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Zooming to Victory in Remote Franchise Litigation

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INTRODUCTION

The COVID-19 pandemic has forced change upon all sectors of society and the economy, including the legal profession. The health risks the pandemic posed halted court proceedings and other normally in-person activities, like depositions and mediations. Of course, a prolonged cessation of litigation was not feasible, and so methods for dispute resolution quickly adapted.

Remote proceedings have become the norm for parties needing redress for their claims. This paper's purpose is to explore the advantages, disadvantages, and some lessons learned so that, the pandemic notwithstanding, we can adapt and, more importantly, change how we go about helping our clients accomplish their goals. Resolution of disputes in courtrooms and through in-person mediations and arbitrations prior to COVID-19, is not a sufficient reason to return to those ways post-pandemic unless their advantages outweigh the advantages of remote proceedings.

A word about the definitions we employ in our discussion—"remote" means that all the participants are physically apart from one another and any dispute resolution service provider; "partially remote" means that one or more participants is not physically present at a hearing or dispute resolution venue. "Virtual" is likely a misnomer as we all recognize that real-life and not fantasy is what generates disputes and pervades our attempts as lawyers and dispute resolution providers to resolve them.

What are the advantages usually associated with "remote" dispute resolution approaches? In lieu of physically proximate mediations and arbitrations, the advantages of "remote" proceedings are generally regarded as:

- Cost savings
- Preserving hearing dates
- Increased timing flexibility
- Increased participation of key decision makers due to decreased need to spend time and expense travelling
- Avoidance of false deadlines

- Environmental benefits¹

There are, of course, disadvantages associated with “remote” approaches. In some matters, particularly with respect to advocacy concerns, the perceived disadvantages mirror the perceived advantages:

- Lesser ability to “read” witnesses, mediators and arbitrators
- Adverse effect on advocacy
- Technology interruptions
- Confidentiality worries
- “Zoom” fatigue²

These advantages and disadvantages are explored in more detail later in this paper. As of early 2021 (before wide-spread vaccination of the US population), remote hearings have become necessary among professional dispute resolution organizations and, despite the abrupt change in platforms, alternative dispute resolution has remained a popular choice. According to the American Arbitration Association, even in remote settings it still provided alternative dispute resolution services for 9,538 business-to-business cases involving approximately \$18 billion in claims in 2020.³ The pandemic has provided dispute resolution providers world-wide with an opportunity for thought leadership and practice protocols that address the issues that remote proceedings may present.

Court-based litigation, especially jury trials, has slowed down measurably because of, *inter alia*, physical and technological limitations in facilities ill-equipped to meet such requirements. Meanwhile, most private providers of arbitration and mediation services are fully digitized and able to accommodate remotely filings that do not require in-person review, docketing, and handling. Many courts systems are not so nimble.

That is not to say remote trials are non-existent—many courts and practitioners have made the most of a difficult situation and pressed forward with remote trials. Many within the judicial community do not view remote trials as a long-term solution and so it is no surprise that the frequency of trials has drastically slowed. Texas is an example. According to the Texas Office of Court Administration, before the pandemic, the state’s courts saw approximately 186 jury

¹ *International Arbitration and the Covid-19 Revolution*, edited by Scherer, M., Bassiri, N., Wahab, M. S. A., Wolters Kluwer International B.V. 2021, at Chapter 7, Empirical Study of Experiences with Remote Hearings: A Study of Users’ Views.

² *Id.*

³ https://www.adr.org/sites/default/files/document_repository/AAA-2020-B2B-Caseload-Press-Release-11Feb2021_1.pdf?utm_source=website&utm_medium=banner-adr&utm_campaign=website-2020b2b-pr.

trials each week.⁴ In the 10 or so months after the pandemic began (March 2020 through January 2021), Texas courts hosted only 222 jury trials total—the equivalent of less than a week and a half of jury trials pre-pandemic.⁵

How practitioners actually view remote proceedings will largely determine their viability going forward post-pandemic. Views differ from organization to organization, and case to case, but it is still possible to make some general observations:

- It is working much better than any of us expected it would.
- Technology issues peaked early, often resulted from user error, and users (even lawyers) have gotten better with practice.
- Fears about confidentiality breaches orchestrated by unscrupulous participants in the safety of their own unmonitored spaces have been largely unfounded in practice and can be mitigated by on-line “surveillance” techniques.
- Fears about not establishing a bond/not looking into the “whites of the eyes” of a testifying witness are also overstated, and can potentially be mitigated by certain fixes, such as better equipment.

Similar efficiencies and benefits apply to more traditional court hearings, which has led many lawyers and judges to forecast continued use of remote hearings in favor of in-person trips to the courthouse to argue motions or handle other pre-trial tasks.⁶ Much like the benefits associated with remote mediation and arbitration, fully embracing technology for remote hearings will reduce added travel costs and inject increased flexibility for the parties. No doubt, there are welcome benefits for participants in a judicial system that is often expensive and inflexible.

Some within the judicial system have noted another benefit to remote hearings and other proceedings: increased access to the system itself. Take Texas again as an example of this increased access—one state official estimated pre-pandemic non-appearance rates of 70% to 80% for eviction cases, child-support hearings, and traffic court.⁷ Post-pandemic, those numbers have inverted, with over 80% of litigants appearing in those cases.⁸ Increased access to the judicial system should be celebrated, and lawyers and judges should strongly consider continuing

⁴ Michelle Casady, *Texas Judges See Lasting Benefits from Pandemic Practices*, March 11, 2021, <https://www.law360.com/articles/1362923/texas-judges-see-lasting-benefits-from-pandemic-practices>.

⁵ *Id.*

⁶ Michelle Casady, *Texas Judges See Lasting Benefits from Pandemic Practices*, March 11, 2021, <https://www.law360.com/articles/1362923/texas-judges-see-lasting-benefits-from-pandemic-practices>.

⁷ *Id.*

⁸ *Id.*

to use remote platforms for certain proceedings if it means increased participation from ordinarily marginalized or disengaged groups.

Some participants in remote hearings do not harbor the same optimism for continued use of a remote platform and often point to the many inadvertent distractions and interruptions that have become a routine part of remote meetings taking place within the hustle and bustle of the ordinary American household.⁹ That is just factoring in the inadvertent or (mostly) unpreventable distractions associated with working in close proximity to children and pets. We have also seen no shortage of horror stories wherein hearing participants make very poor choices during the hearing itself in full view of the judge and other litigants.

A survey of just the most-recent notable departures in decorum gives a flavor of just how different a world of remote court proceedings is from our pre-pandemic norms. For example, a litigant appeared for a hearing from an operating room (while participating in the operation),¹⁰ a defendant appeared naked or at the very least partially clothed,¹¹ a litigant appeared in her bikini while poolside,¹² a lawyer smoked a cigar while cases were being called,¹³ another lawyer drank wine while (unbelievably) appearing during a hearing about a parent's drinking problem,¹⁴ and a defendant appeared with his meth pipe visible on the table behind him.¹⁵ These are just a few of the seemingly innumerable examples of lawyers and litigants dispensing with typical courtroom decorum during remote proceedings.

The utility and viability of long-term use of remote platforms for formerly in-person judicial proceedings is quite clearly still up for debate, but even with additional vaccine availability, we are still a long way from a return to pre-pandemic normalcy. It is important for lawyers, judges, and litigants to continue familiarizing themselves with the ins and outs of remote platforms and continue learning how to streamline the dispute resolution process as new and better remote capabilities become available. This paper aims to aid in that conversation.

⁹ *Id.*

¹⁰ Debra Cassens Weiss, *More Zoom issues in court hearings: Doc joins from operating room, defendant is naked from at least the waist up*, March 1, 2021, <https://www.abajournal.com/news/article/more-zoom-issues-in-court-hearings-doc-is-in-operating-room-defendant-is-naked-from-at-least-the-waist-up>.

¹¹ *Id.*

¹² Debra Cassens Weiss, *Lawyers smoke cigars, drink wine during Zoom hearings; litigants appear from hair salon or while driving*, February 16, 2021, <https://www.abajournal.com/news/article/lawyers-smoke-a-cigar-drink-wine-during-zoom-hearings-litigants-appear-from-hair-salon-while-driving>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

GENERAL TECHNOLOGICAL CONSIDERATIONS

A. Preparing Yourself for Technological Hiccups

Depositions, motion hearings, and, of course, trials play a pivotal role in the judicial process. A constant theme throughout this paper is the importance of selecting the best remote technology platform to utilize. Sometimes this selection is completely within the control of the party (i.e., for depositions, the noticing party will select the platform) and must be made with care. On the other hand, there are instances where platform selection is entirely outside both parties' control (i.e., for hearings and trials, the court will select the platform). It is incumbent upon the lawyers in any dispute to be familiar with as many of the standard remote platforms as possible to ensure they can remain technologically conversant no matter the platform selected.

Currently, there is a suite of platforms that can all serve as the remote space to conduct depositions, hearings, and trials: Zoom, Microsoft Teams, Skype for Business, Webex, and others. Each platform has its own individual benefits and shortcomings. However, it is largely a matter of preference and, ultimately, familiarity with the platform itself, which typically drives the choice of platform. As it stands, and as noted earlier in this paper, Zoom appears to be the most widely available and most popular platform for remote dispute resolution, but each of the aforementioned platforms no doubt has its supporters.

Regardless of the platform chosen, familiarity with it is critically important to make the process of mediation, taking the deposition, arguing a motion, or trying a case as seamless as possible. If you are unfamiliar with litigating on a given platform, an internal "dry run" would be highly beneficial for the practitioner (and the client, if he/she is being deposed or providing trial testimony). A dry run with counsel and a mediator is key to a Zoom virtual mediation, particularly if counsel is not familiar with the technology platform. Counsel can experience the use of breakout rooms, determine the methods to access the mediator to join their breakout room, how to leave the breakout room or the meeting (and then return), and feel comfortable it is a secure environment to ensure confidentiality of any discussions with clients in the rooms. Knowing the functionality, features, and shortcomings of each platform ahead of time is essential.

It is also crucial to have a back-up plan in advance with counsel and mediator in the event of a technology failure. What happens if the power goes out or internet connectivity is lost? If a contingency plan is prepared in advance, the mediation can move on without interruption. Having parties, counsel, and mediator download the Zoom app on their mobile phones is one way to address and avoid an interruption. There are limitations on the functionality of breakout rooms using the mobile app, so everyone needs to be prepared on how to go forward in case this occurs. Although less than ideal, it can avoid a long delay or unfortunate interruption. In addition to your familiarity with the platform, it is essential for anyone assisting your presentation to be familiar with the platform as well. For example, if your focus is taking the deposition, it would be in your best interest to have someone else, for example, a paralegal, oversee the handling of exhibits, along with any technical issues that may arise so that you can focus on conducting the deposition effectively.

As we have all come to learn over the past year, glitches and other malfunctions with remote platforms are seemingly inevitable. Although there are measures one may take to mitigate the chance of a technology malfunction while attending a deposition, hearing, or trial, such as connecting to the internet through a direct line instead of Wi-Fi or doing a practice run ahead of time, it is nearly impossible to eliminate all chances of error. Even the most prepared attorney can have their computer crash, leaving them cut-out from the remote meeting.

Attorneys are not the only ones susceptible to malfunctions; witnesses, court staff, and even the judge may experience difficulties that cause the proceedings to be delayed. A drop in internet connection at the wrong time can cause serious issues. For example, consider the problems that would arise if the court reporter is the one having technology issues. Some court reporters prefer to have their camera off so that they may see the judge and parties, but the judge and parties may not see the reporter. If the reporter's feed of the hearing is interrupted, it may take minutes for them to fix the situation. In that time, important testimony may come from a witness that the record will not reflect. At worst, this could have a material effect on the case.

However, technology tends to provide more benefit than the detriments the risks pose. Proper preparation may not eliminate risk, but it mitigates the possible downsides. For instance, similar to a deposition, the court reporter for a hearing or trial could take steps to eliminate the risk of missing important testimony by also recording the proceedings with the video conferencing software. Zoom allows the host of the meeting to record the duration of the hearing while notifying others of the recording with the display of a blinking red light in the corner of the screen. This would preserve portions of the record that a party may miss due to technology issues.

Rather than relying solely on technology as a safeguard to technology issues, it is helpful to take additional steps. Attorneys should consider having a backup computer they can switch to if they lose connection. This would allow for a quick fix to a connection issue that would allow the proceedings to continue seamlessly. This applies to witnesses and others involved in the hearing as well.

B. The Loss of Non-verbal Cues

A crucial part of arguing before a judge or examining a witness are the non-verbal cues to which lawyers can read and react. Those are difficult to replicate during remote hearings and could significantly diminish the quality of the argument or examination. Unfortunately, this is not something easily mitigated through additional preparation on the attorney's behalf. It is difficult to read the actual cues exhibited.

This can also affect the judge. Judges are professionals when it comes to analyzing the character of those that come before them. Little things the witness might subconsciously do, like fidgeting with their fingers when asked about certain issues, may send signals to the judge about the credibility of the witness or the veracity of a particular answer. When limited to the remote online forum, the judge is generally restricted to only being able to view the upper torso and head of the witness. As a result, any nervous leg shaking, thumb twirling, or exaggerated perspiration may go unnoticed.

Non-verbal cues are like a second language to litigants; a second language that is necessary for litigants to perform to the best of their ability. Fortunately, no one attorney has an advantage over another when it comes to the lack of non-verbal cues in the online forum. This may impact the administration of ultimate justice.

DEPOSITIONS

A. Presentation of Exhibits

It is impossible in a remote space to hand an exhibit to a deponent, so the presentation of exhibits requires more advanced planning, nuance, and finesse. Where in a physical space you can point to a line of text on an agreement or put a pin on a poster-board map, in a remote space you are generally limited to your mouse cursor and whatever tools the particular software application displaying the document (i.e., Adobe Acrobat, Microsoft Word, etc.) will provide. This offers mixed results.

What is essential and good practice, however, is that counsel pre-mark every exhibit and send them to the deponent and/or opposing counsel before the deposition takes place. Consult the applicable court for Administrative Orders regarding remote evidentiary hearings and depositions. Depending on the jurisdiction, pre-deposition transmission of exhibits might be a requirement. However, it is worth considering this practice as a courtesy.

Pre-marking and sending exhibits to the opposing side offers predictable benefits and drawbacks. On the positive side, it increases efficiency and lessens the dependence on technology. If the remote platform fails for any reason, opposing counsel and the witness will have physical copies of the exhibits upon which they can refer.

However, there are obvious, stark disadvantages to sending exhibits ahead of time. First, and most importantly, you lose the element of surprise when presenting documents and exhibits. If you were to send opposing counsel your “smoking gun” exhibit, it will immensely dampen the blow and shock of its production during the deposition. It also allows your opponent to prepare the witness accordingly and, often, invites a choreographed response from the witness. Further, it is impossible to control a deponent’s “line of sight” with certain documents. In other words, it is difficult—if not impossible—to focus a deponent’s attention if they are in physical control of the document as opposed to the party conducting the deposition. They also have the chance to review the document in advance, which can distract them from specific lines of questioning. Additionally, another drawback to consider is any potential confidentiality issue with third-party deponents. In this case, a good practice is to move for entry of a confidentiality order or reach independent agreement on the handling of confidential materials.

A hallmark of remote platforms like Zoom is the “screen-share” function. Screen-share allows a presenter—or in this case the attorney taking the deposition—to mirror a window on his/her computer. In most cases, this will be a PDF viewer or other image software. The questioner can also use screen-share to play videos or audio recordings. Screen-share has become essential for remote depositions because it allows everyone in the deposition to look at the same document, including the court reporter.

Screen-share also has other benefits. The function allows the questioner complete control over exhibits and, thus, what the deponent is able to see. Unlike a physical exhibit, when sharing the screen, the party taking the deposition can use tools or cursors to highlight and point out parts of an exhibit that the deponent should focus on. For example, programs like Adobe Acrobat or Apple's "Preview," allow the user to highlight or select specific lines of text in a document. Further, screen-sharing maintains the element of surprise previously discussed. Lastly, parties can avoid many confidentiality issues because the documents and exhibits are not changing hands.

However, screen-sharing does have some drawbacks. Because of the functionality of screen-share, it is possible to "over-share" the screen. For example, if not correctly executed or prepared for, some windows or icons can be left visible. Caution should be taken not to "over-share" or inadvertently display emails, documents, deposition notes, and other confidential or attorney work-product. Additionally, because screen-share utilizes the platform's technology, it is subject to any and all technological or digital glitches and errors. Finally, some attorneys or deponents who are not familiar with digital media may become distracted by trying to utilize the features of screen-share.

Some court reporters are also equipped and able to present exhibits via screen-share. In these cases, the deposing attorney would need to pre-mark the exhibits and send them to the court reporter. Some advantages of this exhibit presentation are that the attorney can focus on questioning the witness and also retain the element of surprise. However, giving the court reporter the exhibits in advance necessarily limits the manner in which an attorney can utilize exhibits. For example, absent instruction from the examining attorney, instead of presenting exhibits as they become relevant, a court reporter will likely be only capable of bringing up the exhibits in the order that they have been marked. This would come into play in cases where lines of questioning naturally flow into other exhibits that are not necessarily in the order they were marked. Additionally, this method of presentation requires that the court reporter be versed in technological skills and be familiar with the platform being utilized to take the deposition.

In all, the presentation of exhibits using a remote platform can vary depending on the attorney's preference and comfort with use of the remote platform. Regardless of the route taken, it is critical to consider using a platform that simultaneously displays both the exhibit and the deponent's face. Capturing the deponent's physical reaction to certain documents and questions is a quintessential part of depositions. This element can be lost in remote settings if not carefully accounted for.

C. Defending the Deposition

As with any deposition, it is important for an attorney to prepare their client for the rigorous process and the lines of questioning that opposing counsel will ask. Experienced attorneys should not materially alter the approach that they utilize to prepare their clients for a deposition solely because of the format in which the deposition is taking place. However, what is important to consider in defending a deposition in a remote space are the potential pitfalls that come with it.

Counsel and the witness should consider a variety of factors when deciding how to attend a remote deposition. An obvious starting point is to conduct the deposition in an area that will afford ample space for a monitor and potential exhibits. Additionally, it is important to consider the background of the video. Heavily traveled areas in the home or views of a window are places to be avoided. So, too, are backgrounds with dirty laundry, dishes piled on the counter or in the sink, a messy room, or a disorganized office. The background of your video can distract all parties.

Another important consideration for a remote deposition is attire. It is no secret that many people during quarantine and lockdown have dressed professionally only from the waist up. Because of camera angles, it has become commonplace for individuals to dress differently for virtual meetings. As with any deposition, it is important for the witness to dress well. The witness does not necessarily have to dress in a suit and tie or dress, but they do have to look presentable for what their camera will be showing. If the witness plans on getting up and moving around the room, you should advise them to make sure their wardrobe for that day is complete. Etiquette and appropriate dress are important just as an in-person deposition.

Communication is key when defending a deposition. Because of the nature of virtual platforms and reliability of internet connections, breakdowns in communication can occur. Objections may go unheard, or the witness may answer a question and divulge privileged information. Because of this, counsel should make sure that they can communicate with their clients securely during breaks. In addition, it is important to have a secure internet connection that is stable, and preferably hard-wired into your computer. This facilitates smooth connection and ensures that any objections or comments you need to make while defending the deposition are heard.

It is important, also, to make a habit of muting your microphone and turning off your video unless you are on the record. There have been plenty of video clips from court hearings of attorneys swearing at opposing counsel or complaining about arguments. Muting your microphone when not speaking is important to avoid embarrassment, or worse, sanctions.

Lastly, in order to communicate with your client on breaks, make sure you have a secure and separate location, outside of the room where the camera is, that you can communicate. This is to avoid any breaches of confidentiality in the off chance that a microphone goes unmuted during a break. It is a good general practice to turn off video and mute microphones for the duration of any breaks.

D. Final Considerations for Depositions.

It is important to brief everyone on your team to prepare for technical glitches so they do not derail the deposition. Losing an internet connection with a witness, court reporter, or opposing counsel can potentially halt the deposition process. In these circumstances, it is important to develop a plan of action with your team and with opposing counsel in order to address hiccups. Sharing telephone numbers of all involved in the deposition in advance can ensure contact in the case of glitches. Come up with a plan for dealing with connectivity issues such as who will take the lead in contacting the client, opposing counsel, and the court reporter to notify them of problems and get things back on track. In that vein, make sure to keep contact

information for the videographer and the court reporter. This will ensure that the record stays clean in light of a potential technical difficulty.

It is also advisable to come to an agreement with the opposing party on how to treat delays for purposes of deposition time “on the record.” In the worst-case scenario, the deposition may have to be postponed. Make sure to have contingency plans in place in order to exercise all alternatives before having to postpone the deposition. Additionally, you should consider recording the deposition in the event that the court reporter loses connection without notifying the parties. This would allow preservation of the record of questions asked and answered.

You should also recognize that witnesses can use technological excuses to dodge questions or delay questioning. Be wary of uses of phrases like “you’re breaking up,” and the frequency of which they are used. Take note of when the witness uses those phrases. Are they in response to particularly difficult or pressing questions? Is the witness pausing before answering? Consider how you will handle this situation in advance. For example, if it becomes obvious, counsel should request the witness to hard-wire their connection to the internet. If it continues to persist, counsel could ask opposing counsel to verify their client’s internet connection.

Given the limitations of virtual platforms, it is important to recognize the diminished value of theatrics and confronting the witness. Body language is less important because counsel and witness are not in the same room as the deponent. The witness, in a virtual setting, has more control. He/she gets to choose their surroundings, lighting, and atmosphere. They will likely make their surroundings comfortable for them, which will affect their demeanor throughout the deposition. It is key to be aware of this and plan how to control the deposition. Remember that tone and phrasing are especially important in virtual depositions. Lastly, a clear record is most important. It is best to keep virtual depositions as streamlined and clear from a recording perspective as possible.

Finally, remember that a virtual deposition is still a deposition: a critical part of the overall discovery process not to be diminished just because it is virtual. Additionally, strategies and lines of questioning, although specifically tailored to the venue of a virtual platform, should not greatly differ from an in-person deposition. Virtual space allows for more comfort and accessibility but also offers unique considerations and obstacles that must be addressed as present themselves.

MOTION HEARINGS, PRE-TRIAL PROCEEDINGS, AND TRIALS

A. Introduction

Trials are, in essence, a form of theater. Lawyers are on stage performing to persuade the judge or jury. Witnesses are, in their way, performing to convince the fact finder of their credibility and truthfulness. Public proceedings which observe norms of due process are a critical element of our system of self-government. Like most of the other aspects of litigation discussed in this paper, the COVID-19 pandemic has disrupted our ability to conduct live, in-person trials.

However, remote trials come with significant concerns—some practical, others constitutional. The practical concerns are obvious. Despite all of its efficiencies, modern technology is still fraught with issues that are difficult to anticipate and address. From internet connectivity to unexpected and (sometimes) unwelcomed in a video background, it is difficult to guarantee a seamless, uninterrupted virtual proceeding of any kind. The seriousness of a trial compounds these challenges.

The pandemic has forced government agencies at all levels to make adjustments and transform how they do business to ensure people maintain social distance. Courts are no different. In-person proceedings quickly transitioned into conducting court business entirely online, which requires a myriad of logistical considerations; training for judges, court staff, and litigants; and new tools to allow hearings to remain open to the public.

Similar to depositions, video streaming platforms have quickly become a staple in the now distanced legal community. Florida courts, for example, have embraced the move to the online format, not only to comply with health concerns, but also to accelerate modernization efforts. Before the pandemic shut the physical doors to the courtroom, courts had already begun to modernize by allowing for electronic filings, using online dispute resolution (ODR) and other tools to increase efficiency and ease access for litigants. Now, almost a year into the pandemic, there is already a wave of newly licensed attorneys whose courtroom experience is limited to the virtual setting. Many courts now provide tips and guidelines for Zoom conducted hearings. The tips are usually located on court websites and inform both litigants and the public of ways to have a successful hearing, including suggestions on how to position the camera and lighting.

Anyone who has participated in a remote meeting is aware of the issues with communication. If more than one person is speaking, it becomes increasingly difficult to discern who is saying what, leaving the judge to have to interject. Not only does this break up the flow of the argument for the litigants, but it also makes the court reporter's job more difficult. This may be one of the more detrimental factors in conducting hearings online. Having an accurate record of the testimony before the court is essential for ongoing litigation. Internet, communication, and other technological issues impose a threat to the court reporter's ability to hear clearly what is being said to create an accurate record.

There have also been concerns with the ability to safeguard sensitive matters. The shift to online access to the courts from remote locations has made it more efficient for litigants but has also raised security concerns for all. Although most court documents are made public, certain issues that are confidential face a higher risk of exposure to third parties where it is not always guaranteed that the only person on the other side is the individual in front of the camera.

Regardless of these issues, the online forum will likely outlast the pandemic. The shift online has increased efficiency; litigants are no longer required to go through the physical motions of making their way to the courthouse, parking, and shuffling through security with documents in hand to argue a motion within a fifteen-minute time slot. The dead-weight time spent commuting to the court is now new-found time—a rare and valuable resource. Attorneys have the ability to work on matters up until the Zoom screen turns from black to small boxes populated by court staff and the opposing counsel. After the screen turns back to black and the

hearing has concluded, attorneys are already where they need to be to take on their next matter instead of having to make their way back to the office from the courthouse. These small periods of time each day may not seem like much, but over time the aggregate allows for an increase in productivity by eliminating once unavoidable tasks. The courts' technological advancements have had their effects on all aspects of motion hearings in both positive and negative ways.

B. Pre-Trial Considerations¹⁶

1. Software Platforms

As with motion hearings, the software platform that will host the trial will most likely be entirely of the court's choosing. The most popular platforms for trials appear to be Zoom®, Microsoft® Teams, and Skype® for Business. At this point in the court system's foray into virtual trials, it is likely the court has a preferred platform, but if given the opportunity to provide input, a lawyer should press for the platform they are most comfortable with and have the most experience operating. The value of experience and comfort with a platform cannot be understated.

2. Presenting Evidence

As previously noted, remote communication is far from seamless. It can be glitchy, disjointed, and, quite frankly, difficult to pay attention to for long periods of time. The challenge of the trial lawyer is to ensure that the difficulties of communicating remotely do not hamper our ability to zealously advocate on behalf of our clients.

Successfully limiting the impact of these difficulties begins long before jury selection or opening statements. For many experienced trial lawyers, the back and forth of evidentiary objections addressed in person is a useful tug-of-war exercise that can help influence the broader arc of the trial beyond just arguing the objections on the merits. Hashing out evidentiary objections can be another facet of the broader performance of a trial. Born out of decades of television legal dramas, for many laypeople a lawyer's interjection of "I object!" into her opposing counsel's well-crafted soliloquy, and the judge's authoritative decision of "Sustained" or "Overruled," is the most readily identifiable part of the judicial process.

Unfortunately, the push and pull of evidentiary objections does not lend itself to remote platforms. These exchanges can further lead to disjointed, confusing process and deplete both sides of any competitive persuasive advantage. Because of this, lawyers preparing for trial should strongly consider working with opposing counsel and the court to litigate evidentiary objections before trial through written motions and formal hearings, rather than saving them for trial. This

¹⁶ The "Pretrial Considerations" and "Considerations for Trial" sections of this paper were prepared using input received through the interviews of Norman C. Ankers, Partner, Foley & Lardner LLP and Jarren N. Ginsburg, Associate, Foley & Lardner LLP. The authors are grateful for the valuable time and insight both provided.

will allow the parties and the court to give important evidentiary issues their proper attention outside the boundaries of a trial process with a newly heightened, remotely induced level of stress. Litigating evidentiary issues before trial has the added benefit of focusing the judge and jury on witness examinations and the parties' substantive cases during the trial.

Beyond evidentiary objections, the typically highly choreographed process of introducing and publishing exhibits to witnesses and juries adds another level of complexity, uncertainty, and stress to the remote trial process. A well-choreographed exhibit introduction during a witness examination (especially cross-examination of a hostile witness) can create the dramatic moments that every trial lawyer chases.

The process of creating those moments in the era of COVID-19 must begin long before trial and now requires the input of more than just a lawyer's own trial team. In some ways, though, the process of presenting exhibits during hearings and trials has become more favorable for the litigant. Rather than simply handing the judge a physical copy of a document and reading the relevant portion into the record, litigants are able to share the document on screen with the rest of the room and engage in real-time acts, such as highlights and circling relevant parts. Although this seems minor, it is extremely helpful for litigants who are able to focus the judge's attention on what they want the judge to see. Nonetheless, this virtual practice is not full proof. Over the last two hundred years, litigation has rarely changed the way in which proceedings are carried out, and the rushed transition online has taken time to get used to.

Lawyers preparing for trial would be wise to communicate and coordinate early and often with the court clerk who will be responsible for presenting exhibits. Given the difficult circumstances that virtual trials present, many court clerks are happy to permit lawyers to conduct test runs of exhibit presentation to avoid unnecessary hiccups on trial days – some clerks may even be willing to participate in the test runs. Consider whether it makes sense to coordinate beforehand a particular sequencing of exhibits that permit the lawyer to email or message the clerk during the examination and say “please post document X, page Y” so the clerk can present the exhibits precisely as the lawyer wishes without interrupting the flow of the examination. It is difficult to overstate the value of good working relationships with court clerks.

Although it can require another layer of pre-trial planning and preparation, coordinating exhibit presentation with the clerk in advance of trial is a crucial exercise. Doing so can help ensure that lawyers retain complete control over their witness examinations and, with a bit of advanced coordination, can still provide lawyers the opportunity to score rhetorical points and persuade a jury.

Beyond the informal guidance you can receive from court clerks, lawyers should continue to refer to local administrative/judicial standing orders that establish the procedures for the filing and management of exhibits. If they did not before the pandemic, many courts' standing orders may now articulate and impose specific requirements for the parties to exchange exhibits and confer remotely before the hearing in order to ensure the parties can, as much as practicable, stipulate to the authenticity and admissibility of the exhibits before a remote trial begins.

Although this may promote the efficiency of the trial itself, it may be detrimental to the parties' arguments concerning prematurely shared exhibits. With respect to physical evidence, parties may be directed to exchange pictures of the evidence. Parties may also be required to file with the court any objections to exhibits by a specified deadline. Although most hurdles to the online forum are not difficult to overcome, there are many nuances that must be considered ahead of time to assure as smooth a hearing as possible. Fortunately, many courts are actively working to smooth out issues within the courts' control.

Above all, lawyers must do everything they can in advance of a remote trial to ensure that they feel comfortable and prepared. Being prepared in advance of trial is nothing new, of course, but pre-trial activities have taken on a new emphasis this year. Conducting a trial via a virtual platform is new for all lawyers, and with the usual stress attendant to a trial under normal circumstances still present, it is more important than ever that lawyers work to limit the distractions and hiccups that are part-and-parcel of virtual meetings.

C. Considerations for Trial or Evidentiary Hearings

1. Common Sense Tips on Remote Decorum

Courtroom decorum during in-person trials is second nature for the lawyers, parties, and jurors that participate in the trial. The decorum flows naturally from the gravity of trial, the presence of a judge, and the inherent stature and grandiosity of a courthouse and courtroom. Some of this is unquestionably learned behavior, but there is also an instinctual aspect to it all—the moment you step into a courthouse or courtroom, the atmosphere changes and all interactions feel more serious and formal. This built-in formality goes out the window with remote trials, but it is still important that lawyers and litigants treat a remote trial with the requisite solemnity. Abiding by a handful of decorum “best practices” can help ensure this happens.

First and foremost, make absolutely certain before the trial begins that you, your client, and any witnesses you are putting on the stand have: (1) the most-recent version of whatever remote software platform the court is using; (2) a solid internet connection; and (3) working audio and video feeds.¹⁷ In a pre-COVID world, lawyers, litigants, and witnesses were obviously expected to show up to trial on time; having an incorrect or outdated software version installed on your computer or having problematic or inoperable internet connection and audio/video feeds are easy ways to guarantee that you will be late to the remote trial. Do whatever it takes to avoid making a bad first impression.

Lawyers should also consider saving copies of pre-marked exhibits to a location that is easily accessible to them, i.e. saving locally on their own device.¹⁸ Although a court clerk will

¹⁷ See *Hon. Martin Hoffman, Hon. Karin Crump, Hon. Monica Purdy, David Slayton, Remote Jury Trials in the George Allen Courthouse*, Presentation prepared for Dallas Bar Association (December 16, 2020).

¹⁸ *Id.*

likely be responsible for “publishing” the exhibits during trial, there is a chance that the software platform the court uses will not display the exhibit in a manner that makes it easily accessible or easy to manipulate by the lawyer. Having locally saved copies on your device ensures that the witness and jury can view the official version of the exhibit on the software platform while you also have a version for yourself to review, highlight, and otherwise mark up. Fumbling through your briefcase or red-weld folders for an extra copy of an exhibit midway through a witness examination would make you look disheveled and unprepared during an in-person trial. Take care to avoid letting the same happen during a remote trial.

In addition, lawyers and litigants must appreciate that verbal communication via a remote platform is less smooth than in-person communication. It is difficult for all involved to pick-up on the run-of-the-mill non-verbal cues that we use in everyday, in-person interactions. This significantly increases the likelihood of lawyers, witnesses, and judges talking over each other and often results in a staccato rhythm to our video conferences. This does not do any favors to lawyers and litigants. It can appreciably decrease the persuasiveness of your arguments and, perhaps more importantly, makes life very difficult for court reporters. Remember to slow down for the court reporter, do not talk over witnesses or opposing counsel, and be diligent about your use of the “mute” button on the software platform.¹⁹

2. Witness Examination

Witness examination during a remote trial—whether direct or cross—is a completely different experience for all involved. Lawyers do not have the benefit of the aforementioned non-verbal cues to read the witness, which many lawyers may find leads to less control over their own witnesses and fewer dramatic moments when conducting cross examination or impeachment of a hostile witness.

Indeed, if during an in-person trial, a hostile witness says something inconsistent with the record, or a lawyer elicits some other damaging statement, the lawyer (with all of the requisite theatrics) can blindside the witness with an exhibit or prior testimony on a moment’s notice. This element of surprise limits the witness’s ability to react or further couch their trial testimony. In a remote trial, the lawyer’s presentation of the exhibit or prior testimony is often entirely dependent on the court clerk. The time it takes the court clerk to present the exhibit or prior testimony can severely limit the effectiveness of these moments, and there is a real possibility that this delay minimizes the impact of the impeachment on the jury’s view of the witness’s credibility. As previously stated, lawyers should prepare as best they can for this by working with the court clerk on exhibit logistics before trial, but there is still no guarantee that such theatrics will be as effective in a remote trial.

Lawyers should also work with the court to ensure that all parties receive a certain level of assurance that the witnesses called at trial are not receiving outside help or external communications during trial. Admittedly, this is a difficult problem to address—and one which

¹⁹ *Id.*

could not be completely solved without placing a court official in the room with the witness who is on the stand. Nevertheless, parties can move the court to instruct and admonish on the record witnesses of the expectation that he or she will not receive outside communications. A court may also instruct a witness to display the entire room from which he or she is testifying on camera to confirm that no third parties are present.

Lawyers must also consider how to convey effectively the credibility of their own witnesses via a remote platform.²⁰ Removing a jury's ability to perceive a witness's non-verbal cues in person can detrimentally affect the jury's credibility assessment.²¹ Alternatively, remote platforms can have the opposite effect—a video feed will likely mask any nervous tics your witness has (e.g., fidgeting, sweating, foot movement, etc.) that the jury may associate with nervousness or deceit.²² Additional examination practice may be required (preferably on the software platform the court uses) to ensure your witness conveys credibility and allow the opportunity to make necessary adjustments.²³ Higher quality audio reception, a clearer camera lens, or a more professional background setting are just a few adjustments that might help increase the perception of credibility.²⁴

Counsel should also ensure that the parties are able to conduct witness examinations on a level playing field. Unsurprisingly, some judges are doing what they can to host some aspects of trial in person rather than virtually, which has included judges requesting that local witnesses appear in person while permitting remote appearances of witnesses for whom travel is required. This dichotomy can result in significant strategic advantages for one party over the other.

The benefits to a witness of an online hearing are manifest. The witness is no longer required to appear in-person before the court but may attend a hearing from the comfort and convenience of their own home. This makes the process easier on both the litigant and the witness. As it comes time for a hearing, the attorney no longer has to worry about where a witness is and if they will make it to the courtroom in time. Instead, the attorney only needs to make sure ahead of time that the witness has the appropriate login information for the applicable remote platform and that they will have access to a computer with internet connection at the appropriate date and time. These requirements are much less of a burden on the litigant than having to facilitate the witness appearing in-person before the court.

However, giving the witness the ability to appear from a remote location may give rise to some challenges. For starters, it can be more difficult to prepare the witness for the hearing. This assumes in person preparation is not possible due to geographic distance or COVID-19 concerns. Rather than having the witness physically present, which allows the attorney to assess fully how

²⁰ See Christopher Green & Sara Fish, *Tips For Presenting A Credible Witness by Videoconference*, Law360, July 6, 2020, <https://www.law360.com/articles/1288879/tips-for-presenting-a-credible-witness-by-videoconference>.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

the witness responds both verbally and non-verbally, the attorney must get a feel for their witness over the internet.

Remote hearings also place additional responsibilities on the witness. The witness must make sure their equipment works properly, obtain the Zoom meeting ID and password, obtain a copy of exhibits and documents, and professionalize their surroundings to be an appropriate setting for a court appearance. Although each requirement seems minor in comparison to the amount of work that normally goes into a hearing, the aggregate asks a lot more from the witness. Failure to prepare the witness for these additional steps may cause a pause in the hearing that will come across as lack of preparation and unprofessionalism in front of the court.

Moreover, the attorney can mitigate this risk by adequately preparing the witness for these inquiries from the court and informing the witness of the repercussions that they could face for dishonesty or failure to comply.

If a lawyer faces this situation and will have more remote than in-person witnesses, it is imperative that the lawyer push hard for an adjournment until all witnesses can appear in person or, at the very least, a ruling that all witnesses to appear remotely. There are significant disadvantages to remote witnesses compared to in-person witnesses, and many jury consulting firms are preparing empirical evidence that judges and juries are more likely to decide in favor of parties that present witnesses in person versus remotely.

3. Jury Considerations

Jury service can also be complicated in the world of remote trials. There is the very real possibility that remote jury service could work to diminish the socioeconomic diversity of the juror pool. Although most lawyers have ready access to an internet connection and a suitable location from which they can participate in a video conference, many potential jurors may have insufficient internet access, incompatible devices, or live in close quarters without a suitable private location from which to serve. Additionally, with many school children attending class remotely, jury service may still be impractical for some parents or guardians given their childcare duties during typical trial hours. All of this could lead to a more homogenous set of potential jurors.

Because of this, lawyers and judges should consider taking steps to ensure a diverse juror pool remains intact. One court was willing to provide iPads and mobile hotspots to jurors to ensure internet access and device compatibility with the remote software platform.²⁵ That same court also dedicated specific time before the start of the trial for jurors to raise technology issues so the court's IT personnel could sort those out in advance of trial.²⁶ This is just one example of the types of efforts that can ensure the diversity of juror pools remains intact.

²⁵ See Hon. Martin Hoffman, Hon. Karin Crump, Hon. Monica Purdy, David Slayton, *Remote Jury Trials in the George Allen Courthouse*, presentation prepared for Dallas Bar Association (December 16, 2020).

²⁶ *Id.*

D. Constitutional Considerations

The Sixth Amendment’s Confrontation Clause provides that “in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” Remote testimony is not an issue novel to the COVID-19 pandemic, and courts do not view the Sixth Amendment right to confrontation as absolute.²⁷ Indeed, the U.S. Supreme Court has acknowledged as much three decades ago in the context of permitting testimony via one-way closed-circuit video in criminal trial. *See Maryland v. Craig*, 497 U.S. 836 (1990). The *Craig* test that emerged guides courts considering whether remote testimony complies with the Confrontation Clause.²⁸ That test requires courts grappling with the issue of remote testimony and the Sixth Amendment to: “(1) hold an evidentiary hearing; and (2) find: (a) that the denial of physical, face-to-face confrontation at trial is necessary to further an important public policy and (b) that the reliability of the testimony is otherwise assured.” *See U.S. v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006) (applying the *Craig* test to two-way video conference testimony).

Answering the questions the *Craig* test poses have become commonplace in the context of testimony from victims of child abuse where courts have permitted victims of child-abuse to testify against their abusers through one-way video technology so they are spared having to see them. *See Craig*, 497 U.S. at 853. Questions arise, though, about whether *Craig* and its progeny ought to confine themselves only to such extreme situations.²⁹

The considerations inherent to preserving a criminal defendant’s confrontation rights do not begin and end with whether the victim is a minor or whether the video feed is one-way or two-way. Attorneys and judges must also ensure that, no matter the medium of trial, defendants have a legitimate opportunity to cross-examine hostile witnesses.³⁰ There is no doubt many schools of thought about whether a cross examination conducted via Zoom®, Microsoft® Teams, or Skype® for Business constitutes a legitimate opportunity to cross examine such that the Confrontation Clause was satisfied.

Most importantly, judges and parties should not let remote trials stand in the way of access to the judicial system. The parties and the court should have candid conversations concerning the efficacy of a remote trial—whether that be a bench or jury trial. Attorneys must also always keep their clients’ best interests in mind and should prepare to object to any remote trial platform that, in their honest professional opinion, will not afford their clients a fair trial.

²⁷ Michelle Bradford & David Frazee, *Defending the Right to Confrontation in Virtual Criminal Trials*, Law360, October 1, 2020, <https://www.law360.com/articles/1315557/defending-the-right-to-confrontation-in-virtual-criminal-trials>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

MEDIATION

In mediation, the use of Zoom or its equivalents has allowed cases to proceed, often to resolution, at the same rates of cases mediated in-person. Without embracing remote technology, think of all those stepped dispute resolution provisions in franchise agreements that require “face-to-face” high-level meet and confer and/or mediation as a condition precedent to institution of more formal proceedings. If we did not proceed with remote proceedings, we would be stuck at airports, or worse, insisting upon unsafe personal contact.

Undoubtedly, some parties have insisted, at least until travel and meetings were limited, on old requirements like face-to-face meet and confers. That begs the question of whether such demands arose from the efficacy of face-to-face contact as a resolution tool or merely a show of old-fashioned power in the relationship. One of the paper’s authors, who is a mediator, advises that beginning in May 2020 to date no one has made a serious demand for an in-person mediation, and almost all have stopped deferring dispute resolution until a return to “normal.”

Similar to other remote proceedings, mediations can present technical and other logistical challenges requiring patience from all participants. Our mediator author happily reports that civility and good behavior by lawyers (often in short supply pre-pandemic) are in no short supply in pandemic-time mediations as we all wrestle with new and old technology hurdles.

While Zoom is not perfect, its ease of use is perfect for dispute resolution of franchise disputes. When face-to-face must precede mediation, Zoom allows that to happen with little or no expense. The remote option allows flexibility in timing that may advance the timing of resolution, and it dispenses with requirements that force parties to travel to distant corporate headquarters or other locales specified in dispute resolution provisions as a pre-condition to bringing a claim.

Parties with fewer resources often view these requirements as an added and unnecessary expense and as potential obstacles to resolution. Key decision makers on either side or those individuals with particular knowledge of certain matters of a dispute (e.g., a Training Director or Chief Operations Officer) can join from any location and participate more readily regardless of their other travel commitments or obligations. This is especially true if such person is only needed for part of a face-to-face meeting or actual mediation.

Zoom allows these face-to-face meetings to happen without the typical costs and burdens in-person meetings impose. As a result, if the parties are prepared and come in good faith to a remote mediation, such a format can often provide the best and most efficient path to resolve a dispute. Even if early dispute resolution is not mandated through agreement as precedent to litigation, parties may become more willing to consider early, remote mediation given the advantages.

Trust building is an important element of dispute resolution. For those who complain about not being literally in the same room, there is an intimacy that a Zoom screen facilitates, particularly if large enough. Two people looking only at each other, not distracted by what else

is going on around them and speaking directly to each other is a powerful force that is not available in an in-person deposition or hearing. Remote conferencing allows the principals of disputing parties the ability to meet more frequently than if they were both traveling to a distant locale for an in-person mediation. Pre-meeting communications with the mediator, or among counsel, to break the ice, or establish ground rules are easy over Zoom or other remote platforms. Remote mediation also preclude travel plans from truncating negotiations, which may lead to settlement in order to catch the last flight home.

Most importantly, Zoom affords the use of confidential breakout rooms, which allow the parties and counsel private space to confer that even the mediator cannot access without announcement. Zoom affords counsel the ability to leave the breakout room and join the mediator in the main session room to confer solely with the mediator or with opposing counsel outside the presence of their clients if prudent. Parties can do the same if they wish to confer face to face with the other party directly on a specific point. The mediator controls opening and closing the breakout rooms and assigning individuals into the franchisor and franchisee respective breakout rooms to insure privacy and confidentiality.

At certain times during the mediation, the parties and counsel may wish to come all together to address key matters. The mediator can close the breakout rooms and return everyone into the same main session room used at the very outset of the mediation. Often such interactions can facilitate a breakthrough. Similarly, the mediator can then reopen the breakout rooms, move the parties back into their confidential breakout room, as appropriate, to continue caucus or discuss final settlement options.

Similar to the discussion that follows in the section on depositions above, Zoom affords the mediator, lawyers, and the parties to share their screen with participants while in the breakout rooms or the main session. It can be used to share relevant case law or statutory clauses. It is perhaps even more helpful when settlement proposals are on the table. Parties and counsel can present proposals or multiple options in a word document or excel spreadsheet to the mediator in the breakout room using a shared screen. Those documents can be emailed to the mediator who can then share them with the other side. Counter proposals by the other side can be added to such documents with modifications easily and clearly positioned. This can mitigate against inadvertent miscommunication to the mediator and more so assist the mediator in precisely conveying all of the terms of the various offers, counteroffers or component proposals throughout the course of a lengthy mediation. Seeing the terms articulated in writing makes it clearer for everyone in the mediation. If settlement is achieved such a document can be referenced and even attached to the Settlement Memorandum.

Remote breakout rooms and shared screens do not replace serendipitous meetings between participants at a physical venue, but they are a key component in the efficacy of Zoom as a mediation tool. While we all have suffered through inconveniences in the pandemic, those honestly interested in resolution, as opposed to victory at all costs, are well served by Zoom.

ETHICAL IMPLICATIONS OF REMOTE WORK

A lawyer's participation in a remote trial—as well as remote work more generally—raises important ethical issues related to the unauthorized practice of law in jurisdictions wherein the lawyer is not licensed. Although some states have proactively issued guidance on this topic in the wake of the COVID-19 pandemic, formal rules on the topic remain patchwork at best.

American Bar Association (“ABA”) Model Rule 5.5 provides that a lawyer engages in the unauthorized practice of law when practicing remotely for longer than a temporary period of time from a jurisdiction where he or she is not licensed to practice. Most states have adopted some analog of Model Rule 5.5.

COVID-19 has ushered in a new wave of thinking about Model Rule 5.5, and many lawyers have pushed for states to modify their analog rules to acknowledge the remote-work flexibility that the pandemic has required.³¹ With much of the legal profession now working remotely, it is inevitable that some lawyers will practice on a more permanent basis from jurisdictions where they are not duly licensed. Requiring these lawyers to travel to the office in the midst of a global health crisis lest they be the unwitting recipient of an ethics complaint seems like a draconian (and, potentially, dangerous) result. Thankfully, the ABA and even some states have addressed these concerns, both formally and informally.³²

Late last year, the ABA Standing Committee on Ethics and Professional Responsibility issued a formal opinion concerning Model Rule 5.5 that clarified the purpose of the rule.³³ The Committee wrote, in part, that the rule's intent is “to protect the public from unlicensed and unqualified practitioners of law.” See ABA Formal Op. No. 495. The Committee added the rule's “purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed.” *Id.* Of course, ABA opinions are simply advisory, and unless specific states adopt similar opinions or modify their rules of professional conduct, lawyers should not assume that their local Office of Lawyer Regulation agrees.³⁴

In August 2020, the Florida Bar's Standing Committee on the Unlicensed Practice of Law issued a draft advisory opinion consistent with the ABA's formal opinion.³⁵ The Florida Committee agreed that a lawyer “who simply establishes residence in Florida and continues to provide legal work to out-of-state clients from his private Florida residence” as a result of the

³¹ Lyle Moran, *Ethics attorneys hopeful COVID-19 will prompt changes in remote working rules*, ABA Journal, December 28, 2020, <https://www.abajournal.com/web/article/ethics-attorneys-hopeful-covid-19-will-prompt-changes-in-remote-working-rules>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

COVID-19 pandemic “does not establish a regular presence in Florida for the practice of law.” See August 17, 2020 Draft Advisory Opinion, Florida Bar Standing Committee on Unlicensed Practice of Law.

The District of Columbia’s Committee on the Unauthorized Practice of Law issued an opinion titled “Teleworking from Home and the COVID-19 Pandemic” that provided some more detailed guidance to lawyers working remotely.³⁶ That committee explained that lawyers not barred in the District do not engage in the authorized practice of law when they satisfy the following conditions:

- Practicing from home due to the COVID-19 pandemic;
- Maintaining a law office in the jurisdiction where they are admitted to practice law;
- Avoiding use of a D.C. address in any business document or holding themselves out as authorized to practice in the district; and
- Foregoing regular in-person meeting with clients or third parties in D.C. According to the committee, when a lawyer barred in a foreign jurisdiction complies with each of these mandates while practicing remotely in the District, his or her conduct fits within the “incidental and temporary practice” exception to D.C.’s rules on the unauthorized practice of law.

See D.C. Committee on Unauthorized Practice of Law, Op. 24-20, March 23, 2020. Although the ABA, Florida, and the District of Columbia’s opinions do not guarantee that lawyers working remotely across the country are complying with the specific rules applicable to them, they may provide some comfort that ethics regulators are sympathetic to the remote practice of law during the COVID-19 pandemic.³⁷

CONCLUSION

The COVID-19 pandemic has permanently altered many aspects of daily life around the world. Some of these changes will remain after the public health crisis subsides. Litigation is no different. Many of the changes that courts, arbitrators, mediators, litigants, and their counsel have adapted to will survive. The efficiencies and financial savings are impossible to ignore. If there was any silver lining from the pandemic, improvements to how parties resolve disputes is a significant one worth noting.

³⁶ *Id.*

³⁷ *Id.*