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## **The Reality of Virtual Trials, Depositions, Arbitrations and Mediations**

Covid-19 closed businesses, moved school instruction online, delayed surgeries and created health fears throughout the United States. With civil trials suspended, Covid-19 significantly disrupted civil litigation and increased court backlogs. Courts, attorneys, insurance professionals, experts and litigants adapted by shifting most mediations, arbitrations, discovery, hearings and even trials to Zoom and other video platforms.

Even with the pandemic easing, virtual appearances are here to stay, and claims professionals must be able to effectively participate in and evaluate cases that are handled remotely. This includes knowing the pros, cons and pit falls of virtual appearances and how to maximize control of the situation. We discuss virtual mediations, arbitrations, depositions, and trials.

### **I. MEDIATIONS**

Consider in person and remote mediation options. In person meetings allow participants to interact informally, read body language, look each other directly in the eye, express empathy with a pat on the back and seal a settlement with a handshake. A decision maker who invests the time, money, and energy to travel to a distant mediation often gains credibility and demonstrates that she is serious about trying to reach a deal.

While virtual sessions are not perfect substitutes for in person sessions, there are benefits to this technology. Virtual meetings significantly reduce travel costs and time commitments and make it easier to schedule meetings. Participants can simultaneously see each other's reactions on screen. As the speed and quality of videoconferences continue to improve and people become more comfortable with the technology, virtual sessions will continue to grow in popularity. As of early 2022, *Zoom* reported 300 million average daily users.

In virtual mediations, the mediator guides the participants through the virtual rooms, advancing settlement efforts using one meeting "room" for all participants and separate breakout "rooms" for private discussions. Many mediators keep negotiations going on multiple levels by also making calls and texting individuals during the online session. Facetime is another option for mediating simple, two-party disputes.

The best strategies for a successful virtual mediation require advance preparation. First, *know your case*. Verify your client's role in the dispute. Analyze key evidence. Bring the necessary parties to the table. Understand the insurance picture. Second, *prepare your client*. What does your client want? What are the best alternatives to a negotiated agreement? Explain the mediation process, including the

importance of strong internet connection, professional screen appearance and confidentiality. Third, *engage the Mediator*. Establish straightforward objectives and streamline the production of information needed for meaningful settlement discussions. Early strategic one on one calls with the Mediator allow the participants to privately discuss their goals, address obstacles and explore resources in preparation for a productive mediation. Fourth, *simplify complexities* by conferring with your experts regarding key issues and determining the expert's role in the settlement efforts before mediation. Finally, *develop a settlement strategy* well in advance of the mediation session, including the timing of an initial demand or offer, structure of a potential settlement agreement and potential settlement terms.

## **II. ARBITRATIONS**

Virtual arbitrations raise similar issues and benefits as virtual mediations. In addition to the steps outlined above, to set the table for a successful arbitration, it is important to develop a protocol for the use of exhibits and evidence before the virtual hearing. Exchange exhibits in advance and offer to provide the Arbitrator with both electronic copies and a binder of a single joint set of numbered exhibits. Download the exhibits onto your computer before the hearing. During witness testimony, use the screen sharing feature on the video platform to display exhibits. If hard copies of exhibits will be reviewed by a witness, counsel may agree to provide the exhibits to the witness in advance in a sealed envelope with instructions that the envelope only be opened during her testimony.

When preparing your witness, do a test run. Confirm a strong internet connection, uncluttered background, and appropriate lighting. Emphasize that the witness must have privacy while testifying with no distractions, interruptions, or visitors.

Take steps to ensure the reliability of testimony. Require each witness to sit close enough to the camera to see her facial expressions and far enough away to see her hands and the table in front of her. Verify any cell phone is face down and visible on the table. Also, instruct the witness to identify any document that she references during her testimony. Sequester witnesses in breakout rooms until their testimony; otherwise, all participants should remain in view of the camera throughout the proceeding with no virtual or blurred background. Counsel may ask a witness to turn the camera around to confirm no one else is in the room. Further, at the beginning and end of every arbitration session, require all participants to disclose anyone who viewed, overheard, or otherwise accessed any part of the hearing.

In advance of the arbitration, clarify a strategy for confidential communications with your team, including your client, during the hearing. Text messages? Emails? The chat function on the Zoom video platform is efficient, but it is too easy to inadvertently message all participants. Request break out rooms for private discussions with your team throughout the proceeding. Verify that no one will record, or screen shot any part of the hearing without the express consent of the Arbitrator and all counsel.

## **III. DEPOSITIONS**

The single greatest shortcoming for accomplished practitioners in virtual proceedings is loss of control. The loss of control is pervasive. It includes loss of control over the witness, the audience, opposing counsel and even the ultimate decision maker. The following deposition of an expert witness in a construction defect case is instructive.

Session One began on March 10, 2021

7 Q. In the beginning of this deposition, we asked  
8 if you have performed all the work necessary to  
9 formulate your final opinions.  
10 Do you recall that testimony?  
11 A. Yes.  
12 Q. Okay. Are you prepared to give your final  
13 opinion testimony today?  
14 A. Yes.  
15 Q. Okay. What are your opinions?

A five-page detailed answer regarding the witness' expert construction defect opinions regarding four companies' conduct followed. Thereafter, defense counsel asked to follow up questions regarding each opinion.

Session Two continued on June 7, 2021.

22 Q. Other than the Zoom screen that you have on and  
23 any Chat, do you have any other electronic form of  
24 communication or research open now?  
25 A. No.

1 Q. Since the start of the deposition, have you  
2 communicated with plaintiff's counsel in any way?  
3 A. No.

4 Q. Do you have any notes or writings with you?  
5 A. No.

6 Q. Did you have any notes or writing or open  
7 computer screens during your first deposition?

8 A. I had notes about specific items I wanted to  
9 list as things I would testify to.

10 Q. So in reading your first deposition, you were  
11 asked whether you had opinions about the various  
12 entities in this case.

13 Do you remember that?

14 A. Yes.

15 Q. And it appeared to me just from reading your  
16 transcript that you read those answers into the record.  
17 is that correct?

18 A. The only thing I read were the -- from my notes  
19 about specific points I wanted to testify to.

20 Q. And where are those notes now?

21 A. I did not save them.

22 Q. What happened to them?

23 A. I shredded them.

None of the attorneys who examined the expert witness during the first session of his deposition asked a single virtual platform question, even though the deposition occurred remotely. What the witness

has, does, looks at, relies on, etc... when outside of the examiner's physical presence is critical. The "Time" to adapt to video proceedings is now!

#### IV. TRIALS

A potential juror exercising on an elliptical machine while another potential juror lays in bed, lead trial counsel barred from entering the courtroom, unanswered requests regarding the composition of the jury venire and the basis for hardships granted or denied, and attorneys' objections remaining unheard and unpreserved for the record — these are just a few of the issues that plague virtual trials.

While courts endeavor to proceed with jury trials during the balance of the COVID-19 pandemic, it remains questionable how the parties' due process right to a fair and impartial jury can be ensured under previously unvetted conditions caused by remote proceedings. Fulfilling these basic constitutional guarantees in jury trials involves at least four primary considerations.

##### **Issue #1: How can courts guarantee that prospective jurors will be selected from a representative cross-section of the community during the pandemic?**

As to the first issue, the Trial Jury Selection and Management Act, which is contained within California Code of Civil Procedure section 191, states that it is the "...policy of the State of California that all persons selected for jury service shall be selected at random from the population of the areas served by the Court" and that "...all qualified persons have an equal opportunity, in accordance with this chapter, to be considered for jury service in this state." Code of Civil Procedure section 197(a) similarly provides, "[a]ll persons selected for jury service shall be selected at random, from a source or sources inclusive of a representative cross-section of the population of the area served by the Court." Furthermore, no eligible person shall be exempt from service as a trial juror by reason of *inter alia* occupation or economic status. (Cal. Code Civ. Proc. § 203(a).)

Contrary to the foregoing statutory mandates, the pandemic and recurring spikes in Coronavirus cases will unintentionally, but inevitably, ensure that a jury venire does not represent an adequate cross-section of the community. For instance, the elderly or persons with pre-existing medical conditions may refuse to serve given their enhanced susceptibility to disease contraction, and therefore, not even appear for the jury selection process. Even if a jury trial is conducted entirely remotely—a prospect that raises numerous additional concerns highlighted below—socioeconomic factors may lead to the systematic exclusion of potential jurors who do not have access to the technology and broadband required for remote participation. Moreover, while resource-strapped courts may seek to remedy these inherent disparities by imploring parties to voluntarily foot the bill for such expenses, such a solution unavoidably means that only litigants with financial capabilities can proceed with jury trials during this time and fails to grapple with how existing statutory cost-shifting mechanisms should be addressed.

As Chief Justice Tani Cantil-Sakauye expressly recognized in her March 23, 2020, emergency statewide order suspending all jury trials for sixty-days, "the closure of schools means that many...potential jurors cannot leave their homes to attend court proceedings because they must stay home to supervise their children. These restrictions have also made it nearly impossible for courts to assemble juries." The statewide impact of the pandemic has not receded since March of 2020 when the stay in jury trials was issued, and its effect continues to linger.

**Issue #2: How can counsel conduct a “liberal and probing examination” of potential jurors to ferret out potential bias when jurors are masked or only participating in voir dire remotely?**

To allow jurors to participate in trial despite fear of contracting the coronavirus or lack of high-speed internet at home, the Alameda County Superior Court adopted a hybrid approach to jury selection which continues to this day. Specifically, while most prospective jurors participate in voir dire remotely using the Zoom videoconferencing platform, a few jurors attend voir dire in person with a device provided to them, while the judge is in another room, unmasked, and counsel participate remotely. However, both prongs of this approach not only violate parties’ right to conduct a “liberal and probing examination” to ensure the selection of a fair and impartial jury, but ultimately prove infeasible.

California Code of Civil Procedure section 222.5(b)(1) states in pertinent part that “counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable the counsel to *intelligently* exercise both peremptory challenges and challenges for cause...During any examination conducted by counsel for the parties, the trial judge **shall permit liberal and probing examination** calculated to discover bias or prejudice with regard to the circumstances of the particular case before the court.” (*Id.* (emphasis added).) As various courts have recognized, “in practical terms, observing potential jurors may reveal as much about them as counsel may learn from listening to them. As if to underscore the importance of the visual aspects of jury selection, the legal term used to describe the process – voir dire – is itself a combination of two French verbs meaning ‘to see’ and ‘to say.’” The importance of observation during voir dire extends to court and counsel alike.” (*See, e.g., People v. King* (1987) 195 Cal.App.3d 923, 932.)

Moreover, inadequate voir dire that is “fundamentally unfair” is a basis for reversal as the right to voir dire is “a means to achieve the end of an impartial jury.” (*People v. Fuiava* (2012) 53 Cal.4th (relying upon *People v. Carter* (2005) 36 Cal.4th 1215, 1250).) Indeed, without adequate voir dire, the trial judge’s responsibility to remove prospective jurors who will not be able to impartially follow the court’s instructions and evaluate evidence cannot be fulfilled. (*People v. Roldan* (2005) 35 Cal.4th 646 (disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390); *see also* Cal. Code Civ. Proc. § 128(a)(3) (court has the power “[t]o provide for the orderly conduct of proceedings before it”); *California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 19 (judges “are responsible for ensuring...that juries are properly cared for and that all court cases assigned to them are fairly and efficiently heard and decided”).)

Jury selection by way of masked jurors in the courtroom and unmasked jurors participating via videoconferencing impedes counsels’ ability to intelligently examine potential jurors as a group and forecloses the court’s ability to remove jurors who were unable to follow instructions. First, about the masked jurors who appear on Zoom from the courtroom because counsel is barred from entering the courtroom—despite wearing a mask and despite being able to socially distance—counsel cannot observe the potential jurors’ body language and are restricted to seeing only the jurors’ eyes. Accordingly, it is impossible to observe those jurors’ facial expressions, such as smirking or smiling, when responding to questions designed to guarantee the selection of a fair and impartial jury.

Turning to the unmasked jurors who appear virtually using the Zoom platform, effective voir dire is hampered by the following:

- Counsel is at the mercy of jurors’ decisions regarding how to frame their webcams, which often only showed jurors’ faces rather than their entire bodies.
- The Zoom platform is configured such that it is not possible to see all 18 prospective jurors that are questioned as part of the first panel of jurors, so counsel can not see in one screenshot the reactions and facial expressions of potential jurors simultaneously when the attorney conducting voir dire is asking questions: and
- Multiple jurors don’t pay attention and are engaged in other activities during voir dire.

**ISSUE #3: How can courts guarantee that all jurors can fairly receive the evidence?**

"Clearly, a jury trial conducted by videoconference is not the same as a trial were the witnesses testify in the same room as the jury." (*Thorion v. Synder* (7th Cir. 2005) 428 F.3d 690, 697.) It is not the same because tools to assess credibility and persuasiveness, such as "[t]he immediacy of a living person is lost" with remote testimony as well as "the ability to observe demeanor, central to the fact-finding process, may be lessened." (*Id.*) Courts have recognized that "video conferencing may render it difficult for a fact finder in adjudicative proceedings to make credibility determinations and to gauge demeanor." (*Rusu v. INS*, 296 F.3d 316, 322 (4th Cir. 2002) ["virtual reality is rarely a substitute for actual presence and ... even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it"].)

"[E]ven with the benefits that technology provides, substitutes for live testimony are necessarily imperfect ... it seems obvious that remote transmission is to be the exception and not the rule." (*Lopez v. NTI, LLC* (D. Md. 2010) 748 F.Supp.2d 471, 479. Conducting a remote jury trial will ensure that the proceedings will become frequently derailed by technical issues, including some with which the parties may not call attention to during the proceedings. Audio may freeze, connections may be dropped, and these are frequent occurrences during Zoom proceedings.

The following example from an April 2022 trial is illustrative.

15 THE COURT: All right. Juror 14, can you  
 16 hear me now?  
 17 PLAINTIFF'S COUNSEL: I don't know if his phone needs  
 18 to be brought into the room that we're now in.  
 19 THE CLERK: He has it. Here he is now.  
 20 THE REPORTER: Your Honor, are we on the  
 21 record or did you want to be off the record while we  
 22 figure this out?  
 23 THE COURT: It's on the record unfortunately.  
 24 THE REPORTER: Okay. Just wanted to make  
 25 sure.

1 THE COURT: Including the dinosaur sounds.  
 2 THE REPORTER: Okay.

3 JUROR 14: Can you hear me okay?  
4 THE COURT: Is that you, Juror 14?  
5 JUROR 14: Yes.  
6 THE COURT: You no longer sound like a  
7 Tyrannosaurus Rex, which is what you sounded like  
8 before. The strangest thing. So, you're looking at  
9 your computer monitors but listening from your phone; is  
10 that what you're doing?  
11 JUROR 14: Yes.  
12 THE COURT: All right. Well, thank you, sir,  
13 and thank you for your patience. And don't feel bad.  
14 It happens to all of us. It's part of modern  
15 technologies.  
16 So let's all go back.  
17 PLAINTIFF'S COUNSEL: Your Honor, one more thing. Do  
18 we do not need to figure out what the last thing he heard  
19 was so we can do another read back?  
20 THE COURT: Oh, that's true. What's the last  
21 you recall, sir?  
22 JUROR 14: I haven't heard anything  
23 from the beginning. But I'm okay, though. If you need  
24 to move forward, I'm okay though.

#### **ISSUE #4: How can courts guarantee that jurors will deliberate?**

Jurors are required to deliberate together, and that is not feasible in the context of a virtual trial. Zoom “breakout rooms” are conveniences, not solutions to this problem that requires adherence to procedural safeguards. Specifically, the law requires that the Court “provide a deliberation room or rooms for the use of jurors when they have retired for deliberation.” (Civ. Proc. Code, § 216(a).) Virtual deliberations violate this rule because there is no physical “room” in which all the jurors will be present and where their conduct can be safely controlled.

Even if remote deliberations were deemed possible by way of Zoom breakout rooms, “[t]he deliberation room shall be designated to minimize unwarranted intrusions by other persons in the court facility[.]” (*Ibid.*) There is no way for the Court to guarantee that the remotely participating jurors are protected from intrusions. “An important element of trial by jury is the conduct of deliberations in secret.” (*People v. Engelman* (2002) 28 Cal.4th 436, 442.) There is simply no guarantee of secrecy in deliberations where a juror lives with family members or roommates, and the Court cannot protect the surrounding environment outside the visible four corners of the Zoom camera. This unwarranted intrusion can only be safeguarded in the situation of an in-person jury trial.

Similarly, there is no way to guarantee that the jurors will all evaluate the same evidence in the appropriate manner.

Courtroom control, presence and poise are marginalized by social distancing- whether by masks, physical separation, virtual appearances or otherwise. Distancing dilutes control, dissolves presence,

and disrupts poise. And the effect is not equal. The greater one's traditional courtroom skill, the greater the loss in a virtual trial. Trial lawyers will need to find alternative means of communication and persuasion to remain effective in the new world order.

Some trial techniques may be lost forever with virtual trials. For example, a greatly overlooked technique to emphasize a point is silence. Silence used sparingly and appropriately, subliminally encourages your audience to think about the last words that they heard. But silence in a virtual trial will invariably be interpreted as equipment failure or lack of preparation. Similarly, the proper use of physical presence in a courtroom, such as polling potential jurors by asking them to raise hands in response to questions during voir dire or standing in proximity to the juror box and employing eye contact with jurors when examining a witness, vanishes when all participants are reduced to boxes on a computer screen. In both examples, traditional trial skills are eviscerated in the virtual court "room". There is no underestimating the preparation and practice needed to reimagine the skills necessary to be an effective communicator in a virtual space.

Individual skills are not the only thing a trial lawyer has to manage in this brave new world. Control of the record in virtual trials is a whole new frontier. Like Las Vegas, what happens in a virtual courtroom will stay virtual, unless you find a way to memorialize it. Record everything - audio and video. Verify in advance that the court has sufficient staff assigned to the trial to handle such tasks as intaking exhibits, monitoring jurors, monitoring witnesses, and managing virtual "break out rooms" (used for sidebars with the court) all at the same time. Then, have another lawyer from your firm monitor the jurors, witnesses, break out rooms and exhibits as well. Remember, "when the going gets tough, the tough get going" ... let's do it!"