



ALFA International
THE GLOBAL LEGAL NETWORK

2022 Construction Seminar July 27-29, 2022

LITIGATION AND DISPUTE RESOLUTION IN A POST-COVID WORLD

Spencer Wiegard

Moderator

GENTRY LOCKE

Roanoke, Virginia

swiegard@gentrylocke.com

Alfredo Alvarado

LESTER SCHWAB KATZ & DWYER, LLP

New York, New York

aalvarado@lskdnylaw.com

HOW THE COVID-19 PANDEMIC CHANGED THE WAY WE LITIGATE AND MEDIATE

In early 2020 the Global COVID-19 pandemic spread across the world. To “flatten the curve,” social distancing measures were adopted in many countries, states, and cities, with those able to work from home using virtual meeting spaces to conduct business meetings and conferences. Facing executive orders and rules limiting in-person gatherings and mandating social distancing, courts and neutrals have moved to virtual hearings, trials, and mediations. This panel will discuss the current state of virtual litigation, arbitration, and mediation, the efforts to resume in-person jury trials and court proceedings, and how the recent move to the virtual space may change litigation and ADR practice after the pandemic finally ends.

A. What did we see at the start of the pandemic?

As lockdown orders took effect, courts adopted new rules and procedures to conform with social distancing measures and executive orders. As an example, on March 16, 2020, the Supreme Court of Virginia issued a Declaration of Judicial Emergency.¹ This declaration suspended all non-emergency, non-essential court proceedings, tolled and extended all deadlines for 21 days, and continued all non-emergency civil, traffic, and criminal matters, including jury trials.² The Declaration also required Virginia courts to utilize e-filing if available, and to use telephonic or video technology for all necessary hearing, trials, or other matters.³

The first Declaration of Judicial Emergency was effective from March 16, 2020 through April 6, 2020, but was subject to extension for additional periods of up to 21 calendar days.⁴ On March 27, 2020, the Supreme Court extended the period of the Judicial Emergency and clarified some of its prior instructions to Virginia Courts.⁵ Since March 2020, the Supreme Court of Virginia has issued a total of 40 orders extending the Declaration of Judicial Emergency, although as COVID-19 case counts increased and decreased, the Supreme Court of Virginia adjusted the restrictions, eventually providing more leeway to Virginia courts to implement policies that addressed the risks associated with the pandemic.⁶

In California, all emergency orders put into place during COVID-19 pandemic have since expired.⁷ Civil statute of limitations was suspended during COVID expired June 30, 2022, as well as the six-month extension to bring a case to trial.⁸ Most courts are slowly starting to return to the pre-pandemic environment while still respecting safety protocols.

Texas was one of the most proactive states to allow in-person or remote court proceedings.⁹ Courts were allowed to resume conducting in-person proceedings but may continue to use

¹ See, https://www.vacourts.gov/news/items/covid/2020_0317_supreme_court_of_virginia.pdf

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See, https://www.vacourts.gov/news/items/2020_0327_scv_order_extending_declaration_of_judicial_emergency.pdf.

⁶ See, https://www.vacourts.gov/news/items/covid/scv_emergency_orders.pdf.

⁷ See, https://www.courts.ca.gov/documents/appendix_1.pdf

⁸ *Id.*

⁹ See, <https://guides.sll.texas.gov/covid-19/courts>.

reasonable efforts to conduct proceedings remotely.¹⁰ Courts that had not already done were instructed to move swiftly to return to regular pre-trial and trial proceedings as soon as reasonably feasible before March 1, 2022.¹¹ Any court may modify or suspend certain deadlines and procedures until March 1, 2022, with limited exceptions.¹² In-person jury proceedings have been allowed to resume.¹³ In criminal cases involving a potential jail or prison sentence, remote jury proceedings must not be conducted over the objection of the defendant or the prosecutor.¹⁴ Remote jury proceedings must not be conducted in other cases unless the court has considered on the record or in a written order any objection or motion related to moving ahead with the proceeding at least seven days before the jury proceeding (or as soon as practicable if the objection or motion is made or filed within seven days of the jury proceeding).¹⁵ Texas also issued a study of resumption of jury trials during the pandemic.¹⁶

In Oregon, social distancing is no longer required in court facilities, although a presiding judge may issue an order requiring social distancing in the public areas of a court facility through June 30, 2022.¹⁷ Face coverings are generally required. In circuit court, the presiding judge has discretion (with limited exceptions) to decide whether proceedings should be conducted in person or remotely.¹⁸ Jury trial proceedings have resumed.

In New Jersey, courts are fully open and fully staffed. Scheduled in-person events are expanding gradually. Judges will address issues related to COVID-19 based on the circumstances of an individual case.¹⁹ In-person jury trials and grand jury proceedings are being held, with health and safety protocols subject to further adjustments.²⁰

In Maryland, courts have resumed full operations, while continuing to require social distancing and health measures.²¹ Some courts will continue using technology for remote proceedings, but this will vary by court location.²² Jury trials have resumed.²³

B. Major Concerns among the Bar at in the early Days of the Pandemic

a. Delays in Pending Litigation and Arbitration

¹⁰ *Id.*

¹¹ *See*, <https://www.txcourts.gov/media/1454448/229048.pdf>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See*, <https://www.txcourts.gov/media/1449660/jury-report-to-scotx-final.pdf>.

¹⁷ *See*, https://www.courts.oregon.gov/rules/Documents/CJO_2022-012.pdf

¹⁸ *Id.*

¹⁹ *See*, <https://www.njcourts.gov/notices/2021/n211118a.pdf?c=X8U>.

²⁰ *Id.*

²¹ *See*, <https://mdcourts.gov/sites/default/files/admin-orders/20220328liftingthecovid19healthemergencyastothemarylandjudiciary.pdf>

²² *Id.*

²³ *Id.*

At the outset scheduled trials, hearings, arbitrations, and mediations were initially pushed back with counsel and parties hoping that lockdown orders would be short in duration, and that litigation practice and ADR would return to normal within a matter of weeks. However, as the pandemic continued COVID-19 case counts rose, and hospitals ran out of space and resources, the initially postponed trials, hearings, arbitrations, and mediations were further delayed. The ever increasing number of matters with delayed resolutions further built upon the backlogs of pending litigation. Courts, counsel and parties shifted to use available technology and the virtual space in an effort to mitigate the impact of these delays. The National Center for State Courts (NCSC) maintains a guide to the use of virtual hearings across the USA.²⁴

b. Security Concerns for the Shift to Virtual Platforms

A major problem facing law firms, companies, and courts when initially making the shift to virtual was the risk of unwanted viewers, participants, and hackers in the virtual, trial, arbitration, hearing, or mediation. “Zoom Bombing” became a popularized term to describe the intrusion of these unwanted parties in a virtual session.²⁵ Although the media tended to focus on the humorous aspects of “Zoom Bombing,” the potential negative ramifications of this practice in the legal context were quite apparent.

Over time, Zoom and other virtual platforms addressed these security concerns.²⁶ They made improvements by increasing encryption and implementing certain features to help prevent unwanted guests from joining (such as waiting rooms and the ability for hosts to lock sessions). Additionally, once law firms, companies, and courts gained experience utilizing these virtual platforms and the improved features, security concerns began to decrease.

c. Security Tips for Virtual Appearances:

- i. Ensure entry to the virtual meeting is subject to a password;
- ii. Do not set the virtual meeting as a “public” meeting;
- iii. Share the meeting link with only the invitees;
- iv. Setup a waiting room/lobby for invitees;
- v. Admit participants from the waiting room/lobby; and
- vi. Use breakout rooms to keep parties, counsel, and witnesses the proper location while waiting.

²⁴ See, <https://public.tableau.com/app/profile/ncscviz/viz/StateCourtResponsestoCOVID-19/CovidTheCourts>

²⁵ See, <https://www.pcmag.com/how-to/how-to-prevent-zoom-bombing>

²⁶ See, <https://support.zoom.us/hc/en-us/articles/360041848151-In-meeting-security-options>

C. What did the shift to virtual space look like?

a. Key Benefits

Several benefits were apparent when the shift to virtual appearances occurred. The shift offered cost savings for business travel time and expenses not incurred. It was also noticeably beneficial from a logistical standpoint. The logistical improvements related to virtual appearances increased the time litigators have to actually prepare for an appearance, which in turn reduces the overall stress on the litigators.

i. Virtual is More Cost-Effective

Before shifting to virtual hearings and mediations, clients were responsible for travel expenses for attorneys, witnesses, and mediators. With hearings and mediations occurring virtually, these travel expenses were significantly reduced.

ii. Scheduling is Easier

Virtual hearings allow greater flexibility for urgent and semi-urgent matters and injunctions. This flexibility is especially beneficial for commercial parties. Additionally, there are significantly less travel restrictions related to scheduling trials, hearings, depositions, arbitrations, and mediations. There is less worry of back-to-back hearings and mediations running over, and attorneys, parties, and carrier representatives can avoid the rush to have last-minute materials printed at their hotel conference centers, or to catch the last flight home.

iii. Court Dockets are Expedited

With virtual hearings came speedier trials and a noticeable decrease in nonappearance rates.²⁷ With experience and understanding of technology, exhibits and witness testimony can be easier and quicker to present, which can speed up the flow of court dockets. In fact, many courthouses that previously lacked the technology and equipment to effectively run a slide presentation are now welcome and encourage the use of slide decks when appearances are held virtually.²⁸

iv. Mediation Improved, Specifically

Although time spent in the room with counsel during mediation is sometimes used to discuss the case-at-hand, many times it is spent on mobile devices and engaging in small talk. During virtual mediations, this downtime can be spent

²⁷ See, <https://www.ncsc.org/newsroom/at-the-center/2020/may-13>

²⁸ See, <https://www.natlawreview.com/article/will-virtual-hearings-shape-new-generation-litigation>

chatting about the case in private break-out rooms or doing separate unrelated tasks.

If a mediation becomes too complex or complicated, the mediation can be scheduled to occur at different times or on different days. Attorneys aren't limited to local mediators either. If an attorney hears a mediator from another jurisdiction while attending a conference, then the attorney can request to use the mediator in his or her own dispute without incurring the travel costs typically associated with this type of request.

b. Challenges Faced when Shifting to Virtual

Change introduces challenges in addition to benefits, and the shift to virtual hearings and mediation was no different. However, these challenges can be reduced with proper communication between the attorney and client, between attorney and court, mediator or arbitrator.

i. "Zoom Fatigue"

When participating in a virtual hearing or mediation, it can be difficult for all parties involved to remain present and focused on the case-at-hand. Distractions are more likely to happen with easier access to mobile devices and interruptions from family, friends, pets, etc. It can also be difficult for parties to decide where to look (at the speaker on the screen or directly into the camera). These challenges become increasingly more difficult with longer hearings and testimonies.

ii. Technological Challenges

Technology makes virtual hearings and mediations easier when all parties have access to the proper technology and WiFi. When there is a slight delay in audio and video, multiple speakers can talk at once and over one another. This makes it difficult for those on the call to properly hear, record, and process the information being communicated. The audio and video lag time requires the attorney to properly lodge any objections and verify that they have been heard and recorded.

Also, if clients do not have access to a large computer monitor or television capable of streaming video conferences, their ability to see all parties is dramatically affected. When clients have to resort to using a mobile device, they not only have difficulty seeing all of the other parties, but it also leads to potential unwanted movement of the client's camera. This makes it difficult and distracting for others participating in the virtual hearing or mediation.

Although privacy concerns surrounding “Zoom Bombing” have been addressed by the various video conferencing platforms, other security concerns still linger. Many individuals involved in these virtual hearings and mediations have smart devices around their home, such as an Alexa device or Google Home. These devices and other recording devices are potentially problematic, as the audio of the virtual hearing or mediation may be inadvertently recorded.

iii. In-Person Appearances Can Provide Benefits to Effective Litigation

Even though in-person appearances present their own logistical challenges, many of these challenges can be used strategically by the attorney to benefit his or her client. For instance, when attorneys have time constraints, they can leverage the need for a speedier resolution to push for a settlement. On the other side, attorneys can use their limited settlement authority before needing to consult an absent party to their advantage when negotiating in person.

In some situations, in-person appearances are preferred. Reading a witness’ tone and body language is much more difficult over video than it is when the witness takes the stand. Using exhibits during cross-examination in-person can also be much more impactful, as some exhibits may need to be sent in advance of virtual hearings and mediations, thus erasing the satisfying “element of surprise.”

Lastly, mediation in the virtual space can present other challenges and difficulties difficult for clients and attorneys. Reaching a settlement in mediation is often the result of trust and rapport built between the parties, counsel, and the neutral during the mediation session(s), which can be improved by face-to-face interactions. Not having this interaction can lead to anxiety from the client and an inability for the client to fully trust that his or her interests are properly being conveyed and addressed. However, attorneys can help alleviate these concerns through communication of their own experiences using virtual mediation in general or with a particular mediator.

D. What does the future hold?

The world may be seeing a slow return to pre-pandemic days, but the legal community will continue to see the effects COVID-19 had on litigation for many years to come. Complex trials and depositions are already logistically difficult without the use of virtual technology, and disputes with complex evidentiary or challenging technical issues can be better presented in-person than through a screen.

a. Increased Litigation Will Lead to Continued Backlogs

The pandemic not only resulted in delays of pending litigation, but it also introduced a multitude of new litigation related to:

- Supply-chain disruptions; business interruption-related and breach of contract cases
- Legal issues involving force majeure and insurance claims for physical damages
- Federal stimulus money running out
- Sunset of tenant protections

b. How the Legal Community Will Need to Adapt

By recognizing that virtual hearings and mediations are here to stay, the legal community will need to make the appropriate changes to keep up with the demand. Firms will need to improve their technological capabilities and market themselves to inform clients of these capabilities.

Additionally, attorneys will need to hone their skills to handle challenges that make virtual appearances more difficult than being in-person, such as reading the body language of witnesses, judges, and mediators. In order to respond to judicial pressure for attorneys to move quickly, attorneys will need to focus on writing shorter, more concise briefs and refrain from filing unnecessary motions.

As time moves forward and virtual becomes more common, changes will need to happen in civil procedure and arbitration laws. By implementing necessary changes, improvements can be made in the clarity and consistency of virtual hearings and mediations.

c. Conclusion

Virtual trial hearings and mediation are here to stay to an extent, with hybrid options likely to continue indefinitely. With the changes that have already happened and changes likely to happen, it is important to note that there is no “one-size-fits-all” approach when it comes to virtual hearings and mediations.

d. Additional Considerations for use of Virtual Appearances

- i. If it is a hearing, is the motion or issue dispositive or procedural?
- ii. How long is the appearance expected to last as compared to the travel time involved?
- iii. If it is a trial, is it a jury trial, bench trial?
- iv. Will the trial or arbitration last less than one day or several days?
- v. If it is a deposition, is the deponent a key witness, an important expert, or an ancillary potential fact witness who is unlikely to testify?

- vi. If it is a mediation, does the neutral have experience managing a mediation in the virtual space? Are there multiple parties with counsel? Will the parties participate from home or their respective offices?
- vii. Are there potential distractions for the parties, counsel, neutral or court?
- viii. Avoid pitfalls that can result in the ineffective presentation of argument, exhibits, testimony.
 - 1. Stand up when addressing the Court or Arbitrator.
 - 2. Dress appropriately.
 - 3. Invest in a ring light or a camera with a ring light.
 - 4. Ensure you have an appropriate background or virtual background that is not distracting.
 - 5. Don't use the cat filter. ²⁹

²⁹ See, <https://www.youtube.com/watch?v=IG0ofzZOyl8>