



Upgrade Your Remote Litigation Skills

Virtual court hearings and depositions are here to stay. Here's how to succeed.



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The COVID-19 pandemic has brought about a reality for the legal profession that feels like a science fiction novel, with remote trials, court appearances, and depositions. Is the concept of the attorney (or judge, juror, or deponent) appearing remotely here to stay?

Due to the pandemic, in-person jury trials have been practically eliminated from the nearly 600 courtrooms in the Los Angeles County Superior Court, the largest single unified trial court in the U.S. Over the past year, the Los Angeles Superior Court has been forced to conduct remote bench trials and remote jury trials.

There are no guarantees inside of a courtroom: The level of risk, including the amount at stake, can make even the most seasoned litigators feel wary even when he is presenting oral argument and evidence in front of a live judge or jury. However, presenting to a remote juror or remote judge, or conducting a critical deposition from a laptop computer, may increase those existing concerns, which can be complicated by potential pitfalls including, but not limited to, internet connectivity issues, audio and video failures, distractions at home, deficient attention spans, and Zoom burnout.

If virtual appearances continue at any level of frequency, here are critical things to consider and ways to improve remote litigation.

Knowing Your Audience

Attorneys should always consider their audience. Judges and jurors are real human beings with personal beliefs and experiences that make up their own lens of how they will interpret the law, apply facts, and consider arguments.

Often, the audience matters as much as the message. This is precisely why some attorneys, when given the option to appear remotely for a court appearance, will still appear in-person to try to gain valuable “face time” with their particular judge.

It is crucial for attorneys to understand that the judge who reads the facts and law in their legal brief, or listens to who their opening statement at trial (whether in-person or remote) will be, as or more important than the facts and law themselves. If provided with the option, attorneys should seek to make an in-person court appearance rather than a remote court appearance to develop familiarity with their judge. An attorney should want to know as much as they can about the judge (or juror) who will decide their case.

Preparing the Witness

It is a common myth that witnesses simply arrive at the courthouse, take an oath to testify truthfully, and then testify to the court about what they know. In reality, witnesses often meet in-person with an attorney prior to trial to review and discuss the substance and delivery of their anticipated testimony. In-person meetings with witnesses, including witness testimony role-play scenarios, can be most effective. This is because witness testimony is often the most important part of any trial.

During witness preparation, witnesses can be instructed to use effective verbal and nonverbal communication so that they will be perceived as being more credible and persuasive in the courtroom. These instructions are best provided to a witness during in-person, live role-play scenarios. If done properly, this process allows attorneys to present witnesses to the court who appear confident and familiar with the subject matter, and whom will better be equipped to persuade judges and juries by communicating what they know in a clear and concise manner.

Although witness preparation may be routine to most litigators, it is not without public controversy, as witness preparation often takes place in-person and behind closed conference room doors and usually remains confidential. For example, attorneys are not obligated to reveal the witness preparation procedures that they utilize to prepare their own clients because this information is protected by the attorney–client privilege.

However, the purpose behind preparing witnesses is to improve the persuasiveness and credibility of witnesses and their testimony. Pre-trial preparation of witnesses is critical and determines the extent to which triers of fact are persuaded by the testimony of witnesses. Proper witness preparation will allow the attorney to avoid surprises from their witnesses (as well as the adverse party) during trial.

Remote Deposition

When the pandemic began, most states, including California, issued a shelter-in-place order. Soon thereafter, California passed temporary legislation that allowed legal proceedings, such as

depositions, to move forward remotely. This allowed litigation to effectively continue during the pandemic. Recently, California passed legislation (SB 1146) that made some of these changes permanent.

Prior to the pandemic, the Code of Civil Procedure required that legal court reporters be physically present for the depositions of parties in a case. It stated that a party deponent had to “appear in person and be in the presence of a deposition officer.” Additionally, it only allowed court reporters to remotely attend the depositions of non-party witnesses.

California issued an order suspending this rule and authorizing court reporters to remotely attend depositions of parties as well as non-parties. The new amendment to Section 2025.310 now provides that “[a]t the election of the deponent or the deposing party, the deposition officer may attend the deposition at a different location than the deponent via remote means. A deponent is not required to be physically present with the deposition officer when being sworn in at the time of the deposition.”

Remote depositions can save considerable travel expense, and can help expedite litigation around the world. This is particularly helpful with out-of-state or out-of-country deponents.

One potential downside is that, if an attorney is physically present with his deponent client, it will be more difficult for opposing counsel to determine whether that attorney is improperly making hand signals, coaching, or passing notes to the client during the deposition. To minimize this risk, a deposing attorney can always ask the deponent who is present in the room with him and where each person is seated.

Attorneys should prefer in-person depositions whenever possible so that they are able to assess the deponent in person, pick up on body language cues, and directly assess the credibility of the witness. Attorneys should also be careful when preparing their own clients for remote depositions. One thing to consider when producing a client for a remote deposition is their environment and background setting.

If the deponent intends to remotely attend their deposition from their home, the attorney should advise the deponent to be sure to have a clean workspace prepared. A blank wall in the deponent’s home office would be ideal. Similar to a videotaped deposition, utilizing a backdrop can effectively focus the attention on the deponent and their testimony. Perhaps more important is for the attorney to be physically present when their client is being deposed. This better enables the attorney to control his client during their testimony. In a purely remote setting, defending the client’s deposition can otherwise become a risky proposition.

Deponents should try to avoid utilizing a virtual background in Zoom, as it does not always capture the best image of the deponent. If using a virtual background, the deponent should limit their movement as much as possible. Also, the deponent should avoid wearing clothing that is similar in color to their backdrop.

If the deponent moves around, their image will divide into pixels and possibly disappear briefly. If a backdrop must be utilized, the deponent should download a professional backdrop image. Also, the deponent should confirm that their dedicated space has quality lighting. Investing in a higher quality webcam can also greatly improve the quality of the image of the deponent in the remote deposition. Proper preparation is critical to minimizing miscues during a deposition.

Remote Court Appearances

Remote court appearances present challenges. Among other things, it is common to hear distracting noises in the background, and some attorneys may have telephonic or internet connectivity issues. Also, it is routine in telephonic court appearances to have counsel speaking over one another and the judge, as there are no visual cues to know when to speak or stop speaking.

If an attorney must appear remotely they should check in advance for any courtroom information provided by the judge or courtroom staff which might provide additional information regarding remote court appearance protocol. Also, a review of any courtroom information often results in less confusion and fewer continuances/resets of hearings and trials.

Some argue that remote court appearances are preferable to in-person appearances, and that they result in less courtroom disruption, and allow the court to have more control over proceedings. One downside to remote court appearances, though, is that parties and counsel can unintentionally mute their microphones and/or disconnect. If provided with an option, in-person court appearances are recommended, as the attorney can also become acquainted with the judge and courtroom personnel, including court clerks.

Best Practices: In-Person or Remote

Whether you have decided to move forward virtually or in-person, there are best practices that can be applied in either situation to ensure the best result for your client.

Judicial Research. In addition to an in-person court appearance, attorneys can also research prior decisions by their judge on their specific issue. Attorneys can utilize various databases (e.g., LexisAdvance, Westlaw Next, etc.) to research whether their judge has previously ruled on their legal issue.

Additionally, attorneys can search for any non-judicial writings by the judge. The judge may have previously written a law review article or may have been a member on a continuing-legal-education panel or a guest lecturer at a bar association meeting or at a university.

The Future Is Analytics. Some legal vendors are now offering analytical information assessing the vast amounts of data they have collected on judges and their prior decisions. These legal vendors are utilizing artificial intelligence programs to analyze and form hypotheses regarding this information.

For example, your judge is scheduled to hear your upcoming motion for summary judgment. You may be surprised to learn that your judge has previously ruled on 800 other such similar motions. According to the analytical data, you might be able to confirm that your judge has a below-average rate for granting certain summary judgment motions.

Now armed with this information, you could decide to conduct more fact-finding in support of your motion for summary judgment. Also, you could locate and research the recent cases on which your judge has ruled favorably for similarly-situated parties with comparable facts, analyze the types of arguments that were successful in persuading your judge, and then apply them to your own case as much as possible.

Down the road, if you were unable to obtain the decision you were looking for from your judge, you could then analyze how often your judge's decisions have been appealed, and how often the appeals court has overturned those decisions. This could be valuable data to share with your client during future discussions regarding whether to appeal an adverse decision.

Social Media. This is a brave new virtual world. One should always conduct a search of the internet regarding information pertaining to their assigned judges. Although questionable, some judges continue to post content on social media sites. Attorneys should conduct their due diligence to check Facebook, LinkedIn, and Twitter for possible information.

In sum, all attorneys should research their judge as much as they research the law. If you know your judge, whether from in-person interaction or research, you can structure your briefs and oral argument to him or her directly and thus increase your chances of a favorable result.

These are just some of the numerous ways to improve litigation whether practicing remote or in-person.

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