

THE VIRTUAL PROCEEDINGS PLAYBOOK

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*Trials, Hearings, &
Depositions*

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Appeals

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Mediations

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Operations

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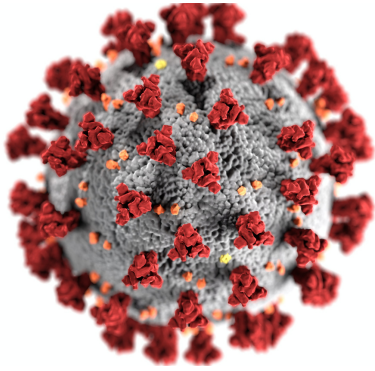
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MOVING FORWARD: COVID IS THE GAME CHANGER

AMY M. STEWART



As COVID-19 engulfed our country, courtrooms, like most businesses, abruptly closed. Immediately, we all had to adjust so that the legal system did not come to a screeching halt. In the weeks following, courts began to hold virtual hearings and bench trials, counsel deposed witnesses over virtual platforms, and mediators and arbitrators studied these online platforms so they could assist parties in efficiently resolving their disputes. The courts continue to grapple with how to proceed with effective jury trials.

In its first report, the Texas Office of Court Administration reported more than 9 million cases filed in the Texas state courts in Fiscal Year 2019 (1). However, because of COVID, the filing volume in Texas courts dropped by almost 50% from the previous year (2). From April – September 2020, an estimated 440,000 remote hearings with 1.3 million participants were held (3). From April – September 2020, an estimated 440,000 remote hearings with 1.3 million participants were held (4).



Typically, Texas courts host 186 jury trials each week. However, between June and August 2020, Texas only held 20 jury trials total - 18 in-person and 2 virtual, of which 13 reached a verdict (5). There were three virtual jury trials with many challenges related to technological issues. Nevertheless, through trial and error, the courts that have conducted virtual jury proceedings have overcome those challenges (6).

The Texas Office of Court Administration performed an online survey of nearly 2,800 lawyers, who were asked if they would be open to a virtual jury trial. 57% of attorneys who responded said no, 24% said maybe, and 19% said yes (7). Despite the resistance, courts are moving forward with virtual, hybrid, and live trials.

At some point in August 2020, I decided that we will be grappling with litigating under COVID-19 guidelines for longer than anyone expected. Large corporations have already told their workforce the offices would remain closed until mid-2021. Twitter, Square, and Shopify announced that their employees could permanently work from home (8). Google told their workers they can work from home until July 2021 (9).



Let's state the obvious: virtual platforms are dramatically different than being in a court of law. I enjoy being in court for trial, engaging face-to-face with the judge, jurors, opposing counsel, and the witnesses. I rely heavily on non-verbal communication signals from judges, juries, counsel, staff, and the witnesses which you can only see. As a former collegiate athlete and coach, I believe in the power of momentum when two opponents are competing. You can literally feel the air shift and propel you forward or back.

Now we have to adjust and get prepared to advocate for our clients in a new arena—the virtual platform. Even live trials are altered because everyone will be socially distanced and wearing masks. Clients have already seen the cost savings of having virtual hearings, depositions, and arbitrations, so outside counsel should expect that clients will want to retain counsel who are effective over these platforms. Accordingly, I have decided to shift my focus to what these platforms can do instead of complaining about what they cannot do.

So, I called on some friends to team up with me to create a playbook on how to handle virtual proceedings, depositions, mediations, arbitrations, jury trials, and appellate issues. My fierce colleagues, Winter Wheeler, M.C. Sungaila, and Cheralyn Stevenson join me in putting together this Virtual Proceedings Playbook (VPP).

Hailing from Atlanta, Georgia, Winter is nationally recognized for her mediation work and is a thought leader across social media regarding dispute resolution practices during the pandemic. A leader I met through my work with the American Bar Association Section of Litigation, M.C. practices in California and is at the top of her game nationally on appellate issues. M.C. led the appellate strategy in proceedings arising from the proposed placement of COVID positive Diamond Princess passengers in then-COVID-free Orange County, California. Cheralyn, the co-founder and Head of Legal Innovation at The Changists, a legal consulting firm focused on helping law firms modernize their operations, provided expertise on leveling up your virtual game with technology.

In sports, you evolve and adapt to changing circumstances. This Virtual Proceedings Playbook is no different. Currently, we are in the middle of the pandemic and at the beginning of the second wave of infections. The VPP Team will continue to evaluate how to zealously represent your client during a pandemic, as this is just a starting point based on our experiences and research.

The Virtual Proceedings Playbook will coach in-house litigation managers and outside counsel through the four quarters of litigating and protecting the appellate record – discovery, hearings, ADR, and trials – and how to take advantage of the special features of virtual platforms.

Let's get in the virtual game.



**AMY M.
STEWART**

POSITION: Trials

HOMETOWN: Dallas, Texas

STATS: Amy leads the only minority and woman-owned law firm in Dallas that focuses on areas of general civil litigation, labor and employment, contracts, product liability, arbitrations, personal injury, and insurance defense. Winning is in her blood – she played college basketball at Wake Forest and coached at her alma mater and Tulane University before shifting her focus to wins in the courtroom.



**M.C.
SUNGAILA**

POSITION: Appeals

HOMETOWN: Orange County, California

STATS: M.C.'s practice focuses on civil appeals, writs, and related trial strategy and consulting. She has consistently briefed and argued cutting-edge appeals that raise core business issues and helped secure important rights for women and girls, nationally and internationally. M.C. is a Chambers-ranked appellate lawyer and strategist.



**WINTER
WHEELER**

POSITION: Mediations

HOMETOWN: Atlanta, Georgia

STATS: Winter is a mediator with a natural ability to get to the heart of the matter. She can read subconscious cues, help parties communicate effectively, help parties understand what both they and their adversaries want, and bridge the gap between them to find common ground. She provides both in-person and online dispute resolution throughout the United States.



**CHERALYN
STEVENSON**

POSITION: Operations

HOMETOWN: Dallas, Texas

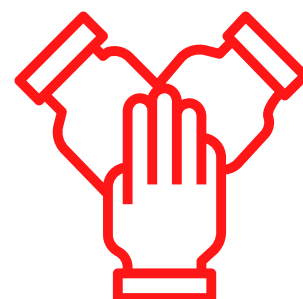
STATS: Cheralyn works with law firms and law departments to develop cost-saving strategies from outsourcing tasks to talented groups of legal professionals, vendor & technology recommendations and implementations, and creating sustainable processes and procedures for businesses. She is a highly accomplished, forward-thinking legal consultant.

PRE-GAME: LITIGATING IN A VIRTUAL WORLD

AMY M. STEWART

Participating in the first Zoom summary jury trial held in the country was a game changer. Preparing for the first virtual voir dire streamed live over YouTube, then later participating in virtual depositions, hearings, arbitrations, and consulting with clients over the past months has conditioned me to think about what is possible, instead of only focusing on the glory days of virus-free live trials. Here are some takeaways that we discuss in greater detail throughout the VPP:

- ✗ Back to Basics.** Litigators who are fundamentally sound in their presentation and trial skills will excel after mastering the virtual platform. As Hall of Fame basketball player and executive Larry Bird says, “beat them with your mind and fundamentals.”
- Lights, Camera, Action.** To maintain the focus on your audience – the judge, mediator, arbitrator, witness, or juror – you must approach your presentation like you are producing a television talk show. Remember the viewer is watching you on the same device they watch Netflix.
- ✗ The Eye in the Sky Does Not Lie.** The virtual platform is a spotlight on you and amplifies your feelings, emotions, authenticity, and state of mind. You must have your game face on at all times during virtual proceedings.
- We Talking about Practice?** Virtual proceedings demand more preparation than live proceedings to be persuasive and effective. Your credibility will be based in part on your ability to use the virtual platform.
- ✗ Teamwork Makes the Dream Work.** You must surround yourself with teammates or vendors who not only understand the virtual platform but have mastered its functionalities as well as other software apps. This is especially true for small and mid-size firms that have to compete against larger firms with more resources. Skill in virtual proceedings helps to level the playing field between big and small firms. A team is only as good as its weakest link.







FIRST QUARTER: DISCOVERING YOUR STORY

AMY M. STEWART & CHERALYN STEVENSON




Game Plan for Written Discovery

Successful trial attorneys are storytellers and written discovery remains a key tool for discovering the story's facts. We tell stories in large part through documents, photographs, and objects because anecdotal juror feedback shows that they rely more on this type of evidence than on witness testimony. Credibility is key with any witness testimony (10). Litigating in this virtual world amplifies the need for storytelling supported by visual evidence that can be clearly seen over the virtual platform.

While the purpose of written discovery efforts has not changed, we need to approach the presentation of it differently. Here are some issues to consider:

-  Document management systems are critical now more than ever. The ability to have an easily accessible, cloud-based central repository of documents is necessary to efficiently locate important case documents with the click of a button.
-  Your key documents must be legible so they can be projected onto a screen. It may be necessary to request the native format or optimized, legible versions of these documents and photographs.
-  For large documents to be accessible, like an agreement with several addendums, it will be important for paralegals and staff to use programs, like Adobe PDF, to break those down and bookmark key pages.
-  Bates label your documents and graphics so they can be quickly pulled up.

The Takeaway: Discovery in a Virtual World

-  From the outset, paralegals and staff must make sure documents and photographs are clear and legible and timely follow up for native or original documents and photographs.
-  Make sure you are using dependable cloud-based document management systems.
-  Utilize technology to organize your documents in an easy-to-access, uniform manner.

Coaching Witnesses for Virtual Proceedings

When talking to jurors after a trial, I always hear this: "It's nothing like TV." Media representations of the justice system, however inaccurate, clearly influence jurors' expectations and decisions (11). So, for live trials we need to create our live presentations to meet the juror's expectations. For example, using PowerPoints with more pictures than words, or implementing animations as demonstratives with the dual goals of educating the jurors and keeping their attention.

We are asking jurors to watch a trial on the same device they watch Netflix on. Judges, arbitrators, and mediators are spectators who appreciate good storytelling as well as engaging and organized evidentiary presentations. Accordingly, more preparation should be put into the "production" aspect of the virtual evidentiary presentation. Indeed, for the 15-minute virtual voir dire, I thought of channeling "my inner Oprah" from her holiday shows on how to get the jurors engaged. "You can be a juror! You can be a juror!"



TECH UP!

Counsel should create electronic PDF notebooks that are bookmarked to direct the judge or witness to pertinent information. Make sure to OCR the PDFs to make it searchable.



If a picture is worth a thousand words, a videotape is worth ten thousand. If you are having a disconnect with the witness during preparation on how they will "show up" to the jury, record the practice examination. Then, play it back and provide feedback. Consider recording the witness well before they will testify to give them time to review and critique their own presentation.

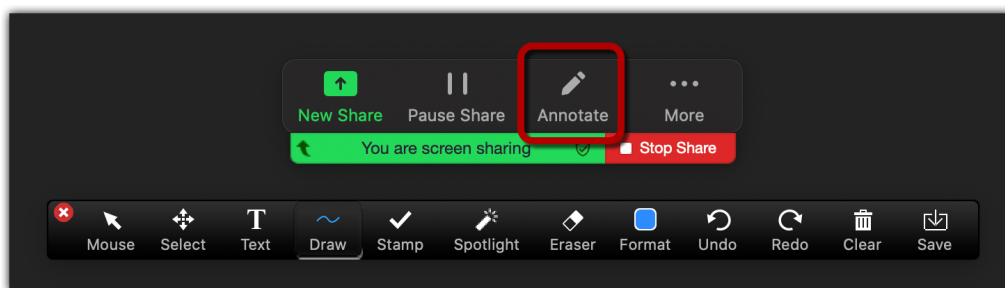
Drafting Witnesses for Virtual Presentations

When trial attorneys evaluate witnesses – fact, corporate representative, and experts – they consider how the witness will play to a jury. There are the “on the surface” superficial considerations, for example, attractiveness, height, weight, stature, how they carry themselves, speech, accent, dialect, or other issues that may be distracting to jurors. Then, there are the issues related to the witness's authenticity, persuasiveness, and the ability to exude trustworthiness. Virtual proceedings are a bright spotlight on these points.

With the goal of creating informative, persuasive, and engaging virtual proceedings, consider these points:

1. **Is your witness comfortable with the virtual platform?** Some people are very uncomfortable with technology and being on camera. Make sure you ask the witnesses about their comfort level using a computer or other device and being on camera and help them through the transition process as much as you can.
2. **Can your witness effectively communicate over the virtual platform?** In a perfect world, we would pick our witnesses from central casting and give them a script and say, “Action!” In this virtual world, witnesses need to be able to provide testimony that supports your case and do it in a way that is engaging and will keep the viewer’s attention.
3. **Can your witness connect to the jury or judge?** Can they make the complicated easy to understand over the screen? Can they earn the jury’s trust as an expert?

Virtual proceedings magnify your witness's strengths and weaknesses. It may be necessary to ensure your witnesses understand Zoom along with its features, like the Annotate feature, which is used for drawing attention to a specific section of a report. Annotation allows your witness to draw on a shared screen as well as highlight text and objects they want to spotlight.



Another question is whether it would be better to record the witnesses’ testimony through a trial deposition rather than having them appear live at a hearing or trial? For all witnesses, determine if there are any health issues with them appearing live at trial. This will continue to be a consideration far after there is a vaccine. For example, if the court orders a hybrid trial that requires witnesses to appear live, can your witness be present? Some corporations prohibit their employees from participating in in-person events because of the risk of exposure.



Provide taped snippets of footage of witness preparation to your client as a preview of what may happen at the deposition, hearing, or trial. This will allow your client to evaluate the strengths and weaknesses of the case, including whether settlement should be put on the table.

Drawing Up Plays for Depositions

Other than hearings and trials, the pandemic has probably impacted the strategies for taking depositions the most. Many practitioners who feel strongly that they need to be in the room with the deponent have pushed those depositions hoping we will get back to normal. However, as virtual depositions have become more commonplace after several months into the pandemic, litigators have had to train up to take the depositions. Here are some lessons learned over the past few months on how to improve your strategies for taking depositions.

A. Deposition Preparation

Because only 1% of cases go to trial before the pandemic hit, depositions are primetime. Everything about litigating in this virtual world takes more time, including deposition and witness training. Here are some considerations as you prepare:

- ✗ Get with the Game Plan.** Weeks before, have your staff get with the deponent to determine the following: Does the witness have a computer with a camera? Will they be using a work computer? What virtual platform can they use (some employers have a preferred vendor)? Also, make sure your staff determines if the witness has used the platform. If not, your staff needs to schedule a time to make sure the software, and any security updates, are downloaded and confirm that the witness feels comfortable with the virtual platform prior to deposition training.
- Communication is Key.** Manage the witness's expectation by advising the deponent how long the deposition training will take. Consider their at-home limitations, such as working from home with children attending online school, or whether a spouse or roommate is there, to see how flexible you would have to be regarding preparation time.



- ✗ Need a Playbook of Key Documents?** If you have a document-heavy case or one that has a lot of photographs, ask whether the witness learns or retains information better using hard copies or whether they can review the documents on a computer. For these types of cases, I would recommend always using a deposition notebook in deposition training as well as using it in the actual deposition.

B. Practice Makes Perfect

COVID-19 has not changed my deposition training process. Prior to the deposition, identify the key documents and have your staff deliver the notebook days before the deposition prep so that the witness has an opportunity to review prior to the training. We advise the witness not to take notes on the pages or on a pad as those can be produced in the litigation. We do advise the witness to tag important pages with a post-it for easy access to discuss later.

- ✗ Create an Agenda.** It is very important that litigators lead in deposition training. This is especially true now when you need to grasp the witness's attention through a screen. It is important to provide the witness with a training agenda that outlines the topics to cover. It shows you have training under control and that you have a plan of attack – for this deposition training session and for the case in general.
- Bring the Witness Up to Speed.** While we have lived a case for months before depositions occur, the deponent has slept since the actions that led to the lawsuit. Accordingly as sort of an icebreaker, start prep with a breakdown of what the lawsuit is about and where the litigation is at this point. If helpful, create a timeline and share it over the virtual platform. Also, have the witness confirm that you are not missing any other key facts or other witnesses.

✗ Repetition. Repetition. Repetition. As the great Hall of Fame coach John Wooden said, “The importance of repetition until automaticity cannot be overstated. Repetition is the key to learning.” This training mantra has become even more important now with prep being handled virtually. Preparing how to respond to tough cross-examination questions and how to push trial themes should be practiced numerous times.

HEADS UP!

Consider if it is more persuasive to capture the witnesses' testimony through a deposition. You can control the witnesses background, dress, and lighting. Also, the witness may be more at ease testifying in a deposition format than in a virtual trial.

HEADS UP!

Check with the court reporter ahead of the deposition about whether you can record the video yourself and send your own Zoom link to the parties to save some money. Even if you cannot, inquire if it would be possible to record it as an unofficial record to provide clips to your client for case evaluation.

0 Eye in the Sky Doesn't Lie. Recording portions of deposition preparation on the virtual platform is extremely helpful. Being able to show the witness footage of their deposition practice, in particular their non-verbal communication, is extremely helpful in making sure your witness is properly prepared.

✗ See the Whole Court. Make sure to consider the information that can be learned from the witnesses' surroundings.

C. Score with Deposition Footage

For virtual proceedings, litigators should consider the "production value." It is unclear when we will be able to select juries and try cases live. Even after the pandemic fades and a vaccine is readily available, there are good reasons to use deposition footage to memorialize testimony. First, from a strategy perspective, you may want to record the deposition testimony because it could be years before certain cases are tried. Second, the witness may have health issues which will not allow them to testify live at trial. Third, your witness may present better and may be more persuasive over videotape in contrast to live testimony. Fourth, your witness may be more effective sitting at their dining room table where they are more comfortable.

TECH UP!

It is critical to understand the platform of the virtual proceeding as well as the technical options you have for presenting evidence. There are seamless technologies such as Trial Pad for displaying exhibits as well as PowerPoint for creating effortless trial presentations. It is important to know the features and tips of Zoom, such as sharing an individual screen instead of your entire desktop. This prevents participants from seeing your open windows and incoming messages. You can also use Zoom to add exhibits in the chat, which is beneficial to effective, live navigation. Consider using Microsoft OneNote for your trial notebook.

SECOND QUARTER: HEARINGS

AMY M. STEWART WITH AN APPELLATE TIP ASSIST FROM M.C. SUNGAILA

Many of you have had virtual hearings at this point. The following are some key points M.C. and I have learned after several hearings in state and federal courts to effectively present evidence and protect the record for appellate purposes:

- ✗ Make it Easy for the Judge and their Staff.** Prior to your hearing, have a staff member determine how the Judge likes to handle virtual hearings. Are there new local rules related to virtual hearings? For example, one judge may prefer a PDF notebook of the motion, response, and any exhibits that are bookmarked to be sent a day prior to the hearing. Others do not like to be sent any PDF materials but do want you to present exhibits using the share function. Additionally, determine if the court has a deadline for exchanging exhibits to be used at the hearing or to be a part of the record.



APPELLATE TIP!

Consider filing with the court or marking the PowerPoint you are using as a demonstrative exhibit to present your points to the court, so the appellate court can see it too.



Creating a Record. Prior to the hearing, if you anticipate that some appellate issues may arise, do not forget to ask the court coordinator whether the court reporter will be present for the hearing. Also, it may be wise to advise the court that there are some appellate issues and that you will be asserting objections on the record. This will provide the court reporter and the court to be aware of your objections and that you will most likely be seeking a ruling on those objections in the record. If there is no court reporter available, ask if the court or you can record it.

- ✗ Make the Most of Your Time.** Virtual hearings take longer than in-person hearings and the courts are vigorously trying to squeeze in as many hearings as they can daily. Accordingly, respect the court's time by knowing how to use your platform and being as succinct as you can in your arguments.



APPELLATE TIP!

Make sure it is clear in the record which portions of the deposition you played.



Use PowerPoint or Other Demonstrative Aids to Organize Your Presentation. Because of the limited time, consider creating a demonstrative aid of the arguments to be presented to the court by the movant. Then, the court can decide if it is easier to inquire and make rulings on each argument in real time, at the end of the hearing, or later after further deliberations.



APPELLATE TIP!

Do not jointly agree to the admission of an exhibit if you plan to challenge it on appeal.



HEADS UP!

Consider conferring with opposing counsel before the hearing to submit joint exhibits so the parties do not have to waste their time getting a ruling. If there are evidentiary rulings to be made, consider having the court rule on them beforehand so the evidentiary presentations will have fewer distractions.

✗ Use of Deposition Footage. In cases where you need to rely on deposition testimony, if the testimony is persuasive, instead of sharing a hard copy deposition of the transcript, play a snippet of the deposition video for the Judge. This is more engaging for the Court and breaks up the monotony of just looking at the screen and watching and hearing talking heads.

0 Presenting Witness Testimony. Time is a scarce commodity for courts at this time. Therefore, prepare your witness so his or her testimony is concise and on point. If you are using exhibits for the presentation, have those exhibits easily accessible so that either you or your staff can share the exhibits timely. Try not to waste the court's and parties' time as you click through documents on your computer to find the right exhibit. Also, it may be prudent to send the exhibits to the witness beforehand.

- Virtual platforms are not as forgiving as being in court when the court can see the activity of a paralegal trying to pull up a document on the ELMO or court presentation software. Instead, you look disorganized and unprepared if there is a delay in sharing and presenting exhibits. The same holds true in developing your cross-examination of witnesses. Put in the forethought on how to seamlessly conduct your cross-examination and use of exhibits.
- If you believe you will file a Motion for Summary Judgment, and it will be done virtually, instead of reading a quote, share the video clip.
- Consider that your experts may need more photographs than in a live proceeding to paint a full picture of their theories.



APPELLATE TIP!

Arrange for a court reporter to transcribe the hearing if the court does not automatically provide one. If the court reporter you engaged is late, or there was a mix-up and no court reporter is coming, ask to be moved to the end of the calendar to allow the court reporter to be present to transcribe proceedings. It is essential that a critical hearing be taken down by a court reporter.



HEADS UP!

For evidentiary hearings, like for motion for summary judgement, consider using short video snippets of key deposition testimony instead of just referring to it in your Power Point.

THIRD QUARTER: MEDIATION

WINTER WHEELER

The timing of settlement discussions in litigation is similar to the seventh-inning stretch. Before we finish this game, let's take a break before heading to the final innings. Mediation is that late-in-the-game check-in before the parties drive forward to trial preparation.

You undoubtedly have cases that either stagnated or remained dormant during the shutdown. These cases may have piled up and you are now trying to determine how to best start the litigation process, how to complete the discovery process, or whether you should take your case to trial.



Mediate your cases at earlier stages than you may have ever considered. With trials up to two+ years away, early mediation can save tons of money on legal costs.

Like many lawyers, you may be used to using a trial date or other court-mandated deadline as a tool to organize and streamline your cases, to keep opposing counsel on a reasonable timetable, or for settlement negotiations. Without looming court deadlines, many lawyers struggle to have effective, interpersonal, and unassisted negotiations.

With courts reopening virtually and physically all over the country, it may be possible for you to request or be assigned a trial date. But certainly, criminal trials will take precedence followed by civil matters that were already pending on trial calendars. So, while you may receive a trial date, it may be absurdly far into the future or in a format with which you do not agree.

Additionally, given the unusual times in which we find ourselves, you, your opposing counsel, or a party may simply be unable to adhere to deadlines or participate live and in-person. Giving ourselves, colleagues, and clients the grace we require right now may involve engaging in activities outside our comfort zone, including virtual mediation.

Take Control of Your Cases Through Mediation

Mediation, in general, gives you maximum control over your case. You can take your case out of court at any stage or keep it out of the court system entirely. From pre-suit through the appellate process, mediation is a much simpler and far less expensive alternative to litigation. Even for lawyers who are familiar with mediation, envisioning the process in a virtual format can be an exercise in mental gymnastics. Many simply cannot fathom on their own how the in-person mediation process with which they are so familiar translates to a virtual setting.

Get Game Ready for Virtual Mediation

Unlike depositions, hearings, and virtual trials, mediation transitioned smoothly, quickly, and easily to the virtual format. Mediations kept the legal system from coming to a standstill during the COVID-19 crisis. A mediator who is experienced and well-versed in various virtual platforms should provide you with the confidence you need to be successful for your client. Your mediator should do all the heavy lifting, from creating the virtual conference, its breakout rooms, and ensuring that all participants are where they need to be at any given moment.

Once you have decided that virtual mediation may be an option for your practice, the first thing you need to do is determine whether your case is appropriate for the virtual platform. If you are unsure given the facts, issues, subject matter, case value, etc., your mediator can weigh in to help you make that determination. Just as not all cases are suitable for in-person mediation, not all cases are suitable for virtual mediation.

Play Smart and Strategically Cut Your Litigation Costs

When you decide that mediation is your end goal, you should immediately eliminate items that you would have completed solely in contemplation of trial, for example, depositions or further written discovery.

You can time your mediation in such a way that you can eliminate some or all of the more expensive things you would do to prepare for trial. For example, expert depositions are notoriously costly. You may not need the expert's sworn oral testimony in advance of a mediation.

Alternatively, you could very well have that expert on standby and have them speak informally during the confidential session. This could potentially be far less expensive than a full deposition of that expert. The possibilities in this regard are only limited by your imagination.



Take advantage of your platform to share demonstrative aids during mediation.

Practice Makes Perfect: Get Acquainted With the Platform

The best way to start preparing for your virtual mediation is to learn the basic functionalities of the platform you will be using. Regardless of the specific program, mediation platforms have the same or at least similar basic functions, with some being more intuitive than others.

Imagine entering the foyer of a physical office and being handed a map that delineates a number of rooms in which your mediation will take place. There is a room for all parties to meet together, a room for each party and their counsel, a room designated just for the attorneys to meet (if they so choose), and a room for the mediator to use between caucuses.

A virtual mediation is exactly the same. When you log into your session, you enter into a virtual lobby. You will be greeted by your mediator and assigned to a room. When it is time to confer jointly, separately, or in whatever combination of participants is necessary, your mediator will ensure that that happens seamlessly for you.

Watch for the Blitz by Addressing any Security Concerns

Many of the concerns we have regarding privacy and security for virtual jury trials simply do not apply to mediation. There is little to no more risk of security or confidentiality breaches in virtual mediation than during in-person mediation. In fact, given that no one can walk by a room and accidentally overhear a private conversation, virtual mediation may be more secure. The numerous virtual platforms provide varying degrees of security, so be sure to discuss your security concerns with your mediator well in advance of mediation day.

Specifically, your mediation should be password-protected, and that password should be randomly generated by the program and never reused. If applicable, the waiting room feature should be utilized so that everyone can be identified prior to entry. Not only is that a way for your mediator to properly greet you, but it also ensures that the proper participants are in the right location. Many of these platforms allow for the meetings to be "locked," which generally means that even with the password no one will be allowed to gain entry into the mediation.

Breakrooms offer additional security and protection from potential intruders because only the mediator is able to move participants in and out of the rooms. To date, there have been no verified reports of successful breaches of all of these layers of security.

Additionally, functions such as record, chat, and file sharing (not screen sharing) can be disabled if you wish. As a practice pointer, you may want to steer clear of using these features if you are discussing highly sensitive or HIPAA-protected information.

Be Ready for the Bright Lights of Game Time

Virtual platforms are great for mediation because it can really enhance your ability to put on a stellar opening presentation. You can present your slideshows and videos much more easily than ever before. There is no extra equipment needed on your or your mediator's part. If your presentation can appear on your own screen, you can make it visible for everyone to see.

Now that we are virtual, an excellent opening presentation that consists of visual aids is an easy way to educate the mediator, impress your client, show your opposing counsel how well you know the strengths of your case, and how you intend to address any weaknesses. Plus, if you get nervous before making statements, you can rely heavily on your presentation. In live mediations, the parties normally waive an opening session so the mediator can get to negotiating. Because it is virtual, the opening session is less adversarial and confrontational.

In addition to sharing presentations, you can also easily show the participants any evidence, photographs, paperwork, etc., as necessary during the mediation. Be sure your evidence is properly Bates-labeled and readily accessible to you. You want to be able to quickly access these materials. Not only will it improve the efficiency of the mediation, it will also instill confidence in your client and demonstrate your intimate knowledge of your case to all of those involved.

Look Good, Feel Good, Play Good

Unlike an in-person mediation, your personal appearance is an integral part of a virtual presentation because participants will be staring directly at you. So, be sure you look your very best. We all look a bit differently on screen than we do in person, so do a solo test-run with the platform to see how you look.

Even if you would not wear makeup in person, you might consider it for the virtual platform. The camera can wash you out and make you appear unnaturally sallow or ashen. Additionally, use sufficient lighting to illuminate your face and eliminate shadows. Place the additional light behind your camera and never behind your head.

Consider your camera's angle and try to maintain it at eye level. If eye level is not possible, looking slightly up into the camera is preferred. You do not want to look down into the camera because that can be perceived as condescending. Dress just as you would if you were appearing in person. If you dress professionally, you will feel and behave more professionally. This is crucial if you are working from home where you would otherwise be informal and comfortable. Create the formality you miss from going to a designated space for the mediation by taking it extremely seriously.

Give thoughtful consideration to your background. A clean, uncluttered location is best. It could be a fun opportunity to show off your degrees or some other conversation piece. It will not only look nice but will give you something to talk about with your client during your downtime. If you do not have a preexisting space that would be appropriate, you can certainly stage one, or you can elect to use a virtual background.

Finally, Get the 'W' for Your Client

The ultimate key to maximizing virtual mediation is to focus on what will satisfy your client! Only you and your client know what that something is, so focus on that, apply these tips, and seize your success.



If you were ever hesitant about making opening presentations to educate either the mediator or the opposing parties, definitely do it now. It is far less awkward and contentious, and you will have a fully captive audience!

Top 5 Misconceptions About Virtual Mediation

It is time to dispel with the top five misconceptions I hear from lawyers who are on the fence about giving virtual mediation a try.

✗ The Technology is Complicated, and my Client cannot Learn It.

- Let your mediator know in advance and ask for help. I have taught many, many people, from attorneys to the elderly, how to use the technology with no problem. I offer that service to my clients for free, in fact. And again, the mediator is the one who does the heavy lifting on mediation day!

○ You cannot Build Rapport with People on a Virtual Platform.

- Of course, you can! I have met more people than I can count during the pandemic who are now close friends—that I have never met outside of Zoom. Also, mediators are trained professionals who take notice of things the untrained simply do not. Spend time researching your mediator online. How is their LinkedIn presence? If it resonates with you, book that mediation!

✗ You cannot Tell if Participants are Paying Attention.

- Regardless of whether the parties are listening to each other during opening statements, the mediator is certainly paying attention and can and will address the relevant issues and ensure that the parties know and understand exactly what is going on. You can also minimize this worry by doing your personal best to create a welcoming atmosphere for the opposing party. Never forego an opportunity to create a positive rapport directly with the opposing party.

○ It is too easy for Participants to Leave and Give Up.

- I have found that people are more committed and will stay longer to work through their issues. The simplest explanation I have been given for this is that because people log into the virtual mediations from locations that are comfortable to them, there is a decreased sense of urgency to leave that might otherwise exist if one were many miles from home.

✗ Keyboard Courage makes Virtual Mediations More Dramatic.

- Keep in mind that the attorneys have clients to answer to, so high drama has simply not been an issue in my experience. In the rare event that I have experienced a participant dramatically leaving a virtual mediation, they each quickly returned and hoped that their departure had not yet been announced to the opposing side. With an in-person mediation, an angry storm out was done for the benefit of opposing counsel watching them do so. When this is done virtually, usually the mediator is the only person to know it has happened and is unaffected by the drama.

Remember, not all mediators are created equal. A negative experience with one has no bearing on the process of virtual mediation as a concept. If you have tried it once and did not like it, consider letting your mediator know what your concerns are. The mediator likely has an explanation for you as to why something happened the way it did. Be sure to ask all the questions you need!

FOURTH QUARTER: TRIALS & ARBITRATIONS

AMY M. STEWART & CHERALYN STEVENSON WITH AN APPELLATE TIP ASSIST FROM M.C. SUNGAILA

Trials and arbitrations are analogous to championship basketball in that you work an entire year for your one shot to win. You are only as good as your team. The only thing that can calm your nerves a little (you always have some butterflies in your belly) is thorough preparation. Also, like at sport games, people actually show up, sit in the gallery, and watch lawyers perform at trial.

What other professional can say the same? So, it is game time.



APPELLATE TIP!

Make sure the ruling on your objections is reflected in the record. Consider filing written objections, to make sure you have made a clear record of what the basis for your objections were, and that you made them.

Pre-Trial: Prepare Before Tip Off

Pre-trial hearings are like when team captains meet at half court to meet with the head referee to run through game rules. When we get to a pre-trial hearing, we have lived with the case for a while, we know the case inside and out, and everyone, especially the clients, are ready for a resolution.

In this virtual world, pre-trial hearings are even more important because we need to resolve so many issues that could disrupt the presentation of evidence and impact the court or juror's decision-making process. Here are a few pointers to get prepared for the pre-trial hearing:

Evidentiary Issues

✗ Get a Ruling: Prior to the pre-trial hearing, counsel needs to work together and put forth joint exhibits for trial. For those exhibits that are objected to, the parties should seek a ruling at the pre-trial hearing. For ease of reference, a chart with these headings would be very helpful for the court to efficiently rule on the document:

Exhibit Number	Description	Offered By	[Link to Exhibit]	Objections and Reasons	Date Identified	Date Admitted

For those exhibits that are easier to rule on in context of supporting testimony, the parties should bookmark those exhibits so that the morning before the exhibit will be offered, the party offering the exhibit can bring it back to the court's attention.

0 Witnesses: Other than identifying your witnesses for the witness list, you usually do not discuss the actual lineup of witnesses before trial. However, with virtual proceedings, these issues should be discussed in an attempt to streamline the proceedings and be more efficient. The lineup of witnesses is even more important because of the additional amount of preparation required for direct and cross examination at virtual proceedings. For efficiency purposes, the court should order the parties to agree to provide a breakdown of the order of witnesses to be called at the pre-trial hearing.

Name	Date(s) of Testimony	Party Calling	Brief Description of Testimony	Length of Direct Exam	Length of Cross Exam	Total

Here are the reasons for adding the discussion of witness line-up during the pre-trial hearing:

- Having a lineup and estimating when they will be called makes the proceedings more efficient and easier to keep the court's and jurors' attention.
- It takes more time to prepare so you need to identify the exhibits to be offered virtually during the testimony and get those uploaded.
- Not every witness will be able to read or testify clearly by reviewing exhibits on the screen. Therefore, the parties may need to provide the witness with a hard copy of the exhibit notebook under seal, so you need lead time to deliver it.

Demonstrative Aids: I have had several situations where opposing counsel sneakily placed a demonstrative aid on the ELMO and presented it briefly to the jury before our side screamed bloody murder. This cannot be the case for a virtual trial where a document can be shared over the virtual platform, there is no way you can object in time before it could prejudice the jury. Accordingly, either during the pre-trial hearing or on the day that the demonstrative will be used, the parties must exchange opening and closing statement slides and other demonstrative aids so a party can present a timely objection. Alternatively, there should be deadlines set forth in the pre-trial report on the parties' agreement to exchange demonstrative aids throughout the trial so the court can rule if there are objections before the proceeding.

Motions in Limine: The practice of getting rulings on Motions for Limine does not change for virtual proceedings. For efficiency, this form may be used to capture the ruling in real time during the parties' limine arguments.

Jury Charge: The parties should work together for a jury charge on a shared platform, like Microsoft SharePoint, so that there is one version of the jury charge that the parties can redline. Further, the Judge or court reporter can access the jury charge as well at the pre-trial conferences. This would make the process more efficient since the parties will be in different locations.

Juror Notebooks: Depending on the number of documents, the parties should agree to provide the jurors with an e-book of exhibits for deliberations. The exhibit e-book would be provided through a Dropbox link at the proper time. The notebook should include an agreed pre-trial "game plan" chart that lists the joint exhibit list and any objections. Essentially, take all the charts you have previously made and combine them into one.

Sample Exhibit List and Objections

Joint Exhibits

Exhibit no.	Description		
J-1	Acme Corp. First Report of Injury		

Plaintiff's Exhibits

Exhibit no.	Description	Objection	Response
P-1	Medical Records - Ochsner	Hearsay	FRE 803(4)
P-2	Medical Bills of Plaintiff	Authenticity	Plaintiff will authenticate

Defendant's Exhibits

Exhibit no.	Description	Objection	Response
D-1	Safety meeting minutes	Hearsay	FRE 803(6)
D-2			

✗ Agreed Pre-Trial Game Plan: Finally, in preparation for trial and for appellate purposes, seek an Agreed Pre-Trial Order outlining the parties' agreement of the following issues prior to the beginning of trial. You can find these documents in the Appendix.

- Joint Exhibits
- List of Evidentiary Objections to rule on
- Agreement regarding disclosure and line up of witnesses to be called
- Agreement regarding disclosure of demonstrative aids
- Motion in Limine
- Agreement related to juror notebooks
- How to handle objections over the virtual platform
- Location of witnesses when they are testifying virtually



APPELLATE TIP!

Make sure the jury instructions you proposed, and those proposed by your opponent, are clearly reflected in the record. The party that proposed an instruction or charge cannot complain about it on appeal. If the record is unclear about who proposed an instruction or charge, the appellate court will assume the appellant did, and find waiver.

Evidentiary Presentation

○ Witness Testimony. With the proceedings literally being streamed from several locations, the parties should have a discussion and agree to the rules related to evidentiary presentation. Here are a few factors to consider:

- What type of device will the witness be using during their testimony, i.e., a phone, laptop, desktop or tablet?
- Where will the witness testify from? Will witnesses be testifying from the producing parties' office, and if so, will counsel or others be in the same room as the witness?
- If the producing party is able to examine the witness from the same room, will cross-examination be allowed as well, pursuant to social distancing guidelines?
- If the witness is testifying from their home, will anyone be in the room with them during their testimony?
- What documents will the witness have in front of them during testimony, i.e., an agreed upon joint exhibit notebook?
- How are the witness backgrounds being handled? Will the parties require a generic background that all witnesses would use?
- Will producing counsel be able to communicate, via text message or otherwise, with the witness during breaks in their testimony?
- Will there be a standing rule in place that all witnesses must turn off their cell phones while testifying?
- Should the witness connect to Zoom on their desktop and cell phone so there is no breakdown in the audio connection?

✗ Photographic Evidence. If photographs are important to your case and your witness's testimony, provide those to the witness who is testifying virtually. Again, you can provide the exhibits to the witness under seal and have them open the envelope after they are under oath and on the record. Further, you want to make sure the court can see the photographs that you will present over the virtual platform for cross examination. Here is a suggested set of questions:

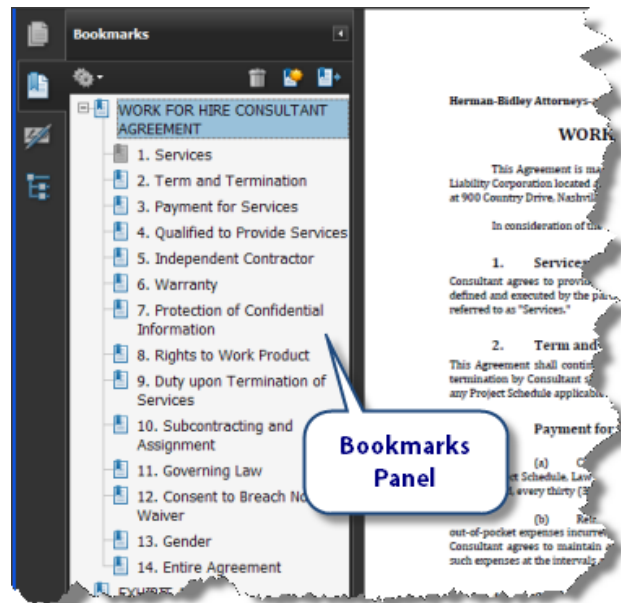
- Bob, you received the envelope of evidence in the mail, correct?
- And you were instructed not to open the envelope until you testified before the court, correct?
- Can you please show us the folder, unseal the envelope, and remove the documents identified as Joint Exhibit 1 - 5?
- OK, I will share the exhibits on the screen but you also have them.

Then you can go into your examination related to those photographs.



Documentary Evidence. The presentation of documentary evidence is much easier after you and your staff have mastered the platform. To improve your presentation, consider the following factors:

- When sharing a document for the witness and they do not have the document in front of them in an exhibit notebook, make sure that you are being patient. Lead the witness and viewers (court, jurors, opposing counsel) to the relevant area. Ask the following set up questions to guide the witness, court, opposing counsel and any jurors through the document. Do not quickly scroll through the document as this is distracting to readers. Instead, use a PDF bookmark.



- Can you see Exhibit A? Are you able to read it?
- Are you familiar with this document?
- I would like to take you to page 7. Use bookmark page 7. I am at page 7. Do you see that?
- OK, let's look at the third sentence in the third paragraph. Are you there?

- Once you have confirmation, you can proceed with your examination. Once the witness confirms they are at the right page, you may want to have a callout for the relevant language.
- Even if the witness and judge have the exhibit before them, still present it and highlight key sections.



Examination related to Tangible Objects and Things. There does not appear to be an effective way to examine a witness who is not in the same room as you about an object that is relevant to the lawsuit. For example, a pipe which allegedly burst, or a large tire that malfunctioned. In these circumstances, here are some suggestions:

- Pre-record this testimony in a trial deposition where the parties can both participate in the examinations in a large conference room or in the courtroom while recognizing social distancing guidelines.
- Propose taking this testimony in court recognizing social distancing guidelines.
- Propose conducting a portion of the proceedings at another location, such as a large conference room at a local university, gymnasium, or hotel conference room where social distancing can be followed. For example, the parties could schedule that all witnesses who need to testify regarding the tangible object can be handled at that time.
- Pre-recorded testimony regarding objects can be played to the court and jurors.

Technology

Technology is changing the litigation game. Technology has been increasingly playing a part in trials from using Electricity Light Machine Organization (Elmo) to displaying evidence to the frequent upgraded use of an iPad in lieu of countless boxes and red wells of trial documents. Rewelds, dollies, ELMOs, whiteboards, and physical notebooks are regulated to the end of the bench. The new changemakers are Zoom, Microsoft Teams, chat, hotspots, lighting, and webcam quality.



With 81% of Americans owning a smartphone and 70% of web traffic happening on that mobile device, jurors will certainly expect technology in the courtroom (12).

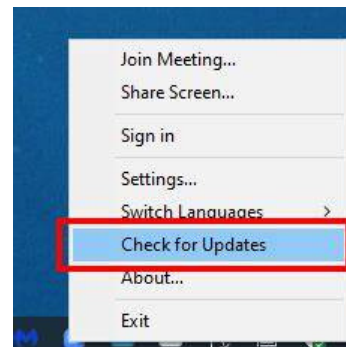
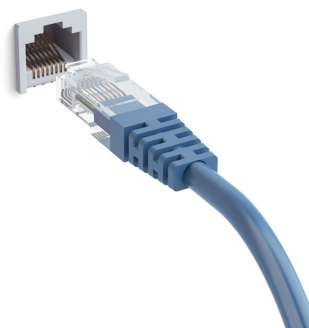
Six months into the pandemic, trial-by-video-jury—at least in the civil context—has been morphing from experiment to expectation (13). Now jurors are reporting to the computer instead of reporting to court for jury duty. With the pandemic having no sure end in sight and courts wanting to move their dockets forward in many cases via virtual trial, technology has become arguably the most important “housekeeping” concern on the agenda. Refer to this checklist to ensure you and your witness are prepared for “the new trial experience”:

- ✗ Reliable Wi-Fi is Imperative.** Most people have stories of going to a website that was slow to load and then abandoning that site within seconds due to unexpected connectivity issues. Save the jurors from abandoning you or your witness and check the Wi-Fi connection speed, which should be between -50 and -60 dBm (14).
- Two Monitors are Better than One.** To give your witness as close of an experience to an actual examination as possible, invest in a universal second monitor that they can use during their testimony. One monitor can be dedicated to seeing the individual that is asking questions while the other monitor can be dedicated to seeing the exhibits.
- ✗ Trial Team Communication can be Instant Now.** Although trials are being performed over Zoom, it is not recommended that you use the Zoom chat feature for team collaboration. You can have your second monitor up with your internal instant messaging application up (with no sound, of course). That way, you and your team can communicate in real-time about the case. You can also have an in-house client be part of your team to have them send suggestions as well.
- Maintaining Order Virtually is a New Skillset.** Courts now have to consider how ethical order is maintained during virtual proceedings. The same rules still apply, such as the attorneys not talking to the witnesses during their testimony and the Judge having a sidebar with attorneys that jurors aren’t privy to hear. Zoom break-out rooms are necessary for having side-bar conversations. The virtual bailiff will also sometimes need to add just one juror to the room with the trial team, for example, if the foreperson is coming back with a question. There are also times where a single juror will need to be removed. The virtual bailiff may need to call a juror that isn’t back on screen from break. Mastering Zoom is critical for maintaining order.

Technology is not only limited to virtual trials. As courts are starting to open up to hybrid trials as well as in-person trials, they are following strict guidelines to prevent the spread of COVID-19. Now is the time to brush up on those technical skills, because the days of bringing boxes of documents for many courts are over. It is time to look at other options, such as OneNote, Trial Director and Trial Pad for your case management needs. The National Institute for Trial Advocacy (NITA) offers training courses on virtual trial preparation.

AVOID FOULS: TECHNOLOGY CONSIDERATIONS

It is imperative to have a reliable internet connection to avoid unnecessary distractions, loss of connectivity, or implicit bias based on what others can deduce from such circumstances. To increase your Wi-Fi speed and extend its reach, you can use commonly known solutions, such as an ethernet cable or a Wi-Fi extender. If you know you are participating in a prolonged proceeding, consider using a hardline ethernet connection. Also, you should routinely check to see if your virtual platform requires an update. Sometimes, your issue may be as simple as having to download an update to fix bugs instead of a problem with your wireless connection.







Voir Dire

Take advantage of the platform's positive attributes.

When I played basketball in college, our coach would videotape practice. As a freshman, I did not understand why because the coaches were standing right there watching. I hated being recorded. Later, when we would argue that we executed the play properly, he would shrug and say, "The eye in the sky does not lie." The same holds true for virtual proceedings.

If we are required to try cases virtually, we have to take advantage of what the platform does offer instead of focusing on what it does not. The virtual platform highlights counsel's emotional intelligence, emotional quotient, or EQ. This simply means the ability to monitor your emotions as well as others' emotions, and to identify and distinguish between different emotions correctly. The most important aspect of having a high EQ is to use emotional information to guide your thinking, behavior, and influence on others (15). Second, it establishes if someone has self-awareness, i.e., do they understand awkwardness related to leaning into the webcam, intonation of statements, when to raise their voice, and the proper use of non-verbal communication. Finally, it highlights who is properly prepared for the proceeding. The spotlight is on you, like it or not.

Instead of standing in front of a venire panel and spanning our eyes over rows of people who are not all looking up or, even worse, at you, you will be sitting at your desk with the ability to stare into the potential jurors' "boxes" that fit on your computer screen. You will have a clearer view of the potential jurors' faces and their non-verbal cues than what you have in a live in-person jury selection. Fifty five percent of our communication is done through body language, so take advantage of seeing the potential jurors' body language communication up close (16). Here are some ways to take advantage of what the virtual platform offers:

-  Confirm how the court will identify the potential jurors on Zoom, so you and your team can plan how to track the jurors during voir dire. For example, see if the court will identify the jurors as "1 – Name."
-  Use gallery view to see all of the jurors.
-  Assign counsel and staff to track responses by assigning squares to jurors.
-  Take note of any additional intel you can gather from the prospective jurors' backgrounds, such as their homes or offices.

✗ Channel Your Inner Talk Show Host. Over a virtual background, you have to grab the jurors' attention and keep it. As I approached preparing for voir dire for a summary jury trial, I had an “ah ha” moment. Approach voir dire as a talk show and engage the jurors with questions, stories, and get them talking. Here are some pointers:

- Prepare as much as possible to reduce the stress from having all eyes on you.
- You cannot do a virtual voir dire by reading a script.
- Keep your eyes on the viewers.
- Humanize yourself and introduce your team, who they probably cannot see, and what they will be doing.
- Use your surroundings to share information about yourself
- Weave trial themes into your questions, just like every host has a show theme.
- Ask jurors direct questions and listen intently.
- See if other jurors agree with each other, i.e., Bob do you agree with what Ava said?
- Ask questions if they do not agree with overarching themes. If it is an emotional case, you have to talk about emotions. Make sure the jury can deal with the facts, not emotions.
- Your demeanor is more important over a virtual platform, i.e., use pauses to make sure jurors can fully answer questions.
- Get them engaged by collectively interacting and answering questions.

What's the Role of the Staff?

Your co-counsel and staff's roles are not much different than in live trial, but they are more important because 100% of your energy must be focused on engaging with the jurors.

- Gather and synthesize data, including the prospective jurors' physical surroundings.
- Track the answers and send follow up questions to lead counsel.
- Direct lead counsel to prospective jurors that need more examination.

Communicating in a Virtual Environment

You cannot pass Post-it notes during voir dire, so you need to have a plan on how to communicate during voir dire.

- Never use the platform's chat function to communicate with your team.
- Use two screens where you text side by side and have one screen dedicated to the jurors and the other for team communications through a separate program, such as Microsoft Teams, Slack, or Google Hangout.
- Dedicated cell phone.

Specific Trial Tactics

A. Impeaching the Witness

The process of impeaching a witness can be clumsy even before a live jury and even worse virtually. Here is how you can stick the landing when impeaching the witness virtually:

✗ Step 1: Anticipate. First, as with a live trial, anticipate what deposition testimony the witness may either not remember from the deposition or try to alter their statements during their trial testimony.

○ Step 2: Be Ready. Have the deposition transcript in PDF on your desktop if you have to refresh the witness's recollection? Have the deposition transcript bookmarked so you can quickly move to the portion you want to use in order to refresh the witness's recollection.

✗ Step 3: On Notice. Prior to the testimony, inform opposing counsel to have their deposition transcript readily available for any possible issues related to the witness's testimony.

○ Step 4: Impeach. When the witness contradicts prior testimony, go through the following questions:

- You remember that you have previously testified regarding this topic under oath?
- Do you remember in your sworn deposition testimony telling me _____?

This way, you have given them an out. If they do not get their testimony aligned, you can impeach them. At this stage in a live trial, you would ask the court to “approach” the witness with a deposition transcript.






However, because we are in a virtual proceeding, you would ask the court if you can share the deposition excerpt with the witness and counsel by sending a link to the transcript through the chat function. Then, turn to reading the deposition testimony. To keep the jury engaged, make sure to take your time explaining what you are doing. You should signal what you are doing so they can follow along. Do not let the witness read their prior testimony. Here is a proposed script:

- “You just testified _____. Let me read you the prior deposition testimony you gave under oath.” Then point to the deposition testimony while you read the question which was asked and ask them to follow along. “Previously, I asked you the following question, _____.” “Back then you testified _____, correct?” Then, STOP.

This will be more challenging in the virtual examination and you will need to make a game time decision on whether it is even worth it to impeach the witness. If you choose to impeach the witness, methodologically go through the impeachment steps. Do not let the witness read their prior testimony or equivocate the reason on why the testimony does not match. Do not turnover control to a shifty witness.

B. Refresh Recollection

A similar process is required to refresh any witness’s testimony. Just like in impeachment, you need to identify which documents are relevant to this witness and anticipate if there are any facts that the witness may not recall. These documents should be readily accessible on your device.

-  **Step 1: Confirm that witness lacks knowledge.** The first step is to establish whether the witness does not remember or recall. If necessary, you may have to confirm that the witness does not recall.
-  **Step 2: Ask what might help.** The next step is to have the witness confirm whether there is a document that might help them remember. If that does not work, you may need to ask, “Would it help you to review the email you sent to Bob?” Because you are presenting this virtually and it is important to keep the jurors engaged, you may want to ask a few questions to explain why that document is helpful and reliable. For example, ask the witness, “Why would the e-mail to Bob assist you with remembering?”
-  **Step 3: Take a peek.** At this stage you need to put the document in front of the witness, but not the jury. Mark the document that you intend to show the witness, for identification. Advise opposing counsel what it is. In a live, in-person trial, you would ask to approach the witness. In a virtual trial, you will need to ask the court if you can share the document *just with the witness* by sending a link to the document through the chat function. After confirming receipt, make sure to instruct the witness to read it silently to themselves and to look up once they are done reviewing the document.
-  **Step 4: Close it out.** Once the witness is done reading the document, advise them to close the document because you do not want them reading or relying on the document.
-  **Step 5: Reset and ask the question again.** Now, with a refreshed recollection, confirm whether the witness remembers. If so, ask your original question again. Alternatively, if the witness still does not remember, ask the court if you can read the relevant portion to the jury as a past recollection recorded. Because you will most likely have to overcome a hearsay objection, be prepared to argue:
 - the witness has an insufficient recollection; showing the writing to the witness fails to jog their memory;
 - the witness had personal knowledge at a former time;
 - the writing was either made by the witness or adopted by the witness;
 - the making or adoption occurred while the event was fresh in the witness’s memory; and,
 - the witness can vouch for accuracy of writing when made or adopted.

OVERTIME: APPEALS

MARY-CHRISTINE "M.C." SUNGAILA

Flag on the Play: Preserving the Record for Appeal

As a trial lawyer, you want to keep one eye on the ball in the trial court, and another on potential appellate court review.

Distinguishing between the Role of the Trial Court and the Role of the Appellate Court.

- Understanding the different roles each court plays is key. Trial courts are the fact-finding tribunals, where the focus is on the introduction of evidence and resolution of factual disputes. The intermediate appellate courts examine the trial court record for errors that made a difference in the outcome of the trial. A supreme court that has discretionary review power focuses on issues of first impression, important legal issues, and conflicts in the law, rather than correcting error in a particular case.

HEADS UP!

Above all, appellate courts search for prejudicial error within the four corners of the trial court record. As one appellate court explains it, “When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two.”

Appellate Court Review

- Appellate courts take a conservative approach to reviewing trial court decisions. A judgment or order of the trial court is presumed to be correct; a party seeking relief on appeal must overcome this presumption and affirmatively show error. An appellate court will generally not review new legal theories that were not presented to the trial court in the first instance, particularly where the factual record was not developed in the trial court in areas crucial to deciding the new legal theory. Nor will an appellate court review an error that a party “invited”; for example, where a party complains on appeal about an erroneous jury instruction that the party itself asked the trial court to give.

What’s in the Record?

- A trial is a multimedia, 360-degree event. A lot goes on. And after COVID, it is all going on in different rooms across the country. How do you make sure the materials you will need to make an argument on appeal appear in the record? And what is the record?
- The appellate record generally boils down to what can be put on paper: the trial transcript, trial exhibits, and trial court orders or papers filed or lodged by the parties (e.g., pleadings, video deposition transcripts, jury instructions, and post-trial motions).
- It is also helpful to clearly state what you are referring to in a document when examining a witness. For example, refer to the page or line, or a specific point in a map or photo (e.g., “the red dot on Exhibit 20 is the property line, correct?”)

Remote Proceedings: Special Issues

- With remote proceedings, you will also want to consider that much of what you are presenting, such as PowerPoints or slides for closing argument, will be seen by the jury but NOT made part of the record unless you affirmatively add them to the record. It is therefore important to consider in each case: do I need to add this to the record to clarify what is going on, or what the jury saw and considered, particularly to establish error or prejudice?
- Remote trial proceedings may or may not be recorded visually and, if they are, it is unclear whether they are an official court record that would be transmitted on appeal. In light of this, treat the proceedings as though no one will see the video recording. If juror or attorney misconduct appears on camera, call it out, describe what occurred, and object.

✗ Get Back to Fundamentals: Top Record Preservation Tips



APPELLATE TIP!

In the appellate court's view, if it is not in the record, it didn't happen. If it's important to your case or future argument on appeal, make sure it is in the record.

- Assert all applicable legal theories.
 - Pursue key legal issues at every possible turn. This not only avoids a waiver finding, but demonstrates to the appellate court that your client seriously believed in these theories from the beginning, not just when your client was looking to reverse a judgment on appeal.
- File motions in limine and obtain definitive rulings on them.
 - Motions in limine are especially appropriate vehicles for seeking to restrict or preclude evidence. Make sure to get a ruling on the motions, and provide an offer of proof of what you would have presented and the impact of the evidence on your case.
- Request jury instructions on key issues and object to others.
 - If you want to assert a legal theory at trial, you generally must request jury instructions that fully and properly embody that theory. Make sure you get a clear, unmistakable ruling on your instruction, and you clearly object to instructions you oppose.
- Make an offer of proof concerning excluded evidence.
 - An offer of proof helps the appellate court evaluate whether the exclusion of evidence affected the outcome of the case. Submit a written offer of proof that details the substance, purpose, and relevance of the proffered but excluded evidence.
- Obtain audible answers from witnesses and verbally record visual presentations.
 - Witness nods do not appear on a written record. If a witness points to an exhibit and says “right there” in response to a question, ask the witness to describe where “there” is on the exhibit, or describe where the witness is pointing yourself.
- Make sure depositions used at trial are adequately reflected in the record the court of appeal will see.
 - Video depositions are often not transcribed in the trial court record; the trial transcript will often read “Video Deposition of Witness X played,” and that is it. Consider submitting the exact page and line excerpts that were played, so the written record reflects what testimony the jury heard.
- Make sure that all trial exhibits are properly marked as to both identity and origin, and that they are also accurately stamped for identification or admission.
- Make complete and timely objections and obtain rulings on them. Obtain a record of all sidebar and chambers conferences.
 - To avoid any claim of waiver, objections should be made immediately and the specific nature and grounds for the objection should be stated. If any objections or rulings are made at an unreported sidebar or during a chambers conference, make sure that what transpired also appears in the record, through a written or verbal summary of what occurred.
- Sometimes the scope of a trial court's ruling is unclear. Ask the court to clarify it so that both you and the appellate court know the ground rules.
- As with trial exhibits, it is important to keep track of jury instructions: who proposed them and in what form, and which were refused, withdrawn, and given.
- Object to the form of the verdict or questions to be asked in a special verdict before deliberations begin.
 - Objections to the form of the verdict should be made before the jury begins to use the form in deliberations. Make sure that neither the verdict form itself nor the jury's answers are ambiguous, complete, or inconsistent; if they are, point that out right away.
- In some jurisdictions, post-trial motions are essential to preserve issues on appeal. In California, for example, issues concerning excessive damages or jury misconduct must be raised by post-trial motion. But even if a post-trial motion is not strictly required, it still may be helpful to file them. A trial judge can sit as a 13th juror, weigh evidence, and grant a new trial, a role an appellate judge cannot play.

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M.C. is the leader of the Firm's Appellate practice group and a Shareholder in the Firm's Orange County office. M.C. is a highly regarded appellate attorney who has briefed and argued appeals raising cutting-edge and fundamental business issues for over two decades. Her work has helped shape undeveloped areas of the law in constitutional law, employment, franchisor liability, product liability, class actions, probate, immigration, Holocaust art recovery, and human rights.



Winter Wheeler | Mediator & Arbitrator

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Winter is an in-person and online-based mediator and arbitrator. She is a former civil litigator who brings an extensive and comprehensive body of experience to her current practice. She specializes in several areas, including wrongful death, catastrophic injury, personal injury, premises liability, nursing home, legal malpractice, medical malpractice, products liability, toxic torts, automotive and trucking liability, civil rights, false imprisonment, municipal liability, water runoff, construction defect, contracts, entertainment, and family law/domestic violence.



Cheralyn Stevenson | Head of Legal Innovation, The Changists

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Cheralyn has an extensive background in legal administrative matters. She holds a Bachelor of Science in Criminology from Regis University as well as a Master of Business Administration in Project Management from Colorado Technical University. She has held numerous leadership positions over the last 20 years planning, monitoring, and executing processes advancing law firm efficiency optimization with innovative risk mitigation and profit maximization strategies.

APPENDIX

JOINT EXHIBIT & WITNESS LIST

JOINT PRETRIAL ORDER

RULES OF EVIDENCE

TRIAL RULES

STANDING ORDER FOR VIRTUAL CIVIL BENCH TRIALS

TEMPLATE FOR VIRTUAL BENCH TRIAL PRETRIAL ORDER

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