



## The Remote Courtroom

Tips for Effective Virtual Advocacy

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As courts deal with the social distancing requirements related to COVID-19, lawyers are increasingly required to conduct virtual court hearings. Now more than ever, litigators must do more than prepare substantively; they must become adept with technology and be able to present persuasively before the court while sitting at home or in the office. As courts have resumed operations, most hearings have been conducted remotely and will continue that

way in many judicial districts. This article offers recommendations for practitioners who participate in virtual hearings.

### **Colorado Courts and Remote Hearings**

To comply with statewide and local stay-at-home orders, Colorado's court system suspended most hearings and trials, and limited other operations, except for those deemed essential. Each jurisdiction has specific administrative

orders in place that govern court appearances.<sup>1</sup> Many courts, including in the 2nd Judicial District, have implemented mandatory phone or video meetings through computer or mobile applications.

### **How Do Remote Courtrooms Work?**

If a hearing is going to take place by telephone conference call, the court will set the time and date for the hearing and notify the parties. The court establishes procedures for telephonic hearings, so you should get to know the procedures for a particular division and read any court orders on the subject. If necessary, contact the division clerk to ask for information about the process.

If a telephonic hearing is conducted, either the court staff will ask for each participant's phone number in advance and call everyone at the appointed time, or the court will use conference calling whereby parties and witnesses join the call using a dial-in number and PIN. For most significant or substantive hearings, voice-only is not usually sufficient; if you have

a choice in how to participate, opt for video to maximize your persuasiveness.

### Appearing by Videoconference

Before COVID-19, criminal courts in some Colorado counties sparingly conducted remote hearings in certain contexts (e.g., a defendant appearing by video from the detention facility). But everything changed in spring 2020 as courts moved to virtual courtrooms in response to the growing pandemic. In some jurisdictions, the process of getting virtual courtrooms ready for expanded use required a great deal of work to set up the technology at the courthouse and in detention facilities, including installing adequate bandwidth and training staff.

Nearly a month after the first Colorado court orders restricting court access and operations, county chief judges further clarified how the courts would continue to operate during the pandemic. Judicial districts have expanded their capabilities to conduct hearings on the record in virtual courtrooms. At the discretion of the presiding judge, and depending on the availability of necessary support staff, parties can schedule matters to be conducted by telephone or by using an interactive audiovisual device such as a computer, tablet, or smart device. The presiding judge, who may appear by using an interactive audiovisual device, may also require, as allowed by law, participants to appear by using

an interactive audiovisual device. The court may set and reschedule matters for hearings to be conducted via an interactive audiovisual device. When a case is scheduled in the virtual courtroom, a link is sent to all lawyers and others involved in the case. The virtual courtroom also allows defendants to appear in court and communicate with an attorney privately during hearings as one would in a regular courtroom setting. The attorneys and court staff can also communicate by private message within the virtual courtroom application.

### Choosing the Right Hardware

To participate in virtual hearings, it is imperative that you have the right hardware setup. Just like wearing tennis shoes to court sends a message about your respect for the court's time and how serious you are about being an effective advocate for your client, so does being properly prepared for the technological challenges a virtual hearing presents. At a bare minimum, you will need a strong internet connection and a device with video and audio capabilities, such as a smartphone, tablet, laptop, or desktop. However, using your phone for video is not recommended if you want to project a professional look.

If your video lags, there may be several possible causes. First, you may need to upgrade your computer. Older computers may have inferior cameras and microphones, lack the memory

(RAM) needed to process the video, and have old video cards not up to the demands of modern videoconferencing. Second, double-check the capabilities of your internet connection. You can check your internet speed for free at various websites, including Google's internet speed-testing site.<sup>2</sup>

When you check your internet speed, you will be given two numbers: upload and download. Download speeds affect your ability to watch a Netflix movie or show, shop online, scroll through social media, view YouTube videos, stream music, and download documents from the web. Upload speeds are important for sending emails with large attachments, backing up data to online or cloud storage services, and working on live, cloud-hosted documents like Google Sheets or Docs. For videoconferencing, you will use both. How much depends on how many parties are in the videoconference and what you will be doing (e.g., screen sharing). Generally, you will not need more than 10 Mbps download and 3 Mbps upload available to you.<sup>3</sup>

Keep in mind that everyone else on your network will "use up" some of what is available to you, so try to ensure no one starts downloading HD movies in the middle of your Court of Appeals argument. Finally, regardless of the quality of your computer or internet connection, you should shut down all programs except those that are essential to your video appearance; having



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numerous programs or browser windows open can affect computer performance.

Audio is just as important as video when it comes to making a good impression. Most computers have built-in mics; if you are only appearing occasionally, this should suffice. However, if you are consistently in virtual hearings, mediations, or depositions, consider getting a dedicated USB microphone. Most built-in microphones are “pencil mics,” meaning they will only pick up when you are speaking directly to them and are only good for short range. For significant appearances or arguments, a quality external microphone is best. To avoid feedback or echoes, do not have multiple computers or phones connected to the same hearing in the same location. Separating your video (using a camera or computer) from your audio (using your phone) can improve audio presentation when done properly.

#### Software Basics

Once you have the right equipment in your office or home, the next area to consider is online meeting software. There are a lot of great options to choose from, but you will be required to use the platforms that the courts have chosen for appearances. Cisco Webex, Microsoft Teams, and Zoom are some platforms that Colorado courts are using.

#### Preparing for Virtual Hearings

It is prudent to log in early. Be patient. The judicial assistants and bailiffs are new to this and are learning just like you are. Make sure your mic is muted when you enter the meeting and at all times when you are not speaking. Eliminate all background noise, including sounds from any background applications. Silence your phone, and if necessary, change your notification settings to eliminate disruptive “dings” from incoming texts and emails.

If your virtual courtroom has messaging capability, you will be able to communicate with other counsel, the clerk, or your client while you wait for the judge to take your case. Use this time to talk about your case just as you would if you were in the hallway in the courthouse. Be very careful about not sending a private message to “everyone” in the messaging

window, if the platform has one. Always take a look at your judge’s website or any orders issued to see if he or she has any special procedures or etiquette for virtual hearings. And if you have any confusion or doubts as to procedure, consider reaching out to the clerk. Adhering to the court’s preferences is as much an effective part of advocacy in a virtual setting as it is for in-person appearances.

Become familiar with the capabilities of any program you are using. Being able to fully use

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all of a platform’s features will make for better presentations and help your clients. If a court uses Cisco Webex, but you and co-counsel are more capable using another program, the judge may allow you to use your program of choice so long as the judge can control the proceeding, the proceeding remains “open to the public,” and the standards of due process are maintained.

If you have supporting documents that you want the court to see, such as contracts,

invoices, canceled checks, photographs, or other relevant documents, they should be submitted to the court and to the other parties well before the hearing.

You might also consider asking to allow the litigants (attorneys, clients, witnesses) to do a “dry run” by contacting the court’s judicial assistant.

#### Visual Presentation

When it comes to virtual hearings, presentation matters. Backgrounds should be visually appealing but not distracting. Many programs allow you to slightly blur the background to keep people from becoming distracted by, for example, the titles of the books behind you. Take steps to prevent other people, animals, or other distractions from becoming visible. (One of the authors conducted a virtual argument in a case in which the attorney was professionally dressed and prepared, but in the background her significant other was visibly walking back and forth in a bathrobe.) Limit rocking or swiveling chairs. This is distracting and irritating, so lock your (and your client or witness’s) chair if necessary. Avoid multitasking so you’re not continually leaving and coming back into the picture.

Lighting might be the single most important thing to consider when getting ready for a video hearing. Avoid any kind of overhead lighting. Placing your light source directly above you will cast unflattering shadows on your face, especially around your eyes. Unfortunately, most people have overhead lights as the default lighting in their homes. Three soft light sources are recommended. Ideally, place two soft lights behind your webcam to the left and right. Together, they will fill all the hard shadows on your face. Place the third soft light behind you to act as ring light. This light will help separate you from the background. A ring light and lighting kit is a perfect solution and worth the expenditure. If you do not have access to spare LED lights and lighting fixtures, you can always count on natural light. Find a room that allows as much natural lighting as possible. Remember, light should not be behind you, but in front of you. If you wear glasses, the light from your computer screen may reflect. Lower the brightness of your screen to reduce this effect.

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Raise your camera to eye level, using a higher table, a box, or even a set of books. Typically, camera angles that are higher are much more flattering. When you position your camera lower than eye level, it can make you look intimidating—and no one wants to be looking up your nose through the entire hearing.

Speaking to a camera lens is quite different from speaking live to a group of people, and it's more difficult to connect with the audience when the critical human connection is missing.<sup>4</sup> According to trial consultants Lisa Decaro and Leonard Matheo, you should practice making the same type of focused, laser-precision eye contact on camera that you use with individuals in person.<sup>5</sup> Look at the camera, not the picture, when speaking.

Finally, maintain a reasonable distance from your camera. Think news anchor. You want to present a “bust view” that includes your shoulders and upper arms, not just your head. Make sure any hand gestures are minimal and within the viewable frame.

### **Dress Appropriately**

Recently, Judge Dennis Bailey of Broward County, Florida made headlines when he wrote,

We've seen many lawyers in casual shirts and blouses, with no concern for ill-grooming, in bedrooms with the master bed in the background, etc. One male lawyer appeared shirtless and one female attorney appeared still in bed, still under the covers. And putting on a beach cover-up won't cover up that you are really poolside in a bathing suit. So, please, if you don't mind, let's treat court hearings as court hearings, whether Zooming or not.<sup>6</sup>

Professionalism is fundamental to the effective and efficient representation of clients in the legal system.<sup>7</sup> Traditionally, the English courts regulated a barrister's dress in such minute detail that even the growth of the attorney's beard or the cut of his clothes was subject to scrutiny.<sup>8</sup> Most courtroom dress requirements are unwritten; however, ethics rules across the country state that hearings must be conducted according to dignified and orderly procedures to protect the rights of all parties.<sup>9</sup> As officers of the court, attorneys should support the

court's authority and dignity by following the court's rules of decorum.<sup>10</sup> Attorneys should also comply with a particular court's local customs of courtesy or practice.<sup>11</sup>

Maintaining sartorial professionalism applies to virtual hearings. Attorneys and court participants should dress in the same professional manner as they would when appearing in person in a courtroom. For better or worse, our clothes affect how we're viewed by others,<sup>12</sup> including

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judges, jurors, and witnesses. Psychologically, human beings are prone to making all sorts of assumptions and decisions based on appearance, and this can make a difference for our clients, especially in close calls.

### **Conducting Hearings and Trials**

Preliminarily, ensure witnesses are prepared for their testimony, have sufficient hardware

and bandwidth, and have a full understanding of the relevant platform. When you want to put a document into evidence (that you previously submitted to the court, parties, and witnesses), you should describe the document you are referring to and ask for it to be marked as an exhibit. For example, if you are referring to your partnership agreement, say something like: “I have a partnership agreement between Mr. Jones and Ms. Smith, dated July 1, 2020. It is behind Tab #1 in the binder of documents I submitted. I would like the partnership agreement marked as Exhibit A.”

Using heading and numbering as a form of “chaptering” your argument is particularly effective during virtual proceedings. When you say, “there are three reasons my client should win,” the judge will write down those three reasons and take notes on each of them.

We know virtual meetings can feel more exhausting than in-person meetings.<sup>13</sup> To help with this, speak in short sentences that are clear and concise. Wait a beat or two before responding or speaking. Pausing is often effective in any presentation, but it is even more crucial in virtual proceedings as it allows one microphone to be on and prevents the cross-speaking that can make virtual meetings so frustrating.

It is very important that counsel work together to produce an effective hearing. This includes working together in advance to stipulate to exhibits, agreeing on how and when objections will be made, and so on. This planning and professionalism will ensure a smooth and effective presentation.

Think about how the virtual presentation changes the way you do things (e.g., present a document to a witness), and be ready for it. Do not submit 150 pages of bank records when all you will refer to is three pages. Some programs can take a long time to prepare a 150-page PDF for screen sharing, whereas a three-page PDF pops up quickly. Consider having a “cameraman” who can zoom in on a demonstrative exhibit as you discuss it and then move the camera back to you.

Many judges prefer that paper exhibits are delivered to court so they can flip through them while arguments are made. Find out what your judge prefers.

During the hearing, do not forgo an effective technique or strategy because the hearing is virtual; use visuals, timelines, calendars, maps, charts, and diagrams where appropriate. The more you can make the virtual experience mimic the in-court experience, the better.

### Special Considerations for Criminal and Dependency and Neglect Matters

Virtual proceedings must protect the right to a fair trial and to counsel, as guaranteed under the US and Colorado Constitutions. The courts and attorneys must ensure that defendants in virtual court hearings, as well as respondent parents in dependency and neglect and termination of parental rights cases, have seamless and sufficient confidential discussions with their lawyers and do not become disconnected from remote proceedings.

The United Kingdom has been using video proceedings in varying degrees since 2009. Its experience has raised several concerning issues that pertain to Colorado judges, attorneys, and defendants involved in virtual proceedings. For example:

- Defendants appearing on video links in England and Wales were more likely to receive custodial sentences and less likely to be given community sentences than those who appeared in person.<sup>14</sup>
- Clients and practitioners developed adverse perceptions of procedural justice that arose from their physical separation from the legal process and parties involved.<sup>15</sup>
- Disproportionate impacts on particular vulnerable groups (including children and those with mental health problems, learning disabilities, and autism) were reported. It can be difficult in person to recognize when a defendant has a disability or support needs; a video screen makes it even harder.<sup>16</sup>
- Research suggests that videoconferencing is not perceived to be “neutral technology” by some—it is believed to shape interactions, and it impacts people’s experiences of probation.<sup>17</sup>

Judges should strive to minimize these issues by educating themselves about the potential for bias in virtual proceedings.<sup>18</sup> Other deficiencies

are not so easily remedied. Criminal defense attorneys and respondent parent counsel should give serious consideration to how their clients and witnesses will present on video before agreeing to any virtual appearances in substantive hearings or trials.

### Conclusion

Colorado courts have embraced virtual court hearings as the new normal to ensure the continued administration of justice through the duration of the nation’s pandemic crisis. Attorneys must ensure they are prepared and

capable of providing competent and persuasive representation for their clients in the virtual court era. Some may think it’s excessive to purchase new equipment, stage a professional background, or work to adapt trial skills to a new medium. We disagree. Virtual court hearings will be the norm so long as the nation grapples with the COVID-19 pandemic, and to varying degrees in different practice areas, probably beyond. To provide the best and most persuasive representation for your clients, embrace this change. Those who evolve will be rewarded and more effectively serve their clients. **CL**



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### NOTES

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