

Professional Perspective

Virtual Litigation in the Post-Pandemic Era?

Martin Roth, Kirkland & Ellis

**Bloomberg
Law**

[Read Professional Perspectives](#) | [Become a Contributor](#)

Reproduced with permission. Published November 2020. Copyright © 2020 The Bureau of National Affairs, Inc.
800.372.1033. For further use, please visit: bna.com/copyright-permission-request

Virtual Litigation in the Post-Pandemic Era?

Contributed by [Martin Roth](#), Kirkland & Ellis

The Covid-19 pandemic has forced the world to adjust to living and working virtually. For civil litigation, largely gone are the days of live in-person hearings, mediations, depositions, and trials. In their place, for the foreseeable future and possibly permanently in some respects, are virtual substitutes. After trudging through initial uncertainty and speedbumps inherent in learning emerging technology, in certain ways the virtual substitutes have proven at least as good as, and perhaps even better than, the pre-pandemic live events they replaced in some situations.

This piece assesses the benefits of the new virtual litigation world, in particular for motion hearings and mediation, as well as proposes some practical tips for using these platforms effectively during the pandemic and beyond.

Motion Hearings: Less Travel, More Screen Time

Just seven or eight months ago, many civil litigators could be described as road warriors and logistical savants. It was common when working on complex national cases to travel from city to city or state to state, frequently within the same week, to argue at hearings before various state and federal judges.

Endemic to that sort of practice were many logistical challenges: scheduling, determining the best and most efficient travel itinerary, ensuring printed materials needed for hearings were shipped to the right hotel or office, and often, determining what technology a particular courthouse had available for the display of evidence or presentation slides. In fact, many courthouses still lack the equipment needed to connect a laptop to run a Powerpoint presentation.

In the virtual world, nearly all of these practical challenges have been replaced by new ones: Where should I sit or stand to best optimize lighting, background, and screen presence? How can I ensure that my microphone and audio setup will work? How can I avoid audio interference or sound feedback if colleagues are located on their own devices nearby to assist? What software will I need to install to connect to the court's platform? What should I do when, inevitably, someone is yelling that I'm talking while on mute?

The good news is that with proper planning and testing, each of these technological issues is readily solvable. Prevailing wisdom has emerged about the proper lighting (in front of and/or above the speaker) and sound (sitting or standing close enough to the microphone and selecting a room with carpet or a rug to prevent echoes). Keeping other users nearby on mute and using one set of speakers or headphones per room usually eliminates audio interference. Most court staff and judges have enough experience and facility with the virtual technology such that with proper testing and a phone number to call or text chambers just in case, most hearings go forward without the inability of a party to connect and without leaving a party on mute for very long.

Beyond these new logistical challenges, new opportunities have emerged from virtual hearings. For example, because courts are using Zoom, Microsoft Teams, and other platforms with a "screen share" feature, the days of awkward paper "hand ups" have gone by the wayside. Most virtual courts welcome slides and other interactive presentations. In addition, the efficiencies gained from not having to travel allows for the scheduling of hearings in far-flung locations on back-to-back days that would not have been possible or would have been too risky to plan pre-pandemic.

Avoiding the scramble to print materials last-minute from a hotel conference center has certainly decreased litigators' stress and increased their preparedness. And many courts' use of Zoom has allowed clients a new direct opportunity to watch hearings that they might not have elected to travel for but now can easily access from the comfort of their office or home by watching live on screen.

These efficiencies and gains make it easy to see why some judges and litigants might well prefer the virtual experience for certain hearings, particularly where the issues involved are discrete. Although "Zoom fatigue" has been widely discussed and might limit the utility for longer hearings and witness testimony, and while there are still some difficulties with multiple speakers talking simultaneously created by audio or video lag, for motions to dismiss, discovery motions, and other legal arguments that can be held in 60 minutes or less, virtual hearings have become efficient. So efficient, perhaps, that they may supplant certain in-person hearings they replaced even after the pandemic subsides and allows for travel with greater frequency.

Time will tell whether judges will only do Zoom hearings in the future upon joint consent of the parties, or whether local rules will govern use, but this is an issue courts and lawyers will confront even as the world “goes back to normal.”

The Virtual Mediation: Gathering Needed Principals to Negotiate By Zoom

Similar to court hearings, prior to the pandemic, mediation of significant cases involving distant parties and national counsel was often a logistical Rubik's cube. Aligning dates on the calendars of mediators, opposing counsel, and the relevant client representatives—and then selecting a location that was sensible for all of these various constituencies—commonly posed a challenge.

Parties would often leverage these logistical challenges strategically during mediation, claiming they only had a number of hours for the case to settle before needing to catch their flights or that they only had a certain amount of settlement authority available without needing to contact a colleague not in attendance. Beyond this, clients and lawyers alike would need to be present on site, usually for hours on end, waiting on the mediator and trying to make productive use of the downtime.

Again, the virtual world has solved for many of these previous logistical concerns. Now mediations can be conducted remotely, with each participant in their own office or home. Foregoing travel allows for ease in scheduling, and has generally increased the availability of business principals to participate both in pre-mediation tactical discussions and in the sessions themselves. Waiting on the mediator's return via Zoom is easier than being captive on site, especially if the participants turn off their cameras and microphones and wait for a text or other signal that the mediator is going to re-enter the virtual room. And “Zoom bombing” and other confidentiality or security concerns that emerged earlier in the year appear to have resolved with increased password protection, locking sessions, and as mediators learn how to utilize and control the technology.

Virtual mediation is obviously not ideal for every case. For example, there may be instances where relationships between business principals that are most effectively leveraged in person facilitate settlement. There are also plenty of suits where for a settlement to occur one side or the other feels the need to present their case in truncated fashion in person at a mediation, as they would in court.

Many mediators and clients may still feel more can be accomplished while everyone is captive on site, especially if there are intricate business and commercial terms to negotiate beyond just the price of settlement. But for the efficiency reasons noted above, like shorter hearings, virtual technology provides mediation with opportunities for greater efficiency, decreased costs, and broader client participation in a way that may be attractive in many cases even in a post-pandemic world.

Virtual Testimony: A Work in Progress

One area where it remains difficult to see a virtual experience replacing an in-person one is for events where extensive witness testimony is required, like trials and depositions. Complex trials and depositions are already a huge logistical challenge without the need to resort to virtual technology. Coordinating the use of documents as exhibits, the placement of demonstratives, and the setup for examination of witnesses requires careful thought and planning in the actual world, let alone in a virtual one.

Compounding these issues, staring at a screen for hours and days on end requires more patience and creates more fatigue than the few hours required for a hearing or mediation. With multiple participants all on the screen together, it can be difficult to decide where to look—and one never knows when all eyes are on you. It is harder to read tone and body language of witnesses on screen. Making sure objections are properly lodged and heard given audio and video lag time presents a challenge. Exhibits may need to be sent in advance such that the spontaneity that is so important to an impactful cross-examination will be lost—if it even can be captured on Zoom at all. And it is more difficult for trial team members to pass discreet notes to each other when they are socially distanced or in different places than a well-timed note next to the podium in the courtroom or in the conference room.

For these reasons and others, and although many depositions and trials have gone forward with great success during the pandemic, the reviews seem more mixed and most trial lawyers seem to yearn for an end to the pandemic so that live, in-person trials can resume as they did before.

Conclusion

Frequently innovation is borne by necessity. We are in such times. As a result, while there will probably be a transition back to the pre-pandemic litigation world in many respects, it is fair to assume that the virtual world has created a “new normal” for certain litigation events like non-testimonial hearings and mediation, at least where clients consent to that new and perhaps cheaper option. That world will be welcome in many circumstances, creating efficiencies by reducing travel and its attendant costs and allowing for greater client visibility and participation.