

Best Practices for Litigating in the Virtual World

The Bottom Line

- *Virtual court appearances should be treated with the same approach as in person appearances.*
- *Build in a cushion for discovery deadlines to allow for delays related to collecting data remotely.*
- *Keep confidentiality and privilege top of mind in litigating virtually. Be cognizant of when the microphone and video are on and use passwords sent in a separate link when producing documents and setting up virtual conferences.*
- *Consider conducting mediations virtually and using virtual breakout rooms.*
- *Make sure to include language in your contracts that allows for electronic signatures.*

As the majority of the United States legal community continues to work from home, many courts are proceeding with cases virtually. Hearings that would have required in person attendance are now being held telephonically or over videoconference, and depositions are expected to move forward over video or teleconference. But a virtual court appearance should not be treated any different than an in person court appearance. In a recent case, a judge in Florida admonished an attorney for appearing on a video conference in bed, showing the dangers of approaching virtual court differently than when physically present.

Below are some tips on how to ensure litigation is successful in our new virtual reality.

Virtual Court

With electronic filings having been implemented in most courts prior to the coronavirus pandemic, many courts are allowing filings to continue electronically in existing cases and are also allowing for the filing of new cases. Although new cases still cannot be filed in New York state court, virtual court conferences and hearings focused on discovery disputes and other outstanding issues in pending cases are now occurring.

It is important to remember that, even if you are “appearing” from home, you are expected to give the court the same respect as you would in person. This means dressing the same way you would in court when participating in a video conference and making sure the background on your video is appropriate (e.g., change that virtual background of a beach to blank and don't join in from bed!).

Discovery and Depositions

E-discovery has been a common practice for years now, but parties should anticipate that document collection efforts will take longer than usual when accessing systems remotely. Building in a cushion when arriving at a schedule for production and keeping your adversary apprised of any expected delays are both ways to avoid disputes down the road.

Despite recent news of “Zoom bombing,” it remains a secure platform if used properly. When conducting a virtual deposition, parties should use a unique room ID for every deposition and have a password protected link. As with e-discovery, the password should be sent in a different email than the room ID to prevent bad actors from accessing both in the event an email is intercepted. It is also possible to “lock” Zoom meetings once all the participants have joined so no one else can enter the room uninvited.

Remaining vigilant in protecting attorney-client privileged communications when appearing virtually is key. If there is a break during the deposition and you and your attorney want to speak privately, not only mute your computer audio and turn off your video, but also leave the room to have a conversation over the phone or another device. It is possible to also create a virtual breakout room on Zoom to interact separately from the other side.

Mediation

Parties are also conducting mediation via videoconferencing. Mediators are able to replicate the in person experience by taking advantage of virtual breakout rooms, allowing for mediators to go back and forth between parties, just as they would in person. Parties can also share documents with the mediator and each other in real time by sharing their desktop or sending documents directly through messaging capabilities.

Electronic Signatures and Notarized Affidavits

A “wet” original signature may not be practicable to send to your attorney when staying at home. Most courts already allow digital signatures, and programs like DocuSign allow users to sign, initial, date and otherwise verify a given document. For contracts, such as a settlement agreement, it is important to include language that electronic signatures have the same force and effect as original signatures.

New York is also permitting virtual notarization under revised rules during the COVID-19 crisis. The notarization must:

- Be done over a videoconference with direct interaction (not prerecorded),
- Have the signatory present a valid photo ID and affirmatively represent that he or she is physically in New York, and
- Include the signatory sending a copy of the signed document to the notary (by fax or electronically) on the same day it was signed.

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