

Virtual proceedings: A practitioners' guide

By Jamie Ballinger, Esq., Thomas H. Barnard, Esq., Stuart R. Goldberg, Esq., Hal K. Litchford, Esq., Diane F. Schmitt, Esq., and Peter Zuk, Esq., *Baker Donelson*

JULY 20, 2020

COVID-19 continues to plague law firms' and attorneys' ability to move cases forward in material ways. As the country begins to reopen, courts are facing significant roadblocks in handling burgeoning case dockets.

Almost every United States jurisdiction has weighed, and must continue to weigh, the efficacy of remote proceedings to complete the business of the court, while simultaneously keeping the court, staff, litigants and witnesses safe and secure. This article offers guidelines to help counsel achieve such efforts.

COURT IS STILL COURT

Above all else, litigators must remember that the seeming informality of remote proceedings should not change the way participants approach the court.

This concept should be the backdrop for every decision you make and demands that, in all aspects of representation, you bring the professionalism you would otherwise bring if courts were fully operational.

PLATFORM

Videoconferencing is the foundation of remote proceedings, but no standard or preferred platform has yet emerged. Likewise, there is no uniform practice governing whether the court or parties provide the videoconferencing platform, although it is expected that, over time, this will become a court function.

To support a remote trial, platforms should be configured for the following features:

- A virtual courtroom in which all parties, counsel, witnesses and the court reporter may be connected before the presiding judge.
- Separate virtual public rooms for each attorney, party and witness.
- The ability to control entry to the virtual courtroom for witness sequestration.
- A virtual private room for the presiding judge and attorneys for sidebar conferences.

- Ideally, virtual private rooms for each set of attorneys and corresponding party, separate private rooms for co-counsel, and a private room for the judge and court personnel.
- Screen sharing capability for publication and management of exhibits and demonstrative evidence.
- Limited accessibility to interested members of the public — i.e., microphone disabled to prevent disruption of the proceedings or “Zoombombing.”

To manage the security and legitimacy of the proceeding, the court may facilitate the platform's setup. If the court makes a platform recommendation, go with it. The key to getting the process off the ground is to always defer to the court's prerogative and remain flexible to potential options.

That said, if the court leaves the decision up to the parties, do not be afraid to take the lead in establishing a proceeding on a mutually agreeable platform that you have become familiar with in your virtual practice.

Having the opportunity to conduct a proceeding on a platform that you already understand how to navigate could certainly be advantageous to you and your client.

WHO MAKES THE INVITE LIST?

As with in-court proceedings, your jurisdictional rules, orders, or advisories may govern who can be present virtually. Best practice is to discuss the matter with the court and opposing parties well in advance to ensure that no one accidentally violates any rules of procedure.

Furthermore, the parties can always stipulate as to the availability of witnesses at trial; decide whether the parties must adhere to sequestration; set up special rooms in the virtual proceeding to allow for confidential areas of the space to assist in calling upon such persons at appropriate times; or have the court handle all such tasks.

Another important consideration is to evaluate how each participant is going to be notified of, or invited to, the proceedings. Just as with trial, confirm your witnesses are aware of the posture of the proceedings so they are not unnecessarily taking off work or avoiding other personal obligations.

Best practice is to contact the court and opposing counsel at least one week before the proceeding to double check the information that will be disseminated to participants and ensure a comprehensive understanding of the procedures that will be used to bring everyone together.

TECHNOLOGICAL CONSIDERATIONS

Hardware is just as critical as software. You should appreciate the various issues that can arise with hardware that can make remote proceedings a nightmare, should something simple like a keyboard fail, and you should have a backup device at the ready.

Make sure your equipment is not merely functional, but optimal. If you have had computer hiccups, have your IT department resolve the issues at least one week before the proceeding.

Do you have headphones that allow you to sufficiently hear those communicating with you? If not, now is the time to upgrade.

Does your microphone work? Is there feedback that may impede your full participation? Either through headphones, or the computer, ensure that your voice can be picked up and that you are communicating clearly, concisely, and crisply.

Does your mouse work? Keyboard? Do you have reserve batteries? A cellphone charger? A computer charger?

TIME CONSIDERATIONS

Plain and simple, virtual proceedings take longer to complete than in those in person. Even with seamless technology that instantaneously connects the parties, there can be significant complications with attorneys needlessly leaving their microphones unmuted; delay in audio versus video feed; persons talking over each other; and an inability to voice objections (and have them ruled on) before the witness answers an otherwise objectionable question.

Some of these problems are not preventable. Best practice is to discuss these issues at the outset of the proceeding, perhaps have the judge emphasize that each participant speak slowly and clearly, and have the objecting attorney keep his/her microphone off during questioning, only switching the microphone on to object or creating some sort of visual cue “failsafe” which requires all parties to stop speaking if the judge makes an agreed upon hand gesture (like a stop sign); and discuss these issues with the court and opposing counsel at the beginning of the proceeding (or even sooner than that).

ANCILLARY DISTRACTIONS

Maintain professionalism by remaining calm and still in front of your screen; ensure that your client or witnesses do the same. This will enhance your credibility to the judge or jury.

It is distracting to participants when a witness (or lawyer) during a video proceeding stands, moves about the room, or talks (even muted talk) to other persons in their homes, or offices.

These seemingly innocuous actions are magnified when all parties are participating remotely and may hurt your case if you or your witness is the culprit. Just like situations in which a person in the gallery whispers or rustles papers during your questioning, you and the court are entitled to respect.

Further, while you are normally able to sit at a trial table and take notes while still frequently glancing at the witness and court, virtual connectivity creates an added and different layer that may make it difficult to do things as you are accustomed.

Simultaneous listening, watching and notetaking is all second nature in a courtroom, but, over the webspace, it’s easier to lose the focus you typically have during a hearing or trial.

Best practice is to practice how to position your screen and camera so that you can take notes and still maintain some eye contact with the judge and participants.

OTHER ISSUES TO CONSIDER

All attorneys and witnesses will be judged by what appears on the screen. Normally, judges and jurors can rely on body language to evaluate a party’s credibility. Judges and jurors went from seeing parties from far away or to the side, to looking everyone straight in the eye.

Now the facial movements and verbal cues are all more important to determining credibility. Litigators should have practice sessions with all witnesses to evaluate witness conduct on screen. If possible, consider having a room set up for remote hearings or trials.

Poor lighting can leave a poor impression and having the ability to position a witness in a room can be useful to avoid focusing on facial expressions.

TIPS FOR PRESENTING WELL ON VIDEO

Generally, you want to think globally when it comes to setting up for your proceedings. Evaluate your surroundings and be prepared to modify them for the best effect. Here are the chief considerations for best presentation:

- **Background:** Evaluate which available background looks the most professional. Avoid personal living spaces as well as the virtual backgrounds available from platforms such as Zoom.
- **Lighting:** If you sit with a window to your back, you will be in shadow and your facial expressions will not be seen. Find a way to have natural light by, for example, facing a window.

- **Security:** Consider likely interruptions and prevent them. You should consider locking the door and placing a sign on the door asking for quiet and to not be disturbed. Silence your cell phone, any office phone, and the notifications on all devices.

Next, observe yourself on video and ask others to observe you on video to evaluate your appearance:

- **Clothing:** You should wear the same clothing that you would wear to court. Do not assume that you won't be asked to stand, and wear professional, wrinkle-free apparel from top to bottom. Your hair and makeup should also be the same as you would wear to court. Depending on the platform, consider using the touch-up feature, which will smooth and correct your video image. Finally, this may be ridiculous, but wear pants. There have been some reports of attorneys getting bench slapped for this totally unnecessary misjudgment.
- **Posture:** You should sit with excellent posture at the front of your chair with your shoulders back and your face up. A relaxed face can be unappealing on camera. Your face should have a high energy, engaged appearance. Consider a slight smile with eyes looking forward. Do not appear distracted, bored, or to be multi-tasking. Do not look off camera or look down, unless it is clear that you are taking notes.
- **Speech:** You should speak naturally and enunciate. You should speak with high energy. You should not yell or speak over others. You may use your hands and nod your head as you would naturally. Avoid "umms or "uh-huhs" and other conversational fillers.

PARTICIPANT PROXIMITY

Sequestration was touched on previously, but, in some instances, is just not possible. Perhaps two witnesses are husband and son who live in the same house. Under the current pandemic situation, it would likely be deemed unreasonable to ask either to leave the house while the other testifies.

This does not mean, however, that they cannot sufficiently separate to satisfy sequestration rules. Finally, audio feedback from participant hardware can increase when their computers are close to one another.

Best practice would be to request that the judge consistently remind the witnesses, upon the swearing in, and stepping down, that discussion of testimony with any person can carry significant legal penalties.

EXHIBIT MANAGEMENT

As most proceedings follow some period of discovery, the element of surprise is likely not something to consider at this stage.

Alternatively, best practice is to decide well in advance what exhibits will be needed, stipulate that each party will forward anticipated exhibits at some agreeable point before the proceeding (and that the recipient will not open them until the agreed upon moment, preferably on camera), actually ensure you timely forward such exhibits to all necessary persons (court and opposing parties/counsel), and consider pre-marking the same to make the software manager's job even easier.

Best practice is to stipulate that each party acting as the proponent of any exhibit be required to (if available) electronically file the entered exhibits with the court/tribunal, immediately following the proceeding, or even better yet, after each day of the proceeding. This way, the court has a backup record of all filed documents in the matter, filed on the date each piece of evidence was admitted.

ALTERED RULES

Fed. R. Civ. P. 43 provides guidance on taking testimony. The advisory notes support an intent to enable virtual testimony where there is "good cause," but do not seem to envision full virtual evidentiary proceedings.

In contrast, Fed. R. Civ. Proc. 1 explains that the rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding for the full and fair administration of justice." Courts may view the interactions of these rules differently.

State courts differ substantially from Federal courts in the ability to respond, often being able to adjust procedures based on an order from the highest court of the state, or based on an emergency state legislative enactment.

Accordingly, the first step for any planning is a full understanding of the applicable rules in the jurisdiction and venue where the proceeding will take place, and then an assessment as to whether local practice can be modified.

A judge of the court in which you are proceeding may enact rules that you were not prepared for and that you have no choice but to follow.

Perhaps the judge limits direct examinations to fifteen minutes, does not allow for sidebars during questioning, is less lenient on leading questions, or is not admitting as much discretionary evidence because the virtual process is more cumbersome and less familiar.

Whatever the circumstances, best practice is to know the informal rules and, as discussed, remain flexible.

This article appeared on the Westlaw Practitioner Insights Commentaries webpage on July 20, 2020.

ABOUT THE AUTHORS



(L-R) **Jamie Ballinger**, of counsel in the Knoxville, Tennessee, office of **Baker Donelson**, concentrates on employment, professional liability and corporate issues in the health care, hospitality and manufacturing industries in both state and federal courts. She can be reached at jballinger@bakerdonelson.com. **Thomas H. Barnard** is a shareholder in Baker Donelson's Baltimore office and is former vice chair of the Government Enforcement and Investigations Group. He is a former assistant U.S. attorney, military prosecutor and military defense counsel with more than 20 years of government experience. He can be reached at tbarnard@bakerdonelson.com. An attorney in Baker Donelson's Baltimore office and a member of the Labor & Employment Group, **Stuart R. Goldberg** concentrates on labor and employment with a focus on employment discrimination and constitutional claims against municipalities and their employees. He can be reached at sgoldberg@bakerdonelson.com. **Hal K. Litchford**, a shareholder in Baker Donelson's Orlando, Florida, office, devotes his practice primarily to the litigation, trial and appeal of antitrust, trade regulation and other significant business-related disputes, including class actions. He can be reached at hlitchford@bakerdonelson.com. A shareholder in Baker Donelson's Baltimore office, **Diane F. Schmitt** focuses on litigation, negotiation and dispute resolution services in handling affirmative litigation involving notes, guarantees, loan agreements, leases and contracts, as well as lender liability counterclaims. She can be reached at dschmitt@bakerdonelson.com. **Peter Zuk**, an attorney in the Washington, D.C., office of Baker Donelson, concentrates on white collar criminal defense and civil litigation. He has experience representing clients in cases involving tax evasion, wire fraud, contract disputes and premises liability. He can be reached at pzuk@bakerdonelson.com. This article reflects the situation at the time it was written based on the rapidly changing nature of the COVID-19 pandemic.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.