

Arguing dispositive motions remotely in COVID times

By: Douglas H. Wilkins and Daniel I. Small © July 23, 2020

At this stage of our column, we had expected to turn seamlessly from summary judgment papers to summary judgment hearings. We had no idea we would be in the midst of a pandemic that is changing our lives and our legal system.

Remote motion hearings in civil cases have been the norm for more than four months, with no clear end in sight. Even when things return to “normal,” the lessons learned from our forced use of technology will likely lead to many more remote hearings than in pre-COVID times.



Who knew that we could use technology so well to reduce travel time and expense, minimize in-court waiting time, allocate hearing time with more certainty, and increase the court’s focus on one matter at a time?

Remote hearings will almost certainly be around permanently, to deal efficiently with some matters that benefit little, if at all, from in-person argument.

These changes raise new questions about our prior advice. Last year, we wrote seven columns, each one discussing a distinct, basic principle of motion practice. We wrote another column on arguing motions to dismiss. Since then, the pandemic has changed the entire context of litigation and all “live” proceedings.

So, how much of our year-old advice about motion practice still applies? We argue that all of it does. In fact, the remote hearing context can seem misleadingly informal. That, combined with other practicalities of remote proceedings, makes it even more important for counsel to adhere to the basics that we discussed in spring 2019.

Our previous advice set forth the following basic principles of motion practice:

- 1) Know your audience
- 2) Follow the page limits’ spirit
- 3) Get to the point
- 4) Equities, equities, equities
- 5) Keep your credibility
- 6) React to cues
- 7) Follow the rules

We will spare you seven new columns. But remote hearings raise enough issues that we will address the first principle now, and leave the others for our next column.

Know your audience

Good advocates speak to their specific audience's perspective. That means the motion judge. It does not mean your client, your opponent, or anyone else in court or on a remote call.

It's hard enough to hear yourself through the court's ears when the judge sits in front of the courtroom behind an elevated bench, surrounded by flags. On the screen, it's even harder.

Video proceedings equalize. Everyone appears in the same-sized box, and you can see your opponents (and perhaps their clients) with the same prominence as the judge.

Judges have found ways to display a courtroom background, sometimes virtually, which (without powerful computers) can produce a surreal flicker between the judge's image and the virtual background. That may help, but it's not the same by a long shot.

It's even worse if you're on the phone with the court, and can't see the court at all. No matter how hard the court tries, the online medium makes it impossible fully to reproduce the courtroom dynamic.

The equalizing effect of remote hearings may have different implications for different judges. All judges require respect for the court, but you know that some judges are more formal than others. What some judges may view as entirely appropriate, others may find obsequious.

Some judges are less formal in court, but virtually all judges probably feel some need to make clear that the remote hearing is still a judicial proceeding. Like you, judges are still adjusting to the implications of the change from real to virtual.

The situation calls for professional discipline both before and during the remote hearing.

1. **Prepare carefully and deliberately.** Good preparation is the best solution to many problems, including the temptation to treat a remote hearing as a mere "discussion" among visual equals. Focus on what is likely to convince your judge, incorporating published or word-of-mouth information about the particular judge who will preside, if possible. This was our advice in spring 2019, and it still works.

Some updates:

- To be sure, it's probably too early to learn a lot about particular judges' online preferences. The clerk may be able to help on that topic to some degree. Otherwise, make conservative assumptions.
 - Anticipate and address technical issues. Otherwise, at best, you will lose your audience, and you may antagonize the court or undermine its perception of your competence. For instance, if you plan to share a document on the screen, make sure you know how to do that, and double-check with the clerk to make sure that your judge will enable screen-sharing for all participants. Anticipate any need for interpreters and notify the clerk. In cases of doubt, confirm with the clerk that the court has received any exhibits to which you will refer.
2. **Dress and act in a way that satisfies the judge that you respect the solemnity of the situation.** You are in court. Don't force the judge to confront his or her own concerns or apprehensions about the apparent informality of the virtual hearing.
 3. **Choose a background that sends the same message.** Bookshelves or bookcases work well, for instance. You should not assume that a virtual background will do so unless you have information about your judge's individual preferences.
 4. **Of course, mute yourself, your clients and your co-counsel when not talking, and avoid "court appearances" by your dog, kids or lawnmowers.** We know zero judges who disagree. Video is different. First-chair lawyers going "off video" entirely are likely to be very disconcerting to the court. The same is probably not true for clients and co-counsel who are not arguing the matter. You may want to advise the court of the

various roles of team members who appear on screen, so that exits or black-outs will have no greater effect than people entering and leaving a real courtroom.

5. Then, try to look the “judge” (i.e., your camera) in the eye when you argue at the hearing. Avoid detracting from your evidence or argument through “side views” that result when you or your witness looks at a screen, but not at the camera. Resist the natural temptation of the medium to treat all participants as equals in a conversation (and never address anyone but the judge unless specifically allowed).

We are not the only ones to make these recommendations. We do emphasize that they flow from one of the most fundamental principles of rhetorical persuasion: Consider everything from your audience’s perspective in a motion hearing. We assume that you are not the rare person who wants to win only on appeal. So, only one person’s opinion ultimately makes a difference. Pay attention to what works.

Previous installments of “Merits of the Cause” can be found here. Judge Douglas H. Wilkins sits on the Superior Court. Prior to taking the bench, he was a trial attorney in private practice and at the Attorney General’s Office. Daniel I. Small is a litigation partner in the Boston and Miami offices of Holland & Knight. A former federal prosecutor, he is the author of “Preparing Witnesses” (ABA, 4th Edition, 2014), and teaches CLE programs around the country. He can be contacted at dan.small@hkclaw.com.

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