NEW AGE OF REMOTE PROCEEDINGS: PITFALLS, PROS AND CONS

COLORADO DEFENSE LAWYERS ASSOCIATION (July 25, 2023)

CHIEF JUDGE SUSAN BLANCO – 8TH JUDICIAL DISTRICT

DEBBY REECE – AMERICAN FAMILY, MANAGING ATTORNEY – WEST REGION

- What is your level of experience with remote court proceedings?
 - Significant (over 50% of your court proceedings take place remotely)
 - Moderate (10%-50% of your time of your court proceedings take place remotely)
 - None or very little (less than 10%)

- Have you had a trial that was 100% remote?
- Yes
- No

Remote Proceedings in Courts

REMOTE PROCEEDINGS IN STATE COURTS

- Many states have implemented remote operations permanently
- <u>Alaska, Arizona</u>, <u>Illinois</u>, <u>Minnesota</u>, <u>Maryland</u>, <u>Michigan</u>, <u>North Carolina</u>, and <u>Texas</u>
- Now <u>Colorado</u> is on the list effective August 1, 2023
- <u>Washington</u> is finalizing a policy
- One big issue is whether the courts can order remote proceedings over the objection of one or both parties

STATUS OF REMOTE PROCEEDINGS IN COLORADO

There are a multitude of platforms:

- State Courts: Webex
- Denver County: Teams
- Federal: Zoom

New Chief Justice Directive

- CJD 23-02
- Adopted in June
- Effective August 1, 2023

STATUS OF REMOTE PROCEEDINGS IN COLORADO

Presumption that the following will be in person

- Civil show cause hearings
- Any contempt hearings
- Jury and Court trials
- Rule 69 Hearings (Execution and Proceedings Subsequent to Judgment)

Court can change for good cause

- CRCP 43 Evidence
 - Must be made by written motion or stipulation as soon as practicable after need becomes known. 3 days to object.
- County Court Rule 343

STATUS OF REMOTE PROCEEDINGS IN COLORADO

Flexible Proceedings

- Party can choose if they want to appear virtually or in person
- Case management conferences, status conferences, court settings when no other hearing purpose is scheduled

No presumptions for depositions

Live streaming is next

STATUS OF REMOTE PROCEEDINGS IN FEDERAL COURT

(Bloomberg Law May 11, 2023)

CARES ACT passed on March 27, 2020

Pandemic-era policy that allowed public broadcasting of remote civil and bankruptcy proceedings

Set to end on September 21, 2023 for civil proceedings (ended May 10, 2023 for criminal proceedings)

Remote broadcasting of court proceedings was essential to maintaining public access during the pandemic

Additional studies are coming for potential changes to the broadcasting policy

- How should virtual proceedings be used?
 - Broadly (everything)
 - Limited to all but trials
 - Limited to all but evidentiary hearings and trials
 - They should not be used



Early 2000s Trial Lawyer Starter Pack

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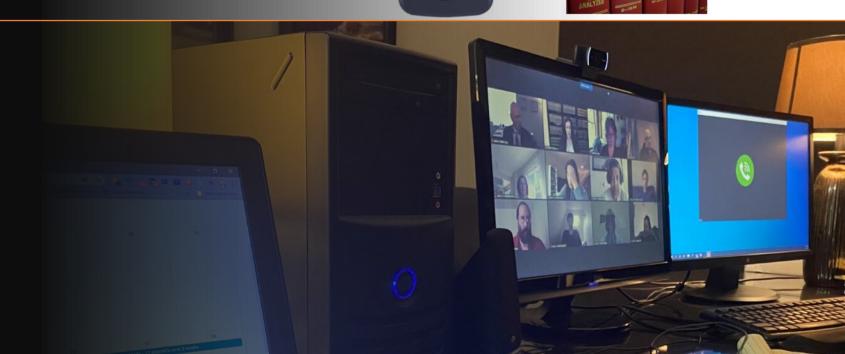
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PITFALLS



- What is your largest concern regarding remote proceedings?
 - Technology failure
 - Decorum
 - Other

PITFALLS



THE TECHNOLOGY JUGGLE: the new age of lawyering in a virtual world

> Multiple Screens Camera Microphone Headset Access to Platforms Knowledge Firewall issues



INTERNET CONNECTION

Poor Connection Witnesses Freezing Poor Audio Delays in Transmission, people talking over each other Broadband of the courts



CONTROL OVER PROCEEDINGS

Clothes Witnesses or jurors talking to each other or other people in the room Going off camera Looking at cell phone Jurors searching internet for information about the case Lawyers coaching their client or witness, passing notes Environment; parties using "props" to try to bolster their case

- Do you prefer virtual proceedings for court trials?
 - Yes
 - No
- Do you prefer virtual proceedings for jury trials?
 - Yes
 - No

- AGREE OR DISAGREE: Remote Jury Trials Tend to Favor the Defendant?
 - Agree?
 - Disagree?

What Virtual Court Offers

PROS of Virtual Court

• GEOGRAPHY

- Remote Areas/Legal Deserts
- Avoid Sitting in Traffic for an Hour to attend a 5 minute Hearing

• EXPENSE SAVINGS

- Attorney/Witness Travel
- Experts
- Gas



PROS of Virtual Court: Jury Trials

- JURY SELECTION
 - Approximately 20-25 people per screen
 - Can see their faces all at the same time
 - Backgrounds, non-verbal information
 - Incorporate information you learn into your case

Visibility of facial expressions

PROS of Virtual Court: Jury Trials Cont.

• TIME SAVINGS

- Don't have to move jurors in and out of the room
- A clerk or bailiff monitors who is coming and going and can virtually place them in a different room
- A clerk or bailiff can also control who joins proceedings and when



PROS To Virtual Court: Exhibits

• EXHIBITS

- If they are agreed upon, screen sharing is easy
- Can easily focus on the part of the document you want to highlight
- You can use technology to highlight the portion of document you want to focus on
- You can see jurors faces while sharing documents

PROS to Virtual Court: Misc.

• SAFETY ISSUES

- High Profile Cases, Protestors
- Crime
- Weather
- INTANGIBLES
 - If you have a great plaintiff, less chance for jury to bond
 - If you have a terrible defendant, he or she won't be sitting in front of the jury all week
 - Works well in smaller cases

- AGREE OR DISAGREE: Remote Trials Tend to Favor the Plaintiff?
 - Agree
 - Disagree

Where Virtual Court Falls Short

CONS to a Virtual Proceeding

Don't get to see the jurors interact with each other

Jurors can't watch Plaintiff move around

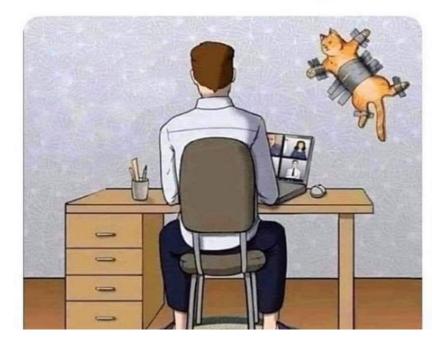
Attention span of jurors is even shorter, lots of distractions

Less control over witnesses and jurors

Less of a splash when impeaching a witness

Interruptions in your own environment

How to prepare for a Zoom meeting



CONS to Virtual Proceedings

Less control over witnesses at a deposition

Does not work as well on complex cases, jurors less engaged

If exhibits not agreed upon, jurors need to be removed to be able to show it on the screen for discussion

Tips and Tricks To Make A Virtual Proceeding a Success

TIPS AND TRICKS-BRIEFING

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- Briefing on the issue of requesting/opposing remote proceedings
 - How to put together a successful motion or opposition?
 - See CJD 23-03

TIPS AND TRICKS -ASKTHE JUDGE & KNOW THE RULES!

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- Ask the Judge
 - Voir Dire
 - Exhibits
 - Sidebars
 - Objections (raise hand)
- Know the Rules
 - No screenshots, photos, video/audio recording, republishing
- Make a record of tech issues
- <u>Ask for accommodations</u> to maintain integrity of proceedings
 - Make sure breakout rooms are not recorded and chats are not preserved
- <u>Interpreting</u> some platforms allow for simultaneous remote interpretation

Keep it formal

Your Background

- Lighting, angle of camera, items behind you
- Use Mute Button

TIPS AND TRICKS -*PRESENTATION*

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Your Voice & Eye Contact

- Inflection
- Stare into camera for eye contact
- Watch facial expressions

Use Pauses

- Interruptions due to tech delays
- Allow for objections (courtesy)
- Allow for clarifications

<u>High energy</u>, manage attention spans and fight zoom fatigue TIPS AND TRICKS-*EXHIBITS*

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Practice your Platform

How to organize

- Exhibits in their own folder and in the order you will use them
- Label exhibits with a description of purpose, Bates stamp every page

<u>Sequence</u>

- Can you mark on exhibits during the presentation or need to pre-mark?
- Ask Court if you can show exhibit via the chat function

<u>Check to see if exhibits are loaded before</u> proceeding

TIPS AND TRICKS – *WITNESS AND CLIENT PREP*

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- <u>Practice</u> (mute and camera, where to look)
- Bring client or witness to your firm
 - Background
 - Device (laptop)
 - Tech issues
 - Remove or limit distractions
 - Make sure they have good internet connection if they aren't going to be at your office
 - Facial expressions (sit further back)
 - Have government issued ID
- <u>Create plan on how to communicate with</u>
 <u>client</u>
 - Have contact info in case you lose contact during proceeding
- <u>Watch the record</u>
 - If client is with you, direct not to talk if mute off
 - Make sure client/witness knows to turn off camera and sound during breaks