



REMOTE PROCEEDING ADVOCACY

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REMOTE PROCEEDING ADVOCACY

By Steven C. Dupré, Carlton Fields, P.A.¹

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MASTER THE TECHNOLOGY SO YOU CAN OPERATE IT BY *YOURSELF*.

The first step to become an effective advocate in remote video proceedings is to make sure you have mastered the use of the technology through which you will be advocating. You must learn to operate the technology *at the same time* that you are advocating your client's position. Being unprepared to present a document via video at a critical moment in the proceedings can have the same deflating effect of getting ready to impeach a witness in open court with a document, and then having to pause for a minute or two to find the document.

1. Do not assume you can just show up at a video proceeding and meet with success.

- (a) Learning remote video technology takes both time and practice.
- (b) This is not as simple as dialing a phone number and announcing your presence.
- (c) You need to arm yourself with both the arguments you plan to make, and the technical skill to present them on a video screen in a credible, competent and persuasive way.
- (d) Do not make the mistake of assuming you can pick these skills up on the fly.

2. Hands on learning – you must learn the App you are using and practice using all features in the App that you will be using.

- (a) Instruction manuals can provide an overview, but piloting any video conferencing App while you are making your argument requires practice and rehearsal.
- (b) The Zoom App, for example, allows you to privately test and place into your muscle memory most of its features.
- (c) Like any App, play with it and explore all its features. Try out every single technical setting.
- (d) If your setup includes multiple screens, learn how to manage those screens in Zoom. If your setup does not include multiple screens, consider modifying your set up to do so, because it makes it easier to view proceedings in which documents will be shared (by you or others) than trying to do so on a single screen).

¹ We appreciate the suggestions and input received from John Day, Esq. that have been incorporated herein.

(e) Set up practices with your firm’s trainers or your colleagues. During your practice session(s), seek input about your lighting, sound quality, and background.

(f) Remember that you will often be interacting with multiple parties on a Zoom call, and the gallery view of those people may impact the location of prompts that are present when you are interacting with only one other person. Thus, your practice sessions should include more than one person.

(g) App practice and rehearsal opportunities may also include:

(i) Every phone call you need to set up with a colleague or a client;

(ii) Every chance you get to talk to your friends or family;

(iii) Once again, seek input about your lighting, sound quality, and background.

3. Properly set up your App’s Account and Profile.

(a) Upload a quality photo as a backup display when your video is not on.

(b) Make sure the on-screen name displayed by the App is your full name and is spelled properly – changes can be made in the Profile settings.

4. Home Technology:

(a) Hardwire your computer to the internet if you can.

(b) Use a fast internet connection.

(c) If you must rely on a wifi connection, make sure you know where in your house or other location you can find the most reliable internet connectivity and speed.

(d) Wireless - Position your computer or tablet as close as you can to your wireless router (which broadcasts your WIFI signal).

Tip: If your home computer or internet services are outdated, upgrade them or conduct your hearings from your law office (if open, of course).

(e) Use the best microphone you can – hard wired to the computer is probably best (e.g., a desk top microphone or lavalier microphone). *Fully charged* Bluetooth headsets work too.

(f) Quality speakers (most of the time, computer speakers should suffice).

(g) Quality web camera – while cameras built into computers will usually suffice, external HD web cameras can provide far better video quality.

5. Set yourself up in a credible audio-visual, distraction-free, video screen.

(a) If you are entering a Zoom conference through a virtual desktop interface (VDI), the computer camera likely will provide *poor quality* video.

(b) Position the camera at or slightly above eye level (not looking down or up at you and strong angles).

(i) You do not want the camera below you looking at your chin or up your nose.

(ii) Nor do you want it above you, looking down at the top of your head or making you look up, craning your neck at odd angles.

(c) Frame your image (if viable) from mid-chest up.

(d) Make sure you are well lit (natural light if possible). The best lighting should be unnoticeable. If you can see you are too dark or too bright, your lighting will be a distracting focal point for your audience that will distract the viewer from your advocacy.

(e) If the light is behind you, your face likely will be too dark. If you are front lit by a spotlight or ring light, learn how to look at the camera without squinting.

Tips:

(i) A quick internet search will let you find lighting solutions designed specifically for computer video conferences.

(ii) A portable desk lamp that can be positioned in front of you will also work.

(iii) Do not position yourself with a bright window or light behind you (close the blinds or reposition your set up).

(iv) Set your camera angle so you do not pick up bright overhead lights on the screen.

(f) Try to set your lights at an angle that does not cause the lighting to reflect off eyeglasses back into the camera.

(g) Conduct a sound-test: use quality, echo-free audio (with volume control) – and know how to increase or decrease the sound you make when you talk.

(i) Consider separately connecting your audio through your phone, but if you do so, make sure to mute your computer to minimize feedback and echo.

(ii) Echoes can be caused when your computer audio and microphone are open and you are participating in the meeting by phone at the same time.

(iii) Figure out how to quickly mute and unmute your audio. If the audio is coming through your computer, in the “Zoom” app, for example,

(1) Alt-A on your keyboard toggles between mute and unmute, or

(2) Holding your computer’s spacebar down temporarily unmutes you while you talk, and then puts you back on mute when you release the spacebar.

(iv) Whenever you are unmuted, recognize that

(1) Every noise you make near the microphone can be heard, including coughs, heaving breathing, and other noises.

(2) Typing on a keyboard can be heard.

(3) Shuffling papers can be heard.

(4) Noises you make while chewing food or drinking can be heard on an open mic.

(h) Silence your computer notifications (those noisy bells and whistles that make noise every time you get a notification of some kind) – if you don’t know how, get help.

(i) Test, learn, practice and rehearse setting it up.

(j) After you think you are all set, take another *look at your self-view* with a *self-critical* eye.

(i) Simplify what you see that your audience will see, minimizing background distractions.

(ii) “Eyeball” what is behind you on the screen and remove that which is distracting.

(iii) If possible, close your email program so that it, and any notifications triggered by receipt of emails, do not distract you during the proceeding and so that you do not inadvertently share the screen containing your emails or displaying those notifications.

(iv) Eliminate views of overhead lights or lights behind you.

6. Minimize the risk of embarrassing or inadvertent disclosures while sharing screen(s) on your computer.

(a) Make yourself aware of whether your computer is configured to notify you – visually – of a communication (a new text, a new email, a *Facebook* message or post, a *Tweet*, an *Instagram* message, a new post in *Teams* or any others in a list that could probably number over 100 or more different Apps at the moment).

(b) If it is, figure out how to turn those notifications off before you start a video conference, particularly if you plan to share something on one of your computer screens.

(c) Failure to do this opens the door to embarrassment or worse if one of those communications pops up on a screen you are sharing as you are sharing it – consider this possibility;

(i) You and your client have agreed to communicate by text message during a deposition.

(ii) Your text messaging App is mirrored on your computer.

(iii) Your client discloses confidential information to you via a text at the very moment you are sharing the computer screen on which those messages are set to pop up.

(iv) And Voila – everyone seeing your shared screen sees and can read your client’s confidential attorney-client communication.

(d) When you decide to share an open item on your computer (a PDF, a power point slide, an e-mail, etc.):

(i) Share the application itself.

(ii) Do not share the entire computer screen on which the open PDF or other application is being displayed to you.

(iii) Otherwise, you risk displaying items that are visible or saved on desktop behind the limited item you wanted to share.

(e) If your proceeding involves needing to be able to share many documents, organize yourself in a way that lets you find and share them easily –

(i) *Beware* having so many items “open” on your computer that you cannot instantly identify the item you want to share (and then end up sharing the wrong item).

(ii) *Close* all items and applications you will not need to access during the video conference.

7. Beware your background and virtual backgrounds.

(a) Pick your background – study it with a critical eye – minimize or eliminate the distracting parts.

(b) Zoom (and some other video conferencing programs) permit the use of your own virtual backgrounds.

(c) Sometimes virtual backgrounds fail and people can see through them to what is behind you, without you knowing it – so make sure that what is actually behind you is appropriate and won't embarrass you.

(d) If you need to use a virtual background (*e.g.*, to conceal your physical location's distractions):

(i) Do not use one that itself creates a distraction; make sure it looks okay even when making hand movements.

(ii) Any photo can be turned into a virtual background.

(iii) Test out how the background looks and use your common sense to gauge how a judge, witness or client may react to it. A “fun” background that may be appropriate on an informal call with family or friends is usually inappropriate for a court proceeding.

(iv) Use a “Green Screen” (turn that feature on in virtual background settings) to stabilize your virtual background.

(v) Watch the news and some of the slightly out-of-focus calming backgrounds and try to replicate one of those.

8. Use a co-host or virtual hot seat assistant where appropriate.

(a) *Co-host.*

(i) A co-host generally should be used for meetings you will be leading that will be attended by many participants.

(ii) A co-host can let people (who show up late or fall out of the meeting) into the proceeding while you are presenting.

(iii) A co-host must know how to operate your video platform to assist with your presentation.

(iv) Practice/rehearse with your co-host.

(v) The co-host can moderate, convey questions from the audience, and help with screen sharing, advancing power point slides, and other technical issues.

(b) *Virtual hot seat assistant.*

(i) This is someone who handles the presentation technology for you in the proceeding – *e.g.*, putting exhibits on screen, playing deposition clips, and the like.

(ii) Recommended for:

(1) Hearings where you display demonstratives,

(2) Evidentiary hearings,

(3) Depositions, and

(4) Trials.

Tip: It works better if the virtual hot seat assistant is in the same room (applying social distancing standards) as the lawyer being assisted.

9. Master the “Share Screen” feature.

(a) This feature allows you to present documents, exhibits, demonstratives and applications during your presentation.

(i) *Note:* When you use this feature, however, your facial image likely will be minimized to the viewer.

(ii) Thus, make sure any item you share enhances, rather than detracts from, the strength of your presentation.

(b) “Pre-set” any documents, exhibits or applications you want to share by opening them on your computer ahead of time and close all applications or files you will not need during the conference.

(c) Close all files and applications you won’t need during your presentation.

(d) Make sure you share the right “screen” on your computer. Practice figuring out which screen option is the correct one.

(e) If you are going to play a Power Point slide show by sharing your screen, make sure you have rehearsed it ahead of time so that you know exactly on which of your screens the slide show will be displayed when you share it. That may be different from the screen you use to advance the slide show. This can be tricky with multiple screens.

(f) Avoid scrolling through PDF exhibits. You should know what page you want to display and have the document set for that PDF page or be prepared to jump to that page with the “Go To” function.

(g) For depositions, learn how to give the witness control of PDF displayed on screen so that they can review what they want to review.

(h) Be on the lookout for (and master new features as they come out) such as Zoom's feature that allows you to share multiple applications at the same time by holding the Control key down and clicking on each item you want to share, before you hit share.

10. Embed “tech” cues into your argument notes or outlines.

(a) Take a lesson from the theater business on this.

(i) Stage managers use “tech sheets” to call out cues that instruct “backstage” personnel running lights, sound, curtains, and set and prop movement on stage to take action so that, to the audience, those features of a production are seamlessly integrated with the actors' performance.

(ii) The cues are written down and rehearsed during a special “tech rehearsal” that includes both actors and backstage personnel.

(iii) Even the most well-rehearsed stage manager (who may think they have memorized the cues) will follow the written tech sheet so that they do not inadvertently miss a cue.

(iv) Thus, when you are going to use technology like sharing a screen to show documents, or advancing a slide show, embed visible cues to take those actions right in your notes.

(b) For example, you may have color coded notes to tell you to say something like this:

“The contract plainly states, []

That cue would tell you both to advance the slide show and to read the quote displayed as a document excerpt that appears when you do so. However, remember that this takes rehearsal.

11. Create a separate “Pre-Set Checklist” and follow it.

(a) Borrow from what stage managers call their “Pre-Set” list, which:

(i) Identifies every prop that has to be on stage and where it needs to be placed at the moment the curtain opens to the audience; and

(ii) Identifies every other step the manager needs to go through before instructing the actors, lights, and sound personnel to start the show.

(b) Sample Pre-Set instructions to consider putting on your Pre-Set List that you should physically check off as you do them:

(i) Verify:

- (1) Cell phone silenced.
- (2) Do not disturb button pushed on office phones.
- (3) Verify that lighting is good.
- (4) Eliminate background distractions.
- (5) Audio levels.
- (6) Insert or confirm that you have fresh batteries for any audio or camera devices that need batteries.
- (7) Conduct screen sharing test.

(ii) If there is even a remote chance that you will want to use the Share Screen feature to display something to all participants:

(1) CLOSE ANY PRIVILEGED OR WORK PRODUCT DOCUMENTS THAT YOU MAY HAVE OPEN BEFORE THE START OF THE PROCEEDING.

(2) DON'T OPEN OR RE-OPEN ANY PRIVILEGED OR WORK PRODUCT DOCUMENTS BEFORE OR DURING THE REMOTE PROCEEDING.

(3) OPEN ALL ITEMS YOU MAY NEED TO SHARE ON THE FLY SO CAN QUICKLY SHARE THEM.

(iii) Print all work product outlines or items you may need to reference during the proceeding.

(iv) Place printed material in easy but inconspicuous reach.

12. Have a low-tech backup plan for when your technology fails.

(a) Murphy's Law applies to technology, just as it does to most everything else. When it fails, in the heat of battle, you may find yourself handicapped if you do not have a lower tech back-up plan.

(b) Consider providing hard copies of exhibits to the Court (if the Court allows this) or a witness ahead of time to be used in case the technology fails.

(c) Many judges have special filing portals to upload such material in PDF format in advance of hearings so that the Court can open up and review matters ahead of time or during the hearing.

(d) Consider using a cloud app that all on the call can be given a link to in order to access exhibits independent of your effort to share them over a video conferencing App.

BROADCAST ADVOCACY SKILLS.

13. Credibility anchors your advocacy.

- (a) Self-evaluate on what makes you a credible advocate to a Court.
- (b) Adapt your advocacy skills for display on a television/computer screen.
- (c) Take lessons from screen actors and newscasters. Watch them critically to see what techniques they use to look believable on camera.
- (d) Apply the principle of the three “C’s” on camera – Confidence, Control and Credibility.
- (e) Wardrobe tips –
 - (i) Avoid stripes, plaids and patterns – cameras make designs like that shimmer and swim on screen.
 - (ii) Colors should contrast with and not blend into your background.
- (f) Display good posture – stationary, straight back chairs help.
- (g) PREPARATION AND REHEARSAL OF the simultaneous handling of the technology while advocating are keys to successful creation of on-screen credibility in remote proceedings.

14. Remember you are “closer” to the judge or the witness than usual.

- (a) Connect with the judge – look her in the eyes by arguing directly at your camera.
- (b) Avoid fast, large and other distracting movements. Your movements – or stillness – should be purposeful.
- (c) DO NOT READ YOUR ARGUMENT –
 - (i) You are close enough on screen for the judge to see your eye movements while reading your text.

(ii) You cannot connect with the court with your face and eyes as effectively if you are reading your text.

(d) If you consult items on your computer screen and wear eyeglasses while arguing, beware that the information you review on your screen may be visible in a reflection in your eyeglasses.

(e) *Tips for looking the judge(s) in the eyes:*

(i) Your argument needs to be *directed at the camera* – if you focus on the camera, you will be looking the viewer in the eyes. Until you get used to doing this, consider taping a photo of someone you like to look at (child, spouse, etc.) immediately above the camera, or place post-it notes on either side of the camera with arrows towards the camera to help you speak directly to the camera.

(ii) Imagine you are talking to one person, even if you have many watching you.

(iii) If you position the view of the judge immediately below the camera you are arguing to, you can probably make it seem like you are looking directly at the judge's image (just below the camera).

(iv) Consider using the *Pin Video* feature to make the judge the dominant image center screen, even when you are talking. (Pin video feature can usually be found under the ellipses in the upper right-hand corner of the person's screen.)

(v) *Do not position the target of your point – a judge, client or a witness – on a second monitor different from the monitor with the camera. If you do, when you look at the viewer's image for emphasis, it will seem to the viewer that you are actually looking away from them.*

(f) Keep your notes *in front of you, not below you and not in your lap.*

(i) You will likely need to refer to notes at some point – or take notes.

(ii) It is less distracting to glance down looking forward, than it is to bow your head, as you might have to do if your notes are in your lap.

(g) Avoid touching your face – the movement is magnified when the camera is in a close up or medium close up.

15. Lean in.

(a) Lean *slightly* closer to the camera to physically add emphasis to a point you are making or a question you are asking.

(b) Do not overuse that technique, and do not bend so far forward that it looks like you are bending over a table to lean in.

16. Balance persuasive non-verbal “facial” advocacy against persuasive demonstratives.

(a) Any time you want to share a demonstrative or exhibit on screen with the court, ask yourself – “Can I make my point more strongly or credibly:

(i) By displaying the demonstrative? or

(ii) By displaying my screen image as I present?

(b) A screen share usually dominates the screen the Court is looking at. That likely means that the judge will focus on it when you share it – perhaps more so than when you put up a Power Point slide in open court.

(i) A picture is worth a thousand words.

(ii) Try to find an image or graphic that corresponds to your point – this may help drive your point home better than forcing the viewer to read 20 lines of bullet point text that you read out loud at the same time.

(iii) If you can’t find a simple image to encapsulate those points, let your face be the graphic as you make those points – without reading them – to the court.

17. Do not let your desire to display your new-found technical skills interfere with your advocacy.

(a) Just as you would in open court or in an in-person deposition, listen for opportunities to pivot or make points in response to what you observe and hear, even if it means jettisoning demonstratives you had rehearsed sharing with the technology.

(b) If opposing counsel makes a point to which you want to respond, or if the judge has posed a question (either to you or your adversary) that provides an opportunity to make a point that doesn’t particularly fit in anywhere in what you rehearsed or doesn’t fit into your screen sharing plan:

(i) *Stop the screen share.*

(ii) Pause.

(iii) Look the court square in the camera’s eye, and make your point in the most impactful manner as is appropriate under the circumstances.

18. Use silence and pauses to punctuate your argument.

(a) You have limited time in most hearings involving arguments to a judge.

(b) When you make a big point, use a pause or silence, while looking square at the camera, to underscore the point before moving on.

19. Be mindful of annoying speech mannerisms.

(a) Use the opportunity to record your rehearsal to rid yourself of any mannerisms such as “uh,” “umm,” “So,” “Okay,” “you know,” and “like” that may have crept into your oral presentation style.

(b) Often these are fillers or nervous tics while you are searching for what to say next.

(c) Eliminate them and learn to like pausing and using silence during your argument. *See* tip 18.

20. Remember you are in court – act and dress like it.

(a) Wear courtroom attire.

(b) Do not wear clothes that disappear into your background.

(c) Just like in court, silence your cell phone. In addition:

(i) Activate do not disturb on office phones (if you are in an office or have a phone nearby).

(ii) Silence your computer notifications.

(iii) Close your door to keep pets, children and other noisemakers out.

(iv) Do not conduct your argument or proceeding from a space where Alexa, Siri or Google devices may hear and respond to you voice.

(v) Put a large “Keep Out – Video Hearing/Deposition/Trial in Progress” sign on your door, at eye level, so someone approaching the door will actually see it and read it (and take it down after the proceeding is over).

21. Hearing Etiquette.

(a) Controlled Privacy – treat the room you are in as if it were part of the live courtroom and control access to the room.

(b) Silence your cell phone – unless of course that is how you are connected to the audio; silence your computer notifications; put office phone on DND.

(c) When you are not talking, minimize your movement and facial expressions.

- (i) Remember you are right in front of the screen (not way back at counsel table) – the judge can see your every expression and movement.
 - (ii) Stay alert and neutrally game faced.
 - (iii) Don't disappear from the camera view.
 - (iv) Stay on mute whenever prudent – to eliminate unintended and sometimes noisy interruptions.
- (d) Speak directly into your microphone –
- (i) Don't shout at a speaker phone.
 - (ii) Consider using an external microphone connected to your computer.
 - (iii) Do not be too far away from the microphone.
- (e) Watch the volume level rise and fall on the image of a microphone in the lower left-hand corner to make sure you're not too loud or too soft – learn where the physical volume controls are on your computer and also where inside the application you can find audio volume controls.
- (f) Wait at least an extra beat in between your points to make sure you do not interrupt a judge if he is asking a question.
- (g) If the judge's question was "talking over" you, you may have missed the first part of it. Do not hesitate to repeat the question you believe the judge asked and wait a bit for the judge to give any clarification.
- (h) Be sure to be very specific in identifying any exhibits or demonstrative aids you are referring to.
- (i) Remember to enunciate even more clearly over the phone than you might do in court.
- (j) Minimize your movement and facial expressions when not talking – remember you are right in front of the screen (not way back at counsel table) and the judge can see your every grimace.
- (k) Be sure you can reach your opposing counsel in case you have a connection problem. Consider creating a cell phone or direct dial phone list for each participant as part of your pre-set list (see topic 11 above) and keep it close at hand in the proceeding.
- (l) If you wear glasses, be aware that they may reflect what is on your computer screen.

- (m) Do not swivel your chair around or away from the camera.
- (n) Remember you are always “on” and everything you do on screen can be seen, including taking notes, drinking a soda, scratching your head, rubbing your eyes, etc.
- (o) If someone is observing the argument or hearing off screen, do not let your listener inadvertently move on screen or talk to you during the hearing.

22. Educate and Train Participating Clients and Witnesses.

- (a) Your clients and witnesses likely have not had the same practice and training you have had on how to conduct themselves during remote proceedings.
- (b) Help them get comfortable with what will transpire.
- (c) They are subject to all of the same rules that the other participants are, so train them in those rules.
- (d) If the client or witness will be participating from home or some other non-office setting, make sure they understand the importance of having a quiet place, free of interruptions, during the proceedings.

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