

Remote Hearings Are Ill-Suited Default For Litigation Realities

By **Mark Eisen** (March 14, 2022)

Much undoubtedly changed in the world of pandemic litigation. From remote proceedings to Zoom depositions to mediation by virtual breakout room, we have grown accustomed to litigation from the living room.

But to be perfectly blunt, I am tired of it. And I would argue the profession has suffered and will suffer for it if we decline to resume in-person proceedings as the norm.

I recently read Joshua Sohn's Law360 guest article, "Remote Hearings Should Be The Default In Civil Litigation." The article was extremely well written. The arguments in favor of remote proceedings are well stated: cost savings and efficiency. The primary justification: Rule 1 of the Federal Rules of Civil Procedure.



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Rule 1 is undoubtedly a critical guiding principle. In short, it states that the Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."^[1]

Nevertheless, I disagree with the article's conclusion.

Rule 1 tells only part of the story. Litigation is complicated, fluid and dynamic. Remote proceedings are an ill-suited default for the realities of litigation and are a disservice to the intricacies of the profession.

Rather than defaulting to remote hearings, courts should give parties the option to appear in person if they want, or remotely if they would prefer.

There are three reasons for this approach.

First, in-person hearings can be a cost-saver.

Sure, any given remote proceeding would save the literal costs of travel for that singular proceeding. But does it save costs in the case as a greater whole? Oftentimes, no.

How many cases have settled on the courthouse steps? How many cases or issues have resolved in the corridors of the courtroom? How many hearings have paused to allow parties to hash it out in the hallway?

The cost of a flight or the time of a commute can very well save long-term costs of litigation.

Requiring opposing counsel to come together forces upon parties the human element of litigation. It forces pleasantries and breaks down barriers.

Remote proceedings create a coldness to litigation that pervades the proceeding. Attorneys can act as paper tigers behind email or over the phone.

Unlike remote proceedings, in-person interaction has the ability to break through the adversarial nature of our profession. Parties do not hash it out in virtual proceedings; they hang up.

Showing up in person may be a cost, but not necessarily an undue cost. It should be viewed rather as a potentially necessary cost. In-person hearings can create a net efficiency and a net savings that should not be overlooked simply because a flight or a drive may have an upfront cost.

Second, the future of our profession needs in-person advocacy.

We have a responsibility to train oral advocates. We are, however, heading down a path of a generation of litigators that have never set foot in a courtroom.

Cases can proceed from start to finish — including depositions and, in some jurisdictions, trial — without the counsel ever engaging in a single in-person interaction between themselves or the court. That cannot be an acceptable outcome.

Federal Rule of Civil Procedure 78, which the Sohn article references, allows courts to "provide for submitting and determining motions on briefs, without oral hearings."^[2]

While Rule 78 may be a necessary evil for overburdened judges that cannot afford to hear every motion, it has resulted in fewer and fewer civil hearings, even on case-dispositive motions.

Couple that with remote proceedings, and the opportunities to see the inside of a courtroom are few and far between for any litigator, much less junior associates.

Believe me, I see the benefit of remote proceedings. I have two kids under four, and I would prefer to be with them and not traveling for any hearing, particularly a basic status or scheduling hearing.

The reality is, however, that many of us cut our teeth as young associates appearing for status hearings and scheduling conferences.

While not the most exciting, those are the hearings that create comfort in the courtroom and comfort addressing judges.

The U.S. District Court for the Northern District of Illinois, for example, had a pre-pandemic procedure known as presentment, in which motions would be noticed for hearing, and attorneys would appear and detail the motion for the judge.^[3]

Sometimes it would result in argument on the motion; sometimes it would result in setting a briefing schedule.

That procedure has largely been a victim of the pandemic. Those types of simple hearings can be invaluable for young associates.

Remote proceedings cannot adequately prepare new attorneys to appear before a judge in a courtroom any more than moot court prepares law students to argue an appeal upon graduation. There is no substitute for the real deal.

Hearings, depending on the jurisdiction, are becoming less common generally. If remote

proceedings become the default, we may well end up with a generation of advocates who know little more than being on brief.

Third, remote proceedings are a poor substitute for in-person proceedings.

By now, we have all seen the unique pitfalls of remote proceedings: inopportune filters,[4] shaky Wi-Fi connections, microphone mishaps, dress code issues,[5] more dress code issues,[6] toilets flushing,[7] dogs barking and kids crying.

At the end of the day, it just is what it is — many attorneys are not taking, and may not be able to take, remote proceedings as seriously.

The pomp and circumstance of the courtroom adds a degree of seriousness to a proceeding that is naturally impossible to replicate through the internet.

Arguing substantive motions into a computer screen is not the same. The interaction between judge and attorney is just not the same. It can be difficult to get into the flow of an argument when the judge or court reporter needs to stop the attorney because of a bad connection or because something did not come through clearly.

Many motions and many hearings can be done equally well remotely. But many cannot.

Waiting for a motion to be called while hoping the baby stays asleep is not ideal. Nor is praying there are no Amazon deliveries that drive the dog into a frenzy during an argument.

Conclusion

There are clear benefits to remote proceedings, as there were pre-pandemic. There are similarly clear downsides.

Providing the option to attend hearings remotely or in person allows attorneys and their clients the opportunity to discuss what best suits the needs of the case. It also allows attorneys the option to come back into the courtroom.

For those of us who have felt the last two years have been less working from home and more living at work, opening up the courtroom may actually improve the work-life balance.

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[1] Fed. R. Civ. P. 1.

[2] Fed. R. Civ. P. 78(b).

[3] See Northern District of Illinois Local Rule 5.3(b).

[4] Morgan Conley, 'I'm Not A Cat,' Atty Assures Judge Amid Zoom Filter Mishap, Law360,

Feb. 9, 2021, <https://www.law360.com/articles/1353822>.

[5] Dorothy Atkins, Calif. Judge Tells DLA Atty On Zoom: 'At Least Have A Tie On', Law360, Feb. 11, 2021, <https://www.law360.com/articles/1354603>.

[6] Carolina Bolado, Put On A Shirt For Video Hearings, Judge Tells Attys, Law360, April 14, 2020, <https://www.law360.com/articles/1263646/put-on-a-shirt-for-video-hearings-judge-tells-attys>.

[7] The Term: Flushing Arguments Down The Toilet, Law360, May 7, 2020, <https://www.law360.com/articles/1271246>.