

Court in the Time of COVID

Judge Andrea Bouressa
471st District Court, Collin County

CCBA Solo/Small Firm Section Meeting

August 24, 2020

Read My Lips: KNOW NEW TECH!

- Practice of law continues to evolve as new technology changes norms and expectations.
- SCOTX Emergency Orders suggest current expectation that most, if not all, litigants and attorneys have sufficient access to technology to appear via audio or video for remote proceedings, depositions, mediations, and more.
- Comment 8, TDRPC 1.01: “Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology.”

Best Practices: Technology

- Test applications and equipment regularly.
- Alert court to anticipated/existing internet connectivity issues.
- Turn on video preview.
- Schedule tech run-throughs with witnesses who are unfamiliar with Zoom, and let them see how screen-sharing and other functions will work.
- Have a back-up plan.

Remote Control

- Control your time:
 - Section IV, Para. 9, *Texas Lawyer's Creed*: "I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes."
 - Decide who is arguing for your side before the hearing starts.
 - Avoid cross-talk.
 - Alert the court if your hearing is evidentiary so that sufficient time can be set aside to hear testimony.
 - Don't assume that you can bring up additional contested issues at your hearing.

Remote Control

- Control your exhibits.
 - Find out the court's method for offering exhibits well in advance of your hearing or bench trial.
 - TDRPC 3.03(a), Candor Toward the Tribunal: "A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act; . . . (5) offer or use evidence that the lawyer knows to be false."
 - Lawyer offering evidence should take steps to ensure that all parties, witnesses, the judge, and the court reporter all have the same version of the same document.

Remote Control

- Control your witnesses:
 - Practice meeting via Zoom.
 - Resolve “mute confusion.”
 - Address distractions that will take attention away from their testimony.
 - Encourage your witnesses to fly solo. Having a witness wingman confuses the record and can inject unsworn or inadmissible testimony into the hearing or trial.
 - Make sure they know: **DON'T LINK AND DRIVE!**

Best Practices: Remote Control

- Encourage observers/non-participants to keep video and sound turned off at all times.
- If another person will be managing your exhibits or handling screen-sharing, identify verbal or visual cues for displaying/removing exhibits from the screen.
- Have witnesses designate a “virtual witness chair” and set specific expectations for their conduct while testifying from that spot.
- Display participants’ full names, correctly spelled, and consider including their roles (*i.e.*, Plaintiff, Def’s Expert, etc.).
- Do not assume witnesses are alone. Verify who/what else is within their view.

World's Longest Grace Period?

- Section III, *Texas Lawyer's Creed*: "A lawyer owes to opposing counsel, . . . courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct."
- Eye-for-an-eye tactics might feel good in the moment, but will not serve your client well in the long run.
- Section III, Para. 2, *Texas Lawyer's Creed*: "I will not quarrel over matters of form or style, but I will concentrate on matters of substance."

World's Longest Grace Period?

- Section III, Para. 14, *Texas Lawyer's Creed*: "I will not arbitrarily schedule a deposition, Court appearance, or hearing until a good faith effort has been made to schedule it by agreement."
- Good faith is a two-way street.
- Consider the urgency of the issue in relation to the rest of the case before bringing a scheduling dispute to the court's attention.
- Court staff cannot resolve your scheduling disputes. If it requires the judge's attention, it should be handled via motion and order, not via email.
- Everyone is facing unique and unexpected challenges, some more obvious than others.
- But: rules and statutes still matter, and will not be disregarded simply "because of the coronavirus."

Tell it to the Judge

- Include opposing counsel on court communications.
- If a communication is more than merely administrative, file it of record.
- Section III, Para. 13, *Texas Lawyer's Creed*: "I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence."
- Make clear whether an oral hearing is requested on a matter, and if not, when you want the matter submitted—especially for emergency motions.
- If a matter is time-sensitive, contact court staff to make sure it is brought to the court's attention. Do not wait until the last possible second to make the court aware of a critical deadline.

Juries Still Out?

- SCOTX Emergency Orders allow jury trials to resume October 1, but earlier jury settings are not automatically continued.
- TDRPC 3.02: “In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.”
- Section II, Para. 8, *Texas Lawyer’s Creed*: “I will advise my client that we will not pursue tactics which are intended primarily for delay.”
- Hypothetical: client tells lawyer he does not want a jury to hear the case, but lawyer files a jury demand to obtain delay, fully intending to waive the jury when finally called to trial. Be wary: CPRC Chapter 10.
- Continuances do not automatically extend deadlines.

Jury Trials: Phoning it In

- Remote jury trials present unique advantages and disadvantages.
- Pros:
 - Highest level of protection during public health crisis
 - Eases burden on jurors caring for small children or other dependents
 - Participants have control over their own environments
- Cons:
 - Hard to guarantee that trial remains the focus of jurors' attention for the duration
 - Loss of personal connection, eye contact
 - Potential for technical problems, especially if unnoticed

When in Doubt, Ask

- This is a time of firsts for all involved, including judges and court reporters.
- Even if your question could be called a “dumb question” (and it’s not), asking is still far better than making a dumb assumption!

THANK YOU!

471ST District Court: Who to Contact

Todd Hill, Court Coordinator 471@collincountytx.gov	<ul style="list-style-type: none">• Schedule a hearing• Ask questions about court procedures• Check the status of a case after checking online first
Brian Burnett, Court Officer bburnett@collincountytx.gov	<ul style="list-style-type: none">• Submit participants' email addresses for access to remote hearings• Request access or report problems with remote hearings• Make an appointment to drop off courtesy binders or documents for in-camera inspection
Denise Carrillo, Court Reporter dcarrillo@collincountytx.gov	<ul style="list-style-type: none">• Request transcripts• Ask questions about reporter's record
Exhibits 471exhibits@collincountytx.gov	<ul style="list-style-type: none">• Submit exhibits for remote evidentiary hearings