

The Online Courtroom: Leveraging Remote Technology in Litigation American Bar Association, Tort, Trial and Insurance Practice Section

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With the advent of the COVID crisis, courts throughout the United States curtailed operations resulting in backlogs, which gave rise to a rush for technological answers to process cases safely. Since then, many articles have been written about online or virtual trials and hearings but this is one of the first books written to address all aspects of the subject. The book resulted from collaboration between the Online Courtroom Project (OCP) and the Tort Trial and Insurance Practice section of the American Bar Association. Editors Richard Gabriel and Ken Broda-Baum gathered together a group of lawyers, retired judges, trial consultants, trial technologists, and researchers to write the book. It reports on the research and experience of the authors from March 2020, when the pandemic first hit, until just before publication in April 2022.

OCP was first envisioned by Richard Gabriel, President of Decision Analysis, in March 2020 when he asked himself whether online trials and hearings were an option to replace in-person hearings and trials. He gathered together a diverse group of acquaintances from the legal profession and established OCP. As its first project he suggested conducting a demonstration online jury trial, which was done over two days in June 2020. Every aspect of a jury trial was covered from jury selection through closing arguments and instructing the jury. Afterward, everyone who had been involved was interviewed by trial consultants, and it was concluded that online hearings and trials were viable alternatives.¹ A report was written up and published on the OCP website.² Later in November of that year a two-day virtual summit was conducted by OCP with co-sponsorship by the National Institute for Trial Advocacy (NITA), the American Board of Trial Advocates (ABOTA), the American Inns of Court, and others. It was titled “COVID, the Court, and the Future of the Jury Trial.” Over 1,500 people attended the summit. OCP then issued a white paper on best remote courtroom practices and conducted several continuing legal education offerings around the country, including a national webinar with NITA where judges from the states of Washington, Florida, and New Jersey described how their jurisdictions provided access to the civil justice system during the pandemic.³

Richard Gabriel and Ken Broda-Baum, one of the original

OCP members, suggested writing a book covering all aspects of online hearings and trials and pitched the idea to the American Bar Association (ABA), which agreed to publish the book. It is organized into two parts and contains 20 chapters written by 22 authors with varied backgrounds.

PART ONE: “CHALLENGES AND OPPORTUNITIES OF ONLINE LITIGATION.”

Chapter 1 is written by Richard Gabriel. It reviews how courts were affected by the advent of COVID in March of 2020 and provides an overview of how courts have addressed the issues presented. He notes:

Even in the midst of a crisis, our constitutional rights as citizens are not suspended. This created significant challenges, as the science and medical communities were still trying to understand how the virus spread, and the courts attempted to balance public safety against every citizen’s access to the justice system At the same time, lawyers and judges quickly adapted to many aspects of online litigation: depositions, hearings, mediations arbitrations and bench trials.⁴

He briefly lists various arguments raised against online trials and hearings and then provides information and statistics from studies responding to these arguments. And he addresses the benefits of online litigation.

Chapters 2 through 5 cover views from the bench, counsel table, witness box, and the jury box. In chapter 2 I review, within the context of “procedural justice,” how online trials and hearings are being handled by a number of judges and justices and what they think of the process. In the Summary, I write:

Simply stated, the American justice system exists to resolve disputes, whether arising from criminal action, family issues, commercial issues, personal injury, and so on, in a civil, timely, and orderly manner. Why should it matter what type of platform is used as long as the dispute can be resolved to the satisfaction of those involved? And

Footnotes

1. The Civil Jury Project at New York University School of Law also conducted a fully online mock trial in May of 2020 and published articles during the year about the process as well as research relating to issues involved. It also wrote a memorandum that concluded that remote civil jury trials were legally permissible and constitutional. See Michael Shammass & Michael Pressman, *Memorandum: The Permissibility & Constitutionality of Jury Trial by Videoconference*, CIVIL JURY PROJECT (May 4, 2020), [https://civiljuryproject.law.nyu.edu/memorandum-the-permissibility-constitutionality-of-jury-trial-by-](https://civiljuryproject.law.nyu.edu/memorandum-the-permissibility-constitutionality-of-jury-trial-by-videoconference/)
2. OCP, *ONLINE JURY TRIALS: SUMMARY AND RECOMMENDATIONS* (2020), <https://www.onlinecourtroom.org/demonstration-report>.
3. RICHARD GABRIEL ET AL., *THE ONLINE COURTROOM NOW AND POST-PANDEMIC: SKILLS AND TOOLS FOR REMOTE ADVOCACY* (2021), <https://www.nita.org/s/product/the-online-courtroom-now-and-postpandemic-skills-and-tools-for-remote-advocacy/01t4W00000CP0xh>.
4. *THE ONLINE COURTROOM: LEVERAGING REMOTE TECHNOLOGY IN LITIGATION* 3–4 (Richard Gabriel & Ken Broda-Baum eds., 2022).

that is where the focus should be What we need to address are the types of hearings and trials that lend themselves best to the remote platform and how to ensure that due process is provided. I attempt to provide a judicial perspective herein.⁵

In Chapter 3, Lisa Oberg and Michael Sandgren, attorneys with Husch Blackwell LLP in Oakland, California, who tried an online mesothelioma case before Judge Seligman in Alameda County, present their observations. They conclude with the following statement: “From the perspective of a trial attorney the challenges of remote trials are initially daunting, but certainly can be overcome. Like any other new area faced by trial counsel, adequate preparation can minimize the inevitable challenges that will pop up during a remote trial.”⁶

Chapter 4 was written by Alicia Acquino, a trial presentation specialist in San Diego. She discusses online trials from the perspective of witnesses and offers suggestions for best results. She notes:

The remote setting allows the witness to be in a more comfortable environment. Appearing in court in front of the person who assaulted you, the employer who caused harm to you, or the person who is accusing you can cause stress and anxiety to the witness. It can be less confrontational and more calming for the witness if they are appearing remotely while in a safe environment.⁷

Chapter 5, written by Ken Broda-Baum, a senior litigation consultant, reviews online trials from the perspective of jurors and presents quotes from a number of them, including the following:

*I was a juror on a civil case for 10 weeks in 2016. The [online] juror experience was in almost all respects better. I could more easily see the documents, exhibits and witnesses’ faces on Zoom than in the courtroom. I could hear everything better as well, also, I didn’t lose an hour each way in traffic every day.*⁸

Sarah Murray, Josh Splansky, Marc King, Noah Wick, and Ted Brooks, trial consultants, generally address technological challenges of online litigation in Chapter 6. They list many of the objections made about online litigation and provide responses. They ultimately conclude:

[T]he biggest technological challenges of new technology are rarely, strictly speaking, technical. When people say that technology ‘doesn’t work,’ rarely is it because a piece of equipment is broken. It is almost always because there is a mismatch between the existing way of doing things and the way new technology forces people to work. The biggest challenges are social and cultural—incorpo-

rating new ways of doing things into existing systems—putting old wine in new bottles.⁹

Chapter 7 is written by attorneys Michael Shammass and Michael Pressman. They address some of the early legal issues that have arisen when courts have utilized online hearings and trials. They conclude: “Any decision as to whether civil or criminal jury trials held via videoconference are permissible would and should likely undergo a balancing approach. With its weighty constitutional protections, the criminal context will likely be where videoconferencing remains most controversial. In the civil context, however, jury trials held via videoconference may well be permissible, even when one of the parties does not consent.”¹⁰

Finally, in Chapter 8, Sarah Murray and Marc King discuss diversity of representation of jurors in online trials and best practices to ensure representative jury pools. They conclude with the following:

Online jury selection, whether as the only online component of a trial or part of a full online trial, shows the potential to *increase* the representativeness of American jury pools and the participation of Americans in jury service, and to help revitalize what has become an increasingly moribund trial jury system.¹¹

PART TWO: “BEST PRACTICES IN THE ONLINE LITIGATION PROCESS.”

This part of the book provides a “hands on” discussion of the various issues arising with online hearings and trials.

Chapters 9 and 10 address “Online Client and Witness Meetings” and “Taking and Defending Online Depositions.” In Chapter 9 Ken Broda-Baum provides a general discussion for online meetings and provides best practices specifically for witness preparation meetings. Attorneys Geoffrey Vance and Robert Kopka discuss best practices for online depositions in Chapter 10.

Theresa Wardon Benz, an appellate specialist with Wheeler Trigg O’Donnell LLP in Denver, Colorado writes about online oral arguments in Chapter 11. She begins with the following caveat:

There are upsides to virtual hearings and arguments, including ease in scheduling, reduction in travel, and open public access. But there are downsides too. It feels less momentous to appear in a state supreme court or federal circuit court by Zoom (and for the U.S. Supreme Court practitioner by speakerphone). It can be harder “to read the room.” Even finding a place where you can stand, as you normally would, but be properly focused on the video screen, is challenging.¹²

“[T]he challenges of remote trials are initially daunting, but certainly can be overcome.”

5. *Id.* at 21.

6. *Id.* at 47.

7. *Id.* at 53.

8. *Id.* at 56 (italics in original).

9. *Id.* at 108.

10. *Id.* at 121.

11. *Id.* at 148.

12. *Id.* at 167.

She then addresses how to best set up and handle online arguments by organizing the chapter into six steps: setting up your courtroom or “studio”; learning and practicing with the technology; learning and practicing new protocols and judicial preferences; how to organize your materials and communicate with co-counsel or the client; planning and preparing the presentation; and, finally, what to do when the technical glitch occurs.

In Chapter 12, Lisa DeCaro, a cofounder of Courtroom Performance, Inc., a trial consulting firm, discusses the fundamental differences between in-person trials versus online trials. She points out that “[t]here are several fundamental differences between advocacy in a live courtroom and advocacy on the screen.”¹³ She then addresses these differences: eye contact, body language, voice and setup of equipment and provides best practices. Her final, but vital tip is “Practice, Practice, Practice.”¹⁴

Chapter 13, authored by Josh Splansky, Ted Brooks, Alicia Acquino, and Noah Wick, all technical trial consultants, may be the most “hands on” chapter in the book: “Implementing Technology for Remote Trials.” They discuss how and where to set up technology; the cost of doing business; implementation of the technology for viewers, presenters and hosts; and they close with “Best Practices for Technology during Online Proceedings.”¹⁵

Chapter 14 is written by Chris Dominic, president and senior consultant at Tsongas, and Laura Dominic, a senior consultant at Tsongas. The chapter provides best practices for managing jurors in the virtual courtroom from juror summons through deliberation. They discuss what the virtual courtroom looks like, what staff are necessary, making contact with the potential jurors, and screening the jurors for service. Then they turn to voir dire, trial, and deliberations. Chapter 15, by Jeffrey T. Frederick, president of his own trial consulting firm, builds on Chapter 14 providing his recommendations of best practices for online jury selection. In his “Final Thoughts” he concludes:

Online voir dire and jury selection has great potential but its future impact is more complicated whether in connection with online or hybrid jury trials. Online jury selection offers significant advantages over its health-focused in-person, masked, and socially distant counterpart The benefits of online versus in-person jury selection are (1) greater jurors honesty and candor resulting from the more intimate voir dire environment; (2) the potential for greater diversity resulting from the use of remote technologies.¹⁶

Veteran business and real estate litigator Jeffrey Kirschenbaum discusses best practices for online testimony in Chapter 16. He recommends using pretrial orders to set ground rules, which, if followed, will set the stage for a more streamlined trial which flows. He discusses direct and cross-examination as well as expert witnesses. He concludes: “There are many benefits to presenting trial testimony online and understanding the benefits will help you get ready for effective direct and cross-examination. The trier of fact will pay closer attention to the testimony of your witnesses

if you are prepared to move through the material in a deliberate and organized manner and maintain eye contact with the camera.”¹⁷ Chapter 17, by Noah Wick, builds on this advice by discussing effective use of trial exhibits and demonstratives online.

In Chapter 18, I present additional jury instructions needed for online trials. In Chapter 19, Karen Lisko, PhD. discusses jury deliberations when the jurors are socially distanced or serving online. She includes a section on best practices for remote deliberations. Richard Gabriel discusses the future of online litigation in the final chapter and raises a number of questions that need to be further addressed:

“What features of the online legal process work as well, better, or worse than their in-person counterparts?”

“How do online legal practices affect the overall cost of litigation?”

“How do online legal practices affect the efficiency of the litigation process, including discovery settlement and trial?”

“Can online litigation practices be employed in criminal cases without violating the constitutional rights of the defendant?”

“What specific practices in the online legal process serve to include or exclude different stakeholders and affect access to and representation in the courts?”

“How do online presentations affect the clarity of court presentations and fact finder attention, retention, and use of presented evidence and arguments?”

“How do online presentations of evidence, testimony, and arguments affect the evaluation of the credibility of the evidence, witnesses, and attorneys, as well as the fact finder decision-maker?”

There are six Appendices. A is the American Bar Association Formal Ethics Opinion 498 dealing with virtual practice. B is the Riverside County, California Trial Setting Order for use with virtual trials. C is a set of recommended questions for online jury selection and service. D is an online proceeding questionnaire. E sets out the ideal features in a web platform for courtroom use. And F lists online resources.

The book does not answer all questions relating to online hearings and trials because the process is still being worked through. But it addresses many of the basic issues to aid lawyers, judges, administrators, technicians, and others who become involved with online proceedings.



J. Gary Hastings served as a Los Angeles Superior Court judge from 1985 to 1993. In 1993 he was appointed to the California Court of Appeal, Second District, Fourth Division, where he served until he retired from the bench in 2006. He then became an Adjunct Professor at Southwestern Law School, where he taught Trial Advocacy and a seminar on the American Justice System for 12 years.

13. *Id.* at 175.

14. *Id.* at 189.

15. *Id.* at 212.

16. *Id.* at 258.

17. *Id.* at 269.