

ESSAY

Ode to Virtual Litigation

BY LISA C. WOOD

WHEN WE GET TO THE OTHER SIDE OF this pandemic, I hope we will not jettison certain practices adopted during the crisis. My extended family has been having weekly Zoom calls that include my elderly parents; we should have started this ages ago. On a grander scale, I have been amazed at the live musical and theatrical virtual performances pulled off by symphonies, opera companies, theatre groups, dance party DJs, and performing arts students around the world. Equally amazing have been the opportunities to participate in virtual court hearings, depositions, mediations, and presentations to enforcement authorities. While I realize these various practices were born of necessity, they also represent extraordinary progress. In less than two months, we have made litigation more efficient, more accessible, and dare I say, more human. I for one hope we retain and improve these practices post-pandemic.

Let me start with the most important aspect of these virtual litigation tools—extraordinary savings of time and expense. There is no need to fly to a faraway city to attend a status conference or argue a motion. Virtual litigation tools conserve time for local hearings as well: one does not need to carve out time to get to court, endure the long security lines, and sit in a crowded court room waiting one's turn for a short status conference. No one has to sit through my long summary judgment argument waiting their turn.

I have always been a fan of a court holding periodic status conferences during discovery so that the court can resolve discovery disputes before the parties proceed to motion practice. Some judges have been reluctant to hold such conferences because of the travel costs for out of town counsel. Most judges have now experienced the wonders of a hearing by video conference call, alleviating any concerns about the effectiveness or expense of regular status conferences. This will also yield additional efficiencies because there will be far fewer discovery motions filed and heard.

While I am still a proponent of sitting with a witness when she is testifying at deposition or in an investigation, I have worked with many witnesses who handle the situation just fine testifying from home without counsel sitting with them, and lawyers can often arrange for one counsel to sit with the witness while the

questioning lawyer and other counsel participate remotely by video. I have found witness prep sessions conducted by video conference to be effective, and these too save time and expense.

Virtual mediations offer wonderful efficiencies. While mediation can be a very effective way of efficiently resolving a matter, I have never enjoyed sitting around the offices of a mediator while the mediator shuttles back and forth between the parties. With a virtual mediation, you and your client can make productive use of your down time far more easily, and it is much easier to involve senior client representatives if they do not have to commit to attending in person.

The use of virtual litigation tools also makes litigation more accessible. We have a huge problem in our country—most litigants cannot afford litigation. As a result, injured parties cannot bring meritorious cases or must settle them early on disadvantageous terms. Some litigants appear pro se, which is an incredible burden on the judiciary and on those who must litigate against them. If we continue to develop virtual litigation tools, we will make litigation more affordable, and therefore a realistic option for the average American and for the many small busi-

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nesses in our country. Virtual litigation tools also permit counsel, parties and witnesses to participate in proceedings even if there are physical limitations, employment restrictions, or childcare challenges that make going to court difficult.

Lastly, I find virtual litigation tools provide an opportunity to connect with participants on a more human level. Having a hearing with a judge via Zoom is much like sitting in chambers with the court. The argument is more conversational, and counsel dispense with the needless formalities of formal argument or, god forbid, theatrics. You definitely have the court's attention. The court cannot hide up on the bench; and there are no distractions from other activity in the courtroom. A few clients have expressed concern about the informality of a Zoom hearing, but I view it as an opportunity to better connect with the court. I would always prefer to spend the time we have for a hearing answering the court's questions rather than marching through my planned formal argument. I also find that it is easier to bring one's authentic self to a virtual hearing or to a virtual witness interview. While part of this may be that people are more willing to share during the crisis, I do think there is something about the intimacy of the video conference tools that encourages authenticity and punishes those who are disingenuous.

I am not recommending that all litigation be conducted virtually, and I look forward to the opportunity to appear in person again for jury trials, long hearings, and challenging depositions about complex topics and/or involving many large documents.

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I would never recommend that a jury trial take place virtually, and there are many occasions when being in person will be important for the fact finder, whether to assess credibility or to deal with the unexpected. I recognize that Zoom can distort some things, but I also recognize that some in-person court appearances are not an ideal setting for engaging the court. Virtual litigation tools may also make some witnesses available to the parties and the court when they would not otherwise be available due to the limits of the court's jurisdiction or the parties' resources.

Bottom line: we have to figure out how to make some of the work we do in cases more efficient to preserve litigation as a realistic and effective tool to enforce the rule of law. Designing how we handle litigation going forward should involve some balancing of the costs against the merits of an in-person setting.

I look forward to hearing from readers about their experiences with virtual litigation tools, and plan to spend my next column on best practices. I hope you will join me in encouraging courts to continue with these practices once we get to the other side. ■