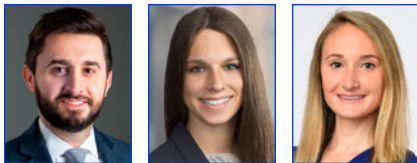


Feature Article

Important Tips for Protecting Your Clients' Interests – Virtually

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We can all agree that these are strange and unprecedented times. We are appearing before federal judges

from our home offices and taking depositions in our sweat-pants. No one could have anticipated the challenges the COVID-19 pandemic would impose on the practice of law, but we as lawyers are adapting and learning, and are doing surprising well—though, of course, not without some blunders along the way.

Perhaps the most commonly used litigation tool to be affected by the pandemic – depositions – are now frequently being conducted virtually via Zoom and other platforms. With proper preparation, virtual depositions can be efficient and effective, and their convenience may lead to more widespread use even after the pandemic. Some key considerations for virtual depositions include the following:

- **Platform** (Zoom or other). This is typically selected by the court reporter. Attorneys should request a training and a demo session so they can learn and practice logging in, turning the microphone and camera on or off, marking and using exhibits, and other functionalities.
- **Location**. Your physical location, whether home or in office, and the location of the witness (if it is your client or witness) should be determined in advance. Consider whether there is good WIFI, lighting, any background noise, and the visible background of the selected location.
- **Technology**. Ensure that you have a camera, computer or laptop, and good internet and power connections. You should have a test-run to confirm your technology is working, and that you know how to use it.
- **Exhibits**. Prepare your exhibits in advance of the deposition. Some platforms allow you to upload your electronic exhibits to the platform prior to the deposition, while others require you to upload and mark each exhibit in real time using the chat function. Beyond electronic exhibits, consider whether it would be helpful to send the witness or other counsel hardcopies of the exhibits, perhaps with a note that they are not to be opened until

the time of the deposition and on camera. It is important to discuss this option with your client, as exhibits were not typically provided to the opposition prior to a deposition pre-COVID-19.

As with depositions, hearings have been handled virtually since March 2020. All of the preparation is the same, with an emphasis on professionalism. It is important to conduct yourself as if you were attending the hearing in person—deference to the court and ensuring you present yourself as if you were addressing the court in-person. You do not want to be the attorney who makes headlines for being admonished by a court for appearing at a hearing from your bed or poolside. One unique consideration is whether you think it would be beneficial to send the court any hard copies of PowerPoint presentation slides or other materials prior to the hearing. Of course, it is vital to contact the judge and get approval before any materials are sent to avoid any issues related to ex parte communications.

Mediations have also been conducted virtually, and it is important to ensure there is agreement between the parties and the mediator as to the logistics of the session. Ensure that the mediator is capable of having two separate rooms (and computers), or virtual breakout rooms, to keep the parties from disclosing confidential information and discussions that are intended to remain between you, your client, and the mediator.

Undoubtedly the most difficult piece of litigation to execute virtually are trials. As we all know, trials are hard and stressful enough under normal circumstances, let alone in the middle of a global health pandemic. But, in recent weeks, courts have increasingly realized that the show must go on, and they cannot indefinitely postpone trials. Perhaps the most publicized virtual trial that has taken place this year is the *Ricardo Ocampo et al. v. Honeywell International Inc.*, No. RG19041182 trial in California's Alameda County Superior Court. *Honeywell* was an asbestos case involving defective automotive breaks that resulted in a complete defense verdict. Plaintiff, a janitor at an automobile dealership, claimed that his exposure to asbestos caused his mesothelioma. The trial lasted for a week, and the jury deliberated for two days. From the *Honeywell* trial and the few other virtual trials that have gone forward,

some common themes and issues have emerged that you will want to be aware of and prepared for if you are have a virtual trial coming up.

- **Juror Attentiveness.** It is hard to keep a juror's attention in an in-person trial—and it is even harder to do so virtually. In *Honeywell*, there were reports of jurors doing other work while listening to evidence and walking around at various points. Make sure you are doing everything you can to keep their attention, and make sure that someone from your office is recording any abnormal juror activity in case you ultimately need to move for a mistrial.
- **Technology.** This goes without saying, but make sure you test all of the equipment you will be using at trial before trial begins. Everyone knows that technology fails sometimes, but you want to ensure that there are no issues that occur that are within your control. In addition to keep tracking of juror inattentiveness, you will want to make sure you are recording any technical problems that occur. If the jurors cannot hear testimony clearly, or if there is any significant lag time, these are issues that could affect the integrity of the trial.
- **Deliberations.** It is not a given that if a trial is conducted virtually, that deliberations will be virtual as well. In fact, in *Honeywell*, the presiding Judge wanted the jurors to participate in person, but it turned out that the Court's meeting rooms could not safely accommodate the twelve jurors. Consider whether you want to insist on having deliberations take place in person to avoid any prejudice to your client or if you are comfortable with them proceeding virtually.
- **Informal Communications.** Trial does, of course, feel a little more informal when you are doing it from your home or office. This comfort, however, can lead to conversations that would not typically happen in the

courtroom. Be sure that you are conducting yourself as if you were in-person at trial—do not make inappropriate conversation with jurors, the court, clients, or opposing counsel. If you witness any such inappropriateness from any other participant, be sure to record it.

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