



Appealing from the Remote Environment

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The COVID-19 pandemic thrust the legal world into a new era of remote legal proceedings with very little time to plan and prepare. Almost overnight, courts throughout the country all but closed their physical doors to parties and instead began holding court over Zoom, Microsoft Teams, and other similar platforms. The prospect of remote proceedings brought hope for continued access to the courts while much of the country closed down indefinitely. Family trial court procedures evolved to allow for remote proceedings from beginning to end to allow parties to obtain necessary orders and continue to get divorced. Appellate courts similarly were able to hold remote oral arguments to allow appeals to continue to progress.

The transition to remote court did, however, bring with it many new unanticipated issues. Some of the difficulties became well known, even throughout nonlawyer culture. The television courtroom drama *All Rise* filmed an entirely remote television episode depicting a fictional remote criminal trial in Spring 2020, which demonstrated the chaos that can ensue when everyone speaks at once. People all over the internet laughed along with the video of the lawyer with a cat filter insisting to the court, “I’m not a cat.” People were perplexed reading that a California doctor was in the middle of performing surgery while attempting to attend traffic court. Anecdotes quickly traveled of lawyers and litigants

attending remote proceedings from the pool, from the kitchen while cooking, from bed, or while driving a car.

While many of the challenges of remote proceedings only cause frustration, some of these issues are more significant and may impact appellate proceedings. It is important for lawyers to consider the possible appellate ramifications of any issues that arise during remote appellate and trial court proceedings. This article will address the new remote proceeding phenomenon and the benefits and shortcomings of it.

Remote Appellate Proceedings

This section of the article will address the benefits and shortcoming of remote appellate court proceedings. These remote proceedings provided benefits such as allowing cases to move toward resolution despite the inability to convene in person, removing difficulties caused by travel, and increasing access for the public to these proceedings. At the same time, however, remote oral arguments have negatively impacted the natural flow of arguments and have limited the benefit of involving a second-chair attorney.

Remote appellate arguments provided many benefits for attorneys and parties. Most obviously, the use of remote appellate arguments allowed cases to continue to move forward during the pandemic in a safe way. If courts had not instituted remote arguments, a huge backlog of cases would have amassed because most parties and their counsel

likely were unwilling to waive oral argument. Remote arguments also allowed attorneys and litigants to argue before appellate tribunals from any location, rather than requiring them to travel to the physical appellate court. This was particularly helpful during the height of the pandemic when many people were anxious traveling outside the home and people were often subject to travel restrictions. This benefit has value even absent pandemic-related anxiety. Unlike trial courts, which are conveniently located all over each state, states often have only one or only a few appellate court locations, which are not necessarily physically close to the attorney or litigant. Allowing remote oral argument removed the need for travel time.

Additionally, remote proceedings provided a new level of access that often did not exist in appellate courts. While appellate courtrooms are generally open to the public, many people do not avail themselves of the opportunity to attend oral arguments absent a specific reason. This changed when the proceedings became remote, and arguments became easily accessible on YouTube. Recorded arguments allowed for those who previously may have been unable to travel to the state's appellate court to watch the argument to now be able to view it. The ability to listen to oral argument allows clients to understand an important piece of their appeal.

Additionally, remote oral argument provides a resource for practicing lawyers as well as recent law school graduates and students. While lawyers can certainly review appellate decisions and often review appellate briefs, they were less likely to be able to review the audio of an argument on an issue they were researching before the arguments were as readily and widely available as they have come to be during the pandemic. With remote arguments, lawyers who are interested in or researching a specific legal issue can listen to the argument. Likewise, these easily accessible proceedings also have the potential to be a resource for law students and inexperienced lawyers. While the video-recorded arguments are a resource on legal subjects for students, listening to oral arguments helps also to demonstrate the procedures, decorum, and skills involved in legal argument. Students who may have difficulties coordinating the attendance of arguments with their class schedules are now able to watch arguments on-demand.

Remote arguments have not been without challenges, however. As with any remote proceeding, technical difficulties can cause problems at any time during a proceeding. Technical difficulties during an argument can have a huge impact on attorneys' performance. They can interrupt the flow of an argument. Such difficulties can also prematurely end a colloquy with a judge. During argument, these colloquies can be critically important to further explain or to distinguish determinative issues for judges. If the transmission of audio or video suddenly cuts out during one of these colloquies, the attorney will likely lose the ability to return to that interaction in an effective way.

The nature of remote arguments has altered these natural colloquies even without technical problems. Because of the difficulties caused by speaking over one another, some courts have created protocols for judges to ask questions in a structured way, rather than the usual course in which judges are able to ask questions throughout the argument. For courts without such protocols, since physical cues often do not transmit through a screen, it is much harder to anticipate when a judge is about to ask a question. This complication may mean that some questions go unasked or that they are asked once the attorney has moved on to a different point in her or his argument.

Additionally, the transition to remote proceedings has affected the ability to have a functional second chair attorney during argument. Some courts have restrictions about the number of people permitted in the room to limit background noise during proceedings. These restrictions could prevent a first-chair attorney from having a second chair to facilitate the argument. Even if a second chair is permitted to be in the room, it is unlikely that the person is able to be in close proximity to the arguing attorney because of the risk of background noise and because of court rules limiting the remote presence of more than one arguing attorney for each party to the appeal.

Appeals from Remote Trial Court Proceedings

This section of the article will address the benefits and shortcomings of remote family trial court proceedings. In the latter case, these shortcomings may provide bases for appeal. While remote trial court proceedings brought benefits of access to the court and electronic files, it also presents shortcomings in the transcripts of the proceeding, potential gaps in the record, and the possibility of "missed" objections.

The immediate transition to remote trial court proceedings at the outset of the pandemic provided benefits to many family court litigants. More than anything, remote proceedings allowed cases to continue. Without remote court appearances, many cases would have been frozen in time for months (or years!) while the country addressed the pandemic. Remote trials have allowed trial attorneys to utilize their electronic and remote work set-up away from the office during the pandemic, a time during which many attorneys have sheltered in place—whether at home or in another remote location. The technology associated with remote trials may also provide a benefit to those cases that are subsequently appealed. Now that trial court exhibits have become increasingly electronic, it will likely be easier for appellate counsel to obtain a full copy of the trial court record, without having to obtain it from trial counsel or travel to the court.

There are several challenges, however, that are unique to remote proceedings that may lead to new issues during appellate proceedings. One potential (and likely) problem is inaccurate or incomplete transcripts, which could result in an inaccurate or incomplete trial court record. Many trial courts

are now conducting court proceedings over generic platforms such as Zoom or Microsoft Teams. These platforms do not have the technology for separate streams of audio. This is very different than a physical courtroom with dedicated microphones that can be listened to individually in the event attorneys, parties, or witnesses speak over each other. As anyone who has participated in a court proceeding understands, people constantly speak over one another—either intentionally or unintentionally. When people speak over each other during remote proceedings, the transcript often reads as “indiscernible.” This is not a reflection of the capabilities of the court reporter, but rather a reality resulting from the jumble of words that naturally occurs when all the parties are speaking over each other in a remote proceeding.

Participants are likely to speak over each other during a remote proceeding for a variety of reasons. Because the attorneys and litigants are not in a physical courtroom, there are times that people forget to exercise courtroom decorum. This can result in excited outbursts of people speaking over one another. Videoconferences also create authentic misunderstandings as to whether a person is done speaking. The cues that can be seen when everyone is physically in one room do not always come through on the screen. While the judge or court reporter may remind participants not to speak over one another, by the time they do so, the damage is usually already done. The result is a portion of the transcript that will likely not accurately reflect what happened during the trial court proceedings.

Remote proceedings also present a risk of transcript inaccuracies resulting from differences in access to technology. While some attorneys and parties are equipped with new laptops, high-quality headphones and microphones, high-speed internet, and quiet offices or conference rooms, this is not true for all attorneys and parties. Some participants have unclear audio as a result of low-quality microphones. Participants without quiet places to attend court may also have background noise, such as barking dogs, children playing, lawnmowers, or neighborhood construction sounds. Difficulties with internet can also cause a lag in the audio transmission. All of these things can result in situations when a court reporter cannot transcribe more than “indiscernible” or “(sounds like _____).”

In addition to challenges in creating accurate transcripts, remote proceedings can bring new challenges in creating a record of exhibits. When all participants are physically in a courtroom, attorneys can exert some degree of control, and be certain that all participants in a proceeding are looking at the same proposed or admitted exhibit. With a remote proceeding, doing so is much more difficult. If electronic exhibits are offered in a remote proceeding, then some attorneys will follow best practices and have all electronic exhibits in a place where all counsel and parties can access them. It is more difficult to ensure that a nonparty witness is using the same exhibits, particularly if the witness has not been provided all

proposed exhibits. That witness may need access given a different way. Also, should any participant in the proceeding have difficulty accessing exhibits electronically, they cannot easily be provided a copy, as they would have been at court when the proceeding took place with the participants physically together. Some attorneys choose to email electronic exhibits. In a case with many exhibits, this can result in a substantial number of e-mails and an increased likelihood of technological or user error. Often, emails are returned as not delivered or not deliverable, or can be easily overlooked by the intended recipient. Not only will these difficulties likely cause delay, but it becomes even more problematic if the court, the witness, counsel, and parties do not all have access to view the same document. While some attorneys may request permission to share documents on the screen during a remote proceeding to attempt to circumvent this confusion, they still must follow the individual state’s requirements for proposed exhibit submission to ensure the exhibits are included in the trial court record. Further, what is shared on the screen is not recorded and, therefore, it is possible that what is shared on the screen is not identical to what has been filed or what a witness is viewing when testifying.

For documents that are not electronically filed, attorneys must make sure that these documents are properly handled by the court and become a part of the record as necessary. For example, if paper filings did not get properly addressed during periods of limited court operations and, therefore, do not become part of the court file, then they will likely not be part of the record on appeal.

Remote proceedings increase the likelihood that counsel or a self-represented party will “miss” an objection. Technical interruptions can mean a participant misses a question or answer. It can also mean the judge may not hear an objection. Additionally, some judges ask participants to keep themselves muted unless they are actively speaking. This may result in the person who is responsible for making an objection being muted and requires the attorney to unmute his or her microphone before stating the objection. Failure to timely unmute can result in the objection not being heard by the judge or not effectively made and not becoming a part of the record. If the objection is not preserved, it will pose a problem on appeal because an appellate court will likely decide an issue framed by that objection was not raised at the trial court level. Additionally, as discussed above, when participants are speaking over one another, the transcript may not accurately create a record of the statements. If this happens, the objection colloquy may not show up in the transcript and may thus not be properly before the appellate court.

Missing documents from the court file or missing testimony in transcripts may limit what a party is able to present on appeal. Because appellate courts do not hear evidence, they are limited to the evidence presented to them in the record from the lower court. *See, e.g.*, Connecticut Practice Book § 61-10 (“it is the responsibility of the

appellant to provide an adequate record for review”); MI R A MCR 7.210 (“In an appeal from a lower court, the record consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced.”); LFNYP § 148:1 (“On appeal, the Court can review only questions presented in the record and is bound by the certified record on appeal. It may not consider anything which does not appear in the record.”).

In most states, parties must provide copies of the relevant transcripts on appeal. When portions of the trial court proceedings cannot be accurately transcribed, the appellate court cannot review this portion of the proceedings. Similarly, if pieces of the trial court file are missing, the appellate court will be unable to review these documents,

Finally, there may also be some potential appellate issues resulting from states having temporarily suspended court deadlines—such as filing deadlines, statutes of limitation, and court deadlines to issue decisions—during the pandemic. Because suspensions of court deadlines for such an extended period of time were unprecedented, there is no way to know how this will affect appeals or be addressed on appeals.

While the precipitous transition to remote proceedings allowed necessary judicial functions to continue, it also created unintended consequences and the potential for problems that could not have been contemplated. Because the transition happened so quickly, most attorneys had to learn about conducting these remote proceedings hastily and in real time. If states decide to continue to hold certain



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proceedings remotely after the public health situation is fully resolved, there are certain issues that will need to be addressed and remedied. Attorneys must educate themselves and be cognizant of how remote proceeding-specific difficulties will ultimately impact a future appeal. **FA**