VIDEOCONFERENCING IN FLORIDA'S CIVIL COURTS

PROFESSIONALISM FOR THE SMALL SCREEN

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This lesson encourages lawyers to think carefully about what they know about video conferencing in Florida's civil courts and to learn information that will help them perform competently when appearing in court via video conference. Set at a bench and bar conference, an interviewer asks lawyers questions about videoconferencing in Florida courts.[1] The lawyers will try their best to answer, but some answers will be wrong. The audience is then asked to consider whether the answer was right or wrong (or some variation). The narrator returns to provide the audience with the best answer.

The video can stand independently, or a facilitator could stop the video after each lawyer's answer and discuss the answer with the audience before moving on to the narrator's explanation. In addition, the Committee can investigate incorporating quizzing technology that records a viewer's answers and gives feedback, increasing interactivity.

Time estimate: Video-based delivery only: about 25 minutes
In-person facilitated discussion: 35-45 minutes.

Introduction

Narrator [*speaking to the camera; neutral background*]: Hello, I'm Mike, your guide for this video. In 2022, the Florida Supreme Court[2] created new rules that expand the use of video conferencing in Florida civil court cases. As a result, lawyers in Florida are using video conferencing to appear before courts more than ever. We might even imagine a future where civil cases might be resolved exclusively in the "digital courtroom" -- without anyone, including lawyers, litigants, witnesses, experts, judges, and court personnel, ever stepping foot into a physical courtroom.

For lawyers, this change to how civil cases can be litigated by remote appearance means that lawyers must know the expectations that apply to video conferences in the courts. And they must also know how to use video conferencing for effective communication. This video will introduce you to information that will help you better understand video conferencing in civil cases and communicate more effectively in a video conference.

This video is not a comprehensive review of all the laws, expectations, or best practices for video conferencing in Florida's civil court cases. Instead, it provides a sampling of important information about video conferencing. As always, it is up to you to research authorities that govern video conferencing. We will give you a head start on that research with a bibliography of resources. You'll find that bibliography in Appendix A [not yet attached].

So, let's turn it over to Chris, who is at a bench and bar conference in Miami, interviewing lawyers about what they know about videoconferencing in civil cases in Florida. Do you know more about videoconferencing than they do? Let's find out! Chris, over to you!

Question #1: Witnesses at Jury Trials?

Interviewer, Chris [*Speaking to Anne in the lobby of a bench and bar conference. Lots of people are milling around in the background. I'd suggest a hotel lobby for this. To add authenticity, you might have the interviewees with nametags on, for example.*]: Thanks, Mike! I'm here with Anne. You are a personal injury lawyer, right?

Anne: Right. Pretty new. I graduated from law school two years ago.

Chris: Tell me, Anne, will Florida courts allow you to present witness testimony by video conferencing in an auto accident case? For example, could a critical witness testify at a trial by Zoom?

Anne: [Youthful, not confident, questioning, but energetic.] Wow. I'll say . . . no. I'm not sure. Maybe at a bench trial, but probably not at a jury trial. A critical witness, right? Like maybe an eyewitness? Hmmmm . . . I'll say no. No. If it's a jury trial, the court would want the jury to be able to see the witness up close. It probably would be the same result for a bench trial. Witnesses are too important. So, no. No. . . . I think.

On-screen: Right or Wrong?

Facilitator Discussion Questions[3]

- Take a poll of participants: What do you think is the right answer?
- What are some advantages of presenting witness testimony via videoconference?
- What are some disadvantages?

Mike: Anne is **wrong**. Under the new 2022 rules of judicial administration in Florida, a court official may allow a witness to testify in a civil proceeding by videoconferencing when a party asks for the witness to appear in that manner or the court decides to allow it.[4] The rules make an exception for involuntary commitment proceedings.[5] This includes testimony at jury trials. A party who wants to present testimony by videoconferencing must show good cause for this delivery method.[6] Under the new rules, the oath witnesses must take before giving testimony can also be administered via videoconferencing; the person giving the oath no longer has to be physically present with the witness.[7]

Let's see what Anne thought of that answer.

Question #2: Jurors, too?

Anne: I had no idea. I thought maybe deposition testimony, but I would not have guessed witnesses at jury trials.

Chris: Let me ask you a follow-up. Can jurors in a civil case serve on a jury by videoconference, like in that auto accident case we were talking about?

Anne: Oh, no. Absolutely not. No way. That goes too far.

On Screen: Right or Wrong?

Facilitator Discussion Questions

- Take a poll of participants: What do you think is the right answer?
- What are some advantages of jurors participating in a trial by videoconference?
- What are some disadvantages?

Mike: Once again, Anne is **wrong**. Under the new rules adopted by the Florida Supreme Court, jurors and potential jurors can appear by videoconference for court proceedings. In the case of potential jurors, the discretion to use videoconferencing lies with the judge. A trial court judge may allow prospective jurors to appear by videoconferencing to determine whether the jurors will be "disqualified, be excused, or have their jury duty postponed." In addition, a court may allow prospective jurors to "participate in voir dire and empaneled jurors to participate in trial through" videoconferencing.[8] The new Florida Rules of Civil Procedure allow voir dire and civil trials to be conducted by video conferencing when the parties stipulate to it, and the court authorizes it.[9]

Let's see what else Chris has for Anne.

Question #3: Depositions, probably?

Anne: [Slightly defeated.] I'm batting zero for two. So that probably means I can depose witnesses using something like Zoom?

Chris: What do you think?

Anne: The answer must be yes to this one.

Facilitator Discussion Questions

- Take a poll of participants: What do you think is the right answer?
- What are some advantages of videoconference depositions?
- What are some disadvantages?

On Screen: Right or Wrong?

Mike: Anne is **right** this time. Deposition testimony can also be taken by videoconferencing when the parties agree, or the court orders it.[10] And that same system applies to Florida mediation and arbitration.[11] Good job, Anne!

[Now Mike turns to a new topic] What these new rules mean in Florida is that lawyers will spend a lot of time doing their work by video conferencing. But do lawyers know how to do a good job at that?

Ah, I see that Chris has cornered another conference attendee.

Question #4: To the back, to the back . . .

Chris: Hi there. Could I ask you a question?

Phil: [More experienced-looking lawyer, well-put-together, more "big firm" vibe in mannerisms and dress.] Sure. [Sounding confident but slightly annoyed.]

Chris: Do you use videoconferencing at your firm?

Phil: All the time, all the time.

Chris: Any court proceedings?

Phil: Yeah, sometimes. Lots of direct questioning of witnesses, mainly depositions. I once cross-examined a witness in a hearing. Some pretrial conferences.

Chris: Would you say the background behind you in a video conference matters when you are on-screen?

Phil: Oh, yeah, absolutely. I'd say it matters a lot.

On Screen: Right or Wrong?

Facilitator Discussion Questions

- Take a poll of participants: What do you think is the right answer?
- Why would backgrounds matter for court proceedings?
- What are some backgrounds you have seen that caused you concern?

Mike: Phil is **right**. When lawyers appear in a physical courtroom or a conference room, they can rest assured that the "background" is professional and not distracting. The judge is in complete control of the courtroom, after all. But, now that lawyers often appear in court remotely, lawyers have to pay more attention to what is in their background. It's not just about the aesthetics of your environment; it's about protecting the decorum and dignity of the judicial system, showing respect for the judge and others, and, perhaps surprisingly, avoiding bias.

A professional background for videoconferencing should reflect the seriousness of the situation and reflect respect for the judicial process. Judges have expressed concern that remote proceedings diminish the dignity of the court proceedings.[12] When appearing before a judge, you should consider your office or home office an extension of the courtroom. Minimize anything in the background that is distracting,[13] overly informal or personal, or inappropriate for a courtroom.

Think, too, about whether your background introduces bias. Does the background show a surrounding that could, even subconsciously, influence perceptions about you or your client? For example, while you might typically have family pictures behind you on your bookshelves, consider removing them for court videoconferences. If you don't, a judge may ask you to do so, particularly where the proceedings involve jurors.[14]

Virtual backgrounds, while often a good choice, can cause their own problems. A virtual background might be distracting or too informal. A beach scene is lovely but probably not appropriate for a courtroom proceeding. In addition, sometimes virtual backgrounds distort the features of the speaker. A speaker's hair might disappear. Hand gestures may disappear or become distorted. These visual distortions can be distracting to others. If you choose a virtual background, have someone give you feedback on how well the background works and if it causes distortion.[15]

Let's go back and see what else Phil has to say.

Question #5: Who's in the virtual courtroom?

Phil: [Now smug and proud.] See if you can stump me, Chris.

Chris: Right, right. Can I ask if you videoconference from home or the office?

Phil: Mostly from my home office.

Chris: Can others overhear you or see you on the videoconference?

Phil: Sometimes, yes. My wife works at home, too, and we share an office. For these calls—

you know, the ones that are more or less "public"—where they are not attorney-client privileged communications, I don't worry too much about sharing the office and having her overhear. She gets out of there for client calls, but we don't stress too much about it for court hearings. I just tell her to be quiet and stay off-screen.

On Screen: Good Idea or Bad Idea?

Facilitator Discussion Questions

- Take a poll of participants: What do you think is the right answer?
- Why might it matter to have others at home or the office see or hear you in a court proceeding?

Mike: What Phil is doing is probably a **bad idea**. Although it may be that some hearings Phil attends are open to the public—those that purportedly anyone can observe—that doesn't necessarily mean that lawyers can treat videoconferencing as identical to open court.[16]

Remember, in the courtroom, the judge can observe everything happening and everyone present. In a virtual hearing, however, the judge can only observe what is on the screen. Anything outside the frame is invisible to the judge. As a matter of professionalism and even ethics, the way we might think of a lawyer allowing another person to be present in the videoconference but invisible to the judge is as an act that lacks candor. If the lawyer or the lawyer's client has someone else present for the hearing but the judge doesn't know it, this could be a kind of misrepresentation to the court. That is, the lawyer should inform the court of the person's presence so that the judge can know everyone who is present.

Even knowingly allowing others to be within "earshot" might be problematic. Although a lawyer cannot guarantee that a person won't overhear the court proceeding, it might be incumbent on the lawyer to act reasonably to limit the *potential* for others to overhear. As we've said, a judge in a physical courtroom can monitor who is in the room and hearing the proceeding. Sometimes, it may be vital to the judge or the other parties to know who can overhear the proceedings. The disclosure of sensitive information, the sequestration of witnesses[17], media limitations, and other considerations might make it particularly important for a judge to be able to carefully regulate courtroom access. A desire to act with integrity should motivate a lawyer to reveal the identity of those who can see or overhear the proceeding or to take reasonable steps to ensure that others cannot, particularly when they have no reason to be present.

In addition, lawyers must be mindful that not all proceedings are "open" to the public. A deposition, for example, while considered to be "before the tribunal,"[18] isn't open to the public. The Florida Bar has even advised lawyers taking depositions remotely to admit only "participants entitled to be present."[19]

And, of course, a lawyer must keep the information related to the representation confidential for the benefit of their clients. Court proceedings may not implicate the full range of protections that a lawyer might afford for attorney-client privileged communications. But for ethical purposes,

disclosing client information is permitted only in limited circumstances, including when that disclosure is "appropriate in carrying out the representation." So, making disclosures in open court that advance a client's case would be an ethical reason to disclose client information. However, allowing others to sit in unannounced or overhear remote court proceedings without the judge's knowledge is not necessarily acceptable from a client confidentiality perspective.

All of this means that lawyers must find private and secure spaces to conduct videoconference court hearings.

I see Chris has found someone on her way to the pool.

Question #6: Judges' Concerns

Chris: Excuse me, do you use videoconferencing for work?

Bonnie: [Middle-aged, dressed in resort wear, wearing sunglasses under a big straw hat. Takes them off to answer.] Why, yes, I do!

Chris: What do you think judges complain about when it comes to lawyers appearing before them on videoconferencing for court?

Bonnie: I've never appeared before a judge on Zoom, so I'm not sure I'd know.

Chris: What's your best guess, then?

Bonnie: [Thinking] Let's see, it's probably the same kinds of things that make me crazy on Zoom calls . . . too much background noise, forgetting to mute, other distractions like pets coming on screen. Oh, judges might not like people who show up too casually dressed.

On Screen: Right or Wrong?

Facilitator Discussion Questions

- Let's brainstorm together: What do you think are the things that judges identify as problems with lawyers' participation in videoconferencing?
- Are Bonnie's answers right?

Mike: Bonnie got a lot of **correct** answers here. [This would be a good place for a PowerPoint-like slide to review each of Bonnie's answers.] Judges have lots of concerns about the way lawyers appear before them on the screen.[20]

1) **Professional dress.** Judges complain that lawyers do not dress appropriately for court when they appear by videoconference. Here's a good rule of thumb: if you wouldn't wear it in the courtroom, don't wear it in the virtual courtroom. [A fun addition might be a PowerPoint-like picture of Bonnie in her pool attire with a red X across her that appears when stating the prior sentence.] Advise your

clients, if they appear with you, to dress appropriately for the forum.[21] As an officer of the court, lawyers have a duty to protect the court's dignity, and professional dress communicates that. But there's also self-interest here as well. By dressing professionally, a lawyer communicates respect for the judge, and that helps the lawyer create a positive impression.

2) **Background noise.** Judges point out that background noise is a problem, and the source can often be pets, household members, or other shared office or home noises.[22] When working from home, choosing a room with a door you can close is a good idea. A trip to the office may be a good idea if home is too busy to ensure a quiet environment. At the very least, mute your microphone whenever you are not talking. That will help diminish background noise.

3) **Interruptions.** Interruptions are a problem for judges in conducting effective court proceedings. With remote hearings, the chance of these interruptions occurring increases. These interruptions range from someone else entering the space or a technological interruption, like a ringing phone. A distracting sight for a judge in a videoconference is to watch a lawyer's eyes veer from the screen to land on something or someone not involved in the proceeding. All participants may wonder, what is going on? Who is in the room? Should they be there? A good practice is to put a "do not disturb" sign on the door and do the same thing with electronics. Turn on "do not disturb" on your phone. Close your emails and chats to ensure they don't "beep" or "ding" during the hearing. Judges want an interruption-free proceeding.

What's Chris got for Bonnie now?

Question #7: Nonverbals, non-important?

Chris: Bonnie, would you say nonverbal communication, such as body language, is more or less important in video conferences?

Bonnie: [Confidently]: Definitely less important.

Chris: Why do you say that?

Bonnie: Well, the screen is pretty small, so no one sees much of you anyway. And think about newscasters—you know, the Walter Cronkite types; they hardly move or show any emotion when they talk, and that doesn't seem to impact us. So I'd say less, it's less important.

On Screen: Right or wrong?

Facilitator Discussion Questions

- Take a poll of participants: Are nonverbal messages more or less important on-screen?
- Why are nonverbal messages important? Why might the opposite be true?
- If nonverbal messages are important, which ones?

Mike: Bonnie is definitely **more wrong than right**. Although participants in a videoconference are physically distanced, they still read each other's nonverbal cues—facial expressions and gestures—while interacting. As Bonnie points out, that screen is often small, and if there are many people on a videoconference in gallery view, it might be even harder to see and interpret the facial expressions and gestures of others on the conference.[23]

Yet, nonverbals are important for communicating our messages, whether in-person or on-screen. Verbal communication sends only a small part of our message; our body language and facial expressions are significant in sending signals about our meaning and intention. In fact, a significant part of our emotional message is sent through our nonverbal communication. We send messages about our interest in others, honesty, and comfort through our eye contact. Our gestures emphasize our verbal communication, can conflict with those messages, and send messages about our emotional state. Head nodding and "leaning in" can convey our attention and interest. Our facial expressions communicate our emotions. When we are in person, the space we maintain between ourselves and others sends a message, as does our decision to touch others—through a handshake or a pat on the back, for example.

If you are still not convinced how much we communicate through nonverbal messages, consider how difficult it is sometimes to understand a person's intention in a text-only message, like email.

Because our nonverbal messages are important and because communicating those messages on-screen is more challenging, attention to one's body language is more important for on-screen communication rather than less. What are some things you can do to improve your on-screen communication? [This is a good place to insert a PowerPoint-style list.]

- **Maintain good eye contact.** This isn't easy because, like those newscasters, lawyers are talking to a camera rather than a person. Thus, we need to think of eye contact slightly differently for on-screen communication. That is, we need to think of creating the *perception* of maintaining eye contact rather than actually maintaining it.

  One way to handle this is to get your screen at eye level. If you have an adjustable second screen, put your screen level with the video camera as best you can so that, at the very least, when looking at participants on the screen, you are also looking in the same direction as the camera. While listening to others, you don't need to stare at the camera; instead, watch other participants' facial expressions and body language. The placement of the camera in the same vicinity as the screen helps maintain the feeling of eye contact while you are observing others.

But, when you are talking, do your best to simulate maintaining eye contact with participants by looking at the camera when you speak. Remember, at least in Western cultures, many people judge speakers' credibility by their eye contact.

- **Frame yourself to capture gestures.** Position your camera at eye level to maintain good posture, frame the camera to capture not just your head but at least some of your body, and capture your hand gestures. (Think of those newscasters and how we can see some of their bodies when they are talking.) If you allow other on-screen participants to see more of your body, you can convey messages with gestures and improve your chances of others interpreting your message as intended.
- **Add emphasis to nonverbals that show you are actively listening.** Much of the time you are on-screen in a court proceeding, you will be muted. So, using verbal feedback for participants while they are speaking is challenging. Think about ways you can convey you are listening attentively to others through your body language. Remember that the courtroom is formal; you will want to be subtle and measured in your active listening cues. A head nod is a good choice for active listening, depending on the context. Imagine a judge describing the limits on discovery at a pretrial conference. While listening, you can nod intermittently to show you understand what the judge is saying. This will send a message to the judge that even though you are physically distanced, you are present with the judge and engaged in the conference.
- **Be extra-mindful of facial expressions.** Unlike in face-to-face courtroom interactions, participants are likely looking at you often. Think about it: in a courtroom, you might focus on the judge and then turn to look at the opposing counsel speak. You might look at the witness when she answers a question. Then, you might look at the clerk when you offer an exhibit. You are not looking at everyone all at once. In videoconferencing, everyone is looking in the same direction—at that gallery of people on the screen—virtually all the time, which increases your chances of being seen. While we may not like it, we are surveilled by others more intently in a videoconference setting.

  Facial expressions send a lot of information about our cognitive and emotional states. Our faces express joy, sadness, confusion, disgust, skepticism, and anger. And we tend to take facial expressions seriously.

  Thus, when on-screen, be extra-aware of your facial expressions. Think about using your facial expressions to help convey the message you want. If you want the participants to know you are confused, furrow your brow. If you want to convey warmth and openness, smile. If you want to convey disapproval, choose a stern look. If you don't want to give up your cards, keep a neutral expression. In other words, in an online setting, pay attention to aligning your facial expressions with your intent.

Bibliography

Guides

Florida Bar Best Practices Guide for Remote Court Proceedings (2022). https://www-media.floridabar.org/uploads/2022/08/TFB-Best-Practices-Guide-For-Remote-Court-Proceedings-2022-Edition.pdf

Endnotes

1. If you want to see what I have in mind, Google "Jay Leno Jaywalking You Tube" and watch a few videos where Jay Leno does some "man-on-the-street" interviews. Note, however, that the goal of this video is not to "make fun" of the interviewees for their lack of knowledge. Instead, the interview vignettes are meant to introduce the information in a fun way. Another example might be Meet Cute NYC on Instagram, in which an interviewer asks couples on the streets in New York about how they met. See one story about Meet Cute here: Finding love in NYC a breeze for couples on @MeetCutesNYC (nypost.com)

2. https://15thcircuit.com/sites/default/files/supreme-court/SC21-990.pdf

3. These questions are for facilitators who are running synchronous (in-person or online) trainings to engage audiences in a discussion of the question before the answer is revealed.

4. Florida Rule of Judicial Practice and General Administration § 2.5230 provides for the use of "communication technology" in Florida's civil court proceedings. This technology includes both audio and audio-video technology that allows all participants to interact together in real-time. See § (a)(1)-(3). We are focused on the videoconferencing aspects.

5. *Id*. at § 2.530 (b).

6. *Id*. at § (b)(2)(A) (explaining good cause and listing the factors the court may consider in determining whether good cause exists).

7. *Id*. at § (b)(2)(B)(ii).

8. *Id*. at § (c)

9. Florida Rule of Civil Procedure § 1.430(d). This also applies to Florida's Small Claims Courts. Florida Small Claims Rule § 7.150(b).

10. Florida Rule of Civil Procedure § 1.310.

11. Florida Rules of Civil Procedure § 1.700.

12. [Citation needed.]

13. *See* The Florida Bar, *The Florida Bar Recommended Best Practices for Remote Court Proceedings* [hereinafter "*Best Practices*"], Rule 1.1 (2022)(noting that participants should be in environments "free from distractions."); https://www.floridabar.org/the-florida-bar-news/what-is-the-right-balance-between-in-person-and-remote-proceedings/

14. See also Douglas Keith & Alicia Bannon, *Principles for Continued Use of Remote Court Proceedings* (Brennan Center for Justice Sept 2020) ("Beyond distruption, the technological aspects of remote proceedings—how defendants' witnesses, and parties appear on screen—including their backdrop, lighting, and sound—may affect credibility determinations and other fact finding.") Principles for Continued Use of Remote Court Proceedings | Brennan Center for Justice

15. It's worth noting that the Florida Bar's Best Practice for Remote Court Proceedings suggests that a "deponent shall not use any virtual background at any time during the deposition." *Best Practices*, 4.4, Remote Deposition Procedures.

16. See the comment to the confidentiality rule, 4-1.6: But for ethical purposes, disclosing client information is permitted only limited circumstances, including when that disclosure is "appropriate in carrying out the representation.'"

17. See, e.g., Best Practices, 3.3.4.("Participants should explain to witnesses that, if the rule of sequestration is invoked, the witness will not be able to observe any part of the proceeding outside of his or her testimony, and will either be placed in a virtual waiting room, virtual breakout room, will be "on call" until it is the witness's turn to testify.")

18. Rule Regulating the Florida Bar 4.3.3 Cmt. (describing a deposition as part of the proceedings that occur before a tribunal).

19. Best Practices, 4.8 "Participants must dress and otherwise present professionally, as if they are physically appearing in a courtroom, deposition, or mediation."

20. See, e.g., Judge Craig C. Villanti, *Virtual Feedback on Remote Court Proceedings—A Judge's Perspective*, Florida Bar News (May 20, 2020) (noting the declines in professionalism from videoconferencing). Virtual feedback on remote court proceedings — a judge's perspective – The Florida Bar

21. Best Practices, Rule 1.1 ("Participants must dress ad otherwise present professionally, as if they are physically appearing in a courtroom, deposition, or mediation.")

22. See, e.g., Judge Craig C. Villanti, *Virtual Feedback on Remote Court Proceedings—A Judge's Perspective*, Florida Bar News (May 20, 2020) (noting "pets and tots" and "flushing toilets" as unwelcome background noise.). Virtual feedback on remote court proceedings — a judge's perspective – The Florida Bar

23. Research suggests that there are advantages and disadvantages of using videoconferencing for courtroom interactions. For example, while access to justice can be increased by the availability for videoconference court appearances, speaker credibility may be harder to establish via videoconferencing. *See* Alicia Bannon and Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court* (Brennan Center for Justice, September 10, 2020) (reporting studies on impacts of videoconferencing in court system). The Impact of Video Proceedings on Fairness and Access to Justice in Court | Brennan Center for Justice