained criminal defendants and appointed defense counsel via iPads provided by the court to counsel and detainees
- weekly Zoom calls among the judges in a geographically large district (previously the judges only met every other month, in person)
- video conferences with judges around the world (previously this judge traveled extensively each year to meet with judges in other countries far and wide; while he will want to do some physical travel, the video calls allow him to confer with more judges)

- hybrid bench trials, with some testimony presented by video conference, and some live
- more bench trials generally, with phasing to streamline process

### Lawyers Would Keep:

- preparing witnesses for deposition and trial testimony via video conference
- arguing motions virtually
- presenting testimony from the less important witnesses in government investigations via video conference
- taking deposition testimony of third parties via Zoom
- hybrid evidentiary presentations, with some via video and some in person.

—Lisa Wood

surprise, but also ensures everyone will have the exhibits and be able to read them.

Some lawyers circulated hard copy binders of all exhibits to the court and witnesses. Others use the video platform to show documents by sharing the screen. If you choose to use the video platform, practice to make sure it works and also be mindful of how the shared screen will reduce the court's view of the witness, and of you.

Also, having documents sit on the screen for any length of time is boring for the court, and mind numbing for the witness. It is worth using document presentation software to make the exhibits come alive on the screen, by pulling out key words or sections or comparing sections of the document to demonstrate meaning.

Finally, be mindful of the record, and make sure you have numbered each page of the exhibit, and refer to the sections of the exhibit to which you are referring in your testimony in a manner that will be clear to the witness and court and to anyone reading the transcript later. With everyone sitting in their own offices or homes, it is much more likely that the witness will be confused about what section of the document you are asking about or will struggle to find it quickly.

**Protect against Zoom fatigue.** All the judges and lawyers I interviewed remarked about how exhausting it was to

spend hours in a virtual proceeding. They all recommended that proceedings be broken up into smaller sections, if possible. If that is not possible, at least vary the people presenting to the court, and the method of presentation, to combat Zoom fatigue. One salutary effect of this problem is that examinations and presentations are shorter and more focused.

**Agree on attire.** This may seem trivial, but it really does make sense to reach agreement on the dress code for the proceeding to avoid anyone making the wrong impression or being embarrassed. I have had several amusing incidents of lawyers and regulators arriving to a hearing in different levels of dress formality. In one, I had an important presentation to a senior regulator. The lawyers from our office all wore suits, as did the junior lawyers in the agency office. The senior official showed up in sweat pants for the Zoom meeting. He was embarrassed.

One of the judges I interviewed remarked on how one witness testified by cell phone, and wandered around his house while he testified, making coffee, getting food from the fridge, and wearing casual clothes. This negatively impacted his credibility. My advice to clients has been to dress as though you are going to court when testifying in a remote proceeding, and I have followed the same advice. To avoid embarrassment for the court or opposing counsel, we typically let counsel know we plan to dress in office attire. One of my partners had an all-day administrative hearing

with expert witnesses. Everyone agreed in advance of that proceeding to dress casually, which pleased the hearing officers.

**Think about multiple cameras, or at least a 360 degree view of witnesses.** When the speakers on a video conference are presented with several different cameras, and the view switches between the cameras periodically, the presentation is much more effective.

Also, several judges I interviewed said they would be more comfortable evaluating a witness's credibility if the camera panned to their hands folded in their lap, and from various side angles from time to time to confirm they are not using notes for their testimony. This addressed the concern that the witness may be looking at notes while testifying, or receiving coaching from someone else in the room. While the court will typically issue an order requiring that witnesses testify in a room by themselves, there is still the risk of coaching with notes, text messages, or otherwise. Not all judges I talked to were worried about this issue, remarking that it is fairly easy to tell when a witness is referring to notes or consulting with someone else in the room. In any event, it is also more interesting for the audience if the view changes from time to time. This will be harder to do if everyone is testifying or arguing from a home office, but in an important proceeding, if possible, it is beneficial to conduct the testimony and presentations from a conference room, with good quality cameras, and someone directing the camera feed.

**Be mindful of context.** Several judges I interviewed expressed concern about their growing criminal docket. Criminal defendants, many of whom may be sitting in detention in lock down, with limited time outside the cell, are on the court's mind. The right to a jury trial and a speedy one at that, means that criminal cases will likely be the first to proceed to jury trials, assuming courts can figure out how to conduct them safely. Civil cases will necessarily need to take a back seat, particularly in courts with large criminal dockets. Several of the judges I interviewed asked that counsel be flexible and understanding in light of these circumstances. Realistically, complex

multi-month jury trials are unlikely to proceed any time soon. Courts can use bench trials to process cases, and even use phased approaches to try the case in pieces to assist the parties and counsel in resolving the dispute. This may actually be a blessing, and allow counsel to plan for a far more efficient resolution of a case than would have been possible before the pandemic. Judges are definitely more open to experimentation in this setting, and the situation demands that we innovate ways to resolve our cases more efficiently.

**Know your court.** This is always important, but you need to understand what the court's attitude is to virtual proceedings. Some judges are frankly phobic about technology, so pushing them to hold Zoom hearings may not be a good idea unless you can arrange for tech support that eases the court's concerns. You also need to educate the court about technology. I heard of one judge who chastised a lawyer for using ear buds. The judge thought they were disrespectful. Clearly the judge had no idea what the ear buds were, and why the lawyer was using them.

There are also different resources available. In general, the federal court has more resources for virtual proceedings than do the state courts, but this is not always the case. Our office has had several virtual trials in the Delaware Chancery Court, which is well prepared for the exercise. On the other hand, I learned in my interviews that the federal bankruptcy court in Alaska is only able to conduct audio hearings, whereas the bankruptcy court in Wisconsin has had virtual video hearings for years, and has excellent screens and cameras to assist the court in holding a video hearing.

There are also regional differences in how the pandemic is being addressed. There are some courts in the country that are holding in-person trials without any mask requirement. Other courts would not think of proceeding that way.

In my next column, I will write about virtual jury trials. If you would like to share an experience you have had trying a case remotely, drop me a line at [lwood@foleyhoag.com](mailto:lwood@foleyhoag.com). ■

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