

Negligence Law Section

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“On Being Remote: Litigating While Quarantined”

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The wise adapt themselves to circumstances, as water molds itself to the pitcher” –Chinese Proverb

Following the implementation of the Governor’s stay-at-home Executive Orders in March 2020, many attorneys in Michigan were reeling with the question of how they would continue to conduct business. In response, the Michigan Supreme Court urged courts to utilize technology whenever possible. ¹

By July 2020, Chief Justice Bridget McCormack reported that Michigan virtual courtrooms surpassed 500,000 hours of Zoom hearings.² These hearings were streamed to YouTube, allowing for public access to the courts while participants remained safely socially distant. As of the writing of this article in September 2020, Michiganders are unable to gather together in person without taking precautionary measures. In-person meetings related to litigation are possible, but they are limited in capacity while indoors and everyone is mandated to wear a mask.

For the purpose of oral argument and taking depositions, masks are tricky to understand people through during testimony, and they hinder the ability to convey or appreciate facial expressions and emotions. Furthermore, depending on the health or medical condition of certain witnesses, or the witness’ close proximity to those with COVID-19, it may not be wise to conduct certain depositions in person.

Given the current limitations on in-person business, which are to continue for the foreseeable future, more members of the Michigan Bar are taking a page from the Michigan Supreme Court’s suggestion, and are agreeing to conduct business through remote platforms such as

¹ MSC Administrative Order 2020-2: Order limiting activities/assemblages in court facilities. March 18, 2020.

[https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08 2020-03-18 FormattedOrder AO2020-2.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08%2020-03-18%20FormattedOrder%20AO2020-2.pdf)

² <https://milawyersweekly.com/news/2020/07/21/virtual-courtrooms-surpass-500000-hours-of-zoom-hearings/>

Zoom,³ Skype,⁴ and Webex.⁵ Below are a few suggestions for successful adaptation to litigating in this new remote environment:

(1) *Determine if your Court implemented remote means of conducting business.*

- Using the online MiCourt Virtual Courtroom Directory,⁶ you can find your particular judge's preference for how they prefer to conduct business remotely. Many court rooms are using Zoom to conduct business and they will send you a link to connect in advance of the hearing.
- The State Court Administrative Office also published the Michigan Trial Courts Virtual Courtroom Standards and Guidelines in April 2020,⁷ which sets out best practices for courts and attorneys in Michigan. The Michigan Courts website also has an excellent "Using Zoom and Virtual Courtroom Resource Center" that provides a number of tutorials and resources for those that are new to videoconference hearings.⁸
- Understand whether your Court implemented changes in the ability to file pleadings via e-filing, fax or email. Administrative Order No. 2020-19 allowed for court pleadings to be accepted for filing by other means if in-person filings are limited. It is important to send your pleadings to the Court in the format they desire, if they are unable to receive physical pleadings by mail.

(2) *Agree or motion the Court to conduct remote depositions.*

- Under MCR 2.306(C)(2), the court reporter is required to be in the presence of the witness. The Federal Rules of Civil Procedure, Fed. R. Civ. P. 30(b)(4), by contrast, allows for a deposition to be taken remotely, either by stipulation from the parties or by a court order.
- Executive Order 2020-41 provided for temporary remote notarization and suspended the Michigan Law on Notarial Acts, 2003 PA 238, as amended, MCL 55.261, et seq. This made it feasible for a court reporter to conduct a remote notarization for a deponent by following specific requirements. This Executive Order was followed by Executive Orders 2020-131 and 2020-173, which continue to allow for remote notarization through September 30, 2020.
- Where parties wish to conduct a remote deposition where the court reporter will not be in the presence of the witness and the parties would like to allow that deposition transcript or video to be admissible at trial, there needs to be agreement via a stipulated order, or a party can motion the Court for an order.

(3) *Set a protocol via stipulated order or motion for conducting remote depositions, by addressing the following:*

- Whether the parties agree to take depositions by Zoom videoconference, telephone or other remote electronic means.
- That the court reporter may administer the oath or affirmation to the deponent remotely via two-way, real-time audiovisual technology as provided by Michigan Executive Order 2020-131.

³ <https://zoom.us/>

⁴ <https://www.skype.com/en/> |

⁵ <https://www.webex.com/>

⁶ <https://micourt.courts.michigan.gov/virtualcourtroomdirectory/>

⁷ https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR_stds.pdf

⁸ <http://info.courts.mi.gov/virtual-courtroom-info>

- That the court reporter's transcript shall serve as the official record of the deponent's testimony.
- Whether the court reporting service will arrange, coordinate and host the deposition through a secure videoconference technology, such as Zoom or a functional equivalent, and provide technical information, including the online link, to the deponent, counsel and the parties to be able to participate in the remote deposition.
- Whether upon request, the court reporting service will test the videoconference technology on the prior business day before the deposition so that any technical issues can be identified and resolved in advance of the deposition.
- If the deposition is noticed as a video recorded deposition, whether the court reporter, as host of the videoconference, will video-record the deponent while on the record.
- Whether all individuals present or listening-in during the videoconference remote deposition shall identify themselves for the record.
- Whether the video-recording of the deposition created by the court reporter using the videoconference technology shall be deemed the equivalent of a video-recording made by a videographer and shall be available for use at trial.
- That the host of the videoconference, the court reporter, shall disable the videoconference technology's "chat" function (or similar private communication function).
- That witness coaching while on the record is inappropriate and universally prohibited by the rules of professional conduct.⁹ This is the case at trial, and it also is the case at deposition. No counsel should ever be instructing their witness how to answer at deposition.
 - o Therefore, parties should set expectations for ethical conduct while on the record in a remote deposition.
 - o A stipulation can include a provision that after the deponent is sworn for the deposition and while on-the-record, there shall be no private off-the-record communications by any means (including but not limited to, talking, texting, messaging, chatting, emailing or by telephone), between the deponent and any person acting on behalf of any counsel or party.
 - o Furthermore, when taking a remote deposition, any questions about whether the witness engaged in any prohibited off-the-record communications can be asked of the witness, who is under oath. If it is apparent that prohibited communications did occur, counsel should build a record instructing opposing counsel and the witness to preserve all communications until the matter can be determined by the court.

(4) *If your hearing or deposition involves the production of exhibits, then plan for how the exhibits will be made visible by all parties.*

- Discuss in advance with all parties or the court how you are going to share exhibits.
- The court reporter can set up a file share function which allows you to upload files into the chat. Make sure to upload files in a file format that everyone can view. PDF format is one of the most convenient formats to send exhibits. However, in sending exhibits through Zoom's file share function, I've sometimes found that the opposing side has had trouble opening the files.

⁹ See MRPC 8.4(c) and *Hall v Clifton Precision*, 150 FRD 525, 528 (ED Pa 1993).

- The parties may want to agree on a bates stamped copy of the relevant records to the case. Then if all counsel and the witness have a copy, it becomes easier to reference a specific record.
- You can also use your screen share function in Zoom, Skype or Google Hangouts to show the witness an exhibit. If you are going to share your screen, make sure you are not going to accidentally expose confidential attorney work product or privileged attorney-client communications you thought was hidden on another corner of your screen. Also, make sure your desktop email or calendar notifications are turned off.
- Some attorneys use TrialPad¹⁰ to share exhibits during deposition. TrialPad is a program from the Apple App Store that runs exclusively on iPads. TrialPad can wirelessly cast over AirPlay to Zoom and allow you to mark-up, highlight, and blow up parts of exhibits on the record.
- Note that if you are conducting a video deposition, where a videographer is preparing a video recording of the witness, sharing the exhibit through screenshare or TrialPad will remove the witness from being full screen as you intend. You might have to work with your videographer to figure out what approach to take if you want the witness to remain full screen during screen share or the use of TrialPad.

(5) *Get the right technology to conduct business remotely.*

- Make sure you have a device with a forward-facing camera and audio source, such as a phone, tablet or computer.
- You may want to consider having multiple monitors when conducting videoconference hearings or depositions. This makes it easier to view documents or notes on your computer while still viewing the witness.
- Ensure your internet connection is fast enough to videoconference. You want to have an upload/download speed of at least 5 megabytes per second to ensure a clear audio and video stream. You can go to speedtest.net to check your connection speed.
- If sound does not come through your computer well on the videoconference, have a phone nearby to dial in for the audio. Be prepared though that if you are calling into the audio on your phone, there may be a lag between the picture and your phone audio. If you do call in via phone, make sure that your microphone on your computer is muted so you do not echo.
- Make sure you have the latest version of Zoom installed. You can check for updates by clicking on your icon with your initial or photo in Zoom, and telling Zoom to “Check for Updates.”
- Make sure you also install any updates for your operating system (Windows or MacOS) or hardware (computer/tablet/phone) as well. My computer decided to shut down in the middle of a deposition once because it decided it had to install a Windows update. Don’t let this be you.

(6) *Stay professional when conducting business remotely.*

- Whether you’re in a court hearing or in a deposition, you want to speak and appear with respect and decorum.
- Make sure that your full name displays on your videoconference profile. If your phone number or nickname shows up, then the Court or court reporter may not know to admit you to the videoconference, and instead you could be stuck in the waiting room.

¹⁰ <https://www.litsoftware.com/trialpad>

- Find a quiet room or place in your home or office for videoconferencing. You may want to set up a dedicated space with all your technology and supplies that you've tested, so that it is no hassle to sit down and participate in a videoconference.
- Mute yourself when you are not talking to minimize background noise and prevent others from hearing the person who is talking. We all now are more cognizant of how much noise our pets, kids and outside traffic can make on a remote video call.
- Be patient and do not talk over others. Raise your hand if you are trying to get attention to speak while someone else is talking. Let whoever is moderating, whether it be the judge, clerk, court reporter give you license to talk.
- Find a neutral background. If you can't find a space in your home or office that is not distracting (for example when you have pets or kids running around in the background), then you can import a background photo that is neutral and obscures where you are. Google "Zoom background" and numerous potential images will show up.
- When using a background photo, the camera will pick up on the color you are wearing versus the background you are in. If you're sitting in a black chair, then you might want to wear a lighter color that contrasts the chair for the camera to find you.
- You can buy a green screen¹¹ to put behind you, which ensures that any background photo you import is even more crisp and looks like a real place. You can also pretend to be the weather guy/gal.
- Ensure you have good lighting so you can be seen. The light should be in front of you. Sometimes if you are seated facing a window, then the light may be too harsh, and you might have to close the blinds or drapes. If your room is too dark, you could even buy what is called a "ring light, ¹²" which is the best way to evenly illuminate your whole face.
- Find a way to get your camera up so that it is looking straight at or down on you. This is more flattering angle than having your camera below your face and pointing more toward the ceiling.
- While you may be at home when taking your deposition, you should still dress from the top up as if you were attending in person. If you are appearing for a remote hearing you still should wear a suit coat, and if you're a gentleman, wear a tie. I saw a judge refuse to hear a motion recently where the attorney had not come to court (albeit virtual) in appropriate attire.

(7) *Be open and adapt to a new way of working.*

- We are all learning and often nothing with technology goes exactly as planned. This is a time to build collegiality between those in our profession.
- There is always more to learn, so be open minded and help your colleagues who have not yet endeavored to conduct business remotely to do so.

¹¹ https://www.amazon.com/MOUNTDOG-Photography-Background-Polyester-Collapsible/dp/B082X6YTHW/ref=sr_1_1_sspa?dchild=1&keywords=green+screen&qid=1600201877&sr=8-1-spons&psc=1&spLa=ZW5jcnlwdGVkUXVhbGlmaWVyPUFWOVJOMV3SIAYRzkmZW5jcnlwdGVkSWQ9QTAwNDQzMzkyRVBFTFhRWlYwUkdRImVuY3J5cHRlZEFkSWQ9QTA0NDAwODk2OTZHSzgxN0UwM1Amd2lkZ2V0TmFtZT1zcF9hdGYmYWN0aW9uPWNsaWNRUmVkaXJlY3QmZG9Ob3RMb2dDbGljaz10cnVl

¹² https://www.amazon.com/Tripod-YouTube-Makeup-Desktop-Brightness/dp/B07JX79GBS/ref=sr_1_14?dchild=1&keywords=ring+light&qid=1600201409&sr=8-14

COVID-19 created upheaval for the legal industry, yet it may have been a tipping point for moving us to being able to do our jobs just as effectively (if not more so) in a remote environment.

Being positive, with less time spent traveling, we can get more meaningful work done in a day. With less travel across our state and country, we can do our part to reduce the spread of COVID-19. Adapting to remote ways to conduct business in this time of crisis allows us to keep moving forward, and over time may lead to a new, and hopefully better, normal.

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