

Civil Litigation**Virtual proceedings are here: Now to do them effectively**By **Barry Leon**

Barry Leon

(April 8, 2020, 8:34 AM EDT) -- The COVID-19 situation is evolving daily. It is clear is that "normal" will not return for some time ... if ever.

Those involved in dispute resolution have rapidly come to accept the reality that "normal" dispute resolution will not return for some time either, if ever. Perhaps we have been moved into a "new normal" in dispute resolution.

The current reality is creating opportunities and leading to innovation. It is causing us to see things differently and to expand our thinking, approaches and skillsets.

We are finding ways to keep the resolution of disputes moving, rather than permitting disputes to be frozen and stagnate. We need to continue to resolve disputes, if not in the same ways then in different ways — perhaps ways that will prove to be less expensive, more efficient, faster and more effective for all participants than traditional in-person

proceedings.

Legitimate concerns

Not surprisingly, the rapid increase in virtual proceedings — arbitrations and mediations, and soon court proceedings — has raised a range of legitimate concerns for counsel, judges, arbitrators, mediators and parties, particularly for the many potential participants in virtual proceedings for whom this is all new.

One of the legitimate concerns is about the feasibility and efficiency of court, arbitration and mediation participants managing the technology for virtual proceedings while simultaneously presenting or hearing the proceeding or conducting the mediation.

Participants in a virtual proceeding will often be distracted (or worse) if they need to manage technology and resolve any technical issues as they arise when their job should be to focus on the proceeding — the evidence, the issues and the submissions, as the case may be.

Counsel, judges, arbitrators and mediators should not permit themselves to become unwilling — and very expensive — virtual proceeding technicians. Even if things go smoothly, in arbitration and mediation their hourly rates will materially increase the cost to the parties, and in court proceedings, scarce judicial resources will be used inefficiently.

If technology problems occur that the participants are not equipped to resolve quickly, the delays and disruptions in the proceeding will further increase the cost to the parties and/or the inefficient use of scarce resources.

Counsel, judges, arbitrators and mediators are not well-positioned to try to resolve a technology problem in the course of a virtual proceeding, nor do they need the distractions and frustrations of trying to pivot from focusing on the case to dealing with the technology problem, and then back to focusing on the case.

Using professional virtual proceeding services

Those who want the best possible virtual proceeding — one that maximizes the prospects of a high quality, problem-free visual and audio experience — need to utilize professional virtual proceeding services.

Professional virtual proceeding services will provide an experienced technical/legal person — a “virtual proceeding specialist” — to handle the technology. This specialist not only needs to be familiar and comfortable with the technology; she or he also needs to be familiar and comfortable with the “legal side” of the virtual proceeding with which she or he will necessarily engage (e.g.: terminology; types of documents; processes, practices and procedures; the ways things are done). In this way, the risk of distractions for all participants can be minimized, as can the risk of technical problems and their consequences, so that the proceeding can be conducted as smoothly and efficiently as possible.

During the virtual proceeding, the virtual proceeding specialist will provide ongoing, real-time technical co-ordination, management and support, from beginning to end.

A professional virtual proceeding service should provide a range of assistance to the participants both before and during the proceeding, which may include pre-proceeding training and a technical rehearsal with proceeding participants on:

- The use of the advanced videoconferencing software;
- Maximizing the quality of the participants’ visual and audio participation in the proceeding, including input on things such as (a) camera placements, lighting and computer settings to maximize both audio and visual quality, and to enable each participant to be viewed clearly, and (b) screen options to enable each participant to focus on one or more particular participant(s) in the proceeding in the most effective manner, depending on that participant’s role (e.g. counsel, party, judge, arbitrator, mediator) and the nature of the activity occurring (e.g. witness examinations; submissions; caucusing): and
- Assisting with the setup of document management and sharing capabilities.

Having done a few virtual arbitration proceedings in recent years — having judged a few rounds of the recent Virtual Vis East Arbitration Moot in Hong Kong, and having assisted with the development and launch of Arbitration Place Virtual — I have learned how truly important it is to utilize professional virtual proceeding services that include an experienced virtual proceedings specialist to handle these many types of issues throughout.

Any other approach is “penny-wise and pound foolish.” The cost of doing it right pales in relation to all the other costs of the proceeding, and certainly to the real cost of in-person proceedings.

Will it be as effective?

Even if virtual proceedings will prove to be less expensive, more efficient and faster, another legitimate concern is whether they will be as effective as in-person proceedings.

A few months ago, I might have responded, “No way.”

With experience I am finding that in some ways virtual proceedings can be more effective for all participants than in-person proceedings. The gains may equal — or even exceed — the losses.

In a real courtroom, and in a real hearing room, how well can counsel or the judge or the arbitral tribunal see a witness’ face? How well can counsel see the judge(s) or the arbitrator(s)? How well can a judge or an arbitrator see the witness or see each counsel? In a mediation, how quickly can the mediator move different parties into different rooms and move between the rooms?

In a high-quality virtual hearing or mediation, the answer to all these questions can be “very well” and “very quickly.”

Understandably, those who have never participated in or seen a demonstration of a virtual proceeding may be suspect. Those involved in all forms of dispute resolution should take a demonstration of virtual proceedings.

If judge, an arbitral tribunal or a mediator has counsel for one or more parties who is concerned about having a virtual proceeding, all counsel should be encouraged to take a demonstration. Seeing is believing.

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