

Adapting to Remote Proceedings in the Post-Pandemic Era: Pre-Trial Proceedings

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BY MICHELLE M. BUFANO, JOSHUA KIPNEES AND IAN C. KERR

The country has started to return to pre-pandemic ways after nearly a year and a half of remote work. For litigators, this means that courts are reopening and holding regular in-person proceedings—and come September, many attorneys will formally return to their offices. But to what extent will the virtual tools so essential to pandemic practice remain essential to the litigation process moving forward?

There is little doubt that remote litigation alternatives—which hold the promise of efficiency gains and cost savings for clients and lawyers alike—are here to stay. But the precise contours of the new status quo remain unclear. The existing rules and standards, removed from the exigencies of the pandemic, may allow those technologies to be used only on an opt-in basis by mutual consent or, failing that, a court order based on a showing of necessity. That structure originates from a pre-pandemic world where virtual tools were the exception, not the norm, and therefore offers parties little guidance or clarity in the post-COVID era.

This uncertainty presents a challenge to the litigation process moving forward, although to some areas more than others. Where the existing legal framework leaves decisions about virtual proceedings solely in the hands of parties, there can be a risk that transaction costs may erase whatever efficiency gains might otherwise result from greater



Michelle M. Bufano Joshua Kipnees Ian C. Kerr

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reliance on remote technology. Parties may insist on in-person appearances, or object to others' requests for virtual appearances, for any number of reasons—some legitimate, but others veering into the realm of gamesmanship. The upshot will mean more disputes and motions that are taxing on parties and the courts.

As the legal community works to identify the best fit for virtual technology once the pandemic ends, it should strive for clearer guidelines, and some degree of uniformity, about when remote alternatives are expected or appropriate. In this series, we explore three areas of federal litigation in particular—pre-trial proceedings, depositions and trials—analyzing the pros and cons of virtual technology, the likelihood of unnecessary transaction costs from its use, and the ways in which the federal system might minimize those costs.

This first part of our three-part series begins with a look at pre-trial proceedings. Out of necessity, and in the exercise of discretion in how they manage their

dockets, federal judges decided to call cases virtually during the pandemic. As a result, lawyers around the country logged in through remote platforms for all manner of routine appearances—such as initial Rule 16 conferences and status conferences—as well as more substantive appearances like motion arguments and injunction proceedings.

Conducting these sorts of pre-trial proceedings virtually has significant advantages. They promote substantial savings in attorney time and fees, by dispensing with the need for attorneys to travel to and from court (and wait around in the courthouse) for what often end up being very brief appearances. Even for more substantive hearings, which can necessitate cross-country travel for a number of days, virtual appearances can lighten the effect on clients' bills and improve attorneys' quality of life. Remote capabilities also foster efficiencies, such as making case scheduling easier and improving court access to represented and pro se litigants.

Remote pre-trial appearances are not without their potential downsides. For example, some lawyers may miss the days of sitting in the courtroom and watching preceding calendar calls to get a "feel" for judges and how they handle their cases. Other lawyers, particularly younger ones, may miss opportunities for in-person courtroom experience—big and

small—that can help equip them for larger roles at trial and offer valuable public speaking experience. And with lawyers logging in from their own screens, they may miss opportunities to strike impromptu, face-to-face deals with adversaries in the hallways.

On balance, however, the benefits of conducting pre-trial proceedings remotely may outweigh these modest drawbacks. Indeed, some federal judges have already committed to continue holding civil status conferences by Zoom after the pandemic ends, and others are likely to follow.

It remains to be seen whether remote pre-trial proceedings can be smoothly incorporated into everyday practice. But there are some factors weighing in their favor. The decision to hold routine status conferences, motion arguments or other pre-trial hearings virtually or in person may likely present little controversy in practice. And in any event, whether to proceed in person or via videoconference generally will be a decision for the courts—not the parties—just as it was during the pandemic. Judges have wide discretion in how they control their dockets, and they can, and should, codify their preferences through individual rules of practice. Doing so would set expectations and provide parties appearing before them with clear guidance about when remote proceedings are appropriate, leaving little room



to bicker later on down the road.

Change through judges' individual rules would necessarily be ad hoc, though, potentially resulting in many different procedures around the country and even within the same trial districts. To further clarify for parties what will be expected of them, the Judicial Conference's Committee on Rules of Practice and Procedure might consider stepping in to ensure the rules are promulgated and administered uniformly.

In the next article of this series, we will consider another area of the litigation process—depositions—where existing legal rules have traditionally left it to the parties to sort out whether to proceed remotely or in person.

Michelle M. Bufano is a partner in the litigation department of Patterson Belknap Webb & Tyler, where she represents companies in complex products liability and mass tort litigation. Joshua Kipnees is a partner in Patterson Belknap's litigation department, where he focuses on complex commercial litigation and false advertising. Ian C. Kerr is an associate in Patterson Belknap's litigation department.