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# **MAKING LEMONADE: USING TOOLS FORGED DURING THE PANDEMIC TO AUGMENT COMPLEX CASES (AND YOUR DAILY PRACTICE TOO!)**

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Since the 2020 ALFA International - International Client Seminar, the world, our businesses, and our practices have changed dramatically. While before March of 2020, remote meetings, video depositions, and remote court conferences were taking place, for the most part our professional and legal lives proceeded in the “real world;” that is, in person. With the lockdowns, travel restrictions, and other precautionary measures that have accompanied the pandemic, everyone has been forced into a crash course in the use of video conferencing and other remote communications. When it was realized that the original “Fifteen Days to Slow the Spread”<sup>1</sup> was going to last far longer, it was no longer feasible to place all litigation and trials on hold.

As of this year’s ICS, some restrictions have been lifted (at least in part), others are ongoing or changing, and courts are holding hearings, and to varying degrees, conducting bench and even jury trials. While we can all hope that, at some point, life will be restored to some sense of “normal,” what is likely to be part of that “new normal” is increased awareness and use of technology to supplement or augment business and law. As businesses, lawyers, regulators, and courts have been forced to become familiar and conversant with such platforms as Zoom, Microsoft Teams, Skype, and other online systems, this has led to an awareness that the use of remote-enabling applications actually expand the possibilities for including persons, testimony, and information which previously were cost-prohibitive or logistically cumbersome. It is hard to believe that most businesses and law firms will, when virtual becomes optional, discard their investment in technology, training, and know how. Moreover, because large segments of society have grown used to communicating through computer screens, one can expect that even after in-person contact is resumed, prior prejudices against remote participation will have been diminished.

### **LEMONADE IN CORPORATE PRACTICE AND INVESTIGATIONS**

The pandemic and lockdowns changed much more than just the process of litigation. Companies big and small have adapted to the new world in many ways, and indeed the pandemic has forced these changes on a wide array of company operations. More employees work remotely, meetings of all nature are virtual, and corporate governance has changed to accommodate the new world. With a return to “normal” on the horizon, many companies expect to extrapolate the lessons learned to future years. These virtual tools, when employed in the post-pandemic world, will come with continuing benefits, and related, enduring difficulties.

#### **The Possible Benefits**

For those organizations that will embrace the “new future” and continuing application of the virtual world, the benefits are expected to often outweigh the problems. Those benefits are centered primarily around a decrease in costs and burden. Perhaps the most common benefits will relate to travel and overhead. Corporate travel that was once considered ordinary and expected may be reconsidered and in large part eliminated; and with more work from home, office space can be reduced along with the

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<sup>1</sup> <https://www.cnbc.com/2020/03/16/trumps-coronavirus-guidelines-for-next-15-days-to-slow-pandemic.html>

accompanying reduction in overhead. But the benefits can extend almost without limit – hiring interviews, internal investigations, inspections of suppliers, audits, and many other corporate functions that were forced virtual during the pandemic may never fully return to normal.

While the nature of some businesses may not be so easily adapted to a continuing virtual world, those businesses that can take advantage will emerge “lean and mean” when compared to their former selves.

### **The Possible Detriments**

The benefits of remote, virtual businesses will, in most cases, come with a price. Suppliers, employees, consultants, and clients require continuing support, some of which literally cannot be done except in person. Frameworks for virtual operations must be designed and implemented to ensure the continued smooth operations of the business.

Employee productivity is also a source for concern. Rather than being in the same office with your employees -- where normal daily interaction provides a built-in check on productivity -- remote working has obvious limitations. How do we know if an employee is really working eight hours a day? Employees need to be engaged and productive for a successful company. Some companies may simply redefine productivity – not based not on hours which are difficult to track, but on tangible production and results. If an employee can produce what is expected of an 8-hour day, and do so in six hours, does it really matter?

State laws, in some states, can be problematic, particularly for higher function meetings like those of the Board of Directors. While most states allow Board meetings to be held anywhere, and by any type of electronic communication, there is a lack of consistency in state laws in this regard, and companies would do well to ensure that their particular manner of electronic assembly for Board meetings is acceptable under state law.

State laws could also present obstacles for electronic formats of other high-level meetings, such as meetings for members and shareholders.

Are virtual meetings of the Board of Directors, and member and shareholder meetings, justifiable after the pandemic under the applicable state law? Close scrutiny of state laws, and even articles of incorporation and bylaws, should be performed to ensure the legality of these meetings. Some states have passed emergency laws or have implemented executive orders to permit electronic meetings, but those laws and orders, to the extent they provide some protection, may sunset after the pandemic. In some instances, companies may want to consider amending the applicable corporate documents in order to help ensure legality of continuing virtual meetings.

Companies also need to be cautious using virtual platforms, to account for any number of issues that may arise, including confidentiality, privacy, security, reliability, and privilege. Not all platforms are created equal in this regard, and it would be prudent to have training options available, and the ready accessibility of IT personnel should problems arise.



Beyond the more ordinary issues that may arise with virtual, high-level meetings, state laws may present other problems. Directors who get distracted during meetings might face issues with state laws that require adequate time and attention – apart from distractions apparent from a video meeting itself, or other forms of distraction could leave a trail (such as texting or emailing others during a meeting). These types of problems, while rare in the situation of a normal meeting with everyone sitting in the same room, may present problems in the virtual world.

### **On the Other Hand....**

Perhaps we are being too hasty, assuming that companies will continue indefinitely to reap the rewards (and address the risks) of a virtual world. Lessons from the pandemic, over time, may simply fade.

For example, while your company and your competitors are equally enjoying benefits of required virtual technology now, the competitive environment may turn that benefit to dust over time. How long will you continue to visit clients and key suppliers virtually, if your competitor is incurring the travel cost and having its meetings in person? Can a virtual meeting really replace the benefit of an in-person dinner (or even just a beer or two) with a client or potential client? Can you really get a sufficient understanding of the capabilities and limitations of a supplier or potential supplier by video?

The world has changed in drastic ways before (think 9/11, for example). Fears, and adjustments in our conduct and daily lives, fade with time. And only time will tell whether, and to what extent, the benefits of the virtual world will stay with us, after vaccines are readily available and we achieve herd immunity.

## **MAKING LEMONADE IN THE DISCOVERY PROCESS:**

### ***EFFECTIVE USE OF WRITTEN PROTOCOLS TO GOVERN REMOTE DEPOSITIONS***

Like it or not, over the past year, lawyers have had to adopt and adapt to new and different ways of gathering, preserving and presenting evidence. Perhaps the biggest change affecting litigation during the COVID-19 pandemic has been the shift to conducting depositions remotely. Indeed, it is perhaps fair to say that, with other cogs of the litigation process slowing dramatically, the remote deposition has become the most essential means for moving cases forward during the pandemic.

While some lawyers – and their clients – have resisted the shift to conducting depositions remotely for various reasons, courts have largely been unsympathetic to arguments that remote depositions are not an adequate or workable substitute for the traditional means of obtaining deposition testimony.<sup>2</sup>

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<sup>2</sup> See *Rouviere v. DePuy Orthopaedics, Inc.*, 1:18-cv-04814, 2020 WL 3967665 (S.D.N.Y. July 11, 2020) (denying plaintiff's request to compel defendant to produce corporate representatives in person and holding that, under circumstances of the case, corporate representatives could be deposed effectively by videoconference); see also *In Re Chicken Broiler Antitrust*

Courts have, of necessity, begun to accept – and even encourage – the use of remote technology, and it seems increasingly likely that we may never fully return to the “old way.” The question for litigators now is simply how to conduct remote depositions most effectively and efficiently, not whether they will be conducted at all. Once pandemic-related concerns about in-person depositions have passed, counsel and their clients may continue conducting depositions remotely in many circumstances, whether because of cost, convenience, logistical concerns and/or other reasons.

It is essential, of course, that counsel, their clients and the witness understand the rules governing such depositions. The Federal Rules of Civil Procedure (see, in particular, Fed. R. Civ. P. 30(b)(4-5)) and most state rules allow for certain stipulations regarding the conduct of depositions; however, there may be jurisdictions in which some fundamental deposition protocols may not be altered by stipulation. In such cases, an actual order of the Court may be required. For instance, whether by rule or standing order, nearly all states have a mechanism by which witnesses can be sworn in remotely. There are, however, states that may still require that the court reporter be present with the witness. In addition, state rules of civil procedure may require specific “read ins,” or, mandatory statements or other formal information to be recited on the record, whenever a deposition is recorded, whether in-person or remotely. This “know the rules” proviso is even more important in cross-border situations, where non-U.S. law may affect the manner in which a remote deposition is (or can be) taken, even if the deposition would otherwise fully comport with the requirements of a U.S. court.

## BEST PRACTICES IN THE USE OF WRITTEN DEPOSITION PROTOCOLS

As remote depositions become the “new normal,” the use of written protocols or stipulations between the parties, agreed to in advance by the parties and the Court, should be used to alleviate concerns about the medium as well as to ensure that the deposition proceeds in a fair and predictable manner without (or at least fewer) objections. While such protocols or stipulations are becoming more and more commonplace in “large” or complex cases, they are still something of a rarity in smaller matters. As the following outline of best practices for remote depositions illustrates, some advance agreement on protocols for conducting remote depositions may be helpful in all cases, particularly if, as expected, parties continue to employ such depositions even after the restrictions imposed by the COVID-19 pandemic have passed. In addition, a comprehensive sample Protocol and Stipulation is attached as Exhibit 1 to these materials.

***Scope of Protocol and Use of Deposition:*** specify whether the protocol will apply to all depositions in the case, or only on a deposition-by-deposition basis. In addition, the parties should also acknowledge that depositions taken in compliance with the protocol are, to best of parties’ understanding and intention, in compliance with the applicable rules of civil procedure. To the extent there is concern about the validity of evidence obtained during a remote deposition, it may be

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*Litigation*, No. 1:16-cv-08637, 2020 WL 3469166 (N.D. Ill.) (rejecting host of arguments and objections to conducting depositions remotely in subject class action litigation).

addressed through specific language incorporated into the protocol or by stipulation. Example language might include:

The parties agree that neither of them shall challenge or object to the validity of any oath administered by the court reporter, even if the court reporter is not a notary public in the state where the deponent resides.

***Technology and platform:*** identify the technology that will be used and, if possible, the vendors and service providers that the parties will utilize. Given the array of functionality that many platforms provide, the parties should also agree on which components will be utilized. If “breakout rooms” are available on the chosen platform, the parties should memorialize any agreement on proper use of those “rooms,” who may be admitted and when.

***Technical problems:*** the protocol should anticipate and account for the possibility that technical issues could arise during the deposition. Attorneys considering remote depositions sometimes worry that technology or connectivity breakdowns will trap them in a deposition where they are not able to protect effectively their client’s interests. A provision addressing such issues may include the following language:

This Protocol [or Order] shall not be interpreted to require any Party to proceed with a deposition where the deponent or counsel cannot hear or understand the other participants or where the participants cannot hear or understand the deponent. In such an instance, the deposition shall be adjourned until any technical problems have been fully resolved, and time spent addressing such technical problems shall not count towards any time limit placed on the deposition by the applicable rules or agreed-upon by the parties.

***Deposition Integrity:*** the parties should agree on measures to ensure the integrity of the deposition, including protections against any surreptitious communication during the deposition. Such a provision might include language providing, for instance, that “Counsel shall not initiate a private conference, whether through text message, electronic mail, or the chat feature in the videoconferencing system, with any deponent while a question is pending, except for the purpose of determining whether a privilege should be asserted.” To the same end, a comprehensive protocol may specifically acknowledge that each witness will be required to state, at the end of the deposition, that he or she did not communicate during the deposition—whether in person, by telephone, videoconference, or any electronic or other means—with any person about the case other than what is reflected in the transcript.

***Transcripts and Recordings:*** identify the means by which testimony will be recorded, whether by stenographic means, video, or both. To the extent agreed upon in advance, it may also be helpful to identify the deposition services providers that the parties will utilize by name and location.

***“Read-ins”:*** the parties should agree on how all formal requirements under the applicable rules or court orders will be handled, including identification of the court reporter, dates, times, names and locations in a manner satisfactory to both parties.

**Process and Deadlines:** the parties should agree on deadlines for providing links, names of witnesses, login information, “tech checks,” and guidelines for the use of real-time transcription, any chat function, video recording and interface configuration (i.e., witness/speaker only, witness and all counsel, etc.). In addition, the written protocol may contain specific provisions addressing the use of backgrounds, an agreement that all participants shall turn off phones and other devices, and an agreement that participants shall remain on camera but with audio muted unless speaking.

**Attendees:** it may be important in some situations that the parties agree in advance on who may be physically present with the witness and limitations placed on such attendees. Counsel for witness only? Client representatives? Opposing counsel? Absent some compelling reason, the protocol should also require that each person attending the deposition be able to hear and see every other participant.

**Handling of Exhibits:** every protocol should specifically outline the process by which exhibits will be marked and viewed. Many platforms allow for the display, marking and sharing of exhibits, and, if such platform capabilities are going to be used, the protocol should state this expressly. Alternatively, if exhibits are to be marked and shared in advance, this should likewise be confirmed as part of the written remote deposition protocol. Finally, Zoom’s screen-sharing function allows counsel simply to display documents directly, which is often the simplest approach. Whatever the methodology, agreeing in advance in a written protocol on the handling of exhibits should minimize misunderstandings and disagreement later. As applicable, the protocol should also address any post-deposition obligations for the return of any shared exhibits.

## CONCLUSION

While some lawyers say they will never concede that a remote deposition is an adequate substitute for an in-person one, it seems likely that we will never return entirely to the “old way.” Given what outside counsel and their clients have learned during the pandemic, we may have reached a point where video depositions will now be closer to the norm than the exception – especially since we have become more acclimated to and, indeed, better at taking and defending them.

Agreeing in advance on a comprehensive, well thought-out remote deposition protocol provides protection against many of the most common and frequently cited concerns about remote depositions, including evidentiary hurdles, problems with technology and fears about witness coaching or other off-the-record communications with the witness. Such protocols ensure a level playing field between the parties and greatly reduce procedural objections that may delay, complicate and increase the costs of litigation.

## MAKING LEMONADE AT ADR AND TRIAL

Of course, for many ALFA lawyers and clients, a major impact of the Covid-related lockdowns has been on the courts. While initially, courts virtually shut down because of the pandemic, over time they all started to conduct more and more business – but all remotely. Status conferences led to motions, led to hearings, and some courts have taken steps towards trials. Still, in most jurisdictions, these proceedings occur by video or teleconference, and as of this writing, most courts are still holding most

trials in abeyance until they perceive that the health risks are reduced and acceptable, and their courts are prepared for in-person business. One undeniable result will be a dramatic backlog in trial-ready cases.

## LEMONADE AT MEDIATION AND ARBITRATION

Once it was recognized that the Covid-related lockdowns were not going to end within a few weeks, an early effort to help cases reach resolution was the encouragement of virtual alternate dispute resolution mechanisms, including mediations and arbitrations. By early June of 2020, New York's Chief Administrative Judge was urging the referral of cases to neutrals, and the New York State Bar Association offered a detailed discussion of why online mediation was a more-than-viable option to allow for case resolution.<sup>3</sup> Since then, many litigants have come to realize that if they want their case resolved anytime soon, alternate dispute resolution mechanisms may be the only option.

An important benefit of *virtual* mediation is the fact that, at present, it is a primary means by which a dispute can be mediated. Group gatherings in courts or conference rooms are, for the most part, prohibited or limited. Even where social distancing might be a viable option, it is unlikely that the participants could be sufficiently adjacent so as to create the dynamics which arise in a traditional mediation. In contrast, virtual mediations can allow for visual and verbal interactions, and permit parties to be present their positions, be heard<sup>4</sup>, and, it is hoped, develop sufficient trust in the neutral to allow him or her to guide a resolution. With adequate preparation, they can include presentations of documents, video demonstrations, and many of the other elements of an in-person mediation. Through many platforms, the mediator can establish "break-out rooms" within the system, so as to emulate the typical course of a mediation. Procedures have been developed by some ADR organizations and courts,<sup>5</sup> which should be consulted in deciding how to proceed.

Countervailing these benefits, of course, is the loss of the traditional in-person interactions that are part of mediations. Many believe that where the neutral is not in the same locale as a recalcitrant party, it will hinder the mediator's ability to make an impression that could lead to a resolution. Thus, evaluating the personalities and dynamics of the persons involved, and seeking to select a mediator who can be effective in a virtual setting, are important parts of deciding whether to proceed with a virtual mediation.

What virtual mediations also offer – and will continue to offer even when in-person mediations are an option – is the removal of geographic limits and constraints. When all participants are connecting remotely, there is no need for the neutral, clients, counsel, and other participants to travel distances

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<sup>3</sup> Orna Artal, "The Case for Virtual Mediation," <https://nysba.org/the-case-for-virtual-mediation/>

<sup>4</sup> Indeed, given that in any in-person setting, it is likely that all would be required to wear masks covering the lower part of the face, at present the virtual mediation has the advantage of allowing participants to actually observe each participant's facial reactions in full.

<sup>5</sup> AAA has published a case study of a multi-party virtual mediation, [https://www.adr.org/sites/default/files/document\\_repository/CaseStudy-Virtual-Multi-Party-Mediation-AAA307.pdf](https://www.adr.org/sites/default/files/document_repository/CaseStudy-Virtual-Multi-Party-Mediation-AAA307.pdf).



just to attend. Indeed, with the removal of geographic barriers, the choice of neutrals can be expanded dramatically, and can allow for a selection of the “best person for the job” – say, a subject matter expert -- regardless of where he or she resides. Thus, from the standpoint of cost, logistics, and expertise, virtual mediations – perhaps even mediations with a blend of remote and in-person interaction -- will be an important option for the future.

Virtual arbitrations offer similar benefits. Where on-line is accepted, there is no longer a geographic limit to any of the participants. The result is a significant lowering of barriers to selection of subject-matter expertise for neutrals, as well as the reduction in certain logistical hurdles to arbitration where the parties, witnesses, counsel, and neutrals are in remote locales. Because concerns for coordinating travel schedules are reduced, it is likely to allow for an earlier hearing.

As is true for mediations, certain ADR organizations have been “ahead of the curve.” The AAA-ICDR has published its AAA-ICDR® Virtual Hearing Guide for Arbitrators and Parties<sup>6</sup>. JAMS has offered its guide,<sup>7</sup> along with a series of articles,<sup>8</sup> and the International Institute for Conflict Prevention & Resolution has provided its own annotated model procedural order.<sup>9</sup>

Countervailing these perceived benefits, of course, is the view of many – including courts<sup>10</sup> and experts<sup>11</sup> – that video confrontation and evidence presentation are not as effective as in-person. As a result, where a party is reluctant to engage in virtual arbitration, the threshold question of whether virtual arbitration can be compelled may need to be addressed. In general, absent a statutory or similar mandate, arbitration can be compelled only when the parties have agreed to arbitrate the dispute.<sup>12</sup> The power of arbitrators is, in turn, limited by the intent of the parties.<sup>13</sup> Thus, while practitioners should, in negotiating agreements in the future, explicitly consider whether to include a virtual arbitration option in their arbitration clauses, parties and courts are presently faced with contracts where on-line hearings were not at the top of anyone’s consideration list when the terms were negotiated.

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<sup>6</sup>[https://www.adr.org/sites/default/files/document\\_repository/AAA268\\_AAA\\_Virtual\\_Hearing\\_Guide\\_for\\_Arbitrators\\_and\\_Parties.pdf](https://www.adr.org/sites/default/files/document_repository/AAA268_AAA_Virtual_Hearing_Guide_for_Arbitrators_and_Parties.pdf)

<sup>7</sup> <https://www.jamsadr.com/online>

<sup>8</sup> <https://www.jamsadr.com/online#publications-details>

<sup>9</sup> <https://www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings>

<sup>10</sup> See *U.S. v. Yates*, 438 F.3d 1307 (11<sup>th</sup> Cir. 2006); Indeed, courts have repeatedly held in a criminal context that absent certain special circumstances, video testimony violates a criminal defendant’s rights under the Confrontation Clause. See *U.S. v. Carter*, 907 F.3d 1199 (9<sup>th</sup> Cir. 2018).

<sup>11</sup> <https://courtleader.net/2020/03/16/courts-and-coronavirus-is-videoconferencing-a-solution/>

<sup>12</sup> Cf. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 1924 (1995).

<sup>13</sup> *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 682-83, 130 S.Ct. 1758, 1773-74 (2010).

In *Legaspy v Financial Industry Regulatory Authority, Inc.*,<sup>14</sup> a broker sought to enjoin a virtual arbitration, arguing that remote proceedings would be “cumbersome and procedurally irregular,” given the number of witnesses and documents to be shared remotely. After citing the Federal Arbitration Act and *Howsam v. Dean Witter Reynolds*,<sup>15</sup> as a basis to effectively punt procedural questions,<sup>16</sup> the court held that it was for FINRA – not the court – to decide the procedural propriety of a remote hearing under its own Rules.<sup>17</sup> Due process arguments were similarly rejected on the basis that FINRA is not a state actor. *Id.* To the extent the court did address the merits, it noted that no evidence had been presented to support the claims of prejudice, and concluded that while “[r]emote hearings are admittedly clunkier than in-person hearings[, this] in no way prevent[s] parties from presenting their claims and defenses.”<sup>18</sup>

Given this reasoning, the courts’ well-established deference to the ability of arbitrators to interpret the applicable clauses and procedures,<sup>19</sup> and the fact that, with time, there is more and more experience and comfort with remote proceedings, it seems likely that those seeking to challenge a virtual arbitration will face an increasingly uphill battle. If a party truly wishes to contest the issue, it would be wise to develop and present a far-more compelling and factually supported explanation as to why the prejudice is insurmountable than was offered in the *Legaspy* matter. From a prospective perspective, however, because courts routinely hold arbitrators to those powers granted them in the arbitration clause, clients and their counsel should consider during the negotiating process whether they wish to allow or preclude virtual arbitrations; if this is of significant importance, the decision should be part of a precise, well-tuned arbitration clause.

## SIPPING LEMONADE AT TRIAL

Over the course of the pandemic, courts have moved from periodic telephone conferences, to video conferences, to bench trials, and even some jury trials. As an example, the Western District of Washington has published lengthy guide, “Virtual Trials, Bench & Jury, A Handbook for Attorneys,”<sup>20</sup> which offers guidance regarding technical, professionalism, and practical approaches to virtual trials. Other courts have developed formal or informal procedures as well,<sup>21</sup> most of which were not under consideration before March of 2020.

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<sup>14</sup> 2020 WL 4696818 (N.D. Ill. 2020).

<sup>15</sup> 537 U.S. 79, 84, 123 S.Ct. 588 (2002).

<sup>16</sup> *Id.* at \*2.

<sup>17</sup> In doing so, it rejected Rules-based arguments that he could not “attend” the hearings, and that the hearing did not have a “location” as required in the Rules. *Id.* at \*3.

<sup>18</sup> *Id.*, \*4.

<sup>19</sup> See *Winfrey v. Simmons Foods, Inc.*, 495 F.3d 549, 551-52 (8<sup>th</sup> Cir. 2007).

<sup>20</sup> <https://www.wawd.uscourts.gov/sites/wawd/files/VirtualTrialHandbookforAttorneys.pdf>. A copy is included in the Appendix to this paper.

<sup>21</sup> Some of these are included in the appendix to this paper.

Among the skills, lessons, and issues which have counsel and clients have been forced to consider and learn are planning for a virtual trial, deciding which platforms to use, how to effectively use technology to present witnesses and evidence, methods to facilitate a coherent trial experience, and ensuring that the client's positions and rights are well-represented. Discarding that hard-earned knowledge once the courthouse doors reopen would seem not just wasteful, but a disregard for the opportunities afforded by virtual evidence presentation.

### Planning for the Virtual (or Blended) Trial

At present, litigants who are proceeding to trial (whether voluntarily or under court compulsion) have no option but to participate virtually. While in the criminal context, courts have been more receptive to arguments that virtual trials may deprive a defendant of his or her rights under the Confrontation Clause,<sup>22</sup> this argument has not carried the same weight in a civil context.<sup>23</sup>

Where the use of remote testimony becomes optional, it would seem ill-advised to default to using only one method to present evidence. Instead, consideration should be given to whether live or virtual evidence is preferable, from the perspectives of both the entire trial and with respect individual witnesses and evidence. In addition, at least some courts are anticipating jury trials where in order to ensure social distancing, video conference technology will be used.<sup>24</sup>

While we are all used to and are well-aware of the benefits of live testimony and trial, the use of videoconference technology offers several benefits that ought to be considered, including:

- Reduced travel costs for remote clients, witnesses (including experts), and counsel.
- Ease in coordinating schedules of participants and court, potentially allowing for earlier trial.
- The ability of multiple client representatives to monitor and participate in the trial, without the cost and disruption inherent in being out of the office and physically present in a courtroom.

This opens the door to the inclusion of multiple persons within the company who may be able to provide factual assistance in response to the evidence presented.

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<sup>22</sup> See extensive discussion in *U.S. v. Rivera*, 372 F. Supp.3d 311, 313-17 (E.D. N. Car., 2019).

<sup>23</sup> See *Kieffaber v. Ethicon, Inc.*, 2021 WL 425822 (D. Kan. 2021), in which the court rejected a series of defense arguments against a virtual jury trial in a products liability case. See also M. Pressman and M. Shamma, "Memorandum: The Permissibility and Constitutionality of Jury Trial by Videoconference," <https://civiljuryproject.law.nyu.edu/memorandum-the-permissibility-constitutionality-of-jury-trial-by-videoconference/>

<sup>24</sup> See, e.g., [https://www.paed.uscourts.gov/documents/notices/EDPA Reinstitution of Jury Trials Guidelines.pdf](https://www.paed.uscourts.gov/documents/notices/EDPA_Reinstitution_of_Jury_Trials_Guidelines.pdf)

- The removal of geography-based limitations regarding the selection of experts.
- The potential to recruit fact witnesses remote from the trial location for virtual testimony, for whom live testimony might be cost-prohibitive or otherwise logistically difficult.
- Experts can monitor (and provide assistance to counsel) during trial, without the expense of travel.
- Efficiency in presenting back-to-back witnesses.
- The possibility of presenting video evidence from remote sites in real time. For example, if the relevant evidence includes field observations, consideration might be given to streaming from the site, even if it is a significant distance from the court.

Depending upon the situation, these “upsides” may be balanced, or even outweighed, by considerations pointing towards a live trial. Because of the myriad of factors (some new), the discussion regarding how to handle the trial, and which witnesses or evidence are best presented in which manner, ought to be an early part of the consultation process. In addition to logistics and travel issues, hard consideration about each witness’s likely testimony and use of exhibits, technology comfort, and even personal presentation manner should be part of the evaluation. The trier of fact – whether a judge or jury – will be watching witnesses who testify virtually “up close and personal;” as a result, any “tells” or personal foibles will be exaggerated, as will facial and upper body mannerisms which create credibility or a personal connection. All of these factors should be closely examined for each witness, and then balanced with basic questions regarding how well the subject matter and nature of the testimony will be received in each setting.

Effective and (relatively) seamless virtual advocacy warrants an examination of a number of factors not typically part of trial preparation. These include

- Where will counsel be? In one’s office, a conference room, at home? For each, do you have the requisite technology and bandwidth to ensure smooth participation? What distractions are there that need to be removed or diminished so as not to interrupt the proceedings?
- How will counsel question or present evidence – sitting before a laptop; in a conference room with a podium; or in some other manner?



- Where will the witness be? Will she testify from her own office or home? Will she instead be in a conference room with counsel? If the witness is not with you, how will you ensure that her technology is acceptable? Do you need to assist the witness with a loaner laptop, a location with better bandwidth, or tech support?
- Who may be present during the trial? Are there reasons for restricting who can attend all or a portion of the trial? For those who will attend, must they be identified?
- For all persons who will be seen on screen, what does their “space” look like? Here, a very critical eye is needed: what is behind you? (It is amazing what we do not “see” because it’s always been there, or it’s simply not expected.) Some platforms allow for virtual backgrounds or video filters, but their use may be subject to court rules and/or technical limitations,<sup>25</sup> and care must be taken to ensure that an inappropriate filter or background does not remain from a prior user.<sup>26</sup>
- How will you deal with documentary evidence? While virtual presentation is likely the default, will you also have hard copies available to you and witnesses? If so, have you discussed that with other counsel, and ensured that the materials are with the witness sufficiently in advance?
- What do you do about non-documentary evidence? For instance, videos can easily be streamed by most platforms. But, what if it is physical evidence? How do you ensure that all counsel, the court, and the trier of fact have the same evidence available?

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<sup>25</sup> Virtual backgrounds and filters require use of processor resources and bandwidth, and filters in particular can result in unexpected video effects. Test before using.

<sup>26</sup> For an example of filters gone awry, visit <https://youtu.be/KxIPGPupdd8>

For any witness who will testify remotely, preparation has newly added dimensions. Not only must she be prepared substantively and regarding the “usual” rules of trial testimony, but also with respect to use of the technology and platform being adopted, *and* how to present oneself to a “television audience.” This is an environment in which personality traits and physical habits are magnified, and where an innocent sipping of water, or looking around before answering, can be interpreted as reflecting disingenuity. Thus, witness prep must include a critical evaluation regarding mannerisms, eye contact with the camera, and other visual aspects of testimony. In addition, preparation needs to include how supporting evidence will be presented, and reemphasizing the importance of silence whenever an objection is raised.

One hard lesson is that one should expect to spend far longer on preparation than is typically allocated. Given that for the foreseeable future, many will insist that preparation itself be done remotely, add into this (where applicable) the need to deliver hard copies to the witness in advance, the need to ensure his technological savvy, and the reality that Zoom fatigue will set in after several hours, and likely militate towards multiple, but shorter, days of preparation. Plan ahead, and prepare early.

## Technology

Beyond the need for a computer (or high-end tablet), a camera, and a fast, reliable Internet connection<sup>27</sup>, thought should be given in advance of trial about some technical options in the context of the case being tried. Different courts are using different platforms, and while there is substantial overlap in many concepts, each platform has its own features and omissions compared to the others. For example, learning how to set up the screen so that important speakers can be viewed in full should be done well in advance of trial. Rehearsal time with the platform that will be used, and familiarity with features that may give an advantage, is important. Even something as obvious as ensuring – that is, testing -- that witnesses and experts all have the requisite hardware, and the platform loaded, updated, and ready, should be on the preparation list.

If the case is document/video intensive, identify and learn the document presentation software you plan to use during the trial, and learn to “share” a window or a screen to present the evidence. It is also important to organize electronic exhibits for quick access during direct or cross-examination, as the option of “going to the boxes” to find the right document is not really available. Use of a second screen can help with this process. Deciding how to set up your “virtual trial table” is something to be done in advance of trial.

What to do about microphones, headsets, and speakers is a surprisingly important question to be addressed. While one can use the microphone and speakers built into a laptop, the sound quality (both in and out) is often less than optimal, and using the built-in systems often increases the risk of feedback.

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<sup>27</sup> It should be remembered that the evaluation of these issues – especially Internet speed – must be done for each location where a witness, attorney, or other participant will be located. One website to use to check for Internet speed is <https://www.speedtest.net>

This is because echoing is an unfortunately frequent consequence where within a single space, more than one device has been connected to the platform; often, when the feedback loop begins, the “culprit” is not even aware that his device is connected to the meeting. Trial judges rapidly lose patience with counsel who cause the echo.

One suggested solution is the use of external audio devices. Options include an external speaker/microphone with enhanced audio capabilities, earbuds, or headsets<sup>28</sup>. The advantage of Bluetooth<sup>29</sup> earbuds or headsets is that they typically provide enhanced sound quality, avoid feedback concerns, and allow flexibility during an examination. Regardless of what is used, however, pre-trial testing and practice is critical.

### Trial Procedures

Just like in a courtroom, a virtual trial will proceed more smoothly if there are in place procedures and expectations applicable to the hearing. Where a court either does not have its own protocol and requirements in place (*see below*), or where the court allows supplementation of its protocols with case-specific procedures, it is important that counsel and client spend some time considering their own case and witnesses, and then structuring the protocols to fit the anticipated methods to be used. Basics such as who should be on camera,<sup>30</sup> when to mute and unmute,<sup>31</sup> how direct and cross-examinations will occur, how to get the court’s attention when objecting, how objections and other arguments will be heard, and who can be an observer during the trial<sup>32</sup> should be ironed out. In addition, because adverse counsel and the court will not be in the same room as the witness, counsel should agree upon the testifying witness’s physical environment: what the setting will be, what documents can be available, how to avoid communications (electronic or otherwise) during testimony, and other means to protect against inappropriate witness contact. This can be as detailed as requiring that the witness sit in a position where the camera can see his or her face, entire upper body and hands, and a space in front of the witness, so that documents cannot be surreptitiously available.

Issues to be considered in developing procedures and protocols include:

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<sup>28</sup> If considering the use of over-the-ear headsets, consider how that will appear to the trier of fact.

<sup>29</sup> While wired earbuds are feasible, they risk being pulled out when one moves or looks for documents or papers.

<sup>30</sup> In multiple party cases, it has been found it is often best to turn off the cameras of all except the judge, witness, examining attorney, and the objecting/defending attorney, so as to preserve bandwidth and allow for larger windows. Even if you are off camera, however, remember that at any time, you may be called upon to object or speak.

<sup>31</sup> Muting all but the persons actually speaking or engaged in the examination is often critical to a smooth hearing. If you are muted, however, you must be quick on the unmute button if there is a need to object.

<sup>32</sup> Most platforms include participant lists, allowing one to monitor who is watching the trial. This can be especially important to exclude prospective witnesses if necessary, or to ensure that sealed testimony is seen only by those permitted to do so.

- Who may be in the room with the witness. While an obvious default may be that the witness must be alone, trial counsel and her witnesses may determine it better that counsel and the witness can be in the same room. In addition, a witness who finds technology challenging may need to have assistance available. Consider from where the witness will testify; if it is his or her home, how do you restrict and avoid family or other household interruptions? All of this should be evaluated in advance of discussing the protocol with adverse counsel.
- How the witnesses will be viewed on camera. In addition to the considerations mentioned above, if examining counsel and the witness are in the same room, the protocol should provide how they both will be viewed: one camera for both or separate cameras for each person. It should further address what else will be seen in the room, and do so in a way that effectively monitor what the witness can access or see during testimony.
- Strict restrictions on access to any electronic or other external communications devices during testimony. No access to any phones, tablets, email communications, or other means for communication should allowed during testimony. (Whether such communications are allowed during breaks ought to be dependent upon local court rules and practices that govern conferring with witnesses during breaks).<sup>33</sup>
- A prohibition against any communications with the witness by any means during testimony while on the record. While this may be subsumed within the prior bullet point, to avoid later debate,

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<sup>33</sup> For a discussion regarding the propriety of conferring in such circumstances, see <https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2018/call-me-maybe-preserving-the-ability-to-talk-with-a-client-during-a-civil-trial/>



an explicit prohibition (subject to the same considerations regarding communications during breaks) is prudent.

- A preclusion of any access to any documents unless they have been introduced as evidence and are being used as exhibit. As part of monitoring compliance, camera placement is important.
- A prohibition against recording the trial by any means.
- A requirement that at the commencement of each witness's testimony (and after each break), he or she confirm under oath that he or she is complying with the requirements of the protocol.
- A procedure regarding how documents will be used during examination. While the manner of using admitted exhibits and previously marked proposed exhibits ought to be simple (as they should have been shared electronically with all counsel well in advance of the evidence), where a new document is being offered – especially to impeach during cross-examination – it is more difficult to share it with the other parties in a virtual trial. Options to consider can include emailing copies at a certain time before the anticipated use; or a short adjournment prior to using the document for the document to be emailed and reviewed. In order to ensure all litigants are subject to the same rules, this should be thought out in advance of trial.
- Consider what evidence may be presented that is not either copies of documents or witness testimony. If you are going to offer tangible exhibits, how will they be provided to all counsel and the court? If you are going to offer portions of a video, will they need to be identified in advance.

- Should there be limits regarding who may attend the trial? In a trade secret case, the public's access will need to be limited, as will those who do not have a need to hear confidential testimony. Should those attending be identified?

## Court Protocols

As the lockdowns have continued, many courts have chosen to facilitate hearings and trials. As a result, guides and protocols have been created by many courts. These vary in the amount of detail, ranging from basic technical suggestions to detailed mandates.

Accompanying this paper are examples of protocols and guides that some courts have promulgated and published. One of the most comprehensive is from the United States District Court for the Western District of Washington, links to which appear below. The protocols and guides include:

### Selected State Courts

#### ■ Alaska

Conducting Criminal and Civil Jury Trials and Grand Jury During the COVID-19 Pandemic:

<https://public.courts.alaska.gov/web/covid19/docs/conducting-trials-gj-pandemic.pdf>

Court System Zoom Hearings Guide:

<https://public.courts.alaska.gov/web/covid19/docs/remote-hearings-alaska.pdf>

#### ■ California.

Court Services Status Due to COVID-19 (includes link to each court's instructions)

<https://www.courts.ca.gov/court-status.htm>

#### ■ Colorado

General guidance is at <https://www.courts.state.co.us/announcements/COVID-19.cfm>

There are numerous protocols and rules established by specific Judicial Districts and Courts.

Some are contained within the Appendix.

#### ■ Connecticut.

Quick Reference Guide:

[https://jud.ct.gov/RemoteJustice/Docs/Quick\\_Ref\\_Guide\\_Remote\\_Hearings.pdf?v1](https://jud.ct.gov/RemoteJustice/Docs/Quick_Ref_Guide_Remote_Hearings.pdf?v1)

Connecticut Guide to Remote Hearings:

<https://jud.ct.gov/HomePDFs/ConnecticutGuideRemoteHearings.pdf>

■ **Florida.**

The Court's general guidance is here: <https://www.flcourts.org/Resources-Services/Emergency-Preparedness/COVID-19-Information-and-Updates>

One Florida Judicial Circuit issued its Pandemic Handbook: A Guide for Attorneys and Litigants.

[https://www.jud11.flcourts.org/docs/Circuit%20Civil%20Handbook%20for%20Attorney%20and%20Litigants%20REV%2007012020%20\(2\).pdf](https://www.jud11.flcourts.org/docs/Circuit%20Civil%20Handbook%20for%20Attorney%20and%20Litigants%20REV%2007012020%20(2).pdf)

■ **Hawaii:**

Remote Court Hearings. <https://www.courts.state.hi.us/remote-court-hearings-via-zoom-or-webex>

■ **Illinois.**

The Supreme Court issued its Remote Court Proceedings Guidance.

[https://courts.illinois.gov/Administrative/covid/052220-SC\\_RHG.pdf](https://courts.illinois.gov/Administrative/covid/052220-SC_RHG.pdf)

Individual courts have since issued their own protocols and guides, some of which are in the Appendix.



### ■ Indiana

General guidance can be found at <https://www.in.gov/courts/covid/public/>

The courts have also issued several instructions or tips, some of which can be found in the Appendix.

### ■ Kansas

Trial Courts Virtual Courtroom Standards and Guides:

[https://www.kscourts.org/KSCourts/media/KsCourts/court%20administration/Virtual\\_Court/KSTrialCourtsVirtualCourtroomStandardsGuidelines.pdf](https://www.kscourts.org/KSCourts/media/KsCourts/court%20administration/Virtual_Court/KSTrialCourtsVirtualCourtroomStandardsGuidelines.pdf)

### ■ Maine

General information and links to Management orders can be found at

<https://www.courts.maine.gov/covid19/index.html>

Maine courts have issued a series of COVID Management Orders. Selected orders are within the Appendix.

### ■ Maryland

Maryland has a detailed Remote Hearings Website.

<https://www.mdcourts.gov/remotehearings>

Guidelines published for remote hearings are in the Appendix.

### ■ Massachusetts.

Massachusetts' Guide for Remote Hearings can be found here. <https://www.mass.gov/info-details/remotevirtual-court-services>

It has also published more detailed “Tips” for appearances and Guides, which are within the Appendix.

■ **Michigan**

Michigan has developed an extensive Virtual Courtroom page, which can be found at <https://courts.michigan.gov/News-Events/covid19-resources/Pages/VCR.aspx>

Specific guides for Virtual Courtroom Standards and Guides for Litigants are within the Appendix.

■ **Minnesota**

Minnesota provides Remote Hearing Information and Best Practices.

<https://www.mncourts.gov/Remote-Hearings.aspx>

■ **New York**

NY Courts Guide to Virtual Hearings: <https://portal.nycourts.gov/knowledgebase/article/KA-01070>

■ **North Carolina**

The courts have published a guide to remote proceedings.

<https://indd.adobe.com/view/0aa43306-f36b-432e-8aae-493c94d29d6d>

Numerous trial level courts have issued rules and protocols, some of which are within the Appendix.

■ Ohio

The Supreme Court has provided resources for courts to address Covid, including for Virtual Hearings. <http://sc.ohio.gov/coronavirus/default.aspx>. This includes a guide to Virtual Public Access. <http://sc.ohio.gov/JCS/courtSvcs/virtualCourt/default.asp>

Because the details are being addressed locally, rules within each court should be consulted.

■ South Carolina

The Supreme Court has issued directives for business to proceed during Covid.

<https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2550>.

■ Texas

The Texas Judicial Branch has a comprehensive page for Coronavirus Information, including electronic hearings. <https://www.txcourts.gov/court-coronavirus-information/electronic-hearings-zoom/><sup>34</sup> It includes numerous how to videos, and best practices. These, and other documents of interest, are included in the Appendix.

■ Utah

Utah's judiciary has a Covid alert page, <https://www.utcourts.gov/alerts/>, which in addition to administrative orders, including a virtual jury voir dire guidance. See Appendix.

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<sup>34</sup> Just added on Feb. 10 is "how to turn off the cat filter."  
<https://www.youtube.com/watch?v=KxIPGPupdd8&feature=youtu.be>

■ Vermont.

The Judiciary has established a Covid page <https://www.vermontjudiciary.org/about-vermont-judiciary/covid-19-and-court-operations>, which includes within it information about Remote Hearings. This is contained in the Appendix.

■ Virginia

Virginia’s guidance can be found on its Judicial System home page.

<http://www.courts.state.va.us> In addition, the Judicial System maintains a comprehensive list of local and appellate court Covid announcements and rules.

[http://www.courts.state.va.us/news/items/covid\\_19.pdf](http://www.courts.state.va.us/news/items/covid_19.pdf) . An example of the guidance from the Court of Appeals is within the Appendix.

■ Washington.

Washington State Courts offer a centralized portal for information about Covid,

<https://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.COVID19> , including a Virtual Courts Directory, <https://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.COVID19> .

**Selected Federal Trial Courts**

■ California, Central District.

Guidelines for Zoom Courtroom Proceedings: <https://www.cacd.uscourts.gov/clerk-services/courtroom-technology/zoom-courtroom-proceedings>

■ California, Northern District:

Preparing to Participate in a Zoom Video Conference. <https://cand.uscourts.gov/zoom/>

■ **New York, Southern District.**

Skype Instructions: <https://www.nysd.uscourts.gov/sites/default/files/2020-05/SKYPE%20Instructions%20for%20Attorneys%205.1.20.pdf>

Plan for Resuming Jury Trials:

[https://www.nysd.uscourts.gov/sites/default/files/local\\_rules/Plan%20for%20Resuming%20Jury%20Trials.pdf](https://www.nysd.uscourts.gov/sites/default/files/local_rules/Plan%20for%20Resuming%20Jury%20Trials.pdf)

■ **Pennsylvania, Eastern District.**

Procedures for resumed jury trials:

[https://www.paed.uscourts.gov/documents/notices/EDPA\\_Reinstitution\\_of\\_Jury\\_Trials\\_Guidelines.pdf](https://www.paed.uscourts.gov/documents/notices/EDPA_Reinstitution_of_Jury_Trials_Guidelines.pdf)

■ **Washington, Western District.**

Remote Hearing Information for Attorneys:

<https://www.wawd.uscourts.gov/attorneys/remotehearings>

Virtual Trials, Bench & Jury, A Handbook for Attorneys:

<https://www.wawd.uscourts.gov/sites/wawd/files/VirtualTrialHandbookforAttorneys.pdf>

This should not be considered an exhaustive nor a static list. As a result, it is suggested that early in the litigation process, counsel consult the website for the court in which the matter is being litigated, as well as the individual judge's rules, and monitor for changes as the case progresses.

Jury trials would logically seem to be more complicated than bench trials. Yet, not only have several courts conducted them,<sup>35</sup> but commentators from the New York University Civil Jury Project have

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<sup>35</sup> For example, ALFA International Member Firm Manatt Phelps & Phillips successfully prosecuted the nation's first all-virtual patent infringement jury trial. *Ironburg Inventions Ltd. v. Valve Corp.*, W.D. Wash.

offered protocols and suggestions for video conference voir dire, trials, and deliberations.<sup>36</sup> Indeed, several states have prepared remote jury voir dire procedures, leading to the conclusion that they are preparing to proceed, at least in civil matters, with jury trials.

### Other Tips

The fundamental rule to remember is simple: **YOU ARE ON TRIAL**. Whether you and your witnesses are in a courtroom, or (because of the lockdowns) are in a conference room, in your office, or in your respective homes, the fact remains that whenever you are connected to the virtual trial, it should be treated as if you are in a trial setting because you are. Keeping that in mind makes the rest something instinctual for most trial lawyers.

What this means beyond avoiding unusual Zoom filters and not wearing pajamas, is that you and your witnesses must always be attentive, prepared, and respectful. Exhibits should be ready, technology should be pre-tested, and the presentation should be developed in a way that will most effectively advocate the client's position. If the technology and/or volume of exhibits is significant, engaging a tech-savvy second chair is prudent, and can offer trial experience to relatively junior lawyers who have been steeped in technology practically since birth. Indeed, as another unexpected benefit of virtual trials, this presents a new opportunity to help train the next generation of trial lawyers.

### THE FUTURE: LEMONADE WHEN VIRTUAL IS OPTIONAL

Whether in the board room, the interview, depositions, ADR proceedings, hearings, or trials, the past year has required that clients and counsel adopt, learn, and (hopefully) refine the use of virtual technology. The result has been (in some cases grudging) acceptance of communicating through 11- to 13-inch screens. It should be kept in mind, however, that it is not just those involved in the legal profession who have become accustomed to the online face, but also a large percentage of the public, for whom school, church, business meetings, holiday family "gatherings," social events, local board meetings, and many aspects of their lives have occurred through the Internet.

Perhaps this means that when considering the post-lockdown business and legal environment, all should adjust their mindsets regarding whether jurors and counterparties will now consider virtual communications and presentations to be "out of the norm." It is suggested that, in fact, the past year of Zoom, Teams, and WebEx meetings has fundamentally transformed how our audiences and business partners expect to be reached. As a result, the legal and business communities should continue to include on-line presentations as a strong option, especially where the information being conveyed (whether in a meeting or on trial) can be effectively (or even uniquely) offered virtually, and where the use of the virtual platform has cost benefits.

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<sup>36</sup> <https://civiljuryproject.law.nyu.edu/resources-2/virtual-jury-trial-protocols/>.