



by Gregory M. Smith

Computer Counselor

Videoconferencing Legal Venues during the Pandemic

Gregory M. Smith, a business litigator at The Maloney Firm, APC in El Segundo, California. He represents clients in contract, trade secret, and corporate governance disputes.

It has been months since COVID-19 began limiting physical access to courts and changed the way the judicial system functions. Jury trials have been continually pushed back, and the Los Angeles Superior Court has not announced a plan to resume “normal” activities any time soon. Instead, LACourtConnect (apparently anything “tech” can’t involve the spacebar) and video conferencing platforms like Zoom, Microsoft Teams, Facetime, and BlueJeans have butted their way into professional and personal use. Many attorneys have used these platforms for appearances via videoconferencing so far, and it is only a matter of time before everyone else has a turn. Here, then, are some practical steps to consider before any appearance via video.

Read the Rules

LACourtConnect has an 81-page user guide, the American Arbitration Association has a six-page “Model Order and Procedures for a Virtual Hearing via Videoconferencing,” and JAMS has a multipage “Videoconferencing Guide.” Regardless of

whether the occasion is court, an arbitration, or something else, it is important to be familiar with the applicable rules or guidelines. In the event that a particular circumstance is not addressed in the rules, a meet-and-confer should be arranged with opposing counsel to see if a favorable solution can be stipulated. If

room. These distractions mean that subtle pauses to let a point sink in or dramatically lowering one’s voice, for example, are wasted. Instead, lawyers must be bigger, bolder, and more animated than usual to capture and retain the attention of their audience. Leaning towards the laptop has the same impact as a close-up

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an agreement cannot be reached, counsel should be prepared to present the issue to the judge or arbitrator while realizing that there is a good chance neither may have considered or understood the issue.

Focus Attention

In a courtroom or conference room, it is fairly easy for the attention to be focused on the speaker, and that focus allows for the conveyance of subtleties. On a videoconferencing, by contrast, the speaker is competing for attention with everything that is going on in “real life”—ringing phones and door bells, incoming texts and emails, and family members or pets who may wander into the

shot in a tv show, i.e., it draws the eye and can help to recapture lost attention from the audience.

Regular Breaks

Because the participants and audience tend to lose focus when absorbing testimony through a screen, regular breaks can allow participants to reset their attention. It would behoove attorneys to request breaks in the proceeding at regular intervals and to make sure that they front-load their examinations to emphasize the most important parts of their testimony, examination, or argument shortly after the hearing resumes. This will ensure that the essential points land when they are

most likely to make an impact on the triers of fact.

Know the Platform

Even a seasoned professional using his or her technology platform of choice should spend a few minutes practicing to make sure exactly how it all works before the hearing begins. Oftentimes attorneys need to share their screen to allow everyone to see a document. However, it can be tricky to navigate displaying the right document while asking questions and listening to the answers, all while making sure case notes and other confidential information are not being shared accidentally. Taking some time prior to the proceeding to ensure seamless multitasking with the technology is time well spent.

Also, speaking with opposing counsel and the judge or arbitrator to ensure that everyone is aware of the procedural requirements and permissions before a document can be shared is a good practice to follow. The in-person steps for identifying, marking, and admitting exhibits will likely need to be modified for the virtual environment. Most platforms also offer the ability to record, so the parties should reach an agreement as

to whether recording will be allowed, and if so, what the limitations on the creation and use of the recordings might be.

Participants' Comfort

Just as counsel must know how to use the technology, witnesses also must be familiar with the video platform. If testimony is hard to follow because of a lagging connection, muted microphones, or other issues, it might as well not be said. Similarly, placement of cameras on some tablets and other devices might make it look like a witness is avoiding "eye contact" when he or she simply does not know where to look. Most technology platforms offer a free "demo" version, so counsel and their witnesses should do at least one practice exam to make sure everyone knows the technical details of how to present their testimony.

It is also important that counsel and their clients know how to communicate outside the platform. Some offer built-in messaging features, but these are often visible to all participants. Attorneys should inform their clients how to send private communications during the hearing and be sure that however messages are sent, the technology platform is secure so that there are no inadvertent

disclosures of privileged communications or work product. This applies to breaks as well; some platforms allow for "breakout rooms" that provide each side privacy, but otherwise, audio and video connections should be muted when the hearing is not in session.

Finally, attorneys should be sure that clients, witnesses, and opposing counsel are aware of the potential ethical issues regarding ex parte communications with opposing parties, witnesses, or the triers of fact. Ethical requirements are not suspended simply because everyone is communicating from the comfort of their own computer screens.

Camera Ready

Although videoconferencing from the comfort of home or the office offers convenience, some of the formality of the court appearance or arbitration will inevitably fall by the wayside. It is important to remember that the physical appearance of all participants and their backdrops will be judged. For that reason, counsel should know where to sit for the proceeding and ensure that the backdrop is professional and fitting for the occasion. Virtual backgrounds that work well in social Zoom gatherings might undermine credibility or suggest that the proceedings are not being taken seriously. Similarly, it would behoove any attorney to make sure that their witnesses have the appropriate attire and backgrounds as well.

Attorneys should remind their clients and witnesses to avoid eating or drinking while testifying; if a witness wants to have water nearby, it should be in a container that fits the decorum of the event. For example, no Big Gulp containers should be used. Simply videoconferencing with the witnesses for a few moments before the hearing begins can help avoid a potentially disastrous first impression. Finally, anyone daring to appear only "top dressed" will want to make sure not to accidentally stand up in the view of the camera or be prepared for extreme embarrassment.

Arbitrations, trials, and hearings via videoconference are here for the foreseeable future. Adjusting to the "new normal" of videoconferences is imperative to ensure that attorneys and their witnesses can get their points across, benefit their clients, and ultimately win their clients' cases. Preparation and small changes to how attorneys present themselves, their witnesses, and their case during a videoconference can make a big impact. ■



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