



Virtually Litigating: Pros and Cons of Litigation Practices  
Developed During COVID-19  
Ethics CLE

Friday, Sept. 24, 2021

10:30 - 11:30 a.m. eastern

College of Law, Dineen Hall, Room 440

And

Online via Zoom

**CLE CREDIT:** Because of COVID-19 related restrictions, this CLE will be offered in person and in a virtual setting, via Zoom. A code will be provided at a particular point in the program, which can be used to claim CLE credit for participation. You will be provided with an Attorney CLE Affirmation form for the code and credit. Syracuse University College of Law has been certified by the New York State Continuing Legal Education Board as Accredited Providers of Continuing Legal Education in the State of New York. Virtually Litigating complies with the requirements of the New York State Continuing Legal Education Board for 1.0 credits towards the professional practice requirement. This program is appropriate for newly admitted and experienced attorneys. This is a single program. No partial credit will be awarded.

**Law Alumni Weekend 2021**

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**COLLEGE OF LAW**  
**Virtually Litigating: Pros and Cons of Litigation Practices Developed During COVID-19**  
**September 24, 2021**  
**10:30 - 11:30 am ET**

**Title:** Virtually Litigating: Pros and Cons of Litigation Practices Developed During COVID-19

**Duration:** 60 Minutes  
1 credit Ethics Credit (NY)

**Summary:** The way we practice law turned on a dime last year as the world adapted to a remote working environment. Litigators faced new challenges as in-person interactions with clients, adversaries, judges, and juries moved to Zoom. Now many claim virtual depositions, mediations, court hearings, and trials are here to stay. But at what expense? Litigators, however, were not the only attorneys impacted by the remote work environment. In-house counsel also faced new challenges in their practice, as interactions with regulators, outside counsel and internal clients were all in a virtual setting. This presentation will discuss the pros and cons of legal technology and practices developed during the coronavirus pandemic. Specific topics will include how costs have changed, how the virtual environment impacts the practice of law, and what gets lost when interactions are virtual.

**Moderator:** Michael Kaplan L'11, Partner, Lowenstein Sandler

**Panelists:** Hon. Mae A. D'Agostino L'80, US District Judge, Northern District of New York  
Allison Fiut L'11, Partner, Harris Beach LLC  
Kara Krueger L'11, Senior Counsel, National Grid

**Timed Agenda:**

10:30 - 10:32 am	Welcome and Introductions
10:32 - 11:22 am	Panel Discussion: Virtually Litigating: Pros and Cons of Litigation Practices Developed During COVID-19 <ul style="list-style-type: none"><li>• How has your practice changed for the better (or worse) as a result of pandemic?</li><li>• What technology has become a regular part of your day? Does it work?</li><li>• What aspects of the COVID practice do you hope stay? And what are you looking forward to being done with?</li><li>• Ultimately, are you able to effectively fulfill your role in the virtual environment?</li></ul>

11:22 am

Q&A

11:27 am

Closing remarks

### Outline of Presentation:

- Introduction
- What will be discussed and presented?
  - How has your practice changed since the beginning of pandemic?
  - Was the technology already in place adequate to allow you to continue to practice? How quick did, were you able adapt? Is the current technology adequate?
  - What, if anything, gets lost in the virtual environment?
  - What changes should stay? What changes are you ready to say to goodbye to?
  - Bottom line, are lawyers able to effectively advocate for their clients in the virtual environment?
- Q&A

### Readings:

Bayles, Cara, *4 Ways Coronavirus May Forever Change Legal Tech*, Law360, June 15, 2020.

Cosgriff Hernandez, Kevin-Khristian, *Key Takeaways From Groundbreaking Virtual Civil Jury Trial*, Law360, October 8, 2020.

Curley, Mike, *Remote Depositions 'New Normal,' Judge Says, Denying Delay*, Law360, July 13, 2020.

Goldman, Darren, *Why Remote Depositions Are Likely Here To Stay*, Law360, August 21, 2020.

Hudgins, Victoria, *Recognizing Widespread Benefits, Court Officials See Continued Role for Virtual Court Proceedings*, Legaltechnews, October 16, 2020.

Moran, Lyle, *The Next Normal*, ABA Journal, August/September 2020.

Morris, Angela, *Remote Court Hearings Likely Here to Stay: Texas Judicial Council Will Make Request to Lawmakers*, Texas Lawyer, September 24, 2020.

Ross, Todd, *Broward Chief Judge on Why He's a "Believer" in Remote Jury Trials*, Miami Daily Business Review, September 2, 2020.

Russell-Kraft, Stephanie, *Depositions Go Virtual During Pandemic, May Remain that Way*, The United States Law Week, May 22, 2020.

Spiro, Edward, *Remote Depositions: The New Normal*, New York Law Journal, October 19, 2020.

Vaira, Peter, *Changes in the Law Practice After COVID-19 ... What Will Be the New Normal?*, The Legal Intelligencer, May 11, 2020.

ABA Formal Opinion 498, *AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY*, March 10, 2021.

*Committee on Professional Ethics*, NY County Lawyers Association.

## Moderator and Panelist biographies

### Moderator:

**Michael A. Kaplan L'11**

Partner

Lowenstein Sandler LLP

New York, NY



Michael represents clients in high-stakes litigation and appeals in federal and state courts throughout the country, as well as in domestic and international arbitrations.

He has extensive experience in every stage of bankruptcy litigation, from investigating potential claims and causes of action to commencing adversary proceedings on behalf of committees and liquidating trusts. Michael's experience enables him not only to respond to any type of litigation that arises during a bankruptcy case but also to craft litigation strategies that are both effective and efficient. His experience investigating and litigating claims against directors and officers allows him to provide vigorous representation to clients facing such claims or seeking to bring them.

Because of his diverse commercial litigation experience, which includes extensive work on products liability, mass tort, toxic tort, and dram shop cases, Michael understands that litigation is an evolving art and that litigators need to possess a constantly changing array of skills. His focus is always on understanding his clients' goals and then creating and executing a litigation strategy to achieve them.

In addition to his passion for litigation, Michael is committed to giving back to the community. He regularly provides pro bono representation to victims of domestic violence through the firm's relationship with Partners for Women and Justice and the Rachel Coalition.

Prior to joining the firm, Michael served as a judicial law clerk to Chief Judge Gary L. Sharpe of the U.S. District Court for the Northern District of New York.

### EXPERIENCE

Bankruptcy Litigation, Committee Representations:

- Century 21 Department Stores: Investigated potential estate causes of action relating to prepetition transactions involving the company's family owners and their network of entities. Based on its investigative findings, the Committee was able to negotiate a global settlement that involved the sale of insurance claims and mutual releases for the family and entities in exchange for \$59 million for the estate, plus potential proceedings sharing on the insurance claims.
- Exide Holdings, Inc.: Investigated potential causes of action for fraudulent conveyances and preference avoidance held by the Debtors' estates. In connection with its investigation, the Committee conducted over a dozen witness interviews and reviewed over 10,000 documents. Based on its findings, the Committee was able to negotiate a global settlement that included a \$2.4 million settlement for unsecured creditors.

- Mission Coal Company, LLC, a Tennessee coal mining company: Led a three-month Rule 2004 investigation and filed a motion seeking standing to prosecute a 52-count complaint, which included claims for avoidance of fraudulent transfers, recharacterization of debt as equity, equitable subordination, and corporate waste. The matter culminated in a contested confirmation trial, which resulted in the parties resolving all outstanding issues for total consideration of approximately \$29 million for the estate.
- SportCo Holdings, Inc.: Prosecuted Rule 2004 motions against the debtors; conducted extensive investigation into potential claims held by the debtors' estates; successfully negotiated a resolution with the lender that established a litigation trust for the benefit of creditors

#### **Business Litigation:**

- Telcordia Technologies Inc., a subsidiary of Ericsson: Successfully defended subcontractor in bench trial over breach of contract and quantum meruit claims where the prime contractor had declared bankruptcy.
- AGL Resources Inc.: Secured significant victory in a civil case arising from claims of injuries from a minor vehicle accident; jury rendered a no-cause verdict and found the client was not negligent.
- Aramark Corporation: In litigation arising from an accident on property managed by Aramark, the jury determined that the client was not liable.
- LifeCell Corporation: Multiple products liability cases involving cutting-edge medical technology.

#### **HONORS & AWARDS**

Order of the Coif

The Order of Barristers

ALI-ABA Scholarship and Leadership Award

National Order of Scribes

College of Law Ambassador Award

#### **Education**

Syracuse University College of Law (J.D. 2011), summa cum laude; Lead Articles Editor, Syracuse Law Review; Executive Director, Moot Court Honor Society

Temple University (B.A. 2008), Political Science, summa cum laude

#### **Admissions**

New York

New Jersey

District of Columbia

Pennsylvania

## Panelists:

### **Hon. Mae A. D'Agostino L'80**

U.S. District Judge  
Northern District of New York  
Albany, NY



Mae Avila D'Agostino is a United States District Judge for the Northern District of New York. At the time of her appointment in 2011, she was a trial attorney with the law firm of D'Agostino, Krackeler, Maguire & Cardona, PC. Judge D'Agostino is a 1977 magna cum laude graduate of Siena College in Loudonville, New York. At Siena College Judge D'Agostino was a member of the women's basketball team. After graduating from College, she attended Syracuse University College of Law, receiving her Juris Doctor degree in May of 1980. At Syracuse University College of Law, she was awarded the International Academy of Trial Lawyers award for distinguished achievement in the art and science of advocacy.

After graduating from Law School, Judge D'Agostino began her career as a trial attorney. She has tried numerous civil cases including medical malpractice, products liability, negligence, and civil assault.

Judge D'Agostino is a past chair of the Trial Lawyers Section of the New York State Bar Association and is a member of the International Academy of Trial Lawyers and the American College of Trial Lawyers.

Judge D'Agostino has participated in numerous Continuing Legal Education programs. She is an Adjunct Professor at Albany Law School where she teaches Medical Malpractice. She is a past member of the Siena College Board of Trustees, and Albany Law School Board of Trustees. She is a member of the New York State Bar Association and Albany County Bar Association.

### **Allison B. Fiut L'11**

Partner  
Harris Beach PLLC  
Buffalo, NY



Allison Fiut is a civil litigator who focuses her practice on resolving a range of commercial disputes in New York state and federal courts and through alternative dispute resolution. Fiut represents clients in business divorce, breach of contract, non-compete, and trade secret misappropriation matters; as well as shareholder, commercial lease, real estate title, environmental contamination, and tax disputes. Fiut also handles CPLR Article 78 proceedings, including reviews under the New York State Environmental Quality Review Act (SEQRA). She has significant appellate litigation experience in New York state and federal appellate courts, having briefed and argued appeals on a wide range of issues.

Ms. Fiut received her Bachelor of Arts degree *cum laude* from Boston University and her Juris Doctorate degree *magna cum laude* from Syracuse University College of Law.

#### REPRESENTATIVE MATTERS:

- Counsel for national Greek yogurt manufacturer and its CEO, defending against derivative and other claims in Supreme Court, New York County.
- Counsel for national oil and gas company in case involving numerous claims for breach of oil and gas leases, successfully resolving or securing dismissal on summary judgment of various plaintiffs' claims.
- Counsel for international oil company, defending against claims alleging liability under New York Navigation Law and common law for alleged petroleum contamination at commercial gas station.
- Counsel for national commercial real estate management companies in commercial lease disputes.
- Counsel for global pharmaceutical company in prosecution of commercial claims including breach of contract, breach of fiduciary duty, and misappropriation of trade secrets.
- Independent counsel for international client in connection with corporate financial investigation. Conducted interviews across multiple states of employees at all levels of the company, analyzed paperwork, and designed criteria and queries to pull relevant data and to run analytics. Prepared numerous analytical investigatory reports for client.
- Counsel to association of energy service companies (ESCOs) in hybrid declaratory judgment article 78 proceeding challenging New York Public Service Commission's issuance of order adopting new rules. Obtained temporary restraining order staying enforcement of the PSC's order.
- Counsel to national liquor wholesaler in Article 78 proceeding challenging New York State Liquor Authority's approval of off-premises liquor license. Obtained affirmance of the license from New York County Supreme Court.

#### PROFESSIONAL AND COMMUNITY ACTIVITIES:

During law school, Allison clerked for the Hon. David E. Peebles, United States Magistrate Judge for the Northern District of New York.

New York State Bar Association, member

Erie County Bar Association, member

Our Lady of Mercy Mock Trial Team, former coach, co-coach

Monroe County Public Defender Office's Pro Bono Appellate Program, volunteer counsel

Buffalo Say Yes to Education Legal Clinic, volunteer attorney



**Kara Krueger L'11**  
Senior Counsel  
National Grid  
Syracuse, NY



Kara J. Krueger L'11 is a Senior Legal Counsel at National Grid, one of the world's largest international investor-owned electric and gas utilities. Mrs. Krueger is based in National Grid's office in downtown Syracuse. She focuses on regulatory and legal matters affecting National Grid's New York operating companies and has been with National Grid for over nine years. Mrs. Krueger is admitted to the bars of New York and New Jersey.

Mrs. Krueger graduated *cum laude* in May 2011. While at the College of Law, Mrs. Krueger was a Form and Accuracy Editor for the Syracuse Law Review, served as a legal writing teaching assistant, and was an active member of the Student Bar Association. Mrs. Krueger graduated from the University of Wisconsin - Madison in 2008 with a B.S in Psychology.

Mrs. Krueger currently serves on the Friends of the Central Library Board and is an active board member of several tennis associations in Central New York.



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## 4 Ways Coronavirus May Forever Change Legal Tech

By **Cara Bayles**

Law360 (June 15, 2020, 2:55 PM EDT) -- When the novel coronavirus closed down courthouses and law firms, technology allowed attorneys, their clients and judges to move litigation forward without jeopardizing public health.

Some of those emergency fixes could stick around even after life returns to normal. Legal experts say embracing remote technology has boosted efficiency, transparency and access to the courts.

Here are some of the top tech fixes that attorneys hope will stick around after the pandemic.

### Video Hearings

When courthouses shuttered in March, some judges, like the Northern District of California's Judge James Donato, didn't want to stop oral arguments. He preferred to hash out questions with attorneys, rather than issuing rulings based solely on the papers.

So he and many of his colleagues took to Zoom, using the webinar format with attorneys presenting as "video panelists," and audience members watching as they would from a courtroom gallery. At first, Zoom access information was only available via PACER, but in late May, the district made video hearing logins publicly available on its website.

Now, Donato would like to offer video hearings even once the San Francisco courthouse reopens.

"I think this is a real breakthrough moment in access to the courts — public access, client access. It's a huge revolution for the better, in getting more people to see what we do," he said.

Video hearings open up the courtroom to people who can't make it to San Francisco, from young attorneys who want to watch oral arguments in the litigation they're working on but can't take the time to commute, to corporate clients who "are writing massive checks, and never watch their lawyers," Donato said.

A former BigLaw partner himself, Donato thinks the webinars could improve lawyers' work-life balance. He remembers flying from his home in San Francisco to attend hearings in Boston that rarely took longer than an hour. While the arguments were vital to the case, the cross-country trip took a toll.

"I would fly out there constantly, and it would be a two- or three-day trip for 45 minutes in court. That disrupts your whole week, disrupts your office, disrupts your home," he said. "I hope the two-day trip for a one-hour hearing is a thing of the past, and we just do it on webinar. I think that's going to have tremendous value, making being a lawyer less burdensome on families, much more cost efficient, maybe even greener."

Other courts systems, like New York state court, always required attorneys to attend in person, even for status conferences or calendar check-ins, according to John Magliery, a partner at Davis Wright Tremaine LLP.

He wouldn't necessarily want to argue motions remotely once courthouses reopen, he said, but New York adopting that technology for other in-court appearances could be a game-changer.

"We're seeing scheduled Zoom conferences where quick check-ins on things like discovery compliance are being achieved much more expeditiously and at much less expense," he said.

## **Client Dashboards**

Another way to boost transparency is through online dashboards, according to Tess Blair, founder of Morgan Lewis & Bockius LLP's eData practice.

Dashboards have long allowed clients to look at which attorneys are working on a case and how much they're billing, but they're also functioning as a communication tool. Clients can log in and see what evidence and data attorneys have compiled, and how they are analyzing it, Blair said.

"They can see all the key factual pieces of their case, and can run reports and do searches and run [an] analysis of the data," she said. "That's another way to interact with us, but also with our work."

Blair said while lawyers have been especially careful during the pandemic to reach out to clients, it's good to offer an option that allows clients to see what's happening in real time, without having to make a phone call.

"That's become really important in this remote working environment, to push information out to clients, to give them insight into their cases, into their data — not just what we're billing, but what we're seeing and the analysis that we're doing," she said.

Telecommuting has also sparked internal interest in dashboards among the attorneys at Ballard Spahr LLP, according to Jim Boyer, the firm's director of matter management and efficiency.

Lawyers are using the technology internally now as a case management tool. The technology has existed at Ballard for about a year, he said, but working from home has driven more widespread adoption.

"The tools are infinitely customizable, and we can make quick adaptations to any practice group or legal team," he said. "We really built a foundation here. But since the pandemic, people have started to really understand the technology and what it can do for them and how easy it is to use."

## **Video Depositions**

To keep litigation moving, attorneys have turned to remote depositions via video.

Magliery, a commercial litigator with 18 years of experience, was skeptical the format could work. So much of a deposition is about reading a witness' body language and facial expressions, and being able to confront them with evidence by sliding a piece of paper across the table, he said.

"Depositions are cross-examinations," he told Law360. "Sometimes you want to ask buildup questions, and then you want to confront the witness with something contradictory to what they're saying."

But the technology worked "remarkably well," Magliery said. It allowed him to enter exhibits into evidence remotely, and pull up documents on screen to confront the witness, so he wouldn't lose the element of surprise. He used his home computer's monitor and his laptop, so he could have two screens — one to look at the document he was referencing and one to keep an eye on the witness' reactions.

"The technology allowed us to upload the document instantly to both the witness and opposing counsel, so they could then see the entire document. And using screen-share technology, we could also show an excerpt of the document to the witness."

Magliery wouldn't want to use video technology for every deposition once the pandemic ebbs. He would ideally be there in person to take the testimony of an adverse party, for example. But he could see remote depositions continuing to work for third-party witnesses; people he wants to subpoena for factual information, not admissions.

"It saved a lot of client money in travel expenses and it saved a lot of time to be able to conduct these remotely," he said. "I would think there could be circumstances in the future where I would be comfortable using some remote depositions in a case."

## **Automation**

Law firms, mindful that their clients' purse strings are tightening amid the pandemic-fueled recession, are now turning to technology for the busywork that can eat up a lot of billable hours.

That means the pandemic has forced litigators to consider how automation and machine learning can help write pleadings.

That technology has been around for a while, according to Blair. But in the past, it's been relegated to contract work.

The firm has long used systems that, through machine learning, can recognize contract terms and conditions. Attorneys can ask the program to spit out an ideal contract.

But now, what was "a very hot trend on the transactional side of the practice" is being applied to court pleadings, Blair said. It's especially helpful when defending a client that's facing serial litigation with multiple complaints.

"The machine can read those complaints and can identify the differences between them, the anomalies, so that we can quickly generate responses," she said.

That can save attorneys time and their clients money.

"We're looking at ways to innovate, to semiautomate the process where we can, so lawyers can spend their time doing the high-value work, and the machines can do the rest, hopefully," Blair said. "We've doubled down on that during COVID, because we know our clients are under tremendous economic pressure."

--Editing by Rebecca Flanagan.



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## Key Takeaways From Groundbreaking Virtual Civil Jury Trial

By **Kevin-Khristián Cosgriff Hernández** (October 8, 2020, 12:30 PM EDT)

As I sat at my laptop to view the recorded videos of the nation's first remote jury trial with a binding verdict (Cayla Griffin v. Albanese Enterprise Inc., d/b/a/ Paradise),<sup>[1]</sup> I was enlivened as the event was a sign that jury trials were back. The trial was part of Florida's Fourth Judicial Circuit Court's virtual civil jury trial pilot program,<sup>[2]</sup> which was created to address the challenges generated by the pandemic.

The jury awarded Griffin, a former dancer, \$354,000 for damages stemming from a physical altercation at Paradise Gentlemen's Club in Jacksonville, Florida, where two bouncers caused serious injuries when removing Griffin from the premises. The altercation took place in February 2018, when Griffin attempted to retrieve her personal effects from the club after being fired. The defendant did not take part in this trial to determine damages, as they did not dispute the facts of the matter.



Kevin-Khristián  
Cosgriff Hernández

### Virtual Trial Fundamentals

The trial was conducted using the Zoom platform, and voir dire took place over two days, with a one-day trial. Judge Bruce Anderson of the Fourth Judicial Circuit Court of the state of Florida presided, and his court staff adapted juror instructions to manage voir dire and trial.<sup>[3]</sup> Matthew Kachergus of Sheppard White Kachergus DeMaggio & Wilkison PA represented Griffin, the petitioner, while the respondent chose not to participate in trial.

Jurors were only permitted to communicate with the court bailiff via the chat function. Jurors were allowed to submit questions to court staff that Judge Anderson then read aloud, and Judge Anderson was the only person in the courtroom, with all other participants (jurors, counsel, witnesses and court staff) appearing remotely.

### Virtual Trial Takeaways

Based on this trial, there are several considerations for the trial team that ventures into online voir dire and/or trial:

#### ***Prepared Voir Dire Is Optimal***

The Florida court employed a paneling method for voir dire, where small groups were brought into the Zoom platform to answer questions. Counsel relied upon a short script with a set of questions and acknowledged having previously conducted online social media research on jurors during voir dire. Use of research for drafting scripts and any suggestions to findings from said research need to be carefully framed so as to quell potential Big Brother concerns among the panel, especially considering the trial's online context.

#### ***Witness Rapport Is Tantamount***

In this new space, the witness you are questioning may not be in the same physical location. It will

be more difficult to read conversational cues as well as the cues from the judge and jury. This will pose challenges for effectively communicating key facts and themes to the jury. These new communicative challenges underscore the importance of effective witness preparation — especially with a witness who is not familiar with the expectations of the court and technology.

### ***Technology Influences Credibility***

We know from trials and pretrial research exercises (focus groups and mock trials) that mishaps with technology negatively impact a juror's perceptions of a trial team's credibility. This is only magnified in the online trial setting and highlights the necessity for having a team member in place to assist with tech issues. A tech person with appropriate experience will also prove useful for coordinating with the court prior to trial. In the process this will free attorneys up for other considerations that require your attention for trial preparation.

Additionally, in the online format, jurors have a limited attention span for shuffling of papers, technical glitches and unintended pauses. These minor delays in presentation will not transfer well in this medium. We know from testing videotaped depositions at focus groups and mock trials that jurors have expectations of performance that are magnified due in part to saturated exposure to entertainment. In other words, jurors want their evidence, and they want it now.

### ***Court Formality Still Applies***

In an interview, Judge Anderson commented, "We're learning as we go along, but it felt like a real trial. It looked like a real trial." [4]

Temptation may be to remain seated in front of the screen, but posture and vocal inflections will be challenged to rise to the occasion. Instead, stand and make sure that you have a camera that provides a shot to capture any hand gestures you may make. Standing for presentations will help to communicate the seriousness of the moment to jurors and emulate what is expected for in-person trials, while improving performance as an orator.

### ***Jury Attention Span Strained***

Some scholars argue that individuals' attention span in the online space is less than that in live settings. [5] The medium itself presents too many opportunities for distraction, which is only compounded by stressors of the time. [6]

The bottom line is that attorneys and judges will have additional challenges to first capture and then retain jurors' attention. With this in mind, careful consideration should be given to the complexity of the case, the main themes, best organization and presentation of facts, and what each witness will testify about.

In preparation for trial, the team should practice with strategically designed demonstratives to optimize time for a seamless presentation that adequately captivates jurors' attention in this new medium. The trial team that better prepares for and is more able to capture jurors' attention will be in an advantageous position at trial.

### ***Story Matters***

For this matter, Judge Anderson permitted jurors to submit questions to court staff. This practice is not specific to virtual trials, and many judges around the country employ this practice in their courtroom. When permitted, the practice provides crucial insight into what jurors may be thinking at that moment in trial, and/or about a specific witness.

The questions presented in this particular trial pertained to witness testimony. What was most notable about the questions submitted by jurors was the importance of narrative and context as jurors made sense of testimony. Jurors strive for the full picture. It is no different in the virtual trial.

In light of constraints of the medium and role of rapport between counsel and witness, trial teams will want to ensure that witnesses get to the point, while providing a fuller context that ultimately aids jurors as they connect the dots. These aspects can be honed during witness training.

## **Show Your Case Strategically**

As a general rule, effectively designed demonstratives go a long way in aiding jurors during deliberations. We see this time and again in pretrial research exercises and at trial.

Demonstratives reinforce critical points and assist jurors with recall during deliberations. Often, we observe how mock jurors rely upon demonstratives to support their positions. For this trial, when demonstratives were displayed, they took up the entire screen with the presenter's voice sounding in the background. This controls the audience's attention by dominating their screen. Moments such as these provide key opportunities to transmit key facts, events, dates and themes.

Careful consideration should be given during preparation as to how demonstratives can help to simplify, reinforce and recall the important aspects of the case as you show your case.

## **Conclusions**

The virtual voir dire and trial will continue to be tested in venues across the country. This pilot program provides crucial insights into how to better prepare and execute for trial.

One final note is that our fellow citizens once again provided litigants with a resolution to their conflict, even at this time when we are all undoubtedly challenged by the pandemic. The resolve, commitment and dedication of the jurors in this historical instance reinforced what we knew — jurors take their task seriously. For those of us working in the litigation industry, the example presented to us provides an opportunity to continue our craft, albeit in a new space.

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*Kevin-Khristián Cosgriff Hernández is a jury consultant and partner at Delphi Litigation Strategies.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] <https://pages.cvn.com/duval-county-florida-remote-trial-program>.

[2] <https://www.floridasupremecourt.org/News-Media/Court-News/Five-trial-court-circuits-chosen-for-virtual-civil-jury-trial-pilot-program-due-to-pandemic>.

[3] Marbut, M. (2020, August 14). Plaintiff awarded a nearly \$355,000 verdict in the first remote jury proceeding in the U.S. since the COVID-19 shutdown. Available at: <https://www.jaxdailyrecord.com/article/duval-trial-makes-history-how-they-did-it-virtually>.

[4] <https://www.jaxdailyrecord.com/article/duval-trial-makes-history-how-they-did-it-virtually>.

[5] Drummond M. A., (2015), Is Technology Changing Our Brains? Jurors Go Cold Turkey on Cell Phones, Originally published in Litigation News, 40:3, available at: <https://civiljuryproject.law.nyu.edu/2918-2/>; and Shammass, M., (2020, July 8), Thoughts on Optimizing Time & Attention in Virtual Trials, NYU Law and Economics Research Paper No. 20-39, available at SSRN: <https://ssrn.com/abstract=3646490>.

[6] Lerner, H. (2020, July 15). Jury selection via Zoom: First Miami-Dade case is a glimpse of court in the coronavirus era. Available at: <https://www.miamiherald.com/news/coronavirus/article244218482.html>.

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## Remote Depositions 'New Normal,' Judge Says, Denying Delay

By **Mike Curley**

Law360 (July 13, 2020, 3:43 PM EDT) -- A New York magistrate judge has told a couple suing over a defective hip implant that they can't force a medical company's officers to meet in person for deposition, saying it presents too much risk in the age of COVID-19, when remote depositions are the "new normal."

In an order filed Saturday, U.S. Magistrate Judge Stewart D. Aaron shot down a bid by Jodi and Andre Rouviere either to force corporate representatives for Howmedica Osteonics Corp. to appear in person for deposition, or alternatively to delay the deposition until it was possible, saying the court would not make them risk exposure to a deadly disease.

"Conducting court proceedings remotely in the Southern District of New York has become the 'new normal' since the advent of the public health emergency created by the spread of the coronavirus and COVID-19. Indeed, Chief Judge [Colleen] McMahon currently is conducting a bench trial via Zoom in a patent case in our court," Judge Aaron wrote. "So too, conducting depositions remotely is becoming the 'new normal.'"

In addition, the judge said the current conditions making remote deposition necessary are likely to continue for "the foreseeable future" and holding off would in effect indefinitely delay discovery in the case.

In the suit, the Rouvieres allege that Jodi was injured after receiving a defective hip implant with parts manufactured by Howmedica and DePuy Orthopaedics Inc., which is also named as a defendant in the suit. The couple is represented by husband Andre.

As of June, Judge Aaron said the case has already seen three extensions of discovery deadlines — some as a result of the pandemic — before the Rouvieres' current motion demanding that representatives of Howmedica give deposition in person. The Rouvieres stated they intended to travel from Florida to New Jersey to take that deposition.

Allowing in-person deposition presents "obvious" hardship to Howmedica's representatives, the judge said. Judge Aaron wrote that social distancing does not guarantee a safe environment for deposition and putting the witness, counsel and stenographers in the same room puts everyone at risk.

While the Rouvieres argued that they would be prejudiced by the "document intensive" and "document laden" remote deposition, the judge said this is not an obstacle as courts have found ways to manage exhibits in remote depositions and there are plenty of tutorial videos that the plaintiffs can use to get acquainted and comfortable with taking such a deposition.

Judge Aaron however did recognize there might be some delays in taking the deposition and ordered that they would have up to eight hours instead of the usual seven.

The judge said the only other potential prejudice is that the plaintiffs' counsel would not be in the room to interact with and observe the demeanor of the witnesses, but a remote deposition may work better for that reason, Judge Aaron added. If the deposition is in person, everyone involved would have to wear masks. However, in a remote setting, they'd be free to see each others' faces, he said.



The judge gave the Rouvieres until Aug. 21 to complete the deposition by video.

Representatives for the Rouvieres, Howmedica and DePuy could not immediately be reached for comment Monday.

The Rouvieres are represented by Andre A. Rouviere of the Law Offices of Andre A. Rouviere.

DePuy is represented by Joseph G. Eaton, J.T. Larson and James F. Murdica of Barnes & Thornburg LLP.

Howmedica is represented by Kim M. Catullo and Paul E. Asfendis of Gibbons PC.

The case is Rouviere et al. v. DePuy Orthopaedics Inc. et al., case number 1:18-cv-04814, in the U.S. District Court for the Southern District of New York.

--Editing by JoVona Taylor.

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## Why Remote Depositions Are Likely Here To Stay

By **Darren Goldman** (August 21, 2020, 3:38 PM EDT)

While many courts have held telephonic hearings for years, depositions have historically been conducted in person. The reasons for this are self-evident.

First, an attorney taking a deposition will often want to use exhibits, and those exhibits will need to be shared with and manipulated by the deponent and the deponent's counsel. Second, an attorney defending a deposition will want to be in the same room as his or her client, since it will give the attorney more control over the situation and allow the attorney to better protect the client. Third, the parties will often want the deposition videotaped, since a video recording of the deposition can be more impactful at trial than simply reading a transcript.



Darren Goldman

As a result of the coronavirus pandemic, however, standard operating procedures have been turned upside down, and in-person depositions have become the exception rather than the norm.

To avoid the entire legal system crashing to a halt, courts, attorneys and parties have had to adapt. For example, in March, the Florida Supreme Court issued Administrative Order AOSC20-23, which permits the use of remote technologies to conduct proceedings.[1] It also allows for witnesses to be sworn in remotely.[2] The combination of these provisions have allowed litigants to use remote conferencing technologies, such as Zoom, Cisco Webex, Microsoft Teams and Skype, to depose witnesses.

While intended to be a temporary measure, Florida's administrative order has already been amended and extended three times, most recently on June 8. Other courts have issued and extended similar orders.

Given that there does not appear to be an end to the pandemic's effect on social gatherings in the near future, remote depositions are not going anywhere. And, as discussed below, because remote depositions work better than many expected they would and have resulted in unanticipated benefits, they will likely remain, even after COVID-19 passes.

### **Attorney concerns have been alleviated.**

Remote deposition technology has taught us that everything that can be done in an in-person deposition can be done remotely.

For example, screen-sharing technology makes it possible for an attorney to use exhibits just as if the attorney and deponent were in the same room. The attorney can ask the court reporter to mark a document as an exhibit and then share his or her screen (or preferably have a paralegal share the screen) so that everyone attending the deposition can see the exhibit. Control of the mouse can then be turned over to the deponent so that the deponent can scroll through the document.

Though one might expect significant lags and technical issues with this approach, the reported problems have been few and far between. Indeed, they are no more prevalent than a miscopied or misstapled hard copy document at an in-person deposition.

The seeming inability to speak with those on the same side without the opposing party hearing has also been resolved through the use of separate "rooms."

The deposition host, which is usually a court reporting service, can create submeetings within a deposition. The parties can take a break, just like in an in-person deposition, and the host can separate the parties into the subgroups. Each subgroup is in its own room, which nobody else can enter or observe.

So, for example, all the plaintiff parties can be in one room and all the defendant parties can be in another. The plaintiffs can thus all see each other and speak freely without the defendants overhearing, and vice versa. Seeing each other is an advantage over communicating by phone or text messages.

A defending attorney, therefore, does not have to worry about the logistics of communicating with his or her client. During a break, the deponent and the defending attorney need only go request that they be sent into their personal room.

The technology also exists for the deposition to be recorded. The court reporter can choose the deponent's screen and make a recording of that screen throughout the entire proceedings. The court reporter can also stop the recording when the request is made to go off the record.

Moreover, the video can be synced with the transcript. Thus, if the deposition needs to be introduced at a trial, the synced video exists no different than if a videographer was recording an in-person deposition.

In other words, the supposed technical impediments one would expect from a remote deposition just do not exist. Indeed, many attorneys may prefer a remote deposition rather than having to travel to a different part of their state or the country, which can result in additional costs and time inefficiencies.

### **Clients will love the cost saving.**

At the same time, remote depositions save money. Depositions are not cheap. In addition to an attorney's hourly rate, there are a number of expenses associated with a deposition. These include court reporting services, travel expenses such as plane tickets, train tickets, rental cars, gas and hotels, food during the deposition, word processing services like printing and copying, and the use of office space, to name a few.

While attorney rates and court reporting services remain regardless of the forum, many of the other expenses are eliminated with a remote deposition. Everyone who would attend the deposition in person can do so from the comfort of his or her own home or office. Thus, no more travel expenses, office rental space and catering costs. And because exhibits can be shared remotely and electronically, the printing and copying expenses are also alleviated.

More often than not, these costs are passed through to the client. By conducting the deposition remotely, these savings are likewise passed through. Clients will like the idea of not having to pay for these costs, and may push for remote depositions once the pandemic passes.

### **It creates additional business opportunities.**

While most analyses regarding remote depositions focus on the impact to the courts, the attorneys and the parties, there is another group to consider: vendors.

Whether it be document collection and storage services, court reporting services, background investigators, or service organizations, third-party vendors are necessary to the smooth operation of litigation. The use of remote depositions creates a business opportunity for third-party vendors.

For example, most court reporting services in Florida now offer remote deposition services. They have certified notaries who can swear in witnesses remotely. They have licenses with Zoom, Skype, Teams and other platforms to host remote depositions. And they have the ability to provide video recordings of the remote depositions.

All of these services come with a fee, of course. And these vendors are not going to want to give up this additional source of income once the pandemic is contained and society returns to normal. As a result, these vendors are likely to continue advertising the benefits of remote depositions. They will also likely lobby their clients and the bar to demand the ability to take remote depositions remains.

## Conclusion

During the past few months, attorneys have gotten used to conducting remote depositions. They have seen firsthand how screen-sharing technology and the ability to separate parties into rooms can result in a remote deposition running just as smoothly — if not more smoothly — than an in-person deposition.

At the same time, clients have learned that conducting a deposition remotely can result in significant cost savings when extraneous costs such as travel, food and office services are eliminated. And third-party vendors, such as court reporting services, have created a new source of revenue to accommodate attorneys and parties who do not want to travel, or cannot travel, for an in-person deposition.

While the pandemic forced the legal community to accept this new way to conduct business, nothing will prevent the community from demanding these procedures remain in place. Given the benefits to all involved, there would be no reason for courts to require in-person depositions and swearing in. As a result, remote depositions are likely here to stay.

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[1] In relevant part, the administrative order states that "All rules of procedure, court orders, and opinions applicable to court proceedings that limit or prohibit the use of communication equipment for conducting proceedings by remote electronic means shall remain suspended," and that "the chief judge of each district court of appeal and each judicial circuit remains authorized to establish procedures for the use, to the maximum extent feasible, of communication equipment for the conducting of proceedings by remote electronic means, as are necessary in their respective district or circuit due to the public health emergency."

[2] Specifically, it states that "Notaries and other persons qualified to administer an oath in the State of Florida may swear a witness remotely by audio-video communication technology from a location within the State of Florida, provided they can positively identify the witness" and "[i]f a witness is not located within the State of Florida, a witness may consent to being put on oath via audio-video communication technology by a person qualified to administer an oath in the State of Florida."

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## *The Next Normal*

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### **Highlight**

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WILL THE **COVID-19** PANDEMIC FUNDAMENTALLY REMAKE THE LEGAL INDUSTRY?

### **Body**

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In late February, the University of Pennsylvania Carey Law School held a Law 2030 conference focused on the myriad challenges the legal profession was likely to face in the next decade and how it could adapt to combat them.

Soon after, the spread of deadly **COVID-19** forced law firms and the justice system to rapidly evolve in ways that conferencegoers had predicted would take years to come to fruition.

Shelter-in-place orders and social distancing guidelines necessitated that an industry known for being slow to embrace technology quickly shift to remote working and use the tools needed to do so effectively. Courts also furiously worked to implement **videoconferencing** and other electronic solutions to keep providing forums for litigants to resolve disputes amid courthouse closures and the suspension of jury **trials**.

The **legal** profession endeavored to comply with the various pandemic-related requirements while encountering the beginning of what is likely to be a prolonged economic downturn due to much of global commerce screeching to a halt.

This confluence of events sparked some **legal** industry observers to predict that the many technological changes being adopted will persist beyond **COVID-19**, as will the utilization of **remote** working. Meanwhile, others have suggested the widespread upheaval will provide fuel for state reviews of whether to open up the **legal** marketplace to alternative business structures and nonlawyer practitioners.

## Big promises, mixed results

Of course, many people made similar prognostications a decade ago, when it seemed the Great Recession would fundamentally and radically transform the legal industry. Ultimately, experts say such large-scale changes were only partially achieved.

Predictions that the U.S. would join Australia and the United Kingdom in permitting alternative business structures in the law did not come true. The American Bar Association's Commission on Ethics 20/20 carefully studied whether to recommend revisions to the ABA policy prohibiting nonlawyer ownership of law firms, but eventually decided against doing so in light of opposition from many in the industry.

However, law firms' approach to client billing was one area of major reform sparked by the last significant economic downturn, says Susan Hackett, the former longtime general counsel of the Association of Corporate Counsel. Rather than just billing clients by the hour, firms started to shift toward billing clients based on the value of the services they were providing- a trend driven in part by clients seeking to cut back their legal expenses and exert more control over their matters.

The legal industry also began to embrace technologies that made some attorney work more efficient, allowing lawyers to spend more time on higher-level tasks. "It brought people to the table to look at doing things differently who had never thought they would sit at that table before," says Hackett, now CEO of Legal Executive Leadership.

Kent Zimmermann, a consultant at Zeughauser Group who advises law firm leaders, agrees some firms responded to the trying financial times by permanently altering their approach to billing and technology utilization. But others only revised their business model to weather the recession and felt the reforms would not serve them well economically in the long run. That's why he says the Great Recession's impact on legal was ultimately mixed.

"I do think many firms kind of snapped back to doing things the way they did before the financial crisis, but I think some others found religion and the benefits to be worth continuing," Zimmermann says.

## 'Forced experimentation'

Zimmermann and Jennifer Leonard, who heads Penn Law's Future of the Profession Initiative, are among the legal professionals who think the **COVID-19** pandemic will produce greater transformative effects.

They both note that while the Great Recession was a substantial shock to the economic system, **COVID-19** has resulted in the sudden upheaval of society at large. This includes changing how members of the public can access the court system or connect with a lawyer.

"It is really fundamentally disrupting overnight every single component of the legal system, and that is very different than 2008-2009," says Leonard, who is also Penn Law's chief innovation officer. "I think it creates enormous opportunities for changing many of the ways we work as lawyers, the ways we provide legal services to our clients and also the ways the justice system as a whole works."

In the short term, Leonard says the pandemic has resulted in massive "forced experimentation."

For instance, **COVID-19** prompted law firms to very quickly adopt technology more common in some other business sectors in order to allow attorneys and staff to work remotely. Video and audioconferencing tools, particularly Zoom, are being used widely for a variety of purposes. These include firm and client meetings as well as webinars.

Firms have also been utilizing videoconferencing technology to conduct litigation in a **remote** fashion. Littler Mendelson, a global law firm representing employers, produced training **videos** to help its attorneys who have needed to conduct **depositions**, mediations and witness preparation via **video**.

Scott A. Forman, a Miami-based Littler shareholder, says he expects **remote** litigation will continue beyond **COVID-19**. "I anticipate that folks who were resistant to **remote** meetings and feeling that everything needed to be in

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person, including **depositions**, that that resistance will dissipate as time goes on and people get used to this new normal," Forman says.

Tools that make it easy for lawyers at a firm to collaborate while working from home also have gained traction. Dave Kinsey, whose Phoenix-based Total Networks assists law firms and other businesses with their technology needs, points to the rise in popularity of Microsoft Teams. It permits attorneys to send instant messages to one another, share files and edit documents at the same time as colleagues. Microsoft Teams also permits **lawyers** to conduct **video** and voice calls. "I think law firms have come a long way in wanting to be very tech-savvy," says Kinsey, president and owner of Total Networks.

### Shift to the cloud

Perhaps unsurprisingly, the pandemic also prompted more law firms to move their operations to the cloud, something forward-thinking legal outfits such as international firm Rimon Law did long ago.

Michael Moradzadeh, founding partner and CEO of Rimon Law, says "it's reckless in some ways" for a law firm not to be cloud based in a climate where remote working is essential. He and others expect more firms will move to the cloud in the months to come.

"I think this painful experience will push a lot of people to ask, 'Why aren't we in the cloud?'" says Moradzadeh, who is based in Silicon Valley. "The argument that it is not secure is just outdated at this point."

"I have a feeling we are going to see the removal of a lot of servers that are still in some small-to-midsize firms because of this," adds Adriana Linares, a New Orleans-based legal technology consultant.

She says there are also a number of legal technology service providers who have yet to move to the cloud, making it more difficult for lawyers utilizing their software to effectively work remotely. Examples of such tools she highlights are estate planning, real estate closing and litigation support software. "I hope those companies start to develop cloud-based services based on feedback from their clients, or I hope their clients develop alternatives in case this ever happens again," says Linares, owner of LawTech Partners and the San Diego County Bar Association's technology and practice management adviser.

### Remote working won't go away

Experts also think widespread **remote** working itself will remain common in the **legal** industry beyond **COVID-19**. One reason they predict this development is because firms' quick transition to having almost all lawyers and staff work off-site was smoother than anticipated.

A Loeb Leadership survey of law firm leaders in the spring found that 98% of the 136 respondents reported at least a moderate amount of success in rapidly moving their employees to home offices, with 77% of respondents saying they have been highly successful.

"It is hard to put the genie back in the bottle if you have been running a business successfully for two to three months with every staff member out of the office," said Ben Allgrove, a London-based Baker McKenzie partner, during an interview in the spring.

The initial economic impact of the **coronavirus**, which prompted firms to begin layoffs and furloughs, also has given legal services providers seeking to cut costs an incentive to have more employees work remotely so they can reduce their physical footprints.

Zimmermann notes that real estate is normally a law firm's second-largest expense behind lawyer compensation, and he says he has spoken to several law firm managing partners and chairs who say they think their firms will occupy less real estate moving forward, perhaps materially less. "There was already some movement in that direction, but I think this will accelerate momentum toward less big corner offices [and] more flexible arrangements in more firms for more people," Zimmermann says.

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Additionally, Bill Karns, co-founder of Karns & Karns in Los Angeles, believes firms that remain supportive of remote working **after the pandemic** will have an advantage in recruiting. "Employees are going to want to go to law firms that allow them to work from home a day a week or two days a week," he says.

### Regulatory reform efforts

Meanwhile, the rapid spread of **COVID-19** came amid several states' efforts to overhaul regulation of the legal industry with the primary goal of strengthening access to justice. Task forces launched by supreme courts or state bars in several U.S. jurisdictions have examined how to make it easier for technology-driven legal services providers to operate and whether to eliminate prohibitions regarding nonlawyer ownership of law firms. Regulatory reform supporters say they believe the **coronavirus** and its aftermath will create additional momentum for such efforts because the many legal issues associated with **COVID-19** will further exacerbate the justice gap.

"I think the demand for legal services will rise, and at the same time I think the ability of lawyers to sustain their practices under the current models are going to be crippling in some cases," says Jayne Reardon, executive director of the Illinois Supreme Court Commission on Professionalism.

She and Scott Bales, the former chief justice of the Arizona Supreme Court, say the pandemic has also highlighted the essential role technology plays in broadening access to justice.

For example, legal innovators have worked in recent months to develop mobile applications that allow members of the public to remotely submit court forms. Legal technologists also have created tools to help consumers and businesses determine if they are eligible for benefits included in the **coronavirus**-related federal stimulus legislation signed into law.

Bales, now the executive director of the Institute for the Advancement of the American Legal System, says restrictions on who can own law firms have historically inhibited technological advances by limiting the investment needed for testing out innovative approaches to delivering legal services.

"I think, over time, opening up the provision of services by entities where lawyers can combine in ownership with nonlawyers has the greatest potential for technological changes and bringing capital into the legal services industry in a more direct way than is now occurring," Bales says.

A similar argument was made in a white paper the Stanford Center on the Legal Profession released in late April highlighting what it says would be the many benefits of reforming ABA Model Rule of Professional Conduct 5.4, which prohibits nonlawyers from owning or investing in law firms.

Utah is the state that appears closest to broadly opening up its legal marketplace. In late April, the Utah Supreme Court proposed a series of wide-ranging regulatory reforms that included permitting nonlawyers to own or invest in law firms. The court planned to decide how to proceed on its proposals after receiving public comments through July 23. "This pandemic has highlighted the need for regulatory reform," Utah Supreme Court Justice Constandinos "Deno" Himonas says.

Meanwhile, sandbox proposals from applicants who believe they could provide low-cost or no-cost legal services addressing issues stemming from **COVID-19** were to be considered for expedited approval.

Himonas says this provision was included in light of the pandemic creating significant demand for **legal** services in a variety of practice areas, including those where litigants are often self-represented.

### Courts streaming video

Judicial leaders throughout the U.S. also have helped courts join the broader **legal** industry in quickly expanding their use of technology in response to **COVID-19**.

In early April, the Texas Supreme Court for the first time livestreamed an oral argument session in which the **lawyers** and some of the justices appeared remotely. Meanwhile, the state's **trial** courts held **video**-powered



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hearings in more than 160,000 civil and criminal cases from late March to mid-June, according to David Slayton, administrative director of Texas' Office of Court Administration. Texas Supreme Court Chief Justice Nathan L. Hecht says this speedy adoption of technology would have been unimaginable prior to the **COVID-19** outbreak.

"I know if we had tried to get **trial** courts in Texas to **videoconference** more, we would be working at it for years before we made any discernible progress," Hecht says.

By mid-June, more than 40 state supreme courts had responded to in-person arguments being canceled by holding remote hearings, according to court transparency group Fix the Court. Although the report said federal courts were not as quick to adapt, it noted several U.S. appeals courts had permitted livestreaming by mid-April.

Additionally, the U.S. Supreme Court livestreamed oral arguments for the first time in May using teleconference technology. Fix the Court reported that more than 880,000 people clicked on the audio feed of the arguments in President Donald Trump's tax records case, and the organization conducted a poll that found 70% of respondents would like the live audio to continue post-pandemic. In a June letter addressed to Chief Justice John Roberts, ABA President Judy Perry Martinez encouraged the Supreme Court to continue livestreaming oral arguments during the upcoming October term.

Hecht, who is also president of the Conference of Chief Justices, expresses confidence videostreaming technology will be used in Texas courts even after the current pandemic. He predicts other states will likely do the same because of the benefits the technology provides **lawyers** and court personnel who live in geographically large states or rural areas.

For example, an April **videoconference** of his court's oral arguments saved **lawyers** in one case from having to make a roughly 1,200-mile round-trip trek from El Paso to Austin for a brief appearance. Additionally, Hecht says tech platforms have a greater incentive now to make their tools easier for courts to use. "With the whole American justice system running downhill toward these changes, the pressure on the industry to improve the platforms to meet the needs of the justice system is going to be enormous," he says.

**COVID-19** also has prompted courts to expand their use of e-filing, e-service and online dispute software, among other tools.

The pandemic sparked Michigan to work to more quickly to expand statewide an online dispute resolution service for some civil disputes and small claims matters, Michigan Supreme Court Chief Justice Bridget Mary McCormack says. She envisions courts across the country will pursue such technological innovations beyond the near term.

"You need to get to the tipping point before something sticks," McCormack says. "That tipping point is coming very quickly."

**Load Date:** September 1, 2020

## **Broward Chief Judge on Why He's a 'Believer' in Remote Jury Trials**

Miami Daily Business Review

September 2, 2020 Wednesday

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### **Body**

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Tuter practiced in South Florida at Stephens, Lynn, Klein, Lacava, Hoffman, & Puya and Conrad & Scherer before being appointed to the circuit bench by then-Gov. Jeb Bush in 2005. His colleagues first elected him as the chief judicial officer of the circuit in 2017 and re-elected him last year.

Tuter has been pushing since early during the pandemic-related closures to get his court ready to conduct civil **trials** remotely. He's worked with **lawyers** with the American Board of **Trial** Advocates and New York University's Civil Jury Project to pilot **remote** jury selection, **trial** procedures and deliberations.

"You never could have convinced me back in March that we could have a jury **trial** on the internet. And you certainly couldn't have convinced me that you could have done the majority of family hearings and probate and civil on some sort of video format," said Tuter when the Lit Daily caught up with him by phone last week. "I would just think there's just so many limitations, but it seems like for every limitation we had we found a solution," said the judge, heaping praise on the staff of his judicial information systems group. Now, he says, "I'm a believer."

The interview has been edited for length and clarity.

What does your docket look like, what's the caseload, and what types of cases do you typically handle?

This is an extraordinarily large circuit. Only Miami-Dade is larger (in Florida). Their population is probably three-and-a-half to four million. We have two million people in Broward County. We have 90 judges and 11 general magistrates, so a total of 101 judicial and quasi-judicial people. We probably have another 50 traffic hearing officers and other people who do quasi-judicial work. It is a very big circuit. Very busy.

We have at any given time about 3,000 people in the county jail, and we've been able to keep that number down. We took the population from about 85% to about 67% today. So that's a substantial savings.

We're pretty much like the rest of the states. We haven't figured out a way to safely bring in juries to the courthouse. The criminal cases have suffered. We've got to get juries in and get caught up on the due process cases.

## Broward Chief Judge on Why He's a 'Believer' in Remote Jury Trials

Everything else that we've been working on on Zoom - civil, probate, family, county court criminal, county court civil, and even traffic tickets - we've been able to manage astonishingly well. The case filings have gone down slightly in some areas as a result of **COVID**, and that's caused some budget concerns because in Florida part of our revenue to run the courts is allocated through court filing fees.

Ask around and I think everybody will say that we've been able to keep the system functioning and working, and the only thing that's suffered is the ability to have jury **trials**, as far as major suffering.

And when we open back up, I've already instructed our staff to create a **virtual**-type, courtroom-type atmosphere in a couple of our courtrooms. They can participate by Zoom instead of coming to the courthouse. I think we're going to make that an option.

Where is your work set up? What is it like?

This is my second term as chief judge. Since March when we closed, the thing I realized is as big of a building as we have and as big of a system as we have, I never envisioned some of things that we would be faced with.

First, there was a slight outbreak of **COVID** in the jail. So we had to address that. Then all of the cameras - everybody who is arrested here within 24 hours has to see a judge - so, the courtroom that we used that's video-equipped and camera-equipped - well people in there started getting symptoms of **COVID**. So, we closed that courtroom. So, now we have to figure out how are we going to get a camera in front of everyone who's arrested every morning for first appearances? So, we're not doing all of those on video. We worked the kinks out of that. Then we started working on the felony docket: How could people plea in a felony case? The biggest problem, of course, is that the people have been in custody, our jail's been on lockdown. So they can't communicate with their lawyer face-to-face. Then the juvenile detention center - kids over there got **COVID**. They closed it down. Sent all the kids to Miami. So now we had to do Zoom hearings on juvenile delinquency hearings, which have to occur every day.

So, it's kind of been one dilemma after another that you're trying to solve and keep the system running.

There was some initial squabbling. "Oh, I'm not going to do these hearings on Zoom." And we entered an order that said "Oh, yes you are." And the more they got used to it, I think the more they like it. It's cost-saving to their client.

We've also done remote mediations. We closed 700 small claims cases last month doing mediations online. I never thought we'd be able to do that either.

I would just say that little by little, we're able to run a huge court system and keep the cases active and not stale, except for in criminal.

What can you tell me about the court's work with the American Board of **Trial** Advocates and the Civil Jury Project to pilot **remote** jury selection and **trials**? Who came to whom? And how did it come about?

We had only been closed for about two weeks. This was in March. I emailed our head of county court and the head of the civil division and I said: "Listen, I want you all to be tasked with what it would look like to do a jury trial online." And I said: "We can do it internally. We can use judicial assistants as the jurors, and then you can use lawyers or judges or staff attorneys to be the players and let's see what it would look like."

## Broward Chief Judge on Why He's a 'Believer' in Remote Jury Trials

So they did one in circuit civil off a tort case, someone fell off a bike or something. And it seemed very efficient. They did it in about a four-hour format because I wanted to make it available for others to watch to see if they could either give us some insight or give us some ideas.

So then our county court did a DUI case - a criminal case - in the same manner with judicial assistants acting as the jury in the case. You know, you call witnesses and all those things just normally occur. Then after I saw that it was doable and could be successful, I called the head of ABOTA here in the 17th Circuit and said: "Would you all like to participate in a civil trial?"

And so we tried a case with ABOTA members being the jury. This time they were put in a break room, actually deliberated, returned a verdict, all of those kinds of things. Then in the last phase, I said, "Let's try a case, but let's get the jury room to issue summonses just like we would in any normal week telling people they're going to participate in an online jury trial." So, my curiosity was how many of them would follow instructions. How many would actually show up at the courthouse - because we've got in big black letters "Do Not Come to the Courthouse" - and what it would look like? (Editorial note: Only one person showed up at the courthouse.) We summoned 120 and something like 55 appeared.

The one thing that's an issue that was raised is what's the socioeconomic stature of a jury who is doing it over the internet. Are you excluding a whole group of people who don't have good WiFi or a laptop or all that kind of thing? So, we were working on the possibility of setting up zones in the community where they could go like a public library where they could have an internet connection and all that and go through voir dire or actually sit through the trial there. So, we thought about that, and I think there's still some logistics that have to be worked out. But all in all, I think that's the way we could do it.

What's going to be the biggest challenge to pulling it off?

Having the lawyers put their case into the pool and say: "I'll participate." Because they're going to have to waive any kind of things relating to the trial being conducted online. They could still appeal any of the evidence issues or jury issues or rulings by the judge, but they would have to stipulate that once they went to trial that they would have to go to verdict and that they were doing it voluntarily and they would accept the jury's verdict the same as had it been in a courtroom. So, that's the biggest hurdle right now is getting the lawyers and their clients to buy into it and to give it a shot. There always has to be someone.

Which changes are likely to stick?

I think the ability to provide a Zoom platform for access to litigants and **lawyers** who can't make it to the courthouse will definitely stay. The idea of having **virtual** courtrooms where there may be some people in the courtroom and some people on Zoom is **here to stay**. I think the idea of our work with the mock jury trials is **here to stay**. It may not be that we're able to do this or next year, but I think down the road it's going to occur. I think some of the changes we've made in county court and the use of alternative dispute resolution, such as the online mediations, are going to definitely stay.

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The United States Law Week  
**Depositions Go Virtual During Pandemic, May Remain That Way**  
By Stephanie Russell-Kraft  
May 22, 2020, 10:01 AM

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- Uptick in virtual depositions during coronavirus pandemic
  - Some say more remote work will help court reporters
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Bloomberg Law News 2020-10-21T08:34:12323-04:00  
**Depositions Go Virtual During Pandemic, May Remain That Way**

By Stephanie Russell-Kraft2020-05-22T10:01:50000-04:00  
Uptick in virtual depositions during coronavirus pandemic  
Some say more remote work will help court reporters

Squire Patton Boggs partner Steven M. Auvil in March asked an Ohio federal judge to take a rather unusual step in a case he was working on, compel a remote deposition.

The state's stay-at-home order precluded an in-person meeting, but opposing counsel in the patent infringement matter argued that a remote deposition would adversely affect their ability to represent their client.

In the process of writing his motion, Auvil found at least a half a dozen other cases in which judges granted requests for remote depositions since the outbreak of the Covid-19 pandemic. One New York federal judge had gone so far as to issue a standing order that all depositions in matters before him may be taken remotely.

While technology required to take virtual depositions has existed for more than a decade, litigants and courts have been slow to adopt the practice and some have said it has very real limitations. But as courts have closed across the country due to the pandemic, more litigants are giving it a shot.

"The courts are expecting the parties to use virtual means," said Auvil, whose motion was ultimately granted. "They're saying video conference technology is rock-solid and has been used for years, so use it."

**Remotely Useful**

"Right now, because of COVID, 100% of depositions are being conducted remotely," said Valerie Berger, a senior vice president at Veritext, the court reporting company Auvil used. "It took a few weeks for clients to adjust and adapt to remote proceedings, but now the number of depositions have exponentially increased and continues to do so."

The widespread adoption of remote depositions has historically been limited by state notarization laws, which vary widely. In many states, notaries--often stenographers-- are required to be physically present with a witness when swearing them in for a deposition, making remote work impossible.

In response to the pandemic, many state governors, including New York's Andrew Cuomo, issued emergency orders authorizing remote notarization, allowing reporters to verify witnesses' identity via video conference. A Senate bill introduced in March would authorize remote online notarizations nationally.

After stay-at-home orders began, Max Curry, owner of Elite Reporting Services, began marketing remote depositions. After stay-at-home orders took effect, his agency's capacity dropped to as low as only five percent of its normal workload. He now estimates that he's at 60 percent capacity, and hopes to take on even more reporting work in the coming months. Many of this is possible because his agency has an IT department and has been able to proactively solicit remote work. "We've had to do a tremendous amount of education and upsell," he said.

Many stenographers see the crisis as an opportunity to advance the kinds of changes they have long called for.

"We've had this technology, we've used it for years," said Curry, who is also president of the National Court Reporter Association.

There has been a widely reported shortage of court reporters in the U.S. in recent years, but Curry believes at least part of that shortage stems from reporters being located in the wrong place. An increased acceptance of remote depositions might help.

"There have been many times where I've been overbooked by four or five jobs in Memphis, but we have two reporters sitting idle in Nashville," said Curry, who runs a statewide court reporting agency in Tennessee.

Christine Phipps, president-elect of the NCRA, owns a court reporting firm in Florida that has been conducting remote depositions for the past ten years.

"I have ten offices throughout the state of Florida, but there are still places in Florida that are difficult to cover," Phipps said. "Like the Florida Keys. Reporters have to come from Miami and drive two hours for a deposition that will take one hour."

As of the end of April, her firm had booked over 2,000 virtual proceedings in 2020, including depositions and examinations under oath, according to Phipps.

She believes that lawyers and judges will be quick to embrace the technology once they see how much time it saves. "How else do we get time back in our day unless people stop traveling?" she said.

Of course, one major problem for stenographers during the pandemic is that most depositions simply aren't happening as discovery deadlines are extended.

Marjorie Peters, an independent court stenographer based in the Washington metro area, works in complex civil litigation and normally takes about three to five depositions per week.

All of her recent work has been remote, but there hasn't been much of it to speak of. "I've maybe taken five depositions, remotely, since March 19," she said in a phone call on May 12. "That's my entire income."

Curry said he gets daily calls from NCRA members who have seen a "great diminishment in income and work."

### Easing Back In

Virtual depositions courts might help courts and lawyers ease back into a new normal after the worst of the virus has passed, but it remains unclear whether the practice will pick up steam as courts re-open.

Peters prefers in-person reporting jobs because she said they allow her to get a more accurate depiction of the record. With video calls, speakers are more likely to go unheard if they cut each other off. "If there's an objection and the witness speaks at the same time, it could cut the objection off," she said. "I don't know if that attorney is yawning or objecting."

Auvil also acknowledged drawbacks. "One of the big concerns with virtual depositions is the lack of checks on the opposing lawyer and the interaction with the witness," he said. "You can't know whether there are signals or communications going on electronically. Maybe the witness is being deposed and the other lawyer is texting answers to the witness."

It's also harder for lawyers and witnesses to use body language virtually. "Like leaning in, pointing to a document with your finger," explained Auvil. "That can sometimes exert pressure on a witness to answer the question more honestly."

But Peters said there is significant value in remote depositions, particularly when travel is prohibitive.

"It should be an option for the litigants to be able to choose," she said. "Based on what we're going through now, people may become more comfortable with it, and that's a good thing. It opens up options."

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# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 498**

**March 10, 2021**

## **Virtual Practice**

*The ABA Model Rules of Professional Conduct permit virtual practice, which is technologically enabled law practice beyond the traditional brick-and-mortar law firm.<sup>1</sup> When practicing virtually, lawyers must particularly consider ethical duties regarding competence, diligence, and communication, especially when using technology. In compliance with the duty of confidentiality, lawyers must make reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such information. Additionally, the duty of supervision requires that lawyers make reasonable efforts to ensure compliance by subordinate lawyers and nonlawyer assistants with the Rules of Professional Conduct, specifically regarding virtual practice policies.*

### **I. Introduction**

As lawyers increasingly use technology to practice virtually, they must remain cognizant of their ethical responsibilities. While the ABA Model Rules of Professional Conduct permit virtual practice, the Rules provide some minimum requirements and some of the Comments suggest best practices for virtual practice, particularly in the areas of competence, confidentiality, and supervision. These requirements and best practices are discussed in this opinion, although this opinion does not address every ethical issue arising in the virtual practice context.<sup>2</sup>

### **II. Virtual Practice: Commonly Implicated Model Rules**

This opinion defines and addresses virtual practice broadly, as technologically enabled law practice beyond the traditional brick-and-mortar law firm.<sup>3</sup> A lawyer's virtual practice often occurs when a lawyer at home or on-the-go is working from a location outside the office, but a lawyer's practice may be entirely virtual because there is no requirement in the Model Rules that a lawyer

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<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

<sup>2</sup> Interstate virtual practice, for instance, also implicates Model Rule of Professional Conduct 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law, which is not addressed by this opinion. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 495 (2020), stating that "[l]awyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction."

<sup>3</sup> See generally MODEL RULES OF PROFESSIONAL CONDUCT R. 1.0(c), defining a "firm" or "law firm" to be "a lawyer or lawyers in a partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization on the legal department of a corporation or other organization." Further guidance on what constitutes a firm is provided in Comments [2], [3], and [4] to Rule 1.0.

have a brick-and-mortar office. Virtual practice began years ago but has accelerated recently, both because of enhanced technology (and enhanced technology usage by both clients and lawyers) and increased need. Although the ethics rules apply to both traditional and virtual law practice,<sup>4</sup> virtual practice commonly implicates the key ethics rules discussed below.

A. *Commonly Implicated Model Rules of Professional Conduct*

1. Competence, Diligence, and Communication

Model Rules 1.1, 1.3, and 1.4 address lawyers' core ethical duties of competence, diligence, and communication with their clients. Comment [8] to Model Rule 1.1 explains, "To maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." (*Emphasis added*). Comment [1] to Rule 1.3 makes clear that lawyers must also "pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Whether interacting face-to-face or through technology, lawyers must "reasonably consult with the client about the means by which the client's objectives are to be accomplished; . . . keep the client reasonably informed about the status of the matter; [and] promptly comply with reasonable requests for information. . . ."<sup>5</sup> Thus, lawyers should have plans in place to ensure responsibilities regarding competence, diligence, and communication are being fulfilled when practicing virtually.<sup>6</sup>

2. Confidentiality

Under Rule 1.6 lawyers also have a duty of confidentiality to all clients and therefore "shall not reveal information relating to the representation of a client" (absent a specific exception, informed consent, or implied authorization). A necessary corollary of this duty is that lawyers must at least "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."<sup>7</sup> The following non-

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<sup>4</sup> For example, if a jurisdiction prohibits substantive communications with certain witnesses during court-related proceedings, a lawyer may not engage in such communications either face-to-face or virtually (e.g., during a trial or deposition conducted via videoconferencing). *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (prohibiting lawyers from violating court rules and making no exception to the rule for virtual proceedings). Likewise, lying or stealing is no more appropriate online than it is face-to-face. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.15; MODEL RULES OF PROF'L CONDUCT R. 8.4(b)-(c).

<sup>5</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) – (4).

<sup>6</sup> Lawyers unexpectedly thrust into practicing virtually must have a business continuation plan to keep clients apprised of their matters and to keep moving those matters forward competently and diligently. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) (discussing ethical obligations related to disasters). Though virtual practice is common, if for any reason a lawyer cannot fulfill the lawyer's duties of competence, diligence, and other ethical duties to a client, the lawyer must withdraw from the matter. MODEL RULES OF PROF'L CONDUCT R. 1.16. During and following the termination or withdrawal process, the "lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred." MODEL RULES OF PROF'L CONDUCT R. 1.16(d).

<sup>7</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(c).

exhaustive list of factors may guide the lawyer's determination of reasonable efforts to safeguard confidential information: "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)."<sup>8</sup> As ABA Formal Op. 477R notes, lawyers must employ a "fact-based analysis" to these "nonexclusive factors to guide lawyers in making a 'reasonable efforts' determination."

Similarly, lawyers must take reasonable precautions when transmitting communications that contain information related to a client's representation.<sup>9</sup> At all times, but especially when practicing virtually, lawyers must fully consider and implement reasonable measures to safeguard confidential information and take reasonable precautions when transmitting such information. This responsibility "does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy."<sup>10</sup> However, depending on the circumstances, lawyers may need to take special precautions.<sup>11</sup> Factors to consider to assist the lawyer in determining the reasonableness of the "expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement."<sup>12</sup> As ABA Formal Op. 477R summarizes, "[a] lawyer generally may transmit information relating to the representation of a client over the Internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access."

### 3. Supervision

Lawyers with managerial authority have ethical obligations to establish policies and procedures to ensure compliance with the ethics rules, and supervisory lawyers have a duty to make reasonable efforts to ensure that subordinate lawyers and nonlawyer assistants comply with the applicable Rules of Professional Conduct.<sup>13</sup> Practicing virtually does not change or diminish this obligation. "A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product."<sup>14</sup> Moreover, a lawyer must "act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent

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<sup>8</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18].

<sup>9</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [19].

<sup>10</sup> *Id.*

<sup>11</sup> The opinion cautions, however, that "a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017).

<sup>12</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [19].

<sup>13</sup> MODEL RULES OF PROF'L CONDUCT R. 5.1 & 5.3. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) (discussing managerial and supervisory obligations in the context of prosecutorial offices). *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 n.6 (2018) (describing the organizational structures of firms as pertaining to supervision).

<sup>14</sup> MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [2].

or unauthorized disclosure by the lawyer *or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.*"<sup>15</sup> The duty to supervise nonlawyers extends to those both within and outside of the law firm.<sup>16</sup>

### *B. Particular Virtual Practice Technologies and Considerations*

Guided by the rules highlighted above, lawyers practicing virtually need to assess whether their technology, other assistance, and work environment are consistent with their ethical obligations. In light of current technological options, certain available protections and considerations apply to a wide array of devices and services. As ABA Formal Op. 477R noted, a "lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex passwords, changed periodically, implementing firewalls and anti-Malware/Anti-Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software." Furthermore, "[o]ther available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems." To apply and expand on these protections and considerations, we address some common virtual practice issues below.

#### 1. Hard/Software Systems

Lawyers should ensure that they have carefully reviewed the terms of service applicable to their hardware devices and software systems to assess whether confidentiality is protected.<sup>17</sup> To protect confidential information from unauthorized access, lawyers should be diligent in installing any security-related updates and using strong passwords, antivirus software, and encryption. When connecting over Wi-Fi, lawyers should ensure that the routers are secure and should consider using virtual private networks (VPNs). Finally, as technology inevitably evolves, lawyers should periodically assess whether their existing systems are adequate to protect confidential information.

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<sup>15</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (emphasis added).

<sup>16</sup> As noted in Comment [3] to Model Rule 5.3:

When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law).

<sup>17</sup> For example, terms and conditions of service may include provisions for data-soaking software systems that collect, track, and use information. Such systems might purport to own the information, reserve the right to sell or transfer the information to third parties, or otherwise use the information contrary to lawyers' duty of confidentiality.

## 2. Accessing Client Files and Data

Lawyers practicing virtually (even on short notice) must have reliable access to client contact information and client records. If the access to such “files is provided through a cloud service, the lawyer should (i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer.”<sup>18</sup> Lawyers must ensure that data is regularly backed up and that secure access to the backup data is readily available in the event of a data loss. In anticipation of data being lost or hacked, lawyers should have a data breach policy and a plan to communicate losses or breaches to the impacted clients.<sup>19</sup>

## 3. Virtual meeting platforms and videoconferencing

Lawyers should review the terms of service (and any updates to those terms) to ensure that using the virtual meeting or videoconferencing platform is consistent with the lawyer’s ethical obligations. Access to accounts and meetings should be only through strong passwords, and the lawyer should explore whether the platform offers higher tiers of security for businesses/enterprises (over the free or consumer platform variants). Likewise, any recordings or transcripts should be secured. If the platform will be recording conversations with the client, it is inadvisable to do so without client consent, but lawyers should consult the professional conduct rules, ethics opinions, and laws of the applicable jurisdiction.<sup>20</sup> Lastly, any client-related meetings or information should not be overheard or seen by others in the household, office, or other remote location, or by other third parties who are not assisting with the representation,<sup>21</sup> to avoid jeopardizing the attorney-client privilege and violating the ethical duty of confidentiality.

## 4. Virtual Document and Data Exchange Platforms

In addition to the protocols noted above (e.g., reviewing the terms of service and any updates to those terms), lawyers’ virtual document and data exchange platforms should ensure that

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<sup>18</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 482 (2018).

<sup>19</sup> See, e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 483 (2018) (“Even lawyers who, (i) under Model Rule 1.6(c), make ‘reasonable efforts to prevent the . . . unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client,’ (ii) under Model Rule 1.1, stay abreast of changes in technology, and (iii) under Model Rules 5.1 and 5.3, properly supervise other lawyers and third-party electronic-information storage vendors, may suffer a data breach. When they do, they have a duty to notify clients of the data breach under Model Rule 1.4 in sufficient detail to keep clients ‘reasonably informed’ and with an explanation ‘to the extent necessary to permit the client to make informed decisions regarding the representation.’”).

<sup>20</sup> See, e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 01-422 (2001).

<sup>21</sup> Pennsylvania recently highlighted the following best practices for videoconferencing security:

- Do not make meetings public;
- Require a meeting password or use other features that control the admittance of guests;
- Do not share a link to a teleconference on an unrestricted publicly available social media post;
- Provide the meeting link directly to specific people;
- Manage screensharing options. For example, many of these services allow the host to change screensharing to “Host Only;”
- Ensure users are using the updated version of remote access/meeting applications.

Pennsylvania Bar Ass’n Comm. on Legal Ethics & Prof’l Responsibility, Formal Op. 2020-300 (2020) (citing an FBI press release warning of teleconference and online classroom hacking).

documents and data are being appropriately archived for later retrieval and that the service or platform is and remains secure. For example, if the lawyer is transmitting information over email, the lawyer should consider whether the information is and needs to be encrypted (both in transit and in storage).<sup>22</sup>

## 5. Smart Speakers, Virtual Assistants, and Other Listening-Enabled Devices

Unless the technology is assisting the lawyer's law practice, the lawyer should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters. Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking.

## 6. Supervision

The virtually practicing managerial lawyer must adopt and tailor policies and practices to ensure that all members of the firm and any internal or external assistants operate in accordance with the lawyer's ethical obligations of supervision.<sup>23</sup> Comment [2] to Model Rule 5.1 notes that "[s]uch policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."

### a. Subordinates/Assistants

The lawyer must ensure that law firm tasks are being completed in a timely, competent, and secure manner.<sup>24</sup> This duty requires regular interaction and communication with, for example,

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<sup>22</sup> See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) (noting that "it is not always reasonable to rely on the use of unencrypted email").

<sup>23</sup> As ABA Formal Op. 477R noted:

In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

<sup>24</sup> The New York County Lawyers Association Ethics Committee recently described some aspects to include in the firm's practices and policies:

- Monitoring appropriate use of firm networks for work purposes.
- Tightening off-site work procedures to ensure that the increase in worksites does not similarly increase the entry points for a data breach.
- Monitoring adherence to firm cybersecurity procedures (e.g., not processing or transmitting work across insecure networks, and appropriate storage of client data and work product).
- Ensuring that working at home has not significantly increased the likelihood of an inadvertent disclosure through misdirection of a transmission, possibly because the lawyer or nonlawyer was distracted by a child, spouse, parent or someone working on repair or maintenance of the home.

associates, legal assistants, and paralegals. Routine communication and other interaction are also advisable to discern the health and wellness of the lawyer's team members.<sup>25</sup>

One particularly important subject to supervise is the firm's bring-your-own-device (BYOD) policy. If lawyers or nonlawyer assistants will be using their own devices to access, transmit, or store client-related information, the policy must ensure that security is tight (e.g., strong passwords to the device and to any routers, access through VPN, updates installed, training on phishing attempts), that any lost or stolen device may be remotely wiped, that client-related information cannot be accessed by, for example, staff members' family or others, and that client-related information will be adequately and safely archived and available for later retrieval.<sup>26</sup>

Similarly, all client-related information, such as files or documents, must not be visible to others by, for example, implementing a "clean desk" (and "clean screen") policy to secure documents and data when not in use. As noted above in the discussion of videoconferencing, client-related information also should not be visible or audible to others when the lawyer or nonlawyer is on a videoconference or call. In sum, all law firm employees and lawyers who have access to client information must receive appropriate oversight and training on the ethical obligations to maintain the confidentiality of such information, including when working virtually.

#### b. Vendors and Other Assistance

Lawyers will understandably want and may need to rely on information technology professionals, outside support staff (e.g., administrative assistants, paralegals, investigators), and vendors. The lawyer must ensure that all of these individuals or services comply with the lawyer's obligation of confidentiality and other ethical duties. When appropriate, lawyers should consider use of a confidentiality agreement,<sup>27</sup> and should ensure that all client-related information is secure, indexed, and readily retrievable.

### 7. Possible Limitations of Virtual Practice

Virtual practice and technology have limits. For example, lawyers practicing virtually must make sure that trust accounting rules, which vary significantly across states, are followed.<sup>28</sup> The

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- Ensuring that sufficiently frequent "live" remote sessions occur between supervising attorneys and supervised attorneys to achieve effective supervision as described in [New York Rule of Professional Conduct] 5.1(c).

N.Y. County Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. 754-2020 (2020).

<sup>25</sup> See ABA MODEL REGULATORY OBJECTIVES FOR THE PROVISION OF LEGAL SERVICES para. I (2016).

<sup>26</sup> For example, a lawyer has an obligation to return the client's file when the client requests or when the representation ends. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.16(d). This important obligation cannot be fully discharged if important documents and data are located in staff members' personal computers or houses and are not indexed or readily retrievable by the lawyer.

<sup>27</sup> See, e.g., Mo. Bar Informal Advisory Op. 20070008 & 20050068.

<sup>28</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.15; See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) ("Lawyers also must take reasonable steps in the event of a disaster to ensure access to funds the lawyer is holding in trust. A lawyer's obligations with respect to these funds will vary depending on the circumstances. Even before a disaster, all lawyers should consider (i) providing for another trusted signatory on trust

lawyer must still be able, to the extent the circumstances require, to write and deposit checks, make electronic transfers, and maintain full trust-accounting records while practicing virtually. Likewise, even in otherwise virtual practices, lawyers still need to make and maintain a plan to process the paper mail, to docket correspondence and communications, and to direct or redirect clients, prospective clients, or other important individuals who might attempt to contact the lawyer at the lawyer's current or previous brick-and-mortar office. If a lawyer will not be available at a physical office address, there should be signage (and/or online instructions) that the lawyer is available by appointment only and/or that the posted address is for mail deliveries only. Finally, although e-filing systems have lessened this concern, litigators must still be able to file and receive pleadings and other court documents.

### **III. Conclusion**

The ABA Model Rules of Professional Conduct permit lawyers to conduct practice virtually, but those doing so must fully consider and comply with their applicable ethical responsibilities, including technological competence, diligence, communication, confidentiality, and supervision.

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#### **AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

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accounts in the event of the lawyer's unexpected death, incapacity, or prolonged unavailability and (ii) depending on the circumstances and jurisdiction, designating a successor lawyer to wind up the lawyer's practice.”).



**Committee on Professional Ethics**

**Formal Opinion 754-2020**

**TOPIC:** Ethical Obligations when Lawyers Work Remotely

**DIGEST:** Law firms in New York State began working remotely in mid-March 2020 due to the COVID-19 pandemic and likely will continue to have a significant number of lawyers working remotely even after the pandemic ends. This opinion addresses a law firm’s ethical obligations when most of its lawyer and nonlawyer staff work remotely. Maintaining a majority remote law firm has significant implications for the way in which lawyers discharge their duties in the areas of confidentiality (New York’s Rules of Professional Conduct (the “Rules”), Rule 1.6), competence (Rule 1.1), and supervision (Rules 5.1 and 5.3). This opinion does not reiterate guidance provided in prior New York State ethics opinions regarding technological competence and confidentiality, but rather highlights distinct characteristics of practicing remotely that require additional consideration.

**RULES OF PROFESSIONAL CONDUCT:** 1.1, 1.6, 5.1, 5.3

**OPINION**

1. If all or most of a law firm’s legal and nonlegal staff works remotely, the firm and its lawyers must determine whether additional measures are necessary to discharge the firm’s duties of competence, confidentiality and supervision. This opinion will address how these three duties may be affected by a remote workforce.

2. Initially, we need to address whether the Rules prohibit a law firm from operating 100% remotely. The New York City Bar Association addressed this issue in its N.Y. City 2019-2. The Opinion observes that Rule 7.1(h) requires that firms have a “principal law office address” in New York, and Judiciary Law Section 470 requires New York-admitted lawyers who reside outside the state to maintain a New York office. In 2015, the New York Court of Appeals held that Section 470 requires nonresident New York-admitted lawyers to maintain a physical law office in New York (*Schoenefeld v. New York*, 25 N.Y.3d 22 (2015)), and this ruling was upheld by the United States Court of Appeals (*see Schoenefeld v. New York*, 821 F.3d 373 (2d Cir. 2016)). Opinion 2019-2 concluded that a New York lawyer may use the street address of a virtual law office located in New York as the lawyer’s “principal law office address,” and thereby satisfy Rule 7.1(h), provided that the law office qualifies as an office for the transaction of law business under New York’s Judiciary Law. Opinion 2019-2 does not suggest that there is any ethical impropriety if a law firm that currently maintains a physical office space in New York works 100% remotely; such firms have a New York address that can be identified as its principal law office address in compliance with Rule 7.1(h).

**Duty of Confidentiality**

3. Rule 1.6(a) prohibits a lawyer from “knowingly reveal[ing] confidential information, . . . [or] us[ing] such information to the disadvantage of a client or for the advantage of the lawyer or a third person” unless certain exceptions not relevant here apply. Under this rule, lawyers have a duty to ensure that each client’s confidential information remains protected from disclosure while the lawyer is working remotely.

4. Numerous opinions have addressed a lawyer’s duties under Rule 1.6, including the duty to mitigate the risk of a data breach or other incursion on client confidential information. If a firm is operating remotely, the law firm will need to attend to the following to fulfill its duty of confidentiality:

- Ensure that information is transmitted securely to each lawyer’s remote computer.
- Establish procedures to secure and back-up confidential information stored on electronic devices and in the cloud, and test that these protocols are functioning well with a remote workforce.
- Check that lawyers have designed their remote workspaces to mitigate the risk of an inadvertent disclosure of confidential information (*e.g.*, workspaces that are physically separate from personal or other non-work papers and that otherwise minimize the likelihood of the inadvertent disclosure of client confidential information).
- Ensure that the security of remote forms of communication (*e.g.*, video conferencing platforms) has been vetted and maintained to ensure that any risk of interference or breach is minimized.

See New York State Bar Technology and the Legal Profession Committee Cybersecurity Alert: Tips for Working Securely While Working Remotely (2020); see generally James B. Kobak, Jr., Current Ethics Issues for Intellectual Property Lawyers Coping with Clients, Courts and Practicing in Cyberspace During COVID and Beyond, at 1-12.

5. Cybersecurity practices that may assist lawyers to meet their ethical duties of confidentiality include:

- Avoiding use of unsecure WiFi systems when accessing or transmitting confidential client information.
- Using virtual private networks that encrypt information and shield online activity from third parties.
- Using two-factor or multi-factor authentication to access firm information and firm networks.
- Ensuring that computer systems are kept up to date, with appropriate firewalls and anti-malware software.
- Backing-up data stored remotely.

- Requiring strong passwords to protect data access and devices.
- Creating, or imploring the law firm to create, a written work-from-home protocol that specifies procedures to safeguard confidential information and other data.
- Training employees on security protocols, data privacy and confidentiality policies and stress compliance.

## **Duty of Competence**

6. A. lawyer has a duty to provide competent representation, which requires that the lawyer have the requisite “knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” This Committee and others have determined the lawyer’s duty of competence includes an obligation to understand the risks and benefits of technology used in practice. NYCLA Formal Op. 749.

7. Lawyers should think carefully about what the duty of competence means in the context of maintaining a remote workforce. For example, if the lawyer must prepare a client for an interview or deposition remotely, relying on telephone calls and videoconferences to communicate with the client rather than in-person meetings, a lawyer must ask herself whether the lawyer can represent the client competently given the conditions under which the interview or deposition must go forward. Factors to consider include (i) have the lawyer and client had an opportunity to meet in person, or developed a meaningful rapport remotely, (ii) has the lawyer done an appropriate risk assessment with respect to potential civil or criminal liability that could result from giving testimony under less than ideal conditions vs. any risks associated with refusing to go forward, (iii) has the client been properly prepared for testifying remotely, (iv) has the lawyer reached agreement with the questioner on procedures to ensure the lawyer has an adequate opportunity to interpose objections and to communicate privately with the client on breaks, and (v) has the lawyer adequately considered legal grounds for objecting to consent to remote testimony, as well as the legal and employment risks attendant to refusing to agree with remote testing conditions.

8. A lawyer should give due consideration to whether she can adequately prepare the client while working remotely. For example, preparing a client for testimony by telephone or via video conferencing software may be effective when the lawyer and client have sufficient facility with appropriate technology, access to the relevant documents, and adequate time and attention to ensure the client’s comfort with communicating via the medium that will be used in the testimony. However, if the client is not comfortable with the technology, or has difficulty presenting himself or herself through the medium that will be used (possibly exacerbated by distractions caused by challenges with mastering the technology or inherent in working from home), the lawyer must seriously consider whether it remains in the best interests of the client to go forward with the testimony rather than pressing for a postponement until the testimony can either happen live or when the client has had sufficient opportunity to become comfortable with the medium. In short, the lawyer must recognize that representing the client remotely may present important challenges to competent representation, and should adjust the manner in which the lawyer carries out the representation accordingly.

## **Duty of Supervision**

9. Rules 5.1 and 5.3 concern the responsibility of law firms, partners, managers and supervising lawyers to provide oversight and supervision to other lawyers and nonlawyers. For example, Rule 5.1(a) requires that law firms “make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.” Rule 5.3(a) requires law firms to “ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate.” Rules 5.1 and 5.3 require that law firms and any lawyer who individually or together with other lawyers possesses managerial authority in the firm make reasonable efforts to ensure that the firm has implemented procedures that will make certain that staff, consultants or others working with the firm who have access to confidential client information comply with the Rules when accessing client data from remote locations. To discharge this duty when an entire firm is working remotely requires the firm and its supervising lawyers to consider whether its pre-pandemic policies and procedures need to be enhanced to address unique supervision issues that may arise in a remote working environment. Some additional challenges to be addressed when the firm is working remotely include the following:

- Monitoring appropriate use of firm networks for work purposes.
- Tightening off-site work procedures to ensure that the increase in worksites does not similarly increase the entry points for a data breach.
- Monitoring adherence to firm cybersecurity procedures (e.g., not processing or transmitting work across insecure networks, and appropriate storage of client data and work product).
- Ensuring that working at home has not significantly increased the likelihood of an inadvertent disclosure through misdirection of a transmission, possibly because the lawyer or nonlawyer was distracted by a child, spouse, parent or someone working on repair or maintenance of the home.
- Ensuring that sufficiently frequent “live” remote sessions occur between supervising attorneys and supervised attorneys to achieve effective supervision as described in NY RPC 5.1(c).

## **CONCLUSION**

10. It is ethical to operate a law office remotely provided that appropriate attention is given to compliance with a lawyer’s duties of confidentiality, competence and supervision, and appropriate safeguards are implemented to ensure compliance with the Rules.