

CORONAVIRUS INFORMATION & UPDATES

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Remote Control: Best Practices for Litigating and Investigating During COVID and Beyond

The COVID-19 pandemic has forced companies and law firms alike to adapt to non-traditional practices for litigating as well as conducting internal and governmental investigations. At the outset of the pandemic, the optimistic view was that protocol changes—like widespread use of videoconferencing technology—were temporary and that stopgap measures would wane as the virus receded. Now, several months wiser, it is apparent that the pandemic has reshaped what it means to litigate and investigate for the foreseeable future.

This alert discusses key considerations and best practices for litigating and investigating during a global pandemic, drawing upon the experience and insight of our Litigation and Enforcement colleagues across Ropes & Gray's global offices.

Conducting Trials and Participating in Hearings

Parties in litigation and arbitration are facing the prospect of proceeding with hearings and trials either in person or remotely, and in some cases are given a choice between the two. Litigants and their counsel should carefully consider the strategic, tactical, and economic costs and benefits when deciding how to proceed.

- In all cases, ensure that counsel has access to experienced trial technology specialists who can assist with the presentation of evidence in advance of and throughout trial.

If proceeding remotely:

- Observe another remote hearing in advance before the same court to obtain a sense of the cadence and process.
- Ensure your space is prepared for videoconferencing (e.g., understanding best practices with respect to privacy, camera angle, background, lighting, and audio capabilities). Inquire as to whether a test run is possible.
- Determine in advance whether the hearing is open to the public, and be mindful of relevant considerations during participation. For example, if the hearing is public, media can dial in without identifying themselves as press.
- Establish who will speak on behalf of each party and what exhibits may be introduced, and provide this information to the court prior to the hearing. Advance communication can assist the court and avoid unnecessary delays or distractions during the hearing.
- Counsel should plan in advance for a separate conference line or video room for privileged client discussions during breaks in the hearing.
- For criminal matters, remote proceedings may implicate defendants' constitutional rights, including the right to be present at trial, the right to confront witnesses, and the right to trial by jury.

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If proceeding in person:

- Scheduling and hearing times are likely to be more constrained; cautiously weigh the strategic balance between establishing a full record and avoiding cumulative or redundant presentations that may extend proceedings and irritate the judge or jury. Consider streamlining opening statements and submitting written testimony, where appropriate.
- Determine in advance local quarantine ordinances and assess whether any live witnesses will be traveling to or from locations with particular quarantine requirements in place.
- Scrutinize the court's orders regarding courtroom attendees, the use of personal protective equipment (e.g., masks and gloves) and social distancing. Where local rules are ambiguous, work together with opposing counsel and the court to establish clear processes to be followed by all in attendance.

Engaging in Mediation and Settlement

Remote mediations also present unique strategic opportunities and risks for clients. A virtual format may make mediation more palatable, allowing parties and their counsel to convene serious settlement discussions without having to travel or confine themselves to a mediation conference space. However, there is a prevailing view that negotiations are less effective without the benefit of face-to-face interactions or the “investment” of gathering the parties together for in-person talks.

- Work closely with clients to assess whether the time is right for mediation. If the case is ripe for settlement, mediation can be effective even if conducted remotely.
- Consider what type of mediator is preferable. A facilitative mediator largely relies on the parties to control the outcome. In contrast, an evaluative mediator recommends mediation positions and typically opines on which sides have the stronger claims and defenses. An evaluative mediator may be a better fit for remote mediation.
- Schedule a pre-mediation call with the mediator and with opposing counsel to agree on the appropriate remote mediation platform and to decide the structure of the mediation.
- Ensure that all individuals with final settlement authority attend, or at least are on standby during the remote mediation.

Conducting Investigative Interviews

While reopening permits the resumption of some in-person investigative interviews, jurisdiction-specific restrictions (e.g., in resurgent areas) or case-specific considerations (e.g., for interviewees at increased risk for severe illness) may require continued reliance on remote interviews by videoconference. Remote interviews present a host of legal, technical, and practical challenges that, in many cases, can be mitigated through advance planning and adherence to a well-developed protocol.

- For remote interviews, protect against intrusion with a unique, randomly generated meeting link and access password.

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- Practice document sharing via the videoconference platform in advance, to ensure a smooth process and avoid inadvertent witness contamination.
- Instruct interviewees (and other participants, as relevant) to participate from a private location, outside the earshot of cohabitants. If that is not feasible, recommend utilizing a headset or headphones to at least shield half of the conversation.
- Perform a dry run with the interviewee (or his/her IT support team) to ensure the interviewee can use the videoconference technology effectively and has an adequate internet connection.
- Where local conditions permit, consider a hybrid interview format, where the interviewee participates from a controlled environment (e.g., socially distanced conference room, accompanied by in-house counsel or investigation team member) with the remainder of the investigation team participating by videoconference.
- When planning for an in-person interview, be mindful of travel rules, office gathering protocols, and company policies.

Conducting Depositions

As with remote investigative interviews, remote depositions present unique considerations not typical for an in-person setting. Careful and advance planning can ensure depositions run smoothly.

- Work with opposing counsel to develop a virtual deposition protocol addressing all aspects of the deposition, from vendor selection to the format of exhibits.
- Some witnesses may require hard copy documents be sent to them, in which case counsel must consider—and guard against—the risk of privileged materials falling into the hands of third parties. Provide clear instructions to the witness for handling, storing, and disposing of such documents.
- Consider a modified remote deposition, where the deponent participates from an office setting accompanied by at least one attorney. This approach may put a nervous witness at ease, allow for swifter resolution of technical issues, and facilitate document review.

Directing Remote Discovery

Each step of the discovery process—preservation, collection, review, and production—is changing to adapt to an environment where more employees work, and key meetings are conducted, remotely. Critically, counsel should ensure that any deviations from the client’s legacy discovery procedures are consistent, well-documented and explained.

- *Preservation*
 - Identify unconventional forms of materials and storage media/locations that may be subject to preservation obligations (e.g., recordings of Zoom meetings, instant messaging through videoconferencing platforms).
 - Consider remote employee practices that may affect discovery (e.g., handwritten notes, deviation from document shredding policies).

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- *Collection*
 - Maintain a cadre of trusted IT providers with a proven system for remote document collection and device extraction.
 - Build additional time and budget into the document collection plan, recognizing that vendors may need to travel to multiple locations collecting decentralized material.
- *Document Review*
 - Engage E-Discovery Providers with proven plans for monitoring and securing remote work. This includes (1) tracking reviewer productivity, engagement, consistency, and performance; (2) providing robust up-front training on privilege and confidentiality; (3) establishing a group review forum through access to virtual rooms or classrooms; and (4) enforcing information security requirements around restricted and auditable access on secure and approved machines.
 - Prohibit review teams from printing, downloading, screenshotting or saving review materials to removable media, as well as from accessing cloud-based file storage, collaboration sites or personal email.
 - Continuously reinforce compliance protocols—with a strict eye towards privilege and confidentiality concerns—through regularly scheduled virtual meetings with the review team.
- *Production*
 - Do not overlook the critical role played by on-site staff in receiving, readying, and delivering production sets. This can require substantial in-person preparation time.
 - When physical media is necessary, work ahead to confirm logistics and prepare production sets with increased lead time to mitigate the risk of missed deadlines or inadvertent errors.

Conducting Forensic Testing and Auditing

Companies have had to reassess how and when to enforce their audit rights when faced with objections from third parties based on health- and business-related concerns.

- Consider whether routine audits can be rescheduled or modified in scope.
- Mitigate challenges posed by reliance on remote testing through advance communication and setting expectations, including collaborating on the audit plan and scope of information requests.

Conclusion

Every facet of our litigation and investigation practices has been affected by the shift to remote advocacy. Understanding these shifts—and cultivating expertise in strategic planning, the use of remote technologies and services, and effective communication with adversaries, the court, and other stakeholders—is critical for driving excellent results at every phase of a litigation or investigation in this “new normal.”