

BY HON. PETER D. RUSSIN AND HON. SCOTT M. GROSSMAN

Let's Go Back to Court, at Least Sometimes

The world has suffered beyond description from the COVID-19 pandemic. It is difficult to find positives from the experience, but in the face of adversity, humankind has an incredible ability to adapt. The restrictions required to limit the virus's spread forced the courts and legal system to pivot quickly by holding hearings remotely by Zoom. This technology existed but certainly was not being used to hold court hearings, at least in most districts.

With necessity being the mother of invention, the use of Zoom exploded and quickly became the norm, resulting in a fundamental shift in how we function. Courts have been able to operate, and lawyers and *pro se* litigants have been able to participate without leaving the comfort of their homes or offices. The benefits are demonstrable, including (1) increased access to justice, a key component to the federal court system; (2) cost savings for litigants not having to pay for their lawyers' travel time to and from the courthouse, and lawyers saving on gas and dry-cleaning costs; (3) greater efficiency for all who participate; and (4) a vast improvement over telephone hearings.

Zoom is by no means perfect. Its two-dimensional universe limits a participant's experience to a very small video square on a computer screen. The communication is often complicated by technical difficulties, including internet issues, poor lighting, and sound and camera problems. There are often distractions, like lawn mowers, barking dogs, cats jumping on laps, crying babies, strange people walking around in the background, and bizarre visuals like piles of dirty clothes and unmade beds. Certainly, for fully settled, nonevidentiary matters, these issues might be tolerated because the benefits outweigh the distractions and complications.

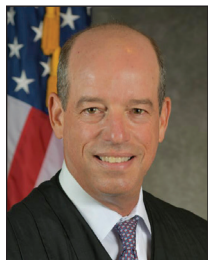
Is something more fundamental lost, though? What impact do video hearings have on our judicial system itself? Federal courts thrive on the public's confidence that justice will be done. Much of that confidence is dependent on the public's trust that litigants are getting their "day in court." The judicial system was designed hundreds of years ago and adopted by the U.S. upon its founding to promote that trust and earn the respect of the public, the judiciary, the litigants and their counsel. For that reason, the courtroom is designed to be a formal, solemn place where very serious proceedings occur that have a substantial impact on people's lives.

All who appear in court, including the judge, must observe rules of etiquette and conventions of

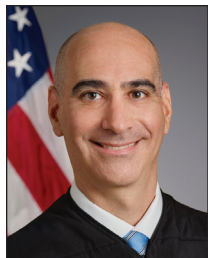
orderly, courteous and respectful behavior. They must dress appropriately and engage with one another deferentially, all out of respect for the system itself. The formalities of the courtroom experience ensure that each lawyer, litigant, witness and judge brings their best to the moment, resulting in the highest level of legal practice and greatest opportunity at achieving justice. When the participants in the judicial process follow these rules and conventions, the dignity of our judicial institutions remain relevant and effective.

An important element promoting the dignity and solemnity of judicial proceedings includes the layout of our courtrooms. They specifically include the seal of the court and the U.S. and state flags behind a raised bench, on which the robed judge sits able to see all that is transpiring in the courtroom. There are separate counsel tables for the respective parties and their lawyers. Lawyers and litigants address the court and examine witnesses standing at a podium. The witness is called, who must stand and take an oath to tell the truth, then sit in a separate box and subject themselves to difficult questioning in what most consider an intimidating environment, where lying is made more difficult than in the comfort of one's own home and with the distance cyberspace affords. There is also a gallery where the public is invited to sit and observe the proceedings, as well as ample space outside of the courtroom where litigants and their lawyers may talk face to face in an effort to resolve disputes right before letting the judge control their destiny. While some of these characteristics may be mimicked on a video screen, they cannot match the real thing.

The bankruptcy court system in this country deals more directly with more human beings than any other federal court. We use our courtrooms more than any other federal court. The statistics are clear. Bankruptcy, by design, requires the litigants to appear before the court early and often throughout a case and is at its core a negotiated process. We can all remember the days before the pandemic when major issues were set to be heard by the court, the nerves that accompanied a difficult argument or evidentiary hearing, and the impact winning or losing would have on the client. Somehow, though — when face to face with the opposing party and their lawyer outside the courtroom minutes before the start of or during a break in the hearing — as reality set in, cooler heads would prevail, thus allowing the matter to settle.



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What about the nonverbal communication that occurs in person in three dimensions that a two-dimensional, one-inch-square video screen simply cannot capture? What about the art of oral argument? The art of examining a witness? What about young lawyers and the training and experience they need to become the best possible lawyers they can be? On Zoom, many of these intangibles are lost, and while that may be acceptable in the greater cost-benefit analysis in certain circumstances, we must strive to achieve a new balance that exploits these benefits but preserves those attributes that have come to define our system of justice.

We must also be cognizant of our civic responsibility to our community, whose support we rely on when building new courthouses (like we are doing in Fort Lauderdale, Fla.). Implicit in the public's support for these magnificent structures we are erecting — often in the hearts of our downtowns — is that these buildings will be visited and used by members of the public. People will come to court, eat breakfast and lunch at local restaurants, take breaks in local coffee shops, utilize municipal and private parking lots, and otherwise contribute to the local economy. It would be difficult to justify public support — and use of public funds — for desirable downtown real estate if no one other than a few judges and their staff are going to use these massive buildings that cost millions of dollars to build and maintain.

The guidelines we adopted in the Fort Lauderdale Division of our court attempt to strike the proper balance.¹

We have no interest in requiring anyone to unnecessarily appear in person. In fact, our guidelines are designed to only require in-person attendance when the advantages outweigh the disadvantages. For example, there should be little debate that, absent good cause under Rule 43, all evidentiary hearings should be in person. There should also be little debate that fully agreed matters may be heard by Zoom. There should be no debate that anyone with a contagious illness (COVID-19 included, of course) should not risk spreading that illness, even if healthy enough to work. The debate arises with respect to everything else.

We have attempted to lay out very clear guidelines subject to little interpretation. At the same time, we have also attempted to provide a mechanism that can capture those circumstances, making remote appearance appropriate when in-person attendance may otherwise be required. A simple *ex parte* motion and proposed order are all that are necessary. The motion may include a cost-benefit analysis or any other appropriate argument. While the motion might not always be granted, litigants can be sure that we will do our best to exercise appropriate discretion balancing the movant's concerns with those of the other parties and the judicial system itself.

The pendulum has swung, for good reason, toward remote hearings. With the COVID-19 pandemic thankfully over, it is time to re-examine and try to find the proper balance. We who labor in our system of justice must appreciate that the analysis is beyond pure convenience and must consider the greater good of all parties, the court and the judicial system itself, as well as the public's confidence in it. **abi**

¹ These guidelines are posted at www.flsb.uscourts.gov (last visited Nov. 16, 2023).