

REMOTE PROCEEDING ADVOCACY

Advocacy in the 21st Century Committee

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The Committee endorses its use, and commends the author for his excellent work product and for sharing it with the College.

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

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REMOTE PROCEEDING ADVOCACY

MASTER THE TECHNOLOGY SO YOU CAN OPERATE IT BY *YOURSELF* (UPDATED)

The first step to becoming 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 certain basic parts of the technology *at the same time* that you are advocating your client's position, even if you enlist a virtual assistant to do the heavy lifting on other aspects of the technology. For example, 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 both your default App and other Apps you may have to use and practice using all their features.

- (a) Two years of remote proceedings have taught us that while you may be partial to a particular App, you likely will be called upon to participate in video conferences in various other Apps (*e.g.*, Zoom, WebEx, Teams, Google Meet and others).
- (b) Most of the skills you have developed with your default App can be used in the other Apps, but the screen sharing options, mute buttons, video, audio and other controls may be different from what you are used to. If you learn you will have to use an App you haven't used at all or are just less familiar with, take the time to learn what's different and what's the same – and rehearse with it, just as you did when you were learning how to use your default App. Do not try to learn it on the fly.
- (c) Instruction manuals can provide an overview but piloting any video conferencing App while you are making your argument requires practice and rehearsal.
- (d) The Zoom App, for example, allows you to privately test and place into your muscle memory most of its features.
- (e) Like any App, play with it and explore all its features. Try out every single technical setting.

(f) If your set up includes multiple screens, learn how to manage those screens in the App. 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).

(g) 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. *Grant immunity to those you enlist to help you from the sting of any critiques they offer of your image or techniques.*

(h) Practice with more than one other person at the same time, because you will often be interacting with multiple parties on a video conference. The gallery view of those people may change the location of prompts that are present when you are interacting with only one other person, so pay attention to any differences.

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

(i) Every verbal communication you need to have with a colleague, witness or client;

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

(iii) Once again, seek input about your lighting, sound quality, and background. They need to believe that they can be candid in their observations of you without being subjected to reprisals, or else they will be less than candid.

(j) Stay abreast of your App's new features as they are released. Apps are adding new features from time to time, such as real-time closed captioning. Use as appropriate or necessary.

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 your on-screen name is your full name properly spelled – you usually can change this in an App's settings. If your default name is the name of your law firm, change it to you so that others can identify you.

(c) If you are using someone else's account, be sure to modify the screen name before going live.

4. Technology – at home and in the office:

(a) Hardwire your computer to the internet (and thus avoid Wi-Fi) if you can. Your connection will likely be faster and more stable if your computer is hard-wired to the internet.

(b) Use a fast internet connection.

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

(d) Wi-Fi - Position your computer or tablet as close as you can to your wireless router (which broadcasts your Wi-Fi 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 –

(i) Hard wired to the computer is probably best (*e.g.*, a desktop microphone or lavalier microphone).

(ii) *Fully charged* Bluetooth headsets work too but test them.

(iii) Microphones on external cameras also work but test them.

(iv) When testing your set up, ask others listening and watching how you sound – and adjust if you sound “tinny” or “distant” or muffled.

(f) Quality speakers - most of the time, computer speakers should suffice, but if not, it is a simple matter to add external speakers to enhance your ability to hear others.

(g) Quality web camera – while cameras built into computers will usually suffice, external HD web cameras can provide far better video quality and sometimes provide you with additional camera controls that can be helpful, such as the ability to brighten your image without turning your lights up higher and the ability to zoom in and out so that your image occupies an appropriate portion of the screen.

5. Manage the bandwidth.

(a) Video conferencing consumes bandwidth on the internet.

(b) The more people who connect with their video cameras turned on, the greater the burden on the bandwidth. As some judges do, one way to manage this is to ask those who will not be speaking or presenting to turn their video cameras off to conserve the available bandwidth.

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

(a) Avoid using a virtual desktop interface (VDI) for your Zoom – your camera may not work or may provide *poor quality* video and audio.

(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 up at your chin, nose or the overhead lights or ceiling fan above your head.

(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 – too far away brings in other distractions. A close-up image of just your head is to be discouraged.

(d) Use a high-definition camera – but if your supposedly HD internal computer camera produces a less than crisp image of you, replace it with a true high definition external camera. (See ¶4(g) above).

(e) 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.

(f) 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:

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

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

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

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

(g) Try to set the light source that is in front of you at an angle so that it does not reflect off eyeglasses back into the camera.

(h) 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) Your computer audio and an open microphone can cause echoes and feedback when you have multiple devices connected to the conference in the same room.

(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 listeners can hear every noise you make near the microphone, including:

- (3) Coughs,
- (4) Heavy breathing,
- (5) Keyboard typing,
- (6) Shuffling papers,
- (7) Chewing,
- (8) Loud people outside your office, and
- (9) Other “noises.”

(i) 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

(j) 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).

(k) 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.

(l) 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.

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

(n) After you think you are all set, look again 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.

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

(a) 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, unless you need to do so in order to be able to drag additional files into view on that screen.

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

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

(ii) *Be aware that* having too many items “open” on your computer may slow your ability to find, instantly identify and share the item you actually want to share, which could then lead you to share the wrong items, with resulting embarrassment or delay.

8. Beware your background, filters, blurs and virtual backgrounds.

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

(b) Most video conferencing Apps permit the use of filters, blurs, and your own or other virtual backgrounds

(c) But filters, blurs and virtual backgrounds regularly fail or are obvious to the point of distraction.

(i) People can see through them to what is behind you, without you knowing it.

(ii) You also can disappear behind them.

(iii) If you can make sure that what is actually behind you without using them is appropriate, use the actual background instead.

(d) If you need to use a filter, blur or 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 (both to you and to someone who can be more objective than you in assessing the image) 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; but beware that some have observed that green screens sometimes still leave a distracting halo around your image. Please note that some have found that white or gray screens work better than literally “green” screens.

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

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.

(iii) Practicing with the “share screen” function will help you see the utility of more than one monitor if you don’t already have one.

(b) “Pre-set” any documents, exhibits or applications you want to share by opening them on your computer ahead of time.

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

(d) If you have multiple screens connected to your computer, make sure you share the correct “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. You do not want to share the screen displaying the “Presenter’s Notes” view of a Power Point any more than the Wizard of Oz wanted Dorothy to see him standing behind the curtain pulling levers.

(f) Avoid scrolling through PDF or other long 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 bookmarks or the “Go To” function. But if you use bookmarks, recognize that the bookmarks themselves will also be visible in the screen share, so be careful how you name your bookmarks.

(g) For depositions, learn how to give the witness control of PDF displayed using the screen share feature so that they can navigate through the item and review what they want to review.

(h) Document viewing programs (*e.g.* Abode) are updated to provide enhanced features. Be on the lookout for (and master) new features as they come out.

(i) Learn how to use features that allow you to share multiple screens and applications side by side (*e.g.*, in Zoom, by holding the Control key down and clicking on each item you want to share, before you hit share).

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

(a) *Co-host.*

(i) A co-host helps manage the conference and can be very helpful 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) If your connection is interrupted, having a co-host may prevent the meeting from abruptly ending if you leave or get bumped off.

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

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

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

(vii) Develop a way to communicate with your co-host during the presentation that will not interfere with the presentation. Rely on a single sources of communication; don't alternate between private chat, text, and/or email. Multiple sources of communication increase the risk of a failure of communication.

(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, sharing copies with the witness and opposing counsel, 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.

(c) *Teamwork.*

(i) Use of a well-rehearsed assistant to handle exhibits and screen sharing responsibilities takes the pressure off. But remember, you should rehearse with your assistant so that the assistant knows when to do what you want them to do.

(ii) Make sure nobody on your team is reluctant to, and encourage them to, vocalize constructive criticism about how you come across, look, or sound on screen.

11. 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,” [DISPLAY SLIDE]

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.

12. 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) Notifications (pop-ups) on your computer are off
- (4) Verify that lighting is good
- (5) Eliminate background distractions
- (6) Audio levels
- (7) Insert or confirm that you have fresh batteries for any audio or camera devices that need batteries
- (8) Conduct screen sharing test
- (9) You have told all others present in the home or office from which you are participating that you should not be interrupted because you are participating in a virtual proceeding (or, if applicable, you are literally in court), and that noise must be kept to a minimum.

(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

13. Know Your Videographer's Rules and Practice.

(a) Some court reporter/videographers have disclosed they have the technical ability to "edit out" from a video of a remote proceeding "distractions" that arise (*e.g.*, people wandering into view behind the witness, barking dogs, and others).

(b) Make sure you are aware of your videographer's capacity and willingness to do so – especially if you are not the one who hired the videographer.

(c) If you or opposing counsel want to use clips of the video at trial, insist that any such "editing" only be done by mutual agreement of the parties to the edit.

(d) Consider addressing this in any remote proceeding protocol that the parties are asked to agree to in your case.

14. 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 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 access exhibits independent of your effort to share them over a video conferencing App.

(e) Redundancy

(i) Part of your backup plan should include a fully charged alternative device with cell phone access, so that if you lose electricity to your first choice, you can swiftly move to this backup.

(ii) You should also have connectivity phone numbers and contact names printed out and accessible in case you suddenly need to connect with your backup device.

15. Witness Preparation – the Importance of Rehearsal and Technical Training

(a) In preparing your witness for a remote proceeding, they need the same technical training and rehearsal that has become second nature to you since remote proceedings were thrust upon all of us.

(b) First ensure the witness has the proper technical set-up and environment. Vehicles, whether underway or stationary, are not appropriate locations from which to examine a witness for a judicial proceeding.

(c) Second, add to your normal preparation task list that your witness can take control of exhibits shared on screen – they just have to ask for that power. Show them how to use it if it is possible that they may be called upon to do so.

(d) Third, add to your normal critique of their performance by being candid about how they came across on screen – what they did right, and what they did that you found improvident, distracting, or otherwise affecting their credibility.

(e) Repeat those three steps until your witness (and you) maximize your comfort level that the witness is prepared for the remote proceeding.

(f) Remind the witness to have an ID that can be displayed to the court reporter. (This is required in some jurisdictions.)

16. Notices

(a) A notice of a video conference deposition does not by itself provide notice that you may be video recording the conference. You must include a separate notice compliant with the applicable procedural rules that permits you to create a video record of videotape (outdated word in the digital age).

(b) In most instances, the videographer needs to be independent of the parties. Parties who have not properly provided notice of an intent to make a video record in accordance with applicable rules of procedure or practice can find they cannot use the video recording. (The rules of procedure in some jurisdictions may permit representatives of the parties to operate the video equipment.)

(c) Put your video link in your notice of hearing or notice of deposition. Also, include the call-in number to be used by others if there is an electronic glitch. Keep opposing counsel's cell number as well as that of every other participant in the conference at hand and give yours out, in case issues technical issues arise and need to be resolved.

17. Open Public Records or Sunshine Laws

(a) Some proceedings must be open to the public. Make sure you follow proper notice procedures for doing so.

(b) Know your options for making a public record of it, and address any enhanced technology needs, especially if the proceeding is likely to draw a large audience.

(c) If knowing who is watching – *e.g.*, including the press – is important to you, have someone other than you monitor attendance.

BROADCAST ADVOCACY SKILLS

The most important step to becoming an effective advocate via remote video proceedings is to adapt your advocacy skills to the technology. In a courtroom, you operate in a multi-dimensional space that encompasses (among other things) the movement of people inside the room, the size of the room, and full body language. Not so in video conferencing. Notice and adapt your persuasive skills to this essentially two-dimensional space.

1. Credibility anchors your advocacy.

- (a) Self-evaluate the techniques you use to be 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 – minimize any movement that looks like wiggling or twisting.
- (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.

2. Remember you are “closer” to the judge, opposing counsel or the witness than when in court.

- (a) Connect with the judge – look her in the eyes by arguing directly at your camera. Do not argue to her image, especially if it is displayed on a screen other than the one on top of which you have mounted your camera.

Tips for looking your target in their “eyes”:

- (i) *Direct your argument 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) *In many Apps*, including Zoom, you can reposition the image of someone in Gallery view by dragging it to the spot you want it to be (with some exceptions). If you position the view of the person you want to “speak to” immediately below your camera, 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.

(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 their image for emphasis, it will seem to them that you are actually looking away from them.*

(vi) If you are using a camera that is not attached to a monitor (e.g. it resting on a tripod), place a monitor directly under the camera and ensure the camera shoots over it to the speaker.

(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) 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.

(1) It is less distracting to glance down looking forward, than it is to bow or bend your head down to look at something in your lap, because bowing your head has the immediate effect of displaying a close up (and often unflattering) view of the top of your head.

Tip: Consider increasing the font size on your notes/outline to make them easier for you to see at a glance.

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

3. Techniques That Some Find Helpful.

(a) Turn off your self-view in the App (**but only after** you have verified your image display is satisfactory).

(b) Move the location of the image of the person you want to address so that it is right under your camera, which will help it appear to that person that you are talking directly to them when you look at them.

4. Lean in – but not too closely or quickly.

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

(b) However, do not overuse that technique, and do not lean in so far that it looks like you are bending over a table to lean in, lest you look weird or, worse yet, like a bully.

5. 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

6. Screen Sharing Advantages to Enhance Advocacy

(a) Bringing focus to your advocacy.

(i) Judges sometimes want you to deliver hearing binders to chambers before hearings. Busy judges may not have time to review voluminous material included in multi-volume thick hearing binders.

(ii) You have the same option in a remote proceeding that you often used in in-person proceedings for focusing a judge on key pages of the binders by asking the judge to work:

“Judge, please open binder 3. Go to tab 45. Turn to page 38 and review the highlighted text halfway down the page.”

(1) Just reading that instruction at a pace slow enough for the judge to understand what she needs to do takes about 10 seconds.

(2) Waiting for the judge to get there will take away more of your precious allotment of hearing time.

(iii) You can save most of that time for argument if instead you share that page on screen going directly to a bookmark you prepared in advance to that page in a PDF of your binders.

(1) This requires some extra prep time in advance of the proceeding, to be sure.

(2) But prepped and rehearsed, your substantive argument proceeds apace and you save a little time for argument rather than wasting it on logistics

(b) Simultaneous screen sharing of multiple items.

(i) Some Apps allow a user to share multiple items on screen at the same time.

(ii) This enables you to do side-by-side comparisons quite easily.

(iii) Just be aware that if the witness or judge is using a laptop to view screen-shared items, the print size may be a challenge to the visual impaired.

(c) Enlarging items. Make sure you or your virtual assistant know how to magnify print size of items being shared, so the viewers can read the “fine print” (so to speak). For example, using an HP laptop, holding the Ctrl key down, rolling your Mouse’s scroll wheel away from you enlarges PDF text and pulling it towards you decreases the size of the text.

(d) Metadata.

(i) Metadata associated with most ESI produced in litigation on occasion can be powerful evidence of who authored something, when they authored it, or how they or others modified it and when (to name a few circumstances).

(ii) By displaying a native format file in a screen-share, you can display that metadata and question the witness about using it. If you had first PDF’d it and then marked the PDF as the deposition exhibit, the native Word metadata would not be visible.

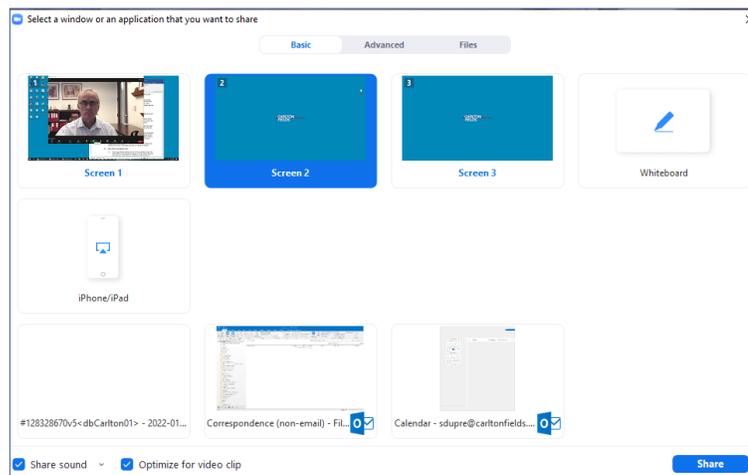
(e) Live Internet data.

(i) You can use screen share to walk through a live internet search and question the witness about the search results.

(ii) This can be a powerful tool when examining a witness about social media and web site content, particularly if you are able to surprise the witness (and opposing counsel) with that information.

(iii) If you want to do this, however, test it ahead of time and make sure the data you want to display is still there right before the deposition or proceeding starts. And, make sure that you want the viewers to see what they will see. For instance, when you open to the Google search page all tabs will be visible and so will your bookmarks. So will the shortcuts to your frequently visited websites. Do you want those visible to your audience?

(f) Displaying video evidence. You can easily share videos through screen-share. If you do, make sure that you check your App for any special instructions in doing so. For example, in Zoom, you should check the boxes “Share sound” and “Optimize for video clip” buttons at the bottom of the Share Screen Selection Window (in Zoom) (see image below) before you hit share and play the video.



(g) Don't share everything at once.

(i) Some recommend you open all your exhibits ahead of time and display them (and nothing else) on one of your computer screens. If you do that, note that if you share the screen that has all of them open at once (instead of sharing just the particular exhibit you want to ask about), the other exhibits, with their file names may be exposed for all to see.

(ii) To avoid that, when you use screen share, do not share the entire computer screen (often times identified as Screen 1 or Screen 2, etc.). Share only the particular PDF in use at the time.

(h) Improvisation enhancement. You probably have a discovery platform (*e.g.*, like Relativity or Everlaw or any of the many others) in which you have stored, and from which, you manage discovery. If a document you failed to identify as a potential exhibit ahead of time becomes important, you can open your platform, pull exhibit up and share that screen (in a pinch). You should wait to share the screen after you have pulled up the exhibit. Showing the screen as you go into the discovery platform and locate the document may reveal something you prefer not to reveal.

(i) Make your evidentiary record. Trials, hearings and depositions conducted remotely today may become fodder for an appellate record. Thus:

(i) Make sure you create a reliable and useful verbal record for the court reporter to transcribe of what you are displaying through screen share, such that an appellate court reading the record will be able to identify it in the Record.

(ii) For example, learn how to take screen shots of what you display (particularly metadata) so that you can mark them as exhibits and have the witness authenticate them so that they become part of the hard copy deposition transcript.

7. 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.

8. 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

9. Be mindful of annoying speech mannerisms and physical tics

- (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 8.*

10. Stay in Character, *Just in Case*

- (a) During breaks in remote proceedings, we have all earned by now that it is important to mute our audio and turn off our camera. Just think about how many public figures embarrassed by gaffs and improvident remarks made in private, when they thought nobody important was listening or watching.
- (b) Best practice – even when you are on a break in a video conference, stay in character, *just like you would if you were in the courthouse or at your opposing counsel’s office.* If you want to have a private conversation, walk out of the room you are in and find privacy elsewhere. Do not have the conversation in your video connected office or conference room or risk the consequences if you inadvertently failed to mute your audio or video.

11. Frequently Observed Distractions.

Two years of intensely using video conferencing has created many firsthand opportunities to witness bad technique and distractions such as those described here. Try not to be the one whose techniques add to this list.

- (a) Remember to take your screen share down. If you are not actively using it, it is a distraction.
- (b) Technical issues – whether caused by local connections, network problems, an inattentive “host” or otherwise *can literally derail a proceeding.* *Have a triage plan written out for every type of problem you have experienced (e.g., hot lines to your tech support; cell phone numbers of other participants you can immediately contact when you have a problem).*
- (c) Bad lighting and other distractions – take off your rose-colored glasses when you are trying to be self-critical and see how you really look on the screen. (Practice by recording a video of your argument on Zoom and then watch the playback).
 - (i) If your lighting is bad, it is obvious and easy to fix, so fix it.
 - (ii) The primary light source needs to be on your face, not coming from behind you or from above your head.

(iii) Clean the space behind you that is visible on your video so that you do not have to use a virtual background.

(iv) Less is more – you may love that busy work of abstract art position on the wall directly behind your head from the camera’s perspective, but get another opinion on how it affects your credibility as an advocate.

(d) Poor or muffled audio.

(i) Everybody complains about poor quality audio.

(ii) If you cannot be heard, how can you be persuasive?

(iii) It is critical to test your audio equipment and have someone connect to your conference test to give you feedback about your sound quality. You have to get this one right. You cannot be sure you are getting it right unless you practice with someone who is in a different location connected to Zoom and can tell you how you sound.

(e) Attending via cell phone camera. Your connectivity can be an issue, and you look different from others who participate via computer. Do not use a cell phone for virtual court-related proceeding unless there is no other option.

(f) Reviewing notes whose placements make you “look away” from the camera.

(i) Speaking while looking sideways at notes is distracting.

(ii) If you read notes on the screen and pretend not to be reading, that will usually be obvious (and distracting).

(iii) Placing items on your screen(s) that shouldn’t be shared with the other participants (one way to avoid this is to place such items on a device (another computer, a Tablet, a short podium that isn’t digitally connected to the video conference)

(g) Fumbled exhibit sharing. Practice makes perfect – or at least reduces the possibility of fumbling the presentation of exhibits or other screen shares.

(h) Unprofessional attire. This is a legal proceeding. Act like it. Dress like as if you were going to be in court.

(i) Distracting others. If you are observing, but not advocating, *turn your video and mute your audio* so that you do not distract others when:

(i) You make faces – which can draw the ire of the judge (or worse yet a panel of judges) on whose lap you are constructively sitting when they are watching the video screen

(ii) You check your phone,

- (iii) You eat,
- (iv) You check your email,
- (v) You drink from a coffee mug with inappropriate images or verbiage prominently displayed on the side or bottom, or
- (vi) You otherwise multi-task.

(j) Virtual backgrounds.

(i) “Don’t use them, unless you are forced by circumstances to participate from a location whose environment you cannot control.” - Anonymous

(ii) You are far better off participating from a clean office than in front of a virtual (*i.e.*, fake) background, even if it looks like a courtroom or office or other appropriate space, and even if you are using a green screen.

(k) When communicating with co-counsel or clients:

(i) Do not inadvertently share your communication with the court or those participating in the proceeding.

(ii) Consider using a communication technique that is disconnected from the video conference – *e.g.*, if you are on your computer in a Zoom hearing, set up a group chat in a separate App on your tablet (that is silenced so as not to create distracting noises)

(l) Beware participating from a video equipped conference room

(i) If you try to emulate standing at a podium so the court gets a full body shot of you at the podium, your face is too far away from the camera to be persuasive.

(ii) If you use the camera to display more than two people seated closely together, the faces will be too far away from the camera to be persuasive.

(iii) Multiply those problems by 10 if you have a herd of people seated around a conference table and you pull the camera shot back far enough to display all of them.

(iv) Redundant connectivity. Have someone on your team linked into the conference with a redundant computer, so that you can keep track of everyone signed into the proceeding or you can stay in the proceeding if your conference room equipment fails.

(v) Beware Overheating.

(1) If your video conference room houses the video equipment inside a cabinet and your hearing or other conference runs for hours, know that the equipment can overheat.

(2) If it overheats, during your argument, it could disconnect you from the argument, with all of the consequences associated with that.

(3) Open the cabinet doors to let the room air circulate.

(m) Masked witnesses. Make sure you work out in advance that the witness not wear a mask. Sometimes, that has proven impossible, because of local rules requiring masks on when people are in particular locations. Work this out ahead of time. You miss a lot of non-verbal information if the witness is wearing a mask.

12. 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).

13. 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 video conferencing App or 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 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.

14. Educate and Train Participating Clients and Witnesses.

(a) Your clients and witnesses likely have not had the same practice and training opportunities you have had at presenting their best face as a witness in remote proceeding. Just as you needed to help them set up their own technology connections, so too should you help them enhance their credibility as a witness in a video conference.

(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.

15. Remote Mediations.

(a) Pros –

(i) Using screen sharing to collaborate and edit settlement documents.

(ii) You also can send drafts back and forth (whether via email or through an App’s chat function).

(b) Cons –

(i) Diminished ability to see “game day” dynamics of who is really calling the shots on the other side (client, lawyer, insurance carrier)

(ii) Diminished ability to find and sell a business solution.

(iii) If each side assembles in a conference room participating by a single video camera, the participants are so distant as to diminish the ability to assess body language, facial expression and other reactions.

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